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Racial selection towards child adoption in Brazil: a right or a discrimination?

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Glossary

CC – Código Civil (Civil Code)

CF – Constituição Federal de 1988 (Federal Constitution of 1988)

CNA – Conselho Nacional de Adoção (National Adoption Register)

CNJ – Conselho Nacional de Justiça (National Justice Council)

CRC – Convention on the Rights of the Child

ECA – Estatuto da Criança e do Adolescente (Child and Adolescent Statute)

IBGE – Instituto Brasileiro de Geografia e Estatística (Brazilian Institute of Geography and Statistics)

ICCPR –International Convenant on Civil and Political Rights

ICERD – International Convention on the Elimination of all Forms of Racial Discrimination

ICSESCR - International Convenant on Economic, Social and Cultural Rights

UNCRC- United Nations Convention on the Rights of the Child

STF – Supremo Tribunal Federal (Supreme Federal Court)

STJ – Superior Tribunal de Justiça (Superior Tribunal of Justice)

Abstract

This study aims to analyse, from a legal perspective, whether the option to select race/colour in the adoption process in Brazil is provided for within the legal framework. In order to take on this challenge, the historical evolution of legislation concerning adoption and racial discrimination is analysed. Since an understanding of racism depends on the historical and cultural context surrounding it, racism in Brazil from a sociological point of view is analysed, albeit succinctly. The study focusses on two main concepts: the principle of the best interests of the child and the prohibition of racial discrimination. Both exist within the Brazilian legal system, expressly represented in its Constitution as well as Brazil being a signatory country to the United Nations Convention on the Rights of the Child (UNCRC) and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

Introduction

This dissertation aims to analyse racial selectivity in Brazil's adoption process. The 1988 Federal Constitution established both the principle of the best interests of the child, and the prohibition of any form of discrimination, including by this the prohibition of any type of discrimination based on race and/or colour. Yet this conversely has resulted in adopters having the ability to express their preference with regard to the race and colour of the preferred child within the adoption process in Brazil, based upon what is determined to be in the child's best interests. While it is understandable that many parents want to adopt children with similar physical features to those of their biological children, the possibility of this taking place is rarely questioned, and it is likely that this lack of discussion stems from the delicate nature of the subject. There is a fear of encroaching upon a very sensitive subject area, discussion of which could further harm the children and adolescents that the system is attempting to aid.

In academic discourse, when such arguments are called into question, the debate almost exclusively revolves around international adoption, and the ethnic and cultural differences between the adopter and the adoptee. Nothing, or at most only a little, is spoken about the selectivity within national adoption processes. It is a topic that remains on the fringes. The few times when the subject is broached, it is debated by psychologists or anthropologists; rarely is it investigated or considered by legal practitioners.

Debate from a legal perspective, however, is essential. Human dignity, the principle of the best interests of the child, and the prohibition of racial discrimination are realities within the Brazilian legal system, expressly represented in its Constitution. The country is further a signatory to the United Nations Convention on the Rights of the Child (UNCRC) and the

International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).

Concerning the legal system, and in order to reject definitively any form of racist action, it is necessary to know if such selectivity is legally permitted. I believe the discussion cannot be avoided, albeit recognising the discomfort it may cause. The idea that Brazil is a country to be upheld as an example of racial harmony, where people from many difference ethnic, racial and colour groups form an immense mixed-race population living in harmony, has been propagated for a long period of time. However, those who are familiar with the history of Brazil know that racism is still wound that is healing. It is no coincidence that the state established affirmative action processes just a few years ago, reserving quotas for Afro-descendant students at public universities. I believe, however, that there are other negative discriminatory practices that remain to be combatted, including within the scope of the Government.

Based on this premise, I seek to analyse if selectivity in terms of colour (race/ethnicity) is legally permitted, based on the idea of the best interests of the child, or whether it one more related to one of many aspects of racial discrimination that needs to be eliminated.

The dissertation is divided into four chapters. In the first chapter, I analyse Brazilian legislation regarding adoption, including the treaties and conventions of which Brazil is a signatory. In the second chapter, I analyse racism in Brazil and the legislation pertaining to it. The third chapter examines racial discrimination with a focus on direct and indirect discrimination, and the final chapter deals with the principle of the best interests of the child; its reach and its limits, particularly within the adoption process.

In the adoption process, candidates are also asked to express their preferences toward age, sex and pre-existing illnesses. Although understanding each of these ‘questions’ merits a detailed analysis, they are not the purpose of this work. Each of these presents numerous issues and questions that a work of this size is unable to encompass.

Chapter I: Adoption in Brazil

Legislation regarding adoption

To understand adoption in Brazil, it is necessary to summarise the legislative development in the field, not least due to the numerous legal changes over time.

Initially, Brazil incorporated legislation from Portugal. During this period, families generally raised and fostered the adopted child as their own, without a law governing such circumstances, but years later, having established a loving relationship, the adopted required Adoption Certificates (called '*Cartas de Adoção',* or '*Cartas de Perfilhação'*), in order for the State to recognise the adopted persons, thereby enabling them to receive the family inheritance. The adoption document's main objective therefore, was to make the adopted an heir.[1] Such requests did not occur in all adoption cases. Many parents raised their children without following this process, undertaking the adoption without approval from the State, and therefore without the children being legally able to receive an inheritance.

The second phase was regulated by the Civil Code of 1916 (Law 3.071/16). By this, permission to adopt was only given to people over 50 years who were childless[2], and only to individuals or married couples[3].

The birth family's parental rights regarding the adopted were not rescinded. Adoption simply transferred paternal custody to the adopter[4]. The only way to demonstrate adoption was by consent[5]. The adoption could be cancelled in two ways: the adopted having the option to disassociate himself or herself one year after reaching the age of majority, or

[1] Alessandra Zorzetto Moreno, "Criando Como Filho": As Cartas de Perfilhação e a Adoção no Império Luso-Brasileiro (1765-1822)*," *Cad. Pagu (Online)*, no. 26 (2006): 463–74, doi:http://dx.doi.org/10.1590/S0104-83332006000100020.
[2] Art 368 CC/16 – Only people over 50 years old, without legitimate or 'legitimated' children, can adopt.
[3] Art. 370 CC/16 – No one can be adopted by two people, unless husband and wife.
[4] Art. 378 CC/16 – The rights and obligations that result from natural parentage are not revoked by adoption, except for paternal power, which will be transferred from the natural father to the adopter.
[5] Art. 372 (original from CC/16): Adoption is only possible with consent of the person that the adoptee is under the guardianship of, whether as a minor or due to illness. Art. 372 CC/16, with amendments from Law 3133/57 – Adoption is only possible with the consent of the adopted or their legal representative if incapacitated or unborn.

when the child was deemed as incapacitated (for instance due to a mental disease), one year after the incapacitation. The bond could be dissolved by a simple agreement between the parties involved, in a written declaration, and without legal intervention.

Adoption was thus created within the legal system as a way to allow infertile couples to have children.

In 1957, there was a change in legislation (Law 3133/57) that permitted adoption by people who already had children. The law, however, made clear distinctions between adopted and biological children, stipulating that if the adopter already had children, the adoptive relationship would not include inheritance[6] because, at that time, the priority was deemed to be the protection of biological children born in wedlock.

Brazilian legislation, defined by the 1916 Civil Code, clearly differentiated between legitimate, illegitimate, and natural children. In general terms, each parentage was as follows: legitimate children were those born within marriage; illegitimate children were those born to people prohibited from marrying, adulterers, or those born from an incestuous relationship. Natural children were those born outside of marriage, but whose parents were not prohibited from marrying, and who could become 'legitimate' following the parents' marriage.

The distinctions are important because the 1916 Civil Code prohibited the parental recognition of illegitimate children, i.e. those conceived by people unable to get married, either because one or both parties were already married, or because they were blood relations. The law, in this case, denied the biological relationship and prohibited parental recognition.

The extent of the law was so great that the courts were hindered in allowing the recognition of children born outside of marriage. In the case where the father recognized a child born outside of marriage, the courts allowed, by way of a legal fiction, the recognition to be

[6] Art. 377 CC/16 – When the adopter has legitimate children "legitimized" or recognised, the adoptive relationship does not involve inheritance rights.

suspended until the end of the father's marriage[7]. Thus, on the death of the father, or his spouse, filiation and legitimacy would be recognized.

However, the courts did not permit the recognition of a child through incest. In this case, the law imposed orphan status on the child so that it could not be recognized by the mother or the father. One way used by biological parents to protect illegitimate children, particularly those from an incestuous relationship, was to adopt them[8]. Consequently, in Brazil, many biological children were adopted by their own parents.

What this period shows therefore, is that the law protected, first and foremost, legitimate children. However, the courts were gradually allowing the recognition of biological children, whether born within a marriage or not, and therefore de facto protection was shifting from legitimate to biological children[9].

Adopted children were also slowly acquiring rights. On 2 June 1965, the enactment of Law 4.655 created the framework for legal adoption[10], including the irrevocability of adoption and the rupturing of ties with the biological family. Adoption was limited to children under seven years of age, or those who had been under the guardianship of the adopters at this age. Another important change was that adoption was deferred to a court judgement. As a rule, the child participated in the rights of inheritance, except when competing with the arrival of legitimate children that followed the adoption.

Full adoption, understood to be where the adopted child is treated on an equal basis to the biological child, was only incorporated into the Brazilian legal system in 1979, through Law 6.697. Under Article 17 of this law[11], the child could be placed in a substitute home through full or simple adoption, with only full adoption legally assigning the status of son

[7] Antonio Carlos Marcato, "Reconhecimento Dos Filhos Ilegítimos," *Justitita, 46(126)* (São Paulo, 1984).
[8] Antonio Carlos Marcato, "Reconhecimento Dos Filhos Ilegítimos,"
[9] Sueann Caulfield, "The Right to a Father's Name: A Historical Perspective on State Efforts to Combat the Stigma of Illegitimate Birth in Brazil," *Law and History Review* 30, no. 1 (2012): 1–36, doi:10.1017/S0738248011000587.
[10] Art. 1°, Law 4655/1965 – The legitimisation of the vulnerable infant is permitted where the parents are unknown, or they have declared in writing that it can be taken, as well as the minor being abandoned before seven years of age, whose parents have been dismissed of parental rights; from the public home with the same age when unclaimed by any parent for more than one year; and, even, for the natural child being recognized only by the mother, the inability to prove its inception.
[11] Art. 17 – Law 6697/1979 - Placement in a substitute home will be undertaken by means of: IV – simple adoption and V full adoption.

or daughter to the adopted[12], severing all previous ties. Thus from 1979, two types of adoption coexisted in Brazil: simple and full.

Simple adoption maintained the provisions established in the Civil Code, notably regarding the difference in inheritance rights, but as of Law 6697/79, it now required a court order[13]. Full adoption was only allowed for children under seven years of age, and in the case of those older, only if at the time of adoption they were already under the guardianship of the adopter[14]. Only full adoption allowed equality between biological and adopted children. However, it is important to note that even though the law gave the adopted child the same rights as biological children, it established a rule of selection based on the age of the child.

Brazilian legislation was only gradually changing in the way it dealt with family relationships, and consequently the principle of adoption. But, with the return of democracy after twenty-one years of military dictatorship, the changes came faster and had a deeper reach and impact.

On 5 October 1988, Brazil enacted a new Constitution, which had a monumental impact on all Brazilian law, including issues of family.

The Federal Constitution of 1988: children, adolescents, family relationships

The constitutions prior to 1988 had few provisions for familial relations. In general, they only provided for marriage and its indissoluble nature[15]. The Federal Constitution of 1988, however, put forward a new approach.

Immediately in the first article, the Federal Constitution explicitly stated that "human dignity" was a foundation of the Republic[16], and as result, the concept is reflected across

[12] Art. 29, Law 6697/1979 – Full adoption assigns the status of son/daughter to the adopted, severing all ties with the parents and relatives, except for matrimonial purpose.
[13] Art. 27, Law 6697/1979 – Simple adoption of a minor in a neglected situation shall be governed by the civil law provided in this Code. Art. 28 -Simple adoption shall depend on a court order, the interested party shall indicate in the application, the surname of the family the adopted shall use, which if the request is granted, the permit and the written legal document shall contain in order to register the birth of the minor.
[14] Art. 30, Law 6697/1979 – Full adoption will be assigned to a minor, up to seven years of age, who is neglected as defined in item I, art 2° of this law, where it is of a continuous nature.
Sole Paragraph – Full adoption shall be awarded to a minor over seven years of age if, at the time of reaching this age, the child was already under the guardianship of the adopters.
[15] Divorce was only permitted in Brazil after the Constitutional Amendment No. 9, on 28th June 1977.

the whole legal system and in various aspects of family law. It recognised common-law marriage between a man and a woman as a family entity, removing the exclusivity of marriage as the only institution that constitutes a family[17], demonstrating a reduction in the influence of the Catholic Church in Brazilian society[18]. It acknowledged the plurality of family relationships[19], established affection, and not marriage as the foundation of the family, recognised equality between spouses[20] – terminating a patriarchal tradition – and prohibited, in clear terms, any distinction between adoptive and biological children[21], thereby enabling the recognition of filiation under any circumstance.

Thus, the Constitution itself acknowledged the diversity of family groups, independent of marriage or blood ties, establishing equivalence for all children, whether biological (legitimate, illegitimate or natural) or adopted, and conferring the priority of affectionate relationships within the family legal construct.

With the establishment of affection in family relationships, biological filiation loses its precedence. As Paulo Luiz Netto Lobo says[22],

> "*In the tradition of Brazilian Family Law, the conflict between biological and socio-affective filiation was always resolved in favour of the former. In truth, only recently has the latter been seriously contemplated in its own right by jurists, and deserving appropriate study.*
>
> *.... In the Law, biological truth is converted to the 'real truth' of filiation by historical, religious and ideological factors, which are the core of hegemonic conception of the patriarchal and matrimonial family and by the distinction set out*

[16] Art. 1, Federal Constitution – The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and of the Federal District, is a legal Democratic State and is founded on: III- the dignity of the individual.
[17] Art. 226, Federal Constitution – The family, which is the foundation of society, shall enjoy special protection from the State. §3°- For purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, such that the law shall facilitate its conversion into marriage.
[18] Maria Claudia C.; Brauner and Andrea Aldrovandi, "Adoção No Brasil: Aspectos Evolutivos Do Instituto No Direito de Família," *JURIS* 15 (20120): 7–35, https://repositorio.furg.br/handle/1/5178.
[19] Art. 226, § 4°, CF/88 – The Community formed by any parent and their descendants is also a family entity.
[20] Art. 226, 5°, CF/88 – The rights and obligations from a marital society are exercised equally by the man and the woman.
[21] Art. 227, § 6° – Children, born in marriage or not, or by adoption, shall have equal rights and eligibility, and any discriminatory designation of their filiation is prohibited.
[22] Luiz Paulo Lôbo Netto, "Direito ao Estado de Filiação e Direito à Origem Genética : Uma Distinção Necessária," *Revista Jus Naveganti* (Teresina, January 2004), https://jus.com.br/artigos/4752, pg 47.

by the need for legitimacy. Legitimate was the biological child born of parents united by marriage; the rest were illegitimate. Over the course of the 20th Century, Brazilian legislation, following a western trend, widened the circle to include illegitimate children with a reduction in its intrinsic oppressive dimension, compressing the discrimination until its disappearance following the introduction of the new Constitution of 1988. Effectively, if all children are assigned equal rights and obligations regardless of origin, any meaning of the notion of legitimacy in family relationships, which was a fundamental term in most rules of Family Law, is now lost. Consequently, it relativises the originating role of biological origin".

There was even a chapter in the Federal Constitution dedicated to children and adolescents in the form of CF/88 Article 227[23] that established a concurrent obligation between the family, society and the State to ensure children and adolescents' rights are exercised with absolute priority, and to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. Article 227 set in motion a doctrine of complete protection.

Article 227 was the result, following the country's return to democracy, of successful pressure and advocacy from international groups and national social activists, such as the National Movement for Helping Street Children, 'Pastoral de Menor', and the National Commission for the Child and Constituents[24], who demanded changes to Brazilian legislation regarding the treatment of children and adolescents.

The introduction of Article 227 in the constitution is critical as it elevates the rights of children and adolescents to a fundamental right.

Regarding adoption, the Federal Constitution laid down the obligation of intervention by the Judiciary and authorized international adoption as part of the law[25].

[23] Art. 227, caput, CF/88 – it is the duty of the family, the society and the state to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression". (original text).

[24] Marli Palma Souza, "Children and Adolescents: Absolute Priority?," *Revista Katalysis* (Florianópolis, January 1998), https://periodicos.ufsc.br/index.php/katalysis/article/view/5575.

[25] Art. 227, §5°, of the Federal Constitution: "Adoption shall be supported by the Government, as provided by law, and will determine cases and conditions that can be permitted by foreigners".

In order to accommodate the new parameters under the Constitution, a new law had to be introduced, and accordingly, on 20 November 1989, in line with the Constitution and the CRC, Law 8.0690 was enacted, entitled 'The Child and Adolescent Statute' (Estatuto da Criança e do Adolescente – ECA).

This statute is clearly based on the CRC. Although the United Nations had only opened the CRC for signature on 20 November 1989, with Brazil ratifying the said convention on 20 September 1990 by Decree Law 99.710/90, the influence of this instrument in the wording of both Article 227 and the ECA is unquestionable. Upon the presentation of the justification of the draft law for the ECA, the rapporteur noted the influence of the CRC in the wording of the law. The statement declared:

> "*In this year 1989, the approval by National Congress is of extraordinary historical significance, as it is in the secular saga of freedom in the last two hundred years of human history…*
>
> *This is also the year in which, after a decade of studies and debates, the Universal Declaration of the Rights of the Child will be transformed by the United Nations into an International Convention on the Rights of the Child. This will be a legal instrument much stronger and more effective than the actual Declaration as it will create specific obligations and duties for signatory states, which will commit to adapting their legal systems to the terms of the Convention.*
>
> *With justifiable pride, the Constituent Assembly of 1988 can say that Brazil has begun to free itself ahead of this task with the approval of a new constitutional law for children and adolescents, as our Constitution foreshadows, and in some cases the new law surpasses measures included in the Draft Convention"*[26].

The abovementioned statute completely revoked previous legislation (including the Minors' Code), and in accordance with the Federal Constitution, granted rights to children and adolescents, placing them as priority subjects of law, and therefore turning them from mere objects into legal subjects, for the first time in the history of Brazilian legislation.

[26] "Diário Do Congresso Nacional (Seção II)," 1989, http://www.migalhas.com.br/arquivos/2015/7/art20150713-02.pdf; Justitifcativa, pg 07.

In its initial articles, the Child and Adolescent Statute reaffirms the principle of complete and priority protection[27] and forbids "any form of discrimination"[28] (Art. 5, ECA). In Article 6, it established the principle of best interests into national legislation and determined that the status of a child or adolescent has to be acknowledged as "a person in development"[29]. Some Brazilian legal scholars, among them Silmara Juny Chinelato and Guilherme Calmon Nogueira da Gama, take the view that the best interests of the child had already been incorporated into legislation in the 1988 Federal Constitution[30].

Specifically regarding adoption, the irrevocability of the measure was legalised[31] by way of court judgements[32], after consent from the biological parents[33], establishing the status of son or daughter on the child with equal rights and obligations, and cutting all ties with the biological parents and relatives except those related to "matrimonial impediments"[34]. Thus, Brazilian legislation now had no distinction between biological and adopted children. The restriction of "matrimonial impediments" remained to take into account laws related to incest.

The ECA further determined the exceptionality of adoption by stating that it is only possible if it is proven that the family of origin is incapable of maintaining the welfare of the child, given that the child or adolescent has the right to choose to remain in the family of origin over any other measure[35]. Reaffirming this right, Law 12.010, in 2009, amended

[27] Art. 1, Law 8069 – This law provides for the complete protection of the child and adolescent.
[28] Art. 5 – no child or adolescent must be the subject to any form of negligence, discrimination, exploitation, violence, cruelty, or oppression, and any attempt, by action or omission, to violate the fundamental rights of a child or adolescent must be punished according to the law.
[29] Art. 6 – In interpreting this law, the social purposes for which it is intended should be taken into account, as well as the requirements of the common good, in addition to individual and collective rights and duties, and the specific condition of children and adolescents as developing persons.
[30] In Camila Fernanda Colucci, "The Principle of the Best Interets of the Child: Theorical Construction and Pratical Usage in Brazilian Law" (University of São Paulo - USP, 2014), doi:10.11606/D.2.2014.tde-25022015-083746.
[31] Art. 39, § 1° – Adoption is an exceptional and irrevocable measure.
[32] Art. 47 – Adoption is by court order and will be entered into the civil registry but the original certificate will not be supplied.
[33] Art. 45, ECA – Adoption requires the consent of the parents or legal representative of the adoptee.
§1° - Consent will be dispended with when the child or adolescent's parents are unknown or Family power has been relinquished.
[34] Art. 41 – The adopted child is assigned the status of son or daughter with the same rights and obligations, including inheritance, removing all ties with the parents and relatives, except for matrimonial impediments.
[35] Art. 39, § 1° – adoption is an exceptional measure and irrevocable, and should only take place when all other measures to maintain the child or adolescent in the natural or extended family have been exhausted, in the form of art. 25 of this Law.

the ECA and introduced the concept of the extended, or increased family, understood to be "that which goes beyond the parents and child, or couple and child unit, and consisting of close relatives that the child or adolescent has a relationship with, or maintains an affinity or effective bond" (Art. 25).

The concept of the extended family reaffirms the exceptionality of adoption, allowing the child or adolescent to remain in the original family when having close relatives with whom ties can be maintained.

Persons over the age of eighteen can adopt provided that the adopter is sixteen years older than the adopted regardless of civil status[36]. Nevertheless, in the case of joint adoption, the adopters must be married or in a common-law relationship in order to demonstrate family stability[37]. A spouse or partner whose companion has a child/children is able to adopt them, and in this case there is no dissolution of previous family ties[38].

The ECA does not restrict adoption by singles, but in the case of joint adoption, the law states that the adopters must be married or in a "stable union". Since in Brazil, not only marriage[39] but also a stable union[40] must be between a man and a woman according to law, many homosexual couples have been prevented from adopting.

Various cases have been filed against decisions based on the above, and the courts, on several occasions, have authorized adoption on the understanding that the described list of families in Article 227 of the Federal Constitution of 1988 is not exhaustive, and have therefore accommodated other family units, such that existing between homosexuals. The

[36] Art. 42, ECA – Persons over the age of 18 can adopt independent of civil status.
§3° - The adopter must be at least sixteen years older than the adoptee.
[37]Art. 42, §2° – For joint adoption, it is essential that the adopters are in a civil marriage or in a stable union thereby confirming family stability.
[38] Art. 41, §1° – If the spouse or partner adopts the other's child, filiation ties are maintained between the adopted and the spouse or partner, and also the respective relatives.
[39] Art. 1514 of the Civil Code/2002 – The marriage takes place when the man and woman show, in front of a judge, their desire to establish conjugal ties, and the judge declares them married.
[40] Article 1723 Civil Code/2002 – A stable union between a man and a woman is acknowledged as a family entity, formed by openly living together, permanent and settled with the objective of constituting a family.

decisions were justified based on the principle of the best interests of the child, equal rights, and human dignity[41].

In a decision on 27 April 2010, the Superior Court of Justice, the highest Federal Court of Appeal, considered a case in which a woman pleaded for the adoption of her (female) partner's children. The Superior Court of Justice upheld the adoption on the grounds that the children had maintained an affective bond with the plaintiff, and it was therefore in the best interests of the children to approve the adoption[42].

Shortly after, on 5 May 2011, the Supreme Federal Court, the supreme court of Brazil, in a direct action of unconstitutionality (ADI/ 4277) recognized, with binding effect, "homosexual union" as a family entity. According to the rapporteur of the appeal, Justice Ayres Britto, the Federal Constitution prohibits any form of discrimination on grounds of sex such that sexual orientation "does not give rise to disparate legal treatment". The decision stated, "The 1988 Constitution, when applying the term 'family', does not limit the use to heterosexual couples, neither to a registry, civil nor religious ceremony."

In another important decision by the highest Federal Court of Appeals, the Supreme Tribunal of Justice authorized joint adoption by two siblings, again based on the best interests of the child and the primacy of the socio-affective family[43].

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[41]Brauner and Aldrovandi, "Adoção No Brasil: Aspectos Evolutivos Do Instituto No Direito de Família."

[42] The summary of the judgement:
"CIVIL LAW. FAMILY. ADOPTION OF MINORS BY A HOMOSEXUAL COUPLE. SITUAÇÃO ALREADY WELL ESTABLISHED. FAMILY STABILITY. PRESENCE OF STRONG AFFECTIVE BOND BETWEEN THE MINORS AND THE PETITIONER. NECESSITY TO MAINTAIN THE INTERESTS OF MINORS. REPORT FROM SOCIAL SERVICES IN FAVOR. SIGNIFICANT ADVANTAGES FOR THE ADOPTEES. ARTICLES 1 FROM LAW 12.010/09 AND 43 FROM THE CHILD AND ADOLESCENT STATUTE. GRANTED." (Special Appeal 889852/RS 2006/0209137-4, STJ, 4° Turma, STJ, Relator Ministro Luiz Felipe Salomão, date of publication 10/08/2010, RT vol. 903, p. 146).
RESP n. 889.852/RS, "Superior Court of Justice", 2012, http://www.stj.jus.br/SCON/jurisprudencia/doc.jsp?livre=adocao+homossexual&b=ACOR&p=true&I=10&i=3 (4 March 2017)

[43] STJ- REsp 1217415/RS – CIVIL. PROCEDURAL. CIVIL. SPECIAL APPEAL. POSTHUMOUS ADOPTION. VALIDITY. JOINT ADOPTION. PRETEXT. PARENTLESS FAMILY. POSSIBILE. Action by the State to annul a posthumous adoption, principally to stop the pension payments to the adopted. – prohibited-, pointing to the infeasibility of a post mortem adoption without the complete demonstration of the deceased's desire to adopt as well as the impossibility of accepting an adoption request between two siblings.
The wording of art 42,§5°, in law 8.069/90- ECA, renumbered as §6° by law 12.010/2009, one of the provisions in the law that the special appeal had violated, contains the possibility of a posthumous adoption taking place assuming the death of the adopter occurs during the course of an adoption process, and the confirmation was clearly shown of the desire to adopt while alive. Post mortem adoptions are valid with proof

On the other hand, the law expressly prohibited adoption between ancestors or siblings of the person to be adopted[44], which demonstrates a definitive severance from the old practice of adoption of biological children.

People separated, divorced or ex-partners can jointly adopt if there is an agreement in place concerning the custody and visiting rights of the adoptee, and if the trial period of adoption (in terms of adoptee and adopters living together) had started prior to the couple's own separation[45].

The ECA also specifically states that adoption shall only be granted if there are clear advantages for the adoptee[46]. The text of Article 43 of the ECA, by determining that the adoption must have clear advantages for the child, reaffirms the principle of best interests of the child.

It also states that there is to be a mandatory requirement that the parties live together for a period of time before granting the adoption, as set by the judge on a case by case basis,[47] and monitored by a multidisciplinary team of professionals[48].

The original publication of the ECA exempted this trial period for children under one year of age, or when the child was already under the guardianship of the adoptees. However,

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of the unequivocable desire to adopt being the same as socio-affective adoption: the treatment of the child as your own and that this condition is openly acknowledged. http://www.stj.jus.br/SCON/jurisprudencia/doc.jsp?livre=1217415&b=ACOR&p=true&l=10&i=5 (4 March 2017)

[44]Art. 42, §1° - Neither the adopter's ancestors, nor siblings can be adopted.

[45] Art. 42, §4° - Divorcees, those legally separated, and ex-partners can jointly adopt, provided that they agree over custody and visiting rights, and as long as the test stage of living together had started while the couple were also living together, and that ties of affinity and affection can be proved with the one who does not have custody in order to justify the exceptionality of the concession.

[46] Art. 43 – The adoption shall be granted when there are clear advantages for the adoptee and they are based on legitimate grounds.

[47] Art. 46- The adoption shall be preceded by a trial period of living together with the child or adolescent, for as period decided by the Judiciary with the specifics of the case being observed.

[48] Art. 46, §4° - The trial period of living together shall be monitored by an interdisciplinary team from the Infant and Juvenile Court, ideally with the support of the experts responsible the implementation of policies for guaranteeing family integration, and the presentation of a detailed report regarding the suitability of granting the measure.

Law 12.010/2009 modified the statute, authorising the same dispensation only when the adoptee was already under guardianship[49].

Law 12.010/2009 also introduced other important changes. It guaranteed unrestricted access to adoption records for adoptees over eighteen years of age, thereby allowing the adopted to know of his or her biological origin. The same right was also given to under eighteens after receiving legal and psychological counselling[50].

Before the change, there was no provision in the ECA that gave the adoptee the right to access this data, and as the ECA ensured the cancellation of court records[51] and prevented any observation of the source documents[52], many children grew up without been able or knowing how to research their ancestry. Recognising the right of adoptees to know their origin was therefore an important change to the legislation.

Above all, the Article reinforced the concept of affection as an essential part of filiation, making it clear that the child has the right to know his/her biological roots without prejudicing the filiation already formed by adoption. Academics have stated many times that knowing your biological origin is the individual right of the child[53,54]. Not recognising this right would violate human dignity.

Law 12.010/2009 augmented an article in the ECA[55] stating that children/adolescents from an indigenous, or Quilombola community who are placed in the care of a substitute family – whether guardianship or adoption[56] – with respect for the social and cultural identity of

[49] Art. 46, §1° – The trial period will be dispensed with if the adoptee already lives under the legal guardianship of the adopter for a time period sufficient to have been possible to evaluate the suitability of the establishment of a bond.
[50] Art. 48, sole paragraph – Access to the adoption process will also be granted to persons under 18, on request and after undertaking legal and psychological counselling.
[51] Art. 47, §2° – The judicial decision shall be filed and the original registry of the adopted will be cancelled.
[52] Art. 47, §4° – No information about the birth shall be included in the adoption registration.
[53] Lôbo Netto, "Direito ao Estado de Filiação e Direito à origem genética: Uma Distinção Necessária *"
[54] Enrique Varsi and Marianna Chaves, "Paternidad Socioafectiva. La Evolución de Las Relaciones Paterno-Filiales Del Imperio Del Biologismo a La Consagración Del Afecto," *Revista Jus Naveganti*, 2011, https://jus.com.br/artigos/18916.
[55] Art. 28, §6 – In the case of an indigenous child or adolescent, or one originating from a Quilombo community, it is mandatory: II – that the placement primarily occurs within the same community or together with members of the same ethnic group;
[56] Art. 28, "main section" – Placement in a substitute family by guardianship, ward, or adoption, independent of the legal status of the child or adolescent, is within the terms of this law.

the child, it is mandatory to arrange for a placement within the same community or with members of the same ethnicity.

Law 12.010/2009 also stipulated that, unless exceptional circumstances prevail, all siblings should be placed within the same substitute family[57].

Given that the adoption of children and adolescents in Brazil is governed by the law, there is a standard procedure that starts with the applicants lodging a petition along with all the necessary documents[58]. Although not regulated by law, the adopter(s) has to fill in an application form provided by the courts that provides their personal data and a profile of the child(ren) preferred for adoption. The ECA does not mention the suitability criteria for the selection of adopters beyond the legal requirements.

After completing the form, a multidisciplinary team provides an opinion on the candidate, the Public Prosecutor's office then submits a declaration, and following this the juvenile court authorizes, or not, the candidate's application. In the case of rejection, an appeal is possible.

With the information gathered, the courts register in a database all the suitable children for adoption alongside the selected candidates[59].

In 2008, the National Justice Council, the body responsible for administrating the duties of the courts[60] and expediting regulatory acts[61], published Resolution 54/2008[62] establishing

[57] Art. 28, §4°– The placement of a child or adolescent in a substitute family shall be preceded by a step by step preparation and post-support, carried out by an interdisciplinary team from the Infant and Juvenile Court, ideally with the support of the experts responsible for implementation of the municipal policy that guarantees the rights of family integration.
[58] Art. 197-A – The adopters, domiciled in Brazil, shall file an initial petition containing: I- full application; II- personal data; III- registered copies of birth certificates and marriage certificates, or a declaration relating to the period of the stable union; IV- copies of national identity and Social Security Cards; V- proof of income and residence; VI- certificates of mental and physical health; criminal report; VIII- proof of no outstanding civil court actions against the adopters.
[59] Art. 50 – The judicial authority shall maintain a register in each district or regional court of all children and adolescents awaiting to be adopted, and another of persons interested in adopting.
[60] Art. 103 – B,§4°– Federal Constitution/88 – it is incumbent upon the council to control the administrative and financial operation of the Judicial Branch and the proper discharge of official duties by judges, and it shall, in addition to other duties that the Statute of the Judiciary may confer upon it.

the National Adoption Register (CNA), a national database of adoptable children and adoption applicants. Subsequently, Law 12010/2009 set forth the obligation to create state and national registers.[63]

The CNA was created to make the process easier, enabling adopters to make an application at one juvenile court and still be able to find a suitable child for adoption across the entire national territory. The resolution did not mention the selection criteria for adopters, it just established the CNA. However, the single point of application enabled the standardization of eligible enquiries by adopters in the CNA, a process previously managed by individual Federal States that had chosen their own (varying) criteria.

Prior to the CNA, for example, between 2005 and 2008, the State of Pernambuco categorised the colour/race of children as light brown, white, dark brown, black, and yellow, according to Paulo José Pereira:

> "With respect to skin colour, there is a significant difference in the registrations: Light Brown (75.8%), followed by White (10.3%) and Dark Brown (9.5%), as verified in table 12. Black also appears in the table, representing 3.3% of registered individuals. Children denominated as yellow are the least registered (0.3%). Even though it is not possible to know how the skin colours were assigned to every child, the registration is evidence of what is characteristically and culturally relevant, if not for everyone involved, at least for the people making the applications. What it seems to suggest by mentioning tones of darkness as in Brown – Light or Dark – is they approximate, or are distant from, more or less, the color Black".[64]

Thus it is possible, via the register, to see the selection criteria of those who wish to adopt. Currently, potential adopters can choose the age, colour/race, sex, the existence or not of

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[61] Art. 103 – B,§4°, I – ensure that the Judicial branch is autonomous and that the statute of the Judiciary is complied with, and it may issue regulatory acts within its jurisdiction, or recommend measures

[62] Resolution 54/2008 - http://www.cnj.jus.br/images/stories/docs_cnj/resolucao/rescnj_54.pdf

[63] Art. 50, §5° - National and State registers shall be created for children and adolescents waiting to be adopted and persons or couples willing to adopt.

[64] Paulo José Pereira, "Adoption: Realities and Challenges for the Twenty-First Century Brazil" (Unicamp, 2012), http://repositorio.unicamp.br/jspui/handle/REPOSIP/280648, pg 103.

pre-existing physical/mental illnesses, and whether or not the potential child they wish to adopt has siblings[65].

Regarding colour/race, it is possible to choose from black, white, yellow, brown, indigenous, or indifferent. The colours and race terms used are the same categories applied by the Brazilian Institute of Geography and Statistics (IBGE) to categorise the national population.

Neither the profession of those registered to adopt, nor the criteria for determining the race/colour of the adoptee is shown. For example, while the vague concept of the term brown (pardo) is taken from the official composition of the Brazilian population, as Rafael Guerreiro Osório points out, "it is correct to assume that practically all browns must have black and white ancestors as the indigenous population were systematically wiped out or forced to live on the borders of the territory, while Asian immigration was highly concentrated in specific regions"[66].

An important fact in the method of adoption selection is that the potential adopter can choose the colour/race that is preferred, independent of the applicant's own ethnic origin. For example, a white adopter can select the preferences of white, yellow, brown, or indigenous, leaving out the option of a black child. It can be seen from this scenario that an adopter expresses an acceptance of inter-racial adoption (yellow or indigenous), but explicitly rejects the adoption of a specific colour/race: black.

The IBGE 2010 census[67] includes research on the entire Brazilian population and includes data in which the race/colour information was provided by the interviewees themselves (i.e. a self-declaration). It indicates the following Brazilian racial division: 47.7% are white, 43.1% are mixed-race, 7.6% are black, 1.1% are yellow, and 0.4% are indigenous. Given that Law no. 12.288/10 establishes that the black population includes all people who

[65] Conselho Nacional de Justiça (National Justice Council); www.cnj.jus.br; Guia Nacional da Adoção; URL: http://cnj.jus.br/images/programas/cadastro-adocao/guia-usuario-adocao.pdf (Accessed July 10, 2017)
[66] Rafael Guerreiro Osorio, *O Sistema Classificatório de 'Cor Ou Raça" do IBGE (Ebook)* (Brasília: IPEA, 2003), http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=4212, pg 30.
[67] "Censo 2010," *IBGE*, 2010, http://loja.ibge.gov.br/censo-demografico-2010-caracteristicas-gerais-da-populac-o-religi-o-e-pessoas-com-deficiencia.html.

declare themselves as black or mixed-race, the information indicates that 50.7% of the Brazilian population is legally classified under Law no. 12.288/10 as black.

Notwithstanding the above data, from the entirety of adopter candidates, 92.33% would accept the situation where they adopted a white child, while only 50.34% would accept a black child. Therefore, there is an enormous acceptance of white children in the country, but a considerably lower acceptance rate for black children that is almost identical to the proportion of black and mixed-race population of the country (with just a just 0.36% difference).

The acceptance of the adoption of yellow children, on the other hand, is registered by 52.72% of adopters, even though the percentage of yellow people in the country corresponds to just 1.1% of the population. In the same vein, despite the indigenous population corresponding to 0.38% of the national population, 48.94% of candidates would accept indigenous children. The disparity in the percentages of population representation versus willingness to adopt suggests that interracial adoption from these two race/colour groups is quite acceptable.

Other data that deserves to be highlighted is the difference between the racial profiles of the general population compared to children available for adoption. While the percentage of white children for adoption (31.38%) is lower than the white population percentage that they represent (47.70%), the reverse occurs with black and mixed-race. Both black and mixed-race children constitute a higher percentage of children available for adoption than they represent within the general population. While black children amount to 19.17% of the total adoptable children, blacks represent 7.6% of the general population, and while mixed-races represent 43.10% of the population, they total 48.85% of adoptable children.

This data suggests two possibilities that are distinct: either black and mixed-race children represent a higher number of children due to their parents' social conditions or it results from the criteria of classification. In the general population classification, the colour/race of

each person is stated by the interviewee while for the children, the information is possibly given by another[68].

Another key issue is that, despite the legal wording mandated by Law 12.010/2009, which stipulates that Quilombola and indigenous children should ideally be adopted within their Community of origin, the adopter is not required to specify if they live or have lived in such communities, since the application form does not ask for this information, and neither is there any corresponding field to indicate if the child previously lived in a Quilombola community, suggesting that the mentioned legal article is being ignored in the processes of adoption.

Adoption applicants are required to participate in psychological counselling programs offered by the Infant and Juvenile Court. In these meetings, the adopter will be invited to take on an interracial adoption, older children or adolescents with specific illnesses or health needs, or siblings[69]. The law never actually authorises any discrimination[70], but it does establish, "the incentive for interracial adoption, older children or adolescents with special needs, or siblings as a group".

What remains unanswered in the legal text is the point at which the adopter can choose the colour/race of the child they wish to adopt. The choice can be effectively made at two specific points or moments. Either the adopter 'selects' the 'race and colour' of the intended child and the Court searches for a child with the desired profile, or the Court indicates the child and the adopter, on seeing the racial characteristics, and agrees or not to the adoption. The legal text does not itself address such questioning, and it is an issue that specifically requires an answer.

[68] The National Council of Justice does not inform the method, nor the professional that classifies the children. Since it deals with children, it is necessarily done by a third party.
[69] Art. 197, C-§1 ° - The candidates are obliged to participate in a program offered by the Infant and Juvenile Court preferably with support from the experts responsible for the implementation of the municipal policies that guarantee the right to a Family life, which include psychological preparation, training, and incentivisation to adopt interracial children, and those older or adolescents with specific health issues or illnesses, and groups of siblings.
[70] Art. 5, ECA- no child or adolescent must be the subject to any form of negligence, discrimination, exploitation, violence, cruelty, or oppression, and any attempt, by action or omission, to violate the fundamental rights of a child or adolescent must be punished according to the law.

Law 1200/2009 states that "it is always appropriate and recommended that", during the preparatory phase of adopting and under guidance from the technical team of the Infant and Juvenile Court, the would-be adopters shall have contact with children and adolescents[71]. According to the legal text, the meetings will not necessarily be between the adopters and the final adoptees, but between candidates and children waiting to be adopted into a substitute family.

Another article in the ECA, Art. 100, establishes that in applying the principle of best interests of the child, "the intervention must first serve the interests and rights of the child/adolescent, without prejudicing the consideration due to other legitimate interests in the context of the diverse interests present in any specific case"[72]. Therefore, the legislation itself stipulates that, in applying the principle of best interests of the child, the legitimate interests of others must also be taken into account.

Finally, there is a crime in Brazil[73] referred to as 'adopt a Brazilian', so called because it is customary practice in the whole country, which involves the registration of an unrelated child as if it were your own, without following the legal adoption procedure. Regarding this point, it is important to observe that, even in cases of 'adopt a Brazilian', the Supreme Tribunal of Justice, the highest Federal Court of Appeal, on two occasions[74,75] , denied

[71] Art. 197 – C- §2° - It is always appropriate and recommended that, the preparatory phase referred to in paragraph 1 of this article shall include contact with children and adolescents put up for adoption via a family or institutional fostering scheme, and under the guidance, supervision and evaluation of a technical team from the Infant and Juvenile court, with the support of experts from the family or institutional fostering program and with the implementation of the municipal policy that guarantees the right to family life.

[72] Art. 100, sole paragraph, line III, ECA

[73] Art 242, Criminal Code – Reporting an unrelated birth as your own; registering somebody else's child as your own; hiding a newborn or substituting it, deleting, or modifying marital status:
Sentence – imprisonment, between two and six years.
Sole paragraph – If the crime is committed through an act of kindness:
Sentence – detention, from one to two years, at the discretion of the judges

[74] STJ -REsp 1.059.214/RS -Summary:
"FAMILY LAW. ACTION FOR DENIAL OF PATERNITY. DNA EXAM NEGATIVE. ACKNOWLEDGEMENT OF SOCIO-AFFECTIVE PATERNITY. REJECTION OF PETITION.
1- In compliance with the principles of the Civil Code of 2002 and the Federal Constitution of 1988, the success of the action to deny paternity depends on demonstrating together that there is no biological origin and no establishment of filiation, strongly characterized by socio-affective relationships and the construction of a family life. It is worth mentioning that a claim directed at contesting paternity can not succeed when it is based on genetic origin, but at the same time in conflict with socio-affective paternity.
2- In this case, the previous courts acknowledged socio-affective paternity (or filiation) as always existing between the plaintiff and the defendant. Therefore, if the declaration made by the plaintiff at the time of filing was false regarding genetic origin, it certainly was not the intention towards the affective bond with the then

requests for rejection of paternity, on the understanding that filiation had already taken place through 'socio-affective' paternity, and with the establishment of this affective bond, it is not possible to sever the filiation even though the birth registration was false.

The National Registry of adoption and its data

The National Justice Council maintains up-to-date information on children available for adoption and people willing to adopt[76]. Data on potential adopters includes details of the desired or preferred colour/race of the requests.

Based on a comprehensive 100% sample of registered candidates at the time of writing, (some 39,875 candidates), and in terms of specified restrictions, 19.34% would only accept white children; 0.89% only black children; 0.11% only yellow children; 4.29% only mixed-race children; and 0.05% only indigenous children. Conversely, 92.33% will generally accept white children; 50.34% black children; 52.72% yellow children; 78.35% mixed-race children; and 48.94% accept indigenous children.

In terms of all adoptable children, from a total of 4,800 (100%), the following racial distribution is apparent: 31.38% are white; 19.17% are black, 0.23% are yellow, 48.85% are mixed-race, and 0.38% are indigenous.

The total proportion of applicants who would accept all races is 45.07%, meaning that there are more candidates who accept all races (around 17,971) than there are adoptable children (4,800).

In summary, of the numerous legal changes to the adoption process in Brazil, none have dealt with the question of inter-racial adoption. Likewise, current legislation only ensures that inter-racial adoption shall be incentivised, without establishing whether colour/race should feature as part of the selection criteria. The choice of the colour/race of adopted

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infants, which is sufficient to maintain the register of filiation and the removal of the allegation of falsification or error.
3- Special Appeal not granted."

[75] STJ- REsp 1244957/SC: CIVIL CASE. SPECIAL APPEAL. FALSE CIVIL REGISTRY. ANNULMENT POSSIBLE. SOCIO-AFFECTIVE PATERNITY PREDOMINANT.
Even in the absence of genetic parentage, the registration of the daughter was done consciously, thereby consolidating socio-affective filiation. – related to the fact that is must be acknowledged and supported by law.

[76] National Justice Council – Brazil - http://www.cnj.jus.br/cnanovo/pages/publico/index.jsf (Accessed June 7, 2017).

child is therefore criteria that are used without any express legal authorization. Despite there being no law enabling it, the State, through the National Justice Council (CNJ), permits race/colour selection for adopted children, noting that racial criterion is an important part of the process of integration. Nevertheless, almost half of would-be adopters (45.07%) do not specify a preference based on the race/colour of the potential adopted child.

Chapter II -Racism in Brazil

It is estimated that Brazil received around 3.6 million slaves over more than 300 years of slavery in the country[77], which corresponds to approximately 40% of the total slave trade brought to the Americas[78]. Brazil was one of the last places in which slavery was abolished, being undertaken as of 13 May 1888, with the publication of Law no. 3353, known as 'Lei Áurea' (Golden Law), which had only two articles:

> "Article 1 – From this date, slavery is declared abolished in Brazil.
>
> Article 2 – All provisions to the contrary are revoked."

Slavery thus ended without any financial support or integration measures from the Government to the enslaved population.

The Constitution of 1891, the first Constitution following the slavery period, established formal equality among all[79] – as shown in the text "everyone is equal before the law" – but nothing was specifically provided concerning a ban on racial discrimination.

The end of slavery in Brazil, as opposed to that of the United States, was not defined by social breakdown and civil strife; it was due to an ideological change.

However, the end of slavery did not extinguish racist theories. In 1856, for example, Gobineau published 'About the inequality of the human races', which propagated the existence of innate differences between the human races[80]. It considered black and indigenous races inferior to the white one and disseminated the idea that, for the development of Brazil, the arrival of European immigrants was necessary to initiate racial

[77] Lilia Schwarcz, "Gilberto Freyre : Adaptação, Mestiçagem, Trópicos E Privacidade Em Novo Mundo Nos Trópicos," *Philia &filia* 2, no. ISSN 2178-1737 (2011), http://seer.ufrgs.br/Philiaefilia/article/view/24427/14103.
[78] United Nations – General Assembly - A/HRC/27/68/Add.1, "Report of the Working Group of Experts on People of African Descent on Its Fourteenth Session," GE.14-1686, 2013, www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Sessions27/Documents/A.HRC.27.68.Add.1_AUV.doc.
[79] Article 72, §2, Constitution of 1891 – Everyone is equal before the law.
[80] Antonio Sérgio Alfredo Guimarães, "Preconceito de Cor e Racismo No Brasil," *Revista de Antropologia* 47, n. 1 (2004): 9–43, doi:http://dx.doi.org/10.1590/S0034-77012004000100001.

'whitening' and therefore a more developed population[81]. Thus, as pointed out by Antônio Sérgio Guimarães, racism, as a doctrine, started to be widespread in Brazil exactly when the law beckoned the institution of formal equality of whites and blacks[82].

Further, Nina Rodrigues, one of the most well-known promoters of racism in Brazil, tried to justify the underdevelopment of the country according to the interracial formation of races that led to a degenerated population.

That is not to say that it was the abolition of slavery that generated the idea of superiority of whites in relation to blacks. What is clear is that during slavery, the difference between whites and blacks was inherent in the system, so that a pseudo-scientific doctrine was not widely required to sustain such differences.

However, if it was true that the formulation of the idea of the superiority of the white race and inferiority of the black race was incorporated into the Brazilian imagination, the idea that a mixture of races would always lead to a degeneration was rejected following the idea that a Brazilian social evolution was possible if there was massive cross breeding with the white race, as a way of populational whitening.

In the words of Lilia Moritz Schwarcz:

> "Brazil has introduced an original model that, instead of betting on a cross breeding failure, the possibilities of whitening were discovered. Therefore, concurrent to the process that would culminate in the freedom of slaves, an aggressive policy to incentivise immigrants began during the last years of the empire, characterized by an intention, also clear, to make the country lighter.
>
> This is how the Brazilian abolition process undertook on some singularities. In the first place, a rooted belief that the future would take to a white nation. Secondly, a relief due to the liberation without conflicts, and above all, avoiding legal distinctions based on race. Different from what happened in other countries, in which the end of slavery trigged a lively process of internal strife, in Brazil the abolition, presented as a gift, resulted in a certain resignation (especially when

[81] Mónica Velasco Molina, "Racial Politics in Brazil:1862-1933," *Latinoamérica. Revista de Estudios Latinoamericanos* 61 (2015): 31–64, doi:https://doi.org/10.1016/j.larev.2015.12.003.
[82] Guimarães, "Preconceito de Cor E Racismo No Brasil."

> compared to other similar situations). Besides that, instead of the establishment of official racial ideologies, segregation categories, such as apartheid in South Africa or Jim Crow in the United States, in this context, Brazil projected the image of a certain racial harmony"[83].

That peculiar situation in the country – in particular because of the lawlessness to legitimize forms of racial segregation such as apartheid, and the absence of contrary organizations toward blacks, such as an equivalent of the Ku Klux Klan – allowed the emergence of a belief that there was no racism in Brazil. It was believed Brazil was an example of racial harmony, a model country in which the diversity of ethnicities and races would live peacefully. It was the myth of "racial democracy" that had Gilberto Freyre as a great exponent with the book "Casa Grande & Senzala" (1933).

Contemporary to these ideas, the Constitution of 1934 was published, which stated the equality of all before the law, prohibiting discrimination on the grounds of race[84].

The provision applied for a short period, since the Constitution of 1937 only established the equality of all before the law. The subsequent Constitution of 1946 established, once again, the formal equality among all and prohibited racial prejudice propaganda[85].

On the international scene, Brazil ratified the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948 through resolution 217 A (III), which in its Article 2 stated:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional

[83]Schwarcz, "Gilberto Freyre : Adaptação , Mestiçagem , Trópicos E Privacidade Em Novo Mundo Nos Trópicos.", p. 89/90.

[84] Constitution/1934 – Art. 113 – 1. Everyone is equal before the law. There will not be privileges, nor distinctions, on the grounds of birth, sex, race, specific or parents' professions, social class, wealth, religious beliefs or political ideas.

[85] Art. 141 - § 1. Everyone is equal before the law. § 5. The manifesting of thought is free, without the connection to censorship, save for performances and public entertainment, answering to each one, in cases and in the form which the law is required for abuses to commit. Anonymity is not allowed. The right of response is assured. The release of books and periodicals is not restricted to Public Authority. Shall not be tolerated war propaganda, violent process to subvert political and social order, or of race and class prejudice.

> or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

In this scenario, and according to the promotion of the concept of a 'country without prejudice', UNESCO chose Brazil in the 1950s to be studied as a successful country with respect to racial harmony[86].

Despite the naivety of the proposal, this study enabled the development of a joint work of national and foreign social scientists, promoting the study of racial matters in Brazil[87]. Among the scientists, the work of Oracy Nogueira stands out. He analysed the peculiarities of racism in Brazil and pointed out the differences between racism in Brazil and in the United States of America. He believed that it is necessary to cover a country's history, as well as both the sociological and anthropological analyses of racism practiced in that country.

Accordingly, Nogueira believed that in the United States, the prejudice is from origin – in other words, everyone who has a drop of black blood is discriminated against, regardless of physical appearance – in Brazil, the prejudice is related to the quantity of phenotypic elements of the black race, such as the colour of the skin, nose and mouth shape, hair texture, and so on. Therefore, people from the same family can be considered more, or less black, and as a result, be more, or less marginalized. Thus:

> "Racial prejudice, as such as presented herein, does not have the same power as in the United States of dividing the society in two groups with their own consciousness, such as two castes or two social parallel systems in symbiosis, being impermeable to one another, despite fundamentally participating in the same culture. In Brazil the prejudice tends to situate the individuals, one to the other over a continuum, on one side extremely black and on the other side completely caucasian.
>
> In other words, the individuals are classified and classify themselves as white, mixed-race or light mulatto, mixed-race or dark mulatto and black, ranging to a

[86] *Identidades Brasileiras, São Paulo: Paulus*, 2006, http://scholar.google.com/scholar?hl=en&btnG=Search&q=intitle:Identidades+brasileiras#8.
[87] I*dentidades Brasileiras, São Paulo: Paulus*, 2006,

certain extent the recognized 'types' and their respective designations from one region to another, regarding in each case the absence or concentration of black traits (pigmentation density, hair color and contexture, nose and lip shape, etc), that means, the resulting appearance of the combination or merger of European and African traits. Individuals with indigenous traits are inserted, along the continuum, in a variable position that can be from white to mixed-race"[88].

In order to illustrate this peculiar racial situation in Brazil, Nogueira narrates the following episode:

> "When an auxiliary researcher was registering data about marriages in one of the local civil registry offices, a 14-year-old girl entered with another girl around 18 years old, mixed-race. The girl informed her name and asked for a Birth Certificate. The clerk of court jested because of her strange name. As he was searching for the register, he jested that she hasn't been registered. When he found the registry he exclaimed 'your father registered you as black, how so?!' The girl didn't have any black traits. She was 'brunette' and she didn't say a word. The clerk asked if her mother was black and she moved her head denying. After checking the data on her registry the clerk exclaimed again: 'Oh, your father is black, isn't he?! How did he register you as a black girl?' Meanwhile, a white man of around 35 years old arrived and the clerk, pointing to the girl, asked him: 'Is this girl black?' After a negative answer, he added to the girl: 'Girl, tell your father that you are not black!' and addressing the man he said: 'How can a girl like that, daughter of a black man with a white woman is like that? It is strange, isn't it?! And the most interesting thing is that she is registered as black! This can even result in difficulties for her. I believe that, if she is going to get an identity card, she could not take it because she is white and on her birth certificate she is black. Our laws recognize four colors: white, black, mixed-race and yellow. And she is not black and not brown. Brown is the other girl' (pointing to the girl's friend)"[89].

[88] Oracy Nogueira, *Preconceito de Marca: As Relações Raciais Em Itapetininga*, 1st edition (São Paulo: edusp-Editora da Universidade de São Paulo, 1998), p. 199.
[89]Oracy Nogueira, *Preconceito de Marca: As Relações Raciais Em Itapetininga*, p. 147.

This particular Brazilian racism results from the individual social contempt that takes place toward a greater or lesser quantity of black traits. The more black traits, the more difficult the possibility of social ascension. There is no bar to ascension, but as the prevailing trend in a dispute where all other factors are even, the one with less black traits shall win. Therefore, there is the desire for whitening, of getting married and having lighter children, which justified the rapid integration of European immigrants in Brazil: "the prejudice of color, creating the whitening concern as a mechanism of social ascension through generations, or preserving the positions already achieved, facilitated the European immigrant integration in the local society" [90].

Still according to Nogueira, as in Brazil racial judgement is individualized by the physical traits of each person, the racial collective consciousness is harmed, making the solidarity between discriminated members precarious: this is different to what happens where the origin prejudice exists (e.g. in the United States). In this case, "both racial groups, the discriminator and the discriminating, are opposed and harassed as distinct social units. On the one hand, there is oppression and on the other, resentment and distrust. Origin prejudice tends to become obsessive in both ways, it engenders reciprocal hate and antagonism"[91]. Here, where the prejudice of mark exists, "the variation of prejudice according to racial traits and the alteration of their effects due to other physical or social traits make the resulting experience diverge from individual to individual, leading to contradictory statements in relation to the 'racial situation' – contradictions that tend to manifest more in the order of the increase in contrast between the speaker, as for example, when it is about a 'deep black' and a 'light mixed-race'"[92].

The prejudice is greater among ones in a higher social position and lower in working classes. In the Nogueira's words, "the intransigence of the white is more significant the higher is their social position, being more complete the relation between the white and the colored individual in the less favorable society, in which intermarriage resistance or the

[90] Oracy Nogueira, *Preconceito de Marca: As Relações Raciais Em Itapetininga*., p 245.
[91] Oracy Nogueira, *Preconceito de Marca: As Relações Raciais Em Itapetininga* p. 243.
[92] Oracy Nogueira, *Preconceito de Marca: As Relações Raciais Em Itapetininga* p. 244.

permanent union between people with different racial traits is lower, especially in rural areas" [93].

Contemporary to these racial studies in Brazil, one episode with an African-American ballerina, Katherine Dunham, occurred in 1951, when she was barred from entering a hotel in the city of Sao Paulo because she was of African descendant. Due to the diplomatic embarrassment created by this episode, Law no. 1.390/51 was edited, typifying for the first time the practice of racist crime[94] in Brazilian Law.

Law no. 1.390/51 addressed the practice of race and colour prejudice as mere contraventions, preventing the implementation of soft measures: simple detention (variable from fifteen days to a year), fine or loss of position (when committed by a public officer).

The importance of this Law is not in its scope of work – rather limited because it only penalizes acts of refused access, refused sale, or entrance to public and private establishments – nor the efficiency of the penalties, which are mild since it typifies the practices as mere breaches. Its importance relies on the fact that it highlights racial discrimination in which African descendants were subject to at the time of writing the law[95], more than sixty years after the end of slavery.

On 26 March 1968 Brazil ratified the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), where, for the first time in Brazil, a law regulated the meaning of racial discrimination[96].

The ICERD, Article 2, obliges signatory States to take all necessary measures to eradicate racial discrimination, including in reviewing their policies[97].

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[93] Oracy Nogueira, *Preconceito de Marca: As Relações Raciais Em Itapetininga* p. 200.

[94] Denise Carvalho dos Santos Rodrigues, "Human Rights and the Issue of Race in the 1988 Federal Constitution :from speech to social practices" (Univeristy of Sao Paulo Law School - USP, 2010).

[95] Sérgio Salomão Shecaira, "Racism in Brazil: A Historical Perspective," *Revue Internationale de Droit Penal- The Fight against Racism - United Nations Conference Durban (South Africa) 31 August - 7 September 2001*, 2002.

[96] "Article 1.1 – In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

[97] "Article 2.1 – States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice

At the time, Brazil was under a military dictatorship, which made it difficult to publicly demonstrate for rights, and therefore it was surprising to see that Brazil had signed the treaty. Minister Juracy Magalhães' speech at the 21st Ordinary Session of the United Nations General Assembly officially shows, nonetheless, that Brazil did not recognise the existence of prejudice:

> "In the field of social problems and human relations, Brazil is proud to be the first country to sign the Convention on the Elimination of All Forms of Racial Discrimination, approved at the recent session of the General Assembly. Within our borders, such a document is not needed, as Brazil has been an outstanding example, for a long time, and I would say, the first of a truly racial democracy where all races live and work together freely without fear or favouritism, without hate or discrimination. Our hospitable land has been open to men of all race and religion – nobody questions the place of birth of a man, or his forefathers, nor worries about this – everyone has the same rights and all are equally proud of being part of a great nation. While the new convention is superfluous as far as Brazil is concerned, we are pleased to accept it so as to serve as an example to be followed by other countries under less favourable circumstances. And I would like to take this opportunity to suggest that racial tolerance is practiced by all races in relation to others: Being a victim of aggression is not a valid reason to attack others. That the example of Brazil, with our effortless moderation, peaceful tolerance and mutual respect in our race relations be followed by all multiracial nations"[98].

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of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division".

[98] Luiz Felipe de Seixas Corrêa, *O Brasil Nas Nações Unidas 1946-2006* (Brasília: Fundação Alexandre de Gusmão, 2007),pg. 215.

The Federal Constitution of 1988

Subsequently, the Federal Constitution of 1988 was proclaimed. This constitution, different from previous constitutions, was developed through large popular and social group participation[99], including from the black movement[100].

Discussions about minorities, racism and discrimination were part of the Congress' agenda, openly discussing the existence of racism in Brazil, with the argument that racism in Brazil implied the impossibility of building a real democratic society since it excluded an immense part of the population, making the citizenship exercise impossible[101].

Under such conditions, racism was raised in more than one passage of the Constitution. It stated that one of the fundamental objectives of Brazil is the promotion of the common good, without any distinction of race or colour[102]. In international relations, Brazil would be guided by the principle of repudiation of racism[103].

Concerning children and adolescents, it is the duty of the family, society, and the State to keep them safe from any kind of discrimination[104]. Regulating this constitutional article, Article 5 of the ECA determined the barring of any kind of discrimination to the fundamental rights, whether in the form of action or omission[105].

[99] Shecaira, "Racism in Brazil: A Historical Perspective."
[100] Rebecca Igreja, "Fighting Racism and Discrimination in Brazil: Legislation and Instituonal Action," *Desacatos* 51 (2016): 32–49, http://desacatos.ciesas.edu.mx/index.php/Desacatos/article/view/1582/1284.
[101] Rebecca Igreja, "Combate Al Racismo Y La Discriminación Racial En Brasil : Legislación Y Acción Institucional,"
[102] Art. 3 CF/88 – Constitutes fundamental objectives of the Federal Republic of Brazil – IV – to promote the well-being of everyone, without origin, race, sex, color, age and any other form of discrimination.
[103] Art. 4, CF/88 – Federal Republic of Brazil are governed by the following principles: VIII – repudiation of terrorism and racism.
[104] Art. 227. It is the duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right of life, healthy, nourishment, education, leisure, professionalization, culture, dignity, respect, freedom, and both familiar and communitarian companionship, besides keeping them safe from all kinds of negligence, discrimination, exploitation, violence, cruelty and oppression.
[105] Art. 5. No child or adolescent shall be the object of any kind of neglect, discrimination, exploitation, violence, cruelty and oppression, punished as required by law any attempt by action or omission on their fundamental rights.

Black culture was valued and recognized as a historical-cultural heritage of the former quilombos[106], granting to the remaining quilombos the definitive ownership of the occupied lands[107].

In relation to the practice of racist crime, until then penalized by law as a mere contravention, it was now given the condition of imprescriptible crime, non-bailable, and convicted with punishment by imprisonment[108], to be defined by law.

Exactly three months after the enactment of the 1988 Constitution, Law no. 7716/89 was edited, criminalizing, as established by CF/88, racist crimes. As a general rule, Law 7716/89 criminalizes three kinds of behaviour:

1) To prohibit, refuse or deny anyone access to commercial establishments (schools, hotels, restaurants, etc);
2) To deny or preclude employment in public office, or a public or private company;
3) To deny or preclude in any shape or form, marriage or social and family life.

Despite the powerful political message obtained through the placement of racism as a non-bailable and imprescriptible crime, the criminalization did not obtain the expected success. In fact, as happened with the former legislation[109], the criminalization of discriminatory practices focused only on specific behaviours – such as banning discriminatory access to commercial establishments, taking office by public contest, banning access to restaurants, bars, pastry shops, etc, – making the prosecution of many other types of behaviour impossible even if they had a clearly discriminatory character. Another problem pointed out by academics is that racism in Brazil is disguised, and consequently it is difficult to confirm

[106] Art. 216. Constitute Brazilian cultural patrimony, any material or non-material properties, taken individually or jointly, reference holders to identity, action, memory of the various groups of Brazilian society. § 5. Remain recorded as historic all documents and site holders of historical reminiscences of former quilombos.
[107]Art. 68. For the remainder of the quilombo communities that are occupying their lands is recognized the definitive property and the State must give them the respective titulations.
[108] Art. 5, XLII, CF/88 - The practice of a racist crime constitutes a non-bailable and imprescriptible crime, subject to the penalty of confinement, in terms of the law.
[109] Law 1390/51- Law Afonso Arinos.

dolus or intent (deliberate desire of the practice conducted), since the defendant may always argue that the alleged 'discrimination' was not motivated by racial prejudice[110].

In an attempt to cover a larger number of conducts or behaviours, Law no. 9459/97 introduced a new article to Law no. 7.716/89[111], criminalizing the one who "practices racial discrimination or prejudice" and subsequently by Law 8081/90, which criminalized the inducement or incitement of racial prejudice by media channels or any other method of communication[112].

While still under the effects of the return to democracy, on 24 January 1992, Brazil ratified the ICCPR and ICSESCR, both of which addressed the question of racial discrimination. It is worth mentioning Article 26 of the ICCPR[113], since it has a more comprehensive range of protection than the ICERD, including "giving a freestanding right to non-discrimination"[114].

In 1997, Law 9459/97, attempting to incorporate a large number of behaviours, established it to be a crime with a more open definition: "practice, induce or incite discrimination or prejudice based on race, colour, ethnicity, religion or place of birth"[115]. It prescribed an increase in the penalty if the crime involved elements referring to race[116]. However, as before, the number of criminal convictions remained very low[117].

During the second half of the 1990s, after the demonstrated ineffectiveness of the penal statutes in the fight against racism – both by their insignificant applicability or by the fact that the criminalization seemed only to attack racism only after its practice (rather than

[110] Tiago Vinícius dos Santos, "Institutional Racism and Human Rights Violations in Public Safety: A Study from the Statute of Racial Equality" (University of São Paulo - USP, 2012), doi:10.11606/D.2.2012.tde-16052013-133222.
[111] Art. 20. Practice, induce, or incite discrimination or prejudice of race, color, ethnicity, religion or national origin. Penalty: imprisonment of one to three years and penalty.
[112] Art 20- Practice, induce, or incite, by way of communication or publication in any form, discrimination or prejudice in terms of race, religion, ethnicity or place of birth.
[113] "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".
[114] Erica Howard, *The EU Race Directive*, 1st ed. (New York: Routledge, 2010), pg 44.
[115] Article 20, Law 9459, 13th May 1997
[116] "Article 140, Criminal Code – If the injury includes elements referring to race, colour, ethnicity, religion or origin: penalty: one to three years imprisonment and a fine"
[117] Shecaira, "Racism in Brazil: A Historical Perspective", p. 152.

acting as an effective deterrent) – the black movement initiated a campaign, demanding a new posture by the State to combat racist behaviour. It demanded the adoption of appropriate measures to break stereotypes and to value the African-Brazilian culture as well as the institution of affirmative actions in order to establish effective equal conditions[118].

In this same period, Brazil prepared to participate in the III World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which had the enthusiastic participation of the Government and civil society, including the holding of a National Conference[119]. In the official document presented to the Conference, the Brazilian Government defended the adoption of affirmative actions[120].

In 2001, Rio de Janeiro edited a state law reserving 40% of college vacancies for two universities – Universidade do Rio de Janeiro (UERJ) and Universidade Estadual do Norte Fluminense (UENF) [121] – to students of African descent. After this, other public universities, invoking the constitutional guarantee of the universities' autonomy[122], established reserved vacancies for African descendants and indigenous students.

The establishment of quotas in public universities generated a widespread national debate[123]. The opposition to this establishment, among other arguments, alleged that the low rate of African descendants in universities derived from social inequality and not from the existence of racial discrimination. It was argued that as is already proven scientifically that there are no differences between races, it would be impossible to establish policy

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[118] Luciana Jaccoud and Nathalie Beghin, *Desigualdades Raciais No Brasil; Um Balanço Da Intervenção Governamental* (Brasília: IPEA, 2002), http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=5442.

[119] José Augusto Lindgren Alves, "A Conferência de Durban Contra O Racismo E a Responsabilidade de Todos," *Revista Brasileira de Política Internacional* 45, no.2, pg 198–223 (2002): 198–223, doi:10.1590/S0034-73292002000200009.

[120] Flávia Piovesan, "Affirmative Action in Brazil: Challenges and Prospects," *Revista Estudos Feministas* 16(3) (2008): 887–96, doi:http://dx.doi.org/10.1590/S0104-026X2008000300010.

[121] Law no. 3708, November 09, 2001.
Institute quotas up to forty percent (40) to the black and mixed-race population for university access (Universidade do Estado do Rio de Janeiro and Universidade Estadual do Norte Fluminense), and other provisions.
Art. 1. The minimum quota of up to 40% to the black and mixed-race population in the universities' filling of undergraduate programs of the universities – Universidade do Estado do Rio de Janeiro (UERJ) and Universidade Estadual do Norte Fluminense (UENF).

[122] Art. 207, CF/88 – Universities hold didactic-scientific autonomy, administrative, financial and asset management, and shall follow the principle of inseparability among teaching, research and extended learning.

[123]Estela Waksberg Guerrini, "Affirmative Actions for Black People in Brazilian Public Universites: The Case of the Court of Rio de Janeiro (2001-2008)" (University of São Paulo, 2010), doi:10.11606/D.2.2010.

institutions based on race, and the institution of such criteria could, conversely to that intended, corroborate the idea of the existence of biological differences among races. Another argument was that, due to the high level of cross-breeding in Brazil, it is effectively impossible to define who African descendants are, and finally, to determine what should be the non-subjective criteria/method of evaluation.

In 2003, the federal government approved a law making the teaching of African Brazilian history and culture mandatory in public and private high schools[124]. In 2008, the law was altered to include the compulsory teaching of indigenous cultures[125]. This demonstrates a new approach from the State, fighting racism through educational projects, and valuing African descendants and indigenous culture.

On 20 July 2010, the Racial Equality Act, Law no. 12.288/2010, was published, describing racial discrimination as, "all distinction, exclusion, restriction or colour based preference, descent or national origin or ethnic, whose purpose is to annul or restrict the recognition, enjoyment or exercise, in equal conditions, of human rights and freedoms fundamental in political, economic, social, and cultural fields, or in any field of public or private life" [126].

The Racial Equality Act expressly prohibits discrimination on the grounds of privacy, broadening the prohibition into the sphere of private life, which was not foreseen in any of the international treaties ratified by Brazil (the ICERD, ICCPR and ICESCR). In spite of the legal wording being very similar to that of the ICERD, attention is drawn to the fact that the Racial Equality Act does not use the expression 'effect' (indirect discrimination), as the understanding that discrimination is always with 'the purpose' (direct discrimination).

On this point, it is important to note that the ICEDR, despite being prior to CF/88, was approved by the current Constitution according to article 5°,§2°, CF/88 which determines that: "The rights and guarantees expressed in this constitution do not

[124] Art. In the fundamental and high school institutions, officials and privates, the teaching of African-Brazilian History and Culture is compulsory.
§ 1. The program contents referred in the caption of this article will include the study of African History, the fight of the African people in Brazil, Brazilian black culture, and black in the formation of the national society, rescuing the contribution of the black people in the social, economic and political areas relevant to Brazilian History.
§ 2. The contents relating to History and African-Brazilian Culture will be taught during the whole school curriculum planning, especially in Artistic Education, Brazilian Literature and History.
[125] Law 11.645/2008.
[126] Article 1, Law 12.288/2010.

exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party". Therefore, the ICERD is included in the Brazilian legal system.

Another point to highlight is the hierarchy of the ICEDR in Brazilian law. This is because, since the enactment of the 1988 Federal Constitution, there were doubts as to the legal power of international treaties on human rights. Doctrine and jurisprudence is divided into 4 areas: constitutional nature, legal nature, 'supraconstitutional', and 'supralegal'[127].

In a judgement delivered by the Supreme Court on 22 November 2006, the records of docket RE 466.343/SP determined that international treaties are 'supralegal', meaning they are hierarchically superior to federal laws, but inferior to the Federal Constitution.

For this reason the enactment of the Racial Equality Act does not repeal the provisions of the ICERD. Both laws are in place such that the stricter law will always apply with regards to discrimination. Therefore, in the public sphere, indirect and direct discrimination is prohibited, while direct discrimination is prohibited in the private sphere.

The Racial Equality Act has also defined the black Brazilian population as being, "a group of people that self-declare black or mixed-race, according to the colour or race aspect used by the Brazilian Institute of Geography and Statistics Foundation (IBGE - Fundação Instituto Brasileiro de Geografia e Estatística), or that adopt an analogous definition" [128]. The concept of affirmative actions[129] is defined and the possibility of its creation by the Brazilian state is declared[130].

On 26 April 2012, the Supreme Federal Court declared [131] the adoption of positive discrimination measures constitutional in order to combat racial discrimination; this was

[127] Federal Supreme Court , RE 466.343/SP, http://m.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2343529, (Accessed 10 March 2017)
[128] Article 1, sole paragraph, I, Law 12.288. July 20, 2010.
[129] Article 1, sole paragraph, VI, Law 12.288, July 20, 2010 – affirmative actions: programmes and special measures adopted by the State and by the private initiative to the correction of racial inequalities and to the promotion of equal opportunities.
[130] Article 4, sole paragraph, VI, Law 12.288, July 20, 2010 – the programmes of affirmative actions will be established by public policies designed to rectify distortions and social inequality and other discriminatory practices adopted, in the public and private spheres, during the process of social formation in the country.
[131] Federal Supreme Court – ADPF 186/DF, http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAdpf54/anexo/adpf54audiencia.pdf (Accessed 11 March 2017).

prompted by cases following the 2003 University of Brasília (UNB) reservation of 20% of its vacancies to African descendants. The declaration of race/colour was considered by the candidates themselves, considering as a basis their phenotypic traits. After their declaration, the candidates were submitted to a commission that would support, or not, their declaration. As a result, the candidates made a self-declaration of race that was confirmed, or not, by the commission. The judgement declared that equality, as foreseen in the constitutional text of 1988, goes beyond formal equality, ensuring material equality, as comprehended by those seeking to correct differences, being of natural, economic, social, or cultural origin. This equality may be reached through State intervention, with policy implementation of the compensatory actions, just as the quotas institutions were.

On the theme of 'races', the Bench affirmed that biological differences among human beings do not exist, but it can be said that the term 'race' is a socio-historic category, recognizing the socio-historic discrimination submitted by this group. The wording of the opinion included: "Such as the constituent of 1988 qualified the non-bailable crime of racism, with the scope of banning negative discrimination of determined groups of people. Based on the concept of race, there is no biological fact, but a socio-historic category, and it is also possible to apply the same logic to authorize the utilization, by the State, of positive discrimination with a view to encourage social inclusion of traditionally excluded groups" (p. 20).

The prejudice tied to phenotype[132] was also taken into consideration and the difficulty of framing the categories 'white', 'black', and 'mixed-race' in a high cross-breeding country.

The vote of Justice Gilmar Mendes, analysing the way in which the candidates were selected at UNB, points out that: "This kind of evaluation is slightly complex and cannot be designated to a confidential commission and without objective criteria. Especially because, in the way in which Brazilian society is structured today, it is practically impossible to associate determined genetic characteristics from ancestors of a specific race, and therefore,

[132] Four Justices – Ricardo Lewandowski, Luiz Fux, Rosa Weber and Gilmar Mendes – pointed out in their respective votes the existence of phenotype prejudice, and the last two mentioned Oracy Nogueira's theory.

establish who is or who is not beneficiary of an affirmative action that takes this criteria into consideration" (p. 20).

He also added: "In 2004, candidate Fernanda Souza de Oliveira's brother, son of the same father and the same mother, was considered 'black', and she was not. In 2007, the identical twin brothers Alex and Alan Teixeira da Cunha were considered of 'different colours' by the UNB commission. In 2008, Joel Carvalho de Aguiar was considered 'white' by the commission, while his daughter, Luá Resende Aguiar was considered 'black', and according to Joel, even after he mentioned that Luá's mother was 'white'" (p. 16).

In 2012, reflecting the decision pronounced by the Supreme Federal Court that declared the establishment of racial quotas as constitutional, the Government edited Law no. 12.711/2012, making it mandatory for all federal universities of the country to reserve vacancies for African descendants.

In summary, Brazilian legislation is clear, particularly since the 1988 Federal Constitution, in the fight against racial discrimination, with the criminalisation of discriminatory behaviour, including the establishment of imprescriptible and non-bailable penalties. The many laws have never had the desired effect, however, and discriminatory practices persisted, largely due to the inability of society and public officials to recognise the existence of racism. Racial mixing concealed accusations, such as if the fact that someone was of black origin prevented that person from being racist. Because of both this and the ineffectiveness of punitive legislation, civil society initiated positive discrimination measures to combat racism, the greatest impact (in 2012) being Law 12.711/2012, which established quotas reserved for black students at all federal universities in Brazil.

Chapter III – Racial Discrimination

Concept

Conceptualizing discrimination is a complex task. The word 'discriminate' has at least two meanings. It might mean a mere differentiation between a number of differing elements, without a negative connotation; or it might be associated with a negative meaning, which places it within a superior or inferior category that results in a prejudicial conclusion[133].

In legislation, using the example of the ICERD, 'racial discrimination' has a more comprehensive meaning than the one utilized in common use (as described later), containing both deliberate discriminatory behaviour ("has the purpose of nullifying or impairing" rights – direct discrimination) and conduct that, despite not having a discriminatory purpose, has a negative effect on a group ("has the effect of nullifying or impairing" rights – indirect discrimination).

Another major issue in the conception of racial discrimination is that many times the terms race, racism, and racial discrimination are used as synonyms, and other times there is a distinction between them. Further, in wider common use, the terms 'racist' and / or 'racism' are often used when other terms are more appropriate, such as 'sectarian' or 'sectarianism'.

To better comprehend the meaning, the concepts of racism and prejudice will be analysed below.

Racial prejudice shall be used to describe a previous and arbitrary idea that someone has about a "race". In terms of ideas, prejudice, even though unwanted, stays out of the legal sphere. If, however, due to the prejudice the individual commits any discriminatory act, or exhibits any discriminatory behaviour, it would move from prejudice into the sphere of discrimination, which is prohibited by law.

Prejudice, many times, is the result of racism, which can be understood as an ideological doctrine that propagates innate differences among races, with naturally superior races and naturally inferior races. The doctrine argues, in essence, that there are biological differences between races.

[133] Howard, *The EU Race Directive*.

Even with the knowledge, in the 1930s, proving that human beings formed a unique race and proving the misunderstanding of the doctrine, racism did not become extinct. The idea of differences between "races" continued to be supported through new paradigms – the greater appreciation of one culture above another, for example, but with the same result, that is the establishment of an unequal relationship among 'races'[134]. In this sense, 'race' becomes associated with ethnicity.

Therefore, race is hereby used to mean of a group of people with a common ancestor, without relating to any biological trait. The term is taken in its socio-historical meaning as a group of people connected by a common ancestor, who are victims of prejudice.

Hence, 'race' as a term exhibits movable traits. In the words of Erica Howard, "race is much more complicated because the term appears to be changing over time; it is not a static concept with a single meaning. It has had different meanings in different historical settings and we will therefore have to trace the meaning of the term over time"[135].

In contrast, the term 'racism' has not always been used to just represent the meaning referred to in the abovementioned doctrine. Racism is often used as synonym for a belief and/or hostile behaviour to the detriment of another person, in order to demonstrate a belief in superiority of one race over another[136].

Racism can even have the same meaning as racial discrimination. According to Banton, "at the United Nations, the word 'racism' is taken to mean almost the same as 'racial discrimination'"[137].

The prohibition of racial discrimination by the ICERD is a legal response to prevent the spread of racist practices and ideas. According to the Convention's preamble: "Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere"[138].

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[134] Howard, "The EU Race Directive".
[135] Howard, "*The EU Race Directive*".
[136] Howard, "*The EU Race Directive*, pg 63".
[137] Michael Banton, "The Nature and Causes of Racism and Racial Discrimination," *International Sociology* 1 (1992): 69–84, p. 69.
[138] ICERD - United Nations.

Even though the ICERD is a response to prejudicial conduct, racial discrimination clearly does not cover every type of discriminatory behaviour. So, which conduct would be banned by racial discrimination?

This answer is given by the limit or interface between liberty and discrimination. On the one hand, the unfair discrimination of a person regarding any specific characteristic cannot be permitted. On the other hand, it is natural that people desire to belong to, and remain inside, a group with which they identify themselves, such as a group of friends, or family: inside this group people protect themselves and each other, and somehow, exclude the ones that do not belong to that group[139].

Based on this, the first distinction to be made is to know if the negative discrimination occurs in the private or in the public sphere. A degree of discrimination is inherent in any action that requires a choice. The action of choosing of a partner, for example, goes through the process of multiple discriminations – age, race, religion, social class, and appearance etc. – none of them illegal, because such discrimination abound only and exclusively within the intimate sphere.

Banton places restrictions on legal and illegal discrimination within the limits of public and private. According to him, the individual learns to socialize with those closest, with the ones who exchange similar experiences, thus remaining in the group that he/she belongs. This is the social pattern. However, he says that this pattern cannot be understood in the public sphere. It cannot act in the public sphere as it does in the private sphere.

The fact, however, is that the differentiation between the public sphere and the private sphere is not always clear or evident and only in context is it possible to analyse if discrimination occurred inside a public or private sphere, and even then differences of opinion can be held as to which[140].

Having incorporated these assumptions, the legal concept of racial discrimination is now referred to. Since the legal concept foreseen in the ICERD is wider than that in the Statute

[139] Howard, *The EU Race Directive*.
[140] Richard Arneson, "What Is Wrongful Discrimination?," *San Diego Law Review* 43, no. 4 (2014): 775–808, doi:10.1525/sp.2007.54.1.23.

of Racial Equality, the analysis shall concentrate on the statute, before analysing the differences between the two.

In the ICERD, the concept of racial discrimination concept is provided in Article 1 with the following definition: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

The legal statute places side-by-side two quite different modes of discrimination. On the one hand, it specifies "distinction, exclusion, restriction or preference which has the purpose", known as direct discrimination by doctrine, and on the other hand, stipulates "distinction, exclusion, restriction or preference … which has the effect", the so-called indirect discrimination by doctrine. While direct discrimination imposes less favourable treatment, the second type of discrimination is the result of the outcome of actions. Thus, for discrimination to arise, an intention or a purpose is not always necessary since the law also covers situations in which an apparently neutral situation has deleterious effects. "The Convention is not limited to purposive or intentional discrimination, but includes discrimination 'in effect' as well as aim".[141]

In the same vein, Banton points out[142]: "By adding the words 'or effect' ICERD went much further and declared that an action performed with a laudable intention could still be unlawful if it had a discriminatory effect. That effect could be one that could not have been foreseen at the relevant time. It complicates the law, because to a certain extent it detaches the concept of discrimination from that of unlawful grounds. It is insufficient for a court to find that an action has sprung from a guilty mind. It has to relate that finding to a particular prohibition if it is to declare that a law has been broken"[143].

[141] Patrick Thornberry, "Discrimination: A CERD Perspective," *Human Rights Law Review* 5:2 (2005): 239–69, doi:1.193/hrlr/ngiO15, p. 256.
[142] Michael Banton, *International Action Against Discrimination*, 2nd ed. (New York: Oxford University Press, 1996).
[143] Michael Banton, *International Action Against Discrimination*, pg 65.

Differences between direct and indirect discrimination

Unfair discrimination is, in itself, a violation of the principle of equality, since discrimination only exists when someone is treated differently. The fact is that this discrimination is not always presented in the same way. It is possible that someone is discriminated against because he/she did not have the same treatment (direct discrimination), or it is possible that someone is discriminated against because an apparently neutral conduct had a negative impact/effect on the group, prejudicing a group to the detriment of another (indirect discrimination).

Thus, there would be direct discrimination if applications to university from indigenous candidates were not allowed, for example. In these cases, there is direct discrimination involved, and the results (in terms of identifying discrimination) do not matter.

In the case of indirect discrimination, a condition that seems neutral can invalidate or reduce access to a determined group, without justification. For example, a work environment that does not allow skirts is indirectly discriminating against women whose religion obliges them to wear this kind of clothing. Therefore, in the case of an indirect discrimination, the result must be considered.

Since indirect discrimination results from an action that is not, in itself, prohibited, the action will not be considered illegal if objectively justified, meaning, there must be proof that the action was taken for a legitimate purpose and the means to achieve this purpose were appropriate (proportionate) and necessary[144].“The main characteristics of the legal concept of indirect discrimination are its effects-based nature and the element of objective justification”[145].

According to Christa Tobler, a wide range of justifications for indirect discrimination are acceptable, since these justifications are proportional to the intended purpose. The idea of proportionality in the case takes into consideration the necessity and the adequacy (proportion). The author says:

[144] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (Luxembourg: Office for Official Publications of the European Communities, 2008).
[145] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, pg. 6.

> "There is a very broad range of potentially acceptable grounds of justification. However, purely budgetary considerations can never serve as objective justification. Further, the aim relied on must be unrelated to discrimination, and mere generalisations are not sufficient in this context. As for proportionality, the requirements are very strict indeed. Proportionality requires that the concrete measure taken in the interest of the legitimate aim be both appropriate (i.e. suitable for achieving the aim in question) and necessary (i.e. another measure with a lesser effect, or even no disparate effect, would not be effective). It is therefore not sufficient that a measure is merely convenient or desirable. The legitimacy of the aim as well as the appropriateness and necessity of the measure must be shown by the person who has allegedly engaged in indirect discrimination"[146].

Furthermore, according to Tobler, three steps must be considered in the analysis of indirect discrimination: "the scope of the law, the nature of the measure as amounting to apparent indirect discrimination, and objective justification" [147]. These aspects are addressed to answer three questions: a) Does the law protect this field of discrimination? b) Can the victim prove that there are apparently conflicting results? c) Can the perpetrator justify objectively his/her conduct? [148].

In terms of indirect discrimination, it is irrelevant if the person committing the discriminatory act intends to discriminate or not, since it is the results of the action that are analysed. "A particularly important aspect of the effects-based nature of the concept of indirect discrimination lies in the fact that it is irrelevant whether or not the person deciding on the measure that causes the discrimination in any way intended such an effect"[149].

With direct discrimination, on the other hand, discrimination is only allowed if there is permission by law. Tobler states: "As a rule, such justification is not available in the case of direct discrimination, except in those few cases where a directive explicitly states the contrary"[150].

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[146] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, pg. 6.
[147] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, pg. 6.
[148] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*.
[149] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, pgg. 31.
[150] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, pg. 32.

This phrase however, should be better examined. In fact, in the configuration of the discrimination, it is necessary to analyse whether the criteria used to justify discrimination are legally acceptable. If they are ethic and legally acceptable, there is no wrongful discrimination.

According to Hower: "Discrimination is not always bad or unlawful. It is not wrong when the criteria used to justify differential treatment are morally acceptable or when it takes place in certain spheres. And, even if distinctions between people are made on grounds that are unacceptable or in prohibited areas, exceptions or justifications to the prohibition could means that the distinctions are not considered unlawful"[151].

Along the same lines, Vierdag says, "discrimination occurs when the equality or inequality of treatment results from a 'wrong' judgment as to the relevance or irrelevance of the various human attributes that are taken into account. Therefore, discrimination will be provisionally defined as 'wrongly equal, or wrongly unequal treatment'"[152].

What would be the ethic-legal acceptable criteria? The ethic-legal acceptable concept, in turn, derives from the socio-historical context in which the discrimination occurs. There is no previous criterion. The ethic acceptable should be analysed case by case:

> "It is by no means enough to say that red hair or blue eyes are irrelevant criteria for unequal treatment. Discussions sometimes concentrate somewhat on the attributes that are deemed morally acceptable or not as bases for legal classification, but in problems such as this no decision can be arrived at in abstract, that is, without taking into account the nature of the rights or duties concerned. Whether aspects of equality or aspects of inequality in the individuals treated must prevail is to be judged in relation to the nature of the subject matter regulated"[153].

Larry Alexander, in trying to establish more objective criteria in this differentiation, proposes a very important distinction between discrimination by preference and discrimination by objection. According to him,

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[151] Howard, *The EU Race Directive, pg 76*.
[152] E. W. Vierdag, *The Concept of Discrimination in International Law*, 1973, doi:10.1007/978-94-010-2430-3, p. 60.
[153]E. W. Vierdag, *The Concept of Discrimination in International Law*, 1973, p. 61.

> "We discriminate against certain people and in favor of others because the satisfaction of our preferences leads us to do so. As they relate to discrimination, these preferences break down into two main divisions: preferences for and against certain people and preferences for various goods and services. Both kinds of preferences lead inevitably to discrimination. But discrimination that flows from preferences for and against people raises issues that are distinct from those raised by discrimination flowing from preferences for various goods and services"[154].

However, the conduct of a person who discriminates by preference is not morally identical to the one who discriminates by objection/avoidance. The discrimination by preference emerges before an identification of a prejudice:

> "Personal commitments, relations, and identifications morally permit and may require particular persons to have greater moral concern for some than for others, even if the preferred individuals merit no greater moral concern from people in general because they possess no greater moral worth than others. My family and my neighbors are morally no more worthy and deserving of concern than other´s families or neighbors, but they are certainly more deserving of *my* concern[155]".

On the other hand, discrimination against, especially if directed towards a small group, is indicative of prejudice and not of identification:

> "Morally favoring a small group and (relatively) morally disfavoring the rest of humanity has a different moral quality from morally disfavoring a small group. This is so primarily because the disfavoring of a small group is less likely to be the logical corollary of positive personal commitments and ties to others than it is to be manifestation of an ideology that proclaims erroneously that members of the small group are morally unworthy. Put differently, my ties to the Alexanders do not require me to believe that the Joneses are morally inferior. Any 'ties' I feel towards

[154] Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," *University of Pennsylvania Law Review* 141, no. 1 (1992): 149–219, doi:10.1525/sp.2007.54.1.23., p. 157.
[155] Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies, pg 160"

the white race, however, to the extent they produced anti-black bias, would most likely be based on an ideology of black moral inferiority"[156].

It is worth mentioning the distinction between direct and indirect discrimination ties, respectively, to the concept of formal and material equality[157,158].

Formal equality specifies that everyone is equal before the law, and is restricted to prohibiting direct discrimination; in other words, prohibiting the different treatment of people who are in the same situation. Legislation against direct discrimination, however, can only prevent the discrimination of two people in the same situation. In formal equality, there is no space for the recognition of pre-existing differences, which can bring about, in some cases, a deepening of the differences. "Uniform treatment in some situations merely exacerbates disadvantages" [159] or, places everyone at the lowest level of protection. "Even more problematically, the absence of substantive underpinning means that a claim of equal treatment can just as easily be met by removing a benefit from the relatively privileged group, and equalising the two parties at the lower point (levelling down), as by extending the benefit to the relatively underprivileged individual, and equalising the parties at a high point (levelling up)" [160].

Material equality, on the other hand, in so far as unequalising the unequal – recognizing the inequities and disadvantages of a determined group – enables the prohibition of indirect discrimination, since it bars an apparently neutral conduct from impacting differently on a group, or harming one specific group. Indirect discrimination, in these terms, is complementary to direct discrimination since it inhibits situations that do not bring a differentiated treatment, but creates different results in each group. The central idea of this point is to assure equality of result.

In contrast, material equality, when recognising the differences of each group, allows the State to adopt compensatory measures in order to promote the fact and reality of equality,

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[156] Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies,"pg. 160.
[157] Olivier Schtter, "Three Models of Equality and European Anti-Discrimination Law," *Northem Ireland Legal Quarterly* 57, n. 1 (2006), doi:10.1525/sp.2007.54.1.23.
[158] Howard, *The EU Race Directive*.
[159] Sandra Fredman, "The age of equality", *in Age as an Equality Issue* (Oxford and Portland Oregon: Hart Publishing, 2003), p. 38.
[160] Sandra Fredman, "The age of equality" , p. 39.

including the establishment of affirmative actions. Hence, the central concern is to ensure equal opportunity.

The implementation of affirmative actions in Brazil – with the introduction of racial quotas in public universities – was only possible because Brazil adopted material equality, thereby recognizing the historical disadvantages to which the population of African descendants is subjected to in the country. It is a positive compensatory discrimination.

The Statute of Racial Equality

On 20 June 2010, Brazil enacted, the Statute of Racial Equality, defining racial discrimination in Article 1, sole paragraph, I, as: "Racial or racial-ethnic discrimination: all distinction, exclusion, restriction or preference based on race, colour, ancestry, or national or ethnic origin whose purpose is to annul or restrict the recognition, enjoyment or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of private or public life".

The ICERD, however, was not revoked by the introduction of the Statute of Racial Equality because ICERD was accepted by the Constitution as a 'supralegal' clause[161], as previously analysed. Both laws remain, and the more protective rule shall be applied when appropriate.

Taking this rule as a premise, together with the concept of racial discrimination established by the Statute of Racial Equality, it is possible to notice an increase, in direct discrimination, in the field of protection against racial discrimination within the public and private spheres. Therefore, in Brazil, direct discrimination is further forbidden in the private sphere. As a result, and bearing in mind what determines Article 2 of ICERD, as well as General Recommendation XIII of CERD[162], it lies with the Brazilian state to review its

[161] Federal Supreme Court, process record no. RE 466.343/SP.

[162] "1. States parties have undertaken that all public authorities and public institutions, national and local, will not engage in any practice of racial discrimination.
2. The fulfilment of these obligations very much depends upon national law enforcement officials who exercise police powers. Law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin".

government's actions following the publication of the referred law, resulting in a better protective field brought by the statute.

Chapter IV – The principle of the best interests of the child

The principle of the best interests of the child has been enshrined in Brazilian legislation since the country ratified the Convention on the Rights of the Child (CRC), by decree no. 99.710/90. Within domestic legislation, the principle of the best interests of the child is not stated in the same way as it is in the Convention as it has been inserted in the principle of full protection[163]. Briefly, besides establishing obedience to the principle of the best interests of the child, it further imposes that responsibility lies between the State, the family and society in the protection of the child.

As well as in the CRC, the principle of the best interests of the child is included in domestic legislation as a general rule. Specifically regarding adoption, domestic legislation states, "it will be granted when presenting real advantages to the adopted and when grounded in legitimate reasons" [164].

The Committee on the Rights of the Children points out that the principle of the best interests of the child establishes three different obligations on States:

1) It imposes the application of the principle of the best interests of the child on all decision-making in the public sphere that may impact, directly or indirectly, on children's lives. "The obligation to ensure that the child´s best interests are appropriately integrated and consistently applied in every action taken by a public

[163] Article 4, ECA – It is the duty of the family, the community as a whole, the society in general, and of the public power to ensure, with number one priority, the accomplishment of rights concerning life, health, feeding, education, sports, leisure, professionalization, culture, dignity, respect, freedom, and both familiar and communitarian companionship.
Sole paragraph:
a) Precedence in receiving protection and help under whatever the circumstances;
b) Precedence in receiving public services or services of public relevance;
c) Preference in both the formulation and the accomplishment of social public policies;
d) Privileged allocation of public resources in the areas related to juvenile protection.
Article 6, ECA – In the interpretation of this law, it will be taken into account the social purpose and demands for common good, the individual and collective rights and duties, and the peculiar condition of the child and of the adolescent as people in development.
[164] Article 43, ECA.

institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children"[165].

2) It imposes on States the requirement, in all administrative or judicial decisions, as in the publication of new laws, to demonstrate that the principle of the best interests of the child was taken into consideration. Seen in these terms, States must demonstrate how the principle of the best interests of the child was conceived and considered during the decision-making process. The principle of the best interests of the child limits adults' powers over children since it imposes a legal duty of explaining their actions towards children. It determines that: "The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child´s best interests have been examined and assessed, and what weight has been ascribed to them in the decision"[166].
3) It determines that the principle of the best interests of the child shall be evaluated and taken into consideration in decisions and actions made in the private sphere that may impact on children's lives: "The obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child"[167].

The principle of the best interests of the child in adoption

In adoption, the principle of best interests of the child has a different weight, and this is made clear by the CRC wording itself. While Article 3.1 of CRC determines that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration", particularly with respect to adoption, the CRC determines in Article 21 that, "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration".

[165] CRC/C/GC/14, "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, paragraph1)," 2013, http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf, p. 5.
[166] CRC/C/GC/14, p. 5.
[167] CRC/C/GC/14, p. 5.

Therefore, if the principle of the best interests of the child shall be ‘a’ primary consideration in each of the acts related to children, in adoption, the principle shall have ‘paramount consideration’, pointing out that, in adoption, the principle of the best interests of the child must have a higher weight than in others acts related to children.

According to Stephen Parker: “I only need to emphasize that whilst the article binds a broader group of decision-makers than typically do the stronger formulations, the best interests of the child are only 'a primary' consideration. Clearly 'a' is weaker than 'the' and, arguably, 'primary' is weaker than ‘paramount’[168].

It results that, while the principle of the best interests of the child, in general terms, must take into consideration the community of children, in adoption cases, the interest to be considered is primarily the adopted child. According to Parker:

> “The differences between these formulations are fairly obvious, but the implications of the differences are not always so apparent. The role of the child seems to change with successively weaker formulations. In the paramountcy version, the attention is on the individual child, and that child is the object of distribution. By the time one arrives at the version in article 3(1) the context may be quite different. First, it is not clear whether children as a class are intended to be the beneficiaries, or children individually. Note how the article begins by referring to 'all actions concerning children' (in the plural) but ends with the requirement that 'the best interests of the child' (in the singular) being the primary consideration. It is hard to see how, practically, the article can have anything other than a collective focus. Although courts of law often make decisions about individual children, the other decision-makers embraced by the article (public and private social welfare institutions, administrative authorities and legislative bodies) often make decisions about groups of children. Resource allocation in education is a good example. Azer … refers to the difficult decision whether the school day should be shortened so that scarce resources in Egypt can be used to give more children some education, or whether it

[168] Stephen Parker, “The Best Interests of the Child - Principles and Problems,” *International Journal of Law and The Family 8* 8 (1994): 26–41, p. 28.

should be maintained or lengthened so that the children who are actually in the education system derive more benefit. If article 3(1) is given the same individualistic focus as the paramountcy formulation in family law, it will be of no use in choices such as this"[169].

Sylvain Vité and Hervé Boéchat admonish, in the same way, the greater interest to be fulfilled in adoption is the child's interest, and not the adoptive parents, biological parents, or the State: "Article 21 … provides that the best interests of the child 'shall' (and not only 'should') be the paramount consideration. This means that the child´s interests must take precedence over any other interests, in particular those of his/her birth parents, prospective adoptive parents, accredited adoption bodies (AABs) or the States concerned"[170]. "It has to be stressed too, that this is the only place in the CRC where the best interests of the child are 'the', and not 'a', primary consideration"[171].

Parker[172] points out that the law, by determining the principle of the best interests of the child is placed as paramount importance, alters the principle of justice distribution, stating that, of all the legally legitimate interests, the interests of the child always prevails over others.

According to Parker, without the principle of the best interests of the child, we would possibly use the principle of equity and that everyone should have his/her case considered equally since nothing would justify the facilitation of one case over the other. The least, continues the author, is that a legal scale of distribution of justice is used, in case the law indicates the facilitation of one of the parties. For example, the law can determine that, in cases of custody dispute, the preference is given to the parents.

What does change in cases in which the principle of the best interests of the child is the focus of attention is that all the other criteria are subordinated to the interests of the child, especially when this principle is placed as paramount importance.

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[169] Stephen Parker, "The Best Interests of the Child - Principles and Problems,", p.28.
[170] Sylvain Vité and Hervé Boéchated. André Alen et al. *A Commentary on the United Nations Convention on the Rights of the Child, , Article 21. Adoption*. (Leiden: Martinus Nijhoff, 2008), p. 24.
[171]Sylvain Vité and Hervé Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child, , Article 21. Adoption*. p. 28
[172] Parker, "The Best Interets of the Child - Principles and Problems."

In a gradation, the stronger the formulation of the principle of the best interests of the child, the lesser is the space for others' interests than the child's to be taken into consideration. Therefore, in the case of adoption, there is no space for utilitarian calculations:

> "The strongest formulation of the best interests principle (i.e. the paramountcy standard) does not permit utilitarian calculation at large because, under the classical utilitarian approach, each is to count as one and no more than one. At most, the paramountcy standard is consistent with a restricted utilitarian approach. The justification for it might be that in order to maximize the welfare of a society over time, one should give greater weight to children's welfare. The weaker the best interests standard, however, then the weaker are the prohibitions on general utilitarian calculation"[173].

The principle of the best interests of the child and culture

Another aspect to be considered in the application of the principle of the best interests of the child is the cultural context in which the child is placed. Thus, the solutions would be addressed case by case, according to the cultural experience of each child. In an analogy, as pointed out by Philip Alston[174], the best interests of the child would have the same role of "margin of appreciation within the jurisprudence developed under the European Convention on Human Rights" [175], relating human rights to the local culture. According to Alston, the best interests of the child who lives in a major urban centre, in which independency is acclaimed, may not be the same for a child living in a rural area in which the central value relies on the proximity of the family[176].

Culture is central in the analysis of the best interests of the child, such that the idea of adoption can be questioned depending on the cultural context in which the child is placed.

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[173] Parker, "The Best Interests of the Child - Principles and Problems, p. 37."
[174] Philip Alston on, "The Best Interests Principle: Towards a Working Reconciliation of Culture and Human Rights," *International Journal of Law, Policy and the Family* 8, no. 1 (1994): 1–25, doi:10.1093/lawfam/8.1.1.
[175] Philip Alston on, "The Best Interests Principle: Towards a Working Reconciliation of Culture and Human Rights,", p. 20.
[176] Philip Alston, "The Best Interests Principle: Towards a Working Reconciliation of Culture and Human Rights," *International Journal of Law, Policy and the Family* 8, no. 1 (1994): 1–25, doi:10.1093/lawfam/8.1.1, p. 5.

In Islamic states, in which the parentage is only recognized as biological filiation, the child's/adolescent's maintenance in foster care can be more preferable than adoption; thus "the best interests of the child may be perceived in a different manner according to different cultures. Its respect does not necessarily lead to the same answers as the ones commonly admitted in Western societies. As mentioned before, Islamic law only recognizes biological filiation, and therefore gives preference to family foster care (such as *kafalah*)"[177].

The principle of the best interests of the child in adoption must be observed from the separation of the child from his/her biological parents until the end of the adoption process, including the follow-up period after adoption.

Consequently, it will be up to each government to analyze, inside the cultural context of each nation, the elements to be considered when determining the best interests of the child in each of the circumstances involved. It should be noted, however, that the circumstances involved in the case of adoption are not the same for a case of custody dispute, and that the individual culture and circumstances of the case shall determine the best interests of the child.

The Committee on the Rights of the Child[178], therefore, points out that, "the child´s best interest is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children concerned" [179]. For this purpose, a guide for States was provided, with a list of non-exhaustive and non-hierarchical elements that might be included in the evaluation to the child's best interests, observing that "elements that are contrary to the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children" [180].

[177] Vité and Boéchat, *Article 21.Adoption, p. 27*.
[178] "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para.1)."
[179] CRC/C/GC/14
[180] CRC/C/GC/14

Interracial adoption is questioned depending on the social-cultural context. Freeman[181] questions whether, inside a particular social context such as the American one, interracial adoption is undertaken in accordance with regard to the best interests of the child.

> "One of the most difficult questions in relation to adoption relates to adoption across racial lines, in particular adoption of black children by white adoptive parents. Debates rage, in the United States in particular, over whether such an adoption can be said to be in the child's best interests.Should an adoptive agency's evaluation of prospective adopters be colour-blind? Can the best interests of a black child be evaluated, "without considering the social meaning of race for that child"? The best interests principle cannot be isolated from social context. Those making the decisions must assess how a particular social setting might affect a child in need of adoption, "in the light of that child's racial ascription and other social identifications such as physical and developmental ability, sex, ethnicity, age, and perhaps religious affiliation"[182].

Concept and critics

The principle of the best interests of the child is not defined in the CRC or in domestic legislation and is not immune to criticism, either because its content is indeterminate[183] or because it enables each interpreter to take into consideration different factors in the decision-making, which makes the decision open to subjectivism. According to Freeman, "It may be that the decision one comes to, say in a disputed custody, or the policy a legislator adopts, will depend on which aspect of a child's welfare is dominant in the minds of the judge or legislator. In other words, there is an ineradicable element of values and hence its subjectivity"[184].

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[181] Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child*, ed. André Alen et al. (Leiden: Martinus Nijhoff, 2007).
[182] Michael Freeman, *Article 3. The Best Interest of the Child*, ed. André Alen et al. (Leiden: Martinus Nijhoff, 2007), pg. 58/59.
[183] Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child Article 3. The Best Interest of the Child"*.
[184] Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child Article 3. The Best Interest of the Child*, p. 28.

Another criticism is related to its indeterminate content is that it might be used as an artifice to cloak prejudices. Freeman comments, "the best interests principle is, of course, indeterminate. One of the dangers of this is that, in upholding the standard, other principles and policies can exert an influence from behind the 'smokescreen' of the best interests principle. It can cloak prejudices, for example anti-gay sentiments. It can also be merely a reflection of 'dominant meanings'. For Thèry, the criterion is an "alibi for dominant ideology, an alibi for individual arbitrariness, an alibi for family and more general social policies for which the law serves as an instrument""[185].

By addressing this debate, Archard[186] points out that the principle of the best interests of the child can only be duly specified if we approach such a principle with the idea of the child's participation. Therefore, the right of the child to participate in the decision-making process is an integral part of the principle of the best interests of the child. "I have argued that the reconciliation to be managed, in terms of the determination of outcomes, is between the child's own views of what is in her interests and the appropriate adult's judgement of what is best for the child"[187].

The Committee on the Rights of the Child, aware of the criticism, points out that the principle of the best interests of the child is a threefold concept: a substantive right, a principle, and a rule of procedure.

As a substantive right, every time that there is a decision involving children, States must put in place mechanisms to assure that the principle of the best interests of the child is taken into consideration, mechanisms to force authorities to consider this principle during the decision-making. Thus, "the right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified

[185] Michael Freeman, *Article 3. The Best Interest of the Child*,, p. 2.
[186] D. Archard, "Children, Adults, Best Interests and Rights," *Medical Law International* 13, no. 1 (2013): 55–74, doi:10.1177/0968533213486543.
[187] D. Archard, "Children, Adults, Best Interests and Rights,", p. 69.

children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court"[188].

As a principle, it imposes on States that, facing a decision that allows various interpretations, the decision taken must be the most beneficial to the child. "If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child´s best interests should be chosen" [189]. According to Zermatten[190], this does not imply saying that States must adopt one or another approach; it only points out that the principle must be taken into consideration during the decision-making process. "Nobody knows what is the best interests of the child, or of these children. The best interest will be assessed by the decision maker in a process where the rule of procedure will be applied and the State party does not say what the decision maker has to decide, but just how he has to take his/her decision"[191].

As a rule of procedure, it imposes that, in the decision-making, the authorities involved analyze the potential impacts the decision will have on the child's life, pointing out in their justification how the principle was respected during the decision.

> "Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been respected in the decision, that is, what has been considered to be in the child´s best interests; what criteria it is based on; and how the child´s interests have been weighed again other considerations, be they broad issues of policy or individual cases"[192].

[188] CRC/C/GC/14, "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para.1), p. 04."
[189] CRC/C/GC/14, p. 04.
[190] Jean Zermatten, "Best Interests of the Child," *Child-Friendly Justice* 1 (2015): 30–42, doi:10.1163/9789004297432.
[191] Jean Zermatten, "Best Interests of the Child", p. 32.
[192] Jean Zermatten, "Best Interests of the Child", p. 04.

Zermatten[193] also points out that the principle of the best interests of the child compels that each child must be considered as a unique being, with his/her own history and opinion, an opinion that must be taken into consideration according to the age and maturity of the child. Thus, the principle of the best interests of the child links to Article 12 of CRC[194], and imposes on the State that authorities recognize the subjective right of the child of being heard in each decision affecting them. According to Zermatten:

> "Art 3 CRC is commonly recognized as an expression of a protective model wherein the decision-maker will undertake a decision with a view to ensuring the well-being of the child... this is a traditional concept that emerged out of the Welfare Systems of the last century. In my opinion, it is impossible to consider the art. 3 strictly from this perspective since it disregards the need to hear the child in all decisions affecting her/him. Indeed, how could a decision-maker determine the best interest of a child, without first asking the child in question about her/his opinion on the matter at hand? In my opinion, the rights of the child to be heard laid down in art.12 of CRC should be understood to extend to all situations where the best interests principle must be applied. The contrary would be very strange! The child must be consulted in all relevant decisions to the extent that she/he is capable of forming her/his own views, and those views must be given due weight in accordance with the age and maturity of the child"[195].

In addition, the principle of the best interests of the child dictates that, in the treatment of children, the global spirit of CRC be considered[196]. Therefore, its other general principles cannot be disregarded, notably the principle of non-discrimination, the right to survival, and the development and the views of the child.

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[193] Zermatten, "Best Interests of the Child."
[194] Article 12, CRC-
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
[195] Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", p. 496.
[196] Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function".

Finally, on account of being a child in development, any decision involving a child must consider short-, medium- and long-term perspectives, rendering the decision even more complex, since what can be the best decision for a child at five years of age may not be the best for the same child ten years later.

In summary, the lack of precision in the principle of the best interests of the child is criticized by some scholars. However, it is this lack of precision that permits, depending on the local culture, a decision to be taken that is closer to the reality of the child. For this reason, I believe the choice of race in adoption procedures depends on the situation in each county. To maintain that the possibility of selecting race in the adoption process is always advantageous harms the key principle of the best interests of the child because it strengthens a principle which has, exactly as its main advantage, the possibility of debate in respect of the socio-cultural reality of each place.

Conclusion

Adoption was not always protected in Brazil, with the lack of legal protection due to moral and cultural values of the time. Initially, the law aimed to protect the institution of marriage and not the child. If a child was born out of the wedlock, for instance, recognition was barred. Only in a second phase, and largely driven by judicial decisions that broke rigid aspects of the law, did protection extend to biological children. Therefore, within society, through the filing of lawsuits, the situation moved from the recognition of children born within marriage to the recognition of biological children.

With the Federal Constitution of 1988, a new proposal for family was raised. The Constitution protects the family in which the relationship is by affinity and not by biological relationship or by marriage. In this way, adoptive children have their rights equated to biological children. Such legal equivalence of rights is a logical consequence, since there is no way to sustain that legal protection is the result of an affinity relation and still maintain differences in treatment between biological and adopted children.

If the law anticipates that the biological family is not a protected property anymore, the legal foundation to sustain the choice of the child's colour within the adoption process can be questioned, as if the physical similarity was a property to be protected. I believe the law does not provide us a foundation to sustain such selectivity.

The decisions of the courts that recognize the right of adoption for two brothers, or homosexual couples, demonstrate a paradigm shift, showing that legal protection occurs regardless of biological relations. To sustain that new family configurations just alter the filiation norms for adoptive parents and not the adopted children is to uphold that the new paradigms only extend to one of the parties – the adoptive parents – a premise that goes against the principle of the best interests of the child. 'Racial' selection in the adoption process is a trace from a time in which the protection lies on the biological filiation, a time that should have been concluded with the Federal Constitution of 1988.

Another aspect to be analysed is the fact that 'racial' selection of a child has been established without express legal authorization. The absence of law demonstrates that society did not have the opportunity to discuss this matter, which differs from that which

happened with quotas for Afro-descendant students in public universities, when at the time, a wide national debate took place. Seen in these terms, it becomes evident that the State maintains a dubious line, in which the concession of rights is more alarming than discrimination. Even if the Brazilian State understands that the possibility of 'racial' selection in adoption is not a discriminatory act, it is evident that the debate and the publication of rules regulating the selection possibility were of paramount importance to society.

Brazil is a mixed-race country. There is no way to sustain ethnic differences between black and white 'races' in Brazil, quite the opposite. As pointed out by Oracy Nogueira, as prejudice is centralized in phenotypic traits, many times disputes occur inside the same 'race': a mulatto (black + white), for example, may have less black traits, and therefore, competes with another mulatto, to have better chances of upward mobility. Thus, there are no cultural barriers in 'interracial' adoptions in Brazil, and this kind of adoption is encouraged by law.

It should be observed that it is not a statement that the identification of 'race' by physical traits is exclusively Brazilian. What is particular to the country is, by the extension of miscegenation, the creation of a particular categorization in Brazilian society. It is possible to classify two brothers of the same father with distinct 'races', depending on the eyes of those who judge them. Therefore, someone may be judged to be white in a determined social group and mulatto in another, depending on the social circle: subjectivity persists. Colour, in Brazil, has a more elastic character than usual and it is also more flexible, depending on the social class of the person responsible for the analysis. As pointed out by Nogueira, the richer families are, the less elastic is the concept.

In this vein, when the Brazilian Government classifies children 'racially', the risk of the Government itself discriminating indirectly is incurred, because categorizing a child to a determined colour might reduce the chances of this child being adopted, since the adopters and those responsible for the 'racial classification' of the children do not have the same 'racial pattern'. The 'racial' classification made by the government may violate the principle of the best interests of the child, since the racial classification will, as a result,

distance the adopters, when the selection process should be exactly the contrary, to bring the adopter closer to the adoptive children.

Another aspect to be considered is the manner in which racial selection is made, in which the adopter can opt for the 'race(s)' preference, without associating this choice with their own racial origin. Therefore, a white couple, for instance, may accept the adoption of indigenous or yellow children – interracial adoption – but exclude the adoption of black children. In this case, a discrimination by objection is emphasized, as pointed out by Larry Alexander. It would be different if, when the adopter selects the race/ colour of the child, the 'race' of the adopter and the 'race' of the adopted child were linked. Therefore, the discrimination would be by preference, totally distinct from discrimination against. Indeed, the conduct of the person who discriminates by preference is not morally identical to the one who discriminates by objection/avoidance. Discrimination by preference is made before an identification of a prejudice. On the other hand, discrimination against, especially if directed to a small group, is an indication of prejudice and not of identification.

It is considered that, since the publication of Law 12.010/2009, adopting parents may maintain contact with the adoptive children. Thus, the revocation of the criteria of 'racial' selection will not increase the exposure of children, which might be harmful. Furthermore, it is possible that the person responsible for children categorization does not have the same parameters as those of the adopting parents. Therefore, the selection process that would have as an objective the speeding up of the procedures will not be apt to do so, since the final decision will be from the adopters themselves, who will say according to their own preferences if they desire or not to adopt the child selected for adoption.

A relevant fact is that nowadays the number of candidates prepared to adopt that do not show any 'racial' preference (17,971) is bigger than the number of adoptive children (4,800). Therefore, the maintenance of such criteria of selection implies that, in a final analysis, the State is working for the parents in the search for ideal children, yet the law determined the opposite: to find ideal parents for the children. Thus, this kind of criteria is no longer supportive of the adoption process in Brazil.

Finally, it must be observed that the Statute of the Child and Adolescent (ECA) points out that interracial adoptions shall be encouraged. Considering that the principle of the best

interests of the child determines that the laws that affect children can only be published if they take the principle into account, and distinct to that which occurs in the United States, interracial adoption is seen by Brazilian law as beneficial to the child. Thus, considering that the principle of the best interests of the child refers to the social context present at any particular locality, we must acknowledge that in the case of Brazil, interracial adoptions should be encouraged, and there is no reason to determine at the beginning of the process that adopters should avoid proximity to a child of a determined ‘race’.

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