Summary of the Doctoral Dissertation in Law

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Perfecting the Law on adoption with foreign elements in Vietnam - theoretical and practical issues

Major: International Law

Code: 9.38.01.08

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Ha Noi, 2017

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The dissertation was defended before the meeting of the Doctoral dissertation Council at the Hanoi Law University at ..... 2019.

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INTRODUCTION

1. The necessary of the dissertation topic

Since the Law on adoption and the Hague Convention No. 33 took effect, the context for child adoption with foreign elements in the country has had radical changes, many important legal documents such as the Constitution 2013, Law on marriage and family 2014, Civil Code 2015, Law on civil Status 2014 and Law on children 2016 have been issued to strengthen the protection of human rights and children's rights.

In this situation, the Law on adoption with foreign elements in our country have revealed inadequacies, which are inconsistent with the newly promulgated regulations, leading to the practice of child adoption activities with foreign elements has had certain limitations in quantity and quality. Specifically, the number of children to be adopted for inter-country adoption fell sharply, not meeting the need to find alternative families for children with special circumstances and settling adoption with foreign elements are also associated with humanitarian assistance (through donation).

On the other hand, due to the Law on adoption , which was issued before our country became a member of the Hague Convention No. 33, therefore, the extent to which the law of general principles is compulsory (jus cogens) is still limited.

In order to ensure the child adoption with foreign /international elements for the best interests of children, in accordance with international practices and standards, it is necessary to take into account the amendments and supplements to the Law on adoption .

Therefore, the topic "***Perfecting the Law on adoption with foreign elements in Vietnam - theoretical and practical issues***" is necessary and highly applicable in the context of Vietnam strengthening the responsibility of implementing the Hague Convention No. 33 and preparing for the amendment and supplementation of the Law on adoption .

2. Research purposes and tasks

The purpose of the thesis is to clarify the theoretical basis and practice of improving the Law on adoption with foreign elements in our country, in order to propose improving solutions.

For the purpose of research, the thesis is tasked with clarifying the general theoretical basis for child adoption; the status of improving the law and affecting the practice of settling intercountry adoption; determine the need to improve the law to propose specific solutions.

3. Scope and subject of research

The thesis focuses on researching the current legal provisions on child adoption and the current status of perfecting the law on adoption with foreign elements in the Vietnamese territory from

the 70s of the previous century till present, expanded the study of legal regulations of some relevant countries.

The thesis studies the content and clarifies the legal situation and completes the law regulating the adoption of foreign elements in our country, in the general context of the world and the cooperation on adoption between Vietnam and other countries.

4. Methodology and research methods

The thesis is based on the methodology of Marxism - Leninism, Ho Chi Minh ideology, our Party's policies and resolutions on improving the law. On that basis, PhD students use methods of analyzing and commenting, synthesizing, comparing, systematizing, reviewing, analyzing practicality and researching conference reports and documents, domestic and international seminars, aimed at clarifying the general needs and trends of international child adoption activities in the world, understanding difficulties and difficulties in the process of improving domestic laws.

5. Approach of thesis topic and theoretical basis

The dissertation approaches the Law on adoption with foreign elements from the general theoretical perspective on adoption law, the Government's policy on child care and protection and the mechanism of international cooperation to ensure the legality of foreign adoption. In particular, the thesis approaches the Law on adoption with foreign elements from the perspective of the legal system based on four pillars: the system of sources of law, institutions to ensure implementation, organization of implementation and information and human resources; thereby building solutions to improve the law.

The thesis is developed based on the basic theory of international justice; dependence / interconnection between the domestic child adoption law and child adoption with foreign elements, between the Law of the origin Government and the receiving Government and its conformity with the Hague Convention No. 33.

6. Research hypotheses

On the basis of the theory and the legal status of child adoption with foreign elements, the thesis should focus on some scientific hypotheses about the impact of inter-country adoption on the situation of abandoned children and children's rights; coherence child adoption with other alternative care measures; socialization of adoption services; issues of determining applicable laws on the conditions and consequences of intercountry adoption in the new context.

7. Structure of the thesis

The thesis includes the introduction, content, conclusion, list of references and appendices. The thesis content is arranged into four chapters.

- Chapter 1: Overview of research situation related to the topic and the issues raised should continue to be studied in the thesis.
- Chapter 2: Rationale for perfecting the Law on adoption with foreign elements in Vietnam and criteria for assessing the level of law improvement.
- Chapter 3: Actuel situation of perfecting the law and the impact on practice of settling child adoption with foreign elements in our country in the current period.
- Chapter 4: Proposing a number of solutions to improve the Law on adoption with foreign elements in our country in the new scene.

8. The scientific and practical significance of the thesis

The thesis will contribute to supplement international legal scientific knowledge about child adoption with foreign elements, approach the issue of improving the law from the perspective of the legal system including the system of sources of the law and system processing, information and human resources. Research results of the thesis are practical and highly applicable to solve difficulties in resolving child adoption with foreign elements when proposing changes in financial mechanisms.

The thesis identifies the scientific and practical basis for improving the system of law sources on child adoption with foreign elements through the proposal to continue internalizing the Hague Convention No.33; strengthening the functions and responsibilities of the central agency on international adoption, building titles of social workers in child adoption and supplementing domestic adoption agencies.

CONTENT

Chapter 1: Overview of research situation related to the topic and the issues raised should continue to be studied in the thesis.

Many national and international reports in this area have been carried out, in which the situation of adopting Vietnamese children overseas is also reviewed and evaluated. The research reports focus on the practice of settling child adoption with foreign elements and recommending perfecting the law. Since the adoption of the Law on adoption and the Hague Convention No. 33, many authors and authorities and domestic organizations have focused on studying the current legal provisions, evaluating the effectiveness of rules with practice of settling child adoption with foreign elements. Research projects in the world and in the country have made important contributions in assessing the status of improving the law in our country, setting out requirements and recommendations on improving the Law on adoption with foreign elements in Vietnam.

The advantages of the research projects have described very specifically and deeply the situation of settling child adoption with foreign elements in our country over time. The drawback is that domestic and foreign research results are still scattered, not yet exploited, acquired and used by competent Vietnamese agencies. Most of the world's important reports on Vietnam are built in foreign languages (in English and French). Therefore, exploitation efficiency and receptive recommendations are not high.

Comparing with the results of scientific studies up to now, the thesis topic "***Perfecting the Law on adoption with foreign elements in Vietnam - theoretical and practical issues***" is the topic has never been studied systematically and comprehensively at the doctoral level of jurisprudence, especially when the content of the thesis focuses on the theoretical basis and practice of improving the Law on adoption with foreign elements within the framework of the Hague Convention No. 33 after more than 8 years of implementing the Law on adoption.

From the limitations, the thesis should continue to provide some basic arguments to perfect the legal system on child adoption with foreign elements in Vietnam: it is necessary to continue legalizing the jus cogens principles of the Hague Convention No. 33; supplement some missing legal documents, such as consequences of child adoption with foreign elements, determine the scope of implementation of the Hague Convention No. 33; designated organizations, change forms of child adoption; propose appropriate policies and mechanisms to ensure law enforcement, especially financial mechanisms and mechanisms for inter-country adoption and child adoption with foreign elements; strengthen functions and human resources to meet the requirements of implementing tasks.

Chapter 1: Conclusion

International and domestic studies have made important contributions in assessing the legal status of child adoption with foreign elements in our country, especially in the period before the Law on adoption and and the Hague Convention 1993 took effect in our country. However, the research results are scattered. The foreign research projects are built in foreign languages (in English and French), so the exploitation and reception of recommendations to improve the law have not achieved high efficiency.

Chapter 2: Rationale for perfecting the Law on adoption with foreign elements in Vietnam and criteria for assessing the level of law improvement.

2.1. General theoretical basis about the Law on adoption

2.1.1. Adoption is a civil enregistration

Acts of domestic and foreign child adoption recognized by the civil registry and recorded in civil enregistration just produces legal validity. Parental and child relations between adopters and adopted children arise only after the adoption is registered / recorded in the Adoption Register. The competent authorities expresses its will through acts of recognizing or not recognizing the adoption of children on the basis of considering and evaluating the voluntariness of the parties. However, the settlement of inter-country adoption is governed by the Law on adoption.

2.1.2. Child Adoption raises parent-child relations

When the adoption is registered by a competent Government agency and recorded in the Adoption Register, the parent-child relationship between the adopter and the adopted child is recognized and protected under the law. This relationship between parents and children is hypothetical/false: it can be substituted or existed simultaneously with blood relation and moved from blood relationship to adoptive parents and adopted children. This consequence completely depends on the will of each Nation.

Most receiving countries such as France, Italy, Quebec (Canada), Germany all stipulate the form of full adoption, whereby the adoption terminates legal relations exist between the birth parents and children being adopted and this is not revocable.

2.1.3. Principles for settling child adoption

From a modern point of view, child adoption is approached from a perspective as a measure to find a substitute family for children with special circumstances, losing their original family environment. The substitute family is the adoptive family, in which the upbringing and care of children with special circumstances raise the parents-children relationships. Finding a

substitute family is a measure to implement the principle of prioritizing domestic adoption before the international adoption solution.

The principle of the best interests of children is one of the basic mandatory principles (jus cogens) of the Hague Convention No. 33 and the Convention on the Rights of the Child. The laws of our country all stipulate the principle of the best interests of children. The assessment of children's best interests varies, depending on the views and policies of each country. After all, the best interests of children are a legal tool for competent authorities and organizations to decide on child adoption in the most appropriate way to ensure mental, physical and health of adopted children. According to the Hague Convention No. 33, three measures to ensure the implementation of the principle of the best interests is confirming the eligibily of children for adoption, archiving information about children and finding the family suitable for children. These measures have also been legalized in the Law on adoption .

Voluntary principle is one of the basic principles whereby adoption must ensure voluntariness between adopters, birth parents and adopted children when reaching a certain age and obeying procedures for obtaining opinions of competent government authorities.

2.1.4. Children who are allowed to be adopted

Compliance with regulations on children in handling child adoption is important to prevent cases of buying, selling, kidnapping and exchanging children for domestic and foreign adoption. Persons who are adopted under 16 years of age, except for stepson or stepdaughter and nephew or niece of adopter who can be from 16 years old to under 18 years old. This provision is implicitly understood that the adult is not the subject of adoption in accordance with the Law on adoption in our country.

The government encourages the adoption of abandoned children, orphans or other children with special circumstances. This provision is not limited in the direction that only those children are allowed to be adopted. In practice, it is difficult to identify children who need to find alternative families. There are some abandoned children have information about their bird parents but cannot contact them, if they cannot get their parents'opinions, children are not eligible to be adopted; so children will have to live longer, even lifelong in a nurturing facility. In cases where a child has a birth parent or lives with a loved one, he / she must be unable to care for and nurture the child before the child can be being considered for adoption. Reasons such as low income, large numbers of children and no job are not good grounds to decide to separate children from their original families.

Children who are related to adopters are also eligible for adoption. Relatives are understood that children of the spouse adopted by their stepfather / stepmother or children who are nephews, nieces adopted by theirs aunts and uncles.

2.2. Differentiating laws on domestic adoption and adoption of foreign elements

2.2.1. Some basic theoretical issues of law on domestic adoption

Domestic adoption is the adoption between Vietnamese citizens permanently residing in the country together. Adoption without registration (*adoption in fact*) will not be legally valid. Subjects of domestic adoption relations include Vietnamese citizens permanently residing in the country including adopters and adopted children (in the family, elsewhere or in foster care establishments).

Adoption raises the rights and obligations between adoptive parents and adopted children; Adopted children have the right to change their last name, first name and middle name. Under current law on civil status, adopted children cannot re-register their birth when changing their names, names and declarations about registered parents. This affects the secret factor in the relationship between adoptive parents and adopted children, and shows that blood ties exist in parallel with adoption. Regarding inheritance, adopted children have the right to inherit like biological children. Domestic adoption may be terminated according to the provisions of law. Because the Law on adoption does not stipulate the criteria for termination of adoption for the benefit of an adopted child, therefore other than force majeure circumstances or for a serious reason affecting the interests of adopted children, the adoption of children cannot be terminated.

In the context of growing international migration, domestic adoption has the influence of foreign elements such as the adoption of two nationalities in which Vietnamese nationality can be adopted in the country when they live permanently in Vietnam, or adopt children before leaving the country to live abroad and work. In such cases, adopted children may not be allowed to enter the country with their adoptive parents, or are not eligible to be adopted in accordance with the law of the country where the adoptive parents will live, the adopted child is not entitled to reside with the adoptive parents in that country or without the foreign nationality of the adoptive parents. In the current trend, cross-border recognition of domestic adoption is a problem that has not yet been adjusted by international documents.

2.2.2. Some basic theoretical issues of law on adoption with foreign elements

Adoption with a foreign element is the adoption between Vietnamese citizens and foreigners, between foreigners who reside permanently in Vietnam, and between Vietnamese citizens and one foreign resident. This concept is concretized into adoption cases with foreign elements under Article 28 Law on adoption . Thus, the concept of adopting children with foreign factors

only defines the components of civil relations with foreign elements, not yet showing the nature, features and trend of international adoption in the world. Methods for individual / independent adoption (*adoptions indépendantes*) or under separate agreements (*adoption privée*) have many negative effects on children's rights and interests. Under the Hague Convention No. 33 international adoption must involve licensed organizations, in order to limit and eliminate illegal intermediaries.

Subjects of child adoption relations with foreign elements include foreigners permanently residing abroad, Vietnamese residing overseas and foreigners living and working in Vietnam for more than 01 year and foreigners permanently residing in Vietnam. In particular, the subjects of foreigners permanently residing abroad are common subjects. Adopters must meet the conditions required by the law of the country of permanent residence and Article 14 of the Law on adoption to adopt children in Vietnam. That is, the simultaneous application of the two legal systems of the receiving country and the origin country. Conditions for child adoption include age, capacity for civil acts, marriage, family, psychological, health and social conditions and must be approved by a competent authority (court or administrative authority) through a license mechanism. Couples of the same gender may not adopt children in accordance with the laws of our country.

Children adopted abroad must be determined by the Department of Justice in province to be eligible for adoption in a foreign country. Children in fostering establishments can only settle for foreign adoption when they are not adopted by domestic people. Children with disabilities and serious diseases are exempt from this procedure because they are admitted to be adopted overseas. Children living at home can only be settled for overseas adoption if they are the stepchild of the spouse adopted by their stepfather or stepmother who is a foreigner in order to reunite their family or nephews, nieces of aunts, uncles living in foreign countries adopted. Under the Hague Convention No. 33, children adopted who are living in families with their relatives are also governed by the Convention.

The law of our country does not have provisions on determining the applicable law on the consequences of adoption with foreign elements, except the issue of nationality of adopted children. Therefore, when Vietnamese children are settled for adoption in a foreign country, the consequences are determined according to the law of the receiving country. The receiving country will base itself on the laws of its country to recognize the decision for Vietnamese children to be adopted abroad, depending on whether the previous legal relationship has been cut or maintained between birth parents and children who are adopted. Under the Hague

Convention No. 33, in the case of the law of the receiving country, it is possible to change from simple adoption to full adoption.

2.3. Criteria for assessing the improvement of legislation on adoption with foreign elements in our country

The improvement of adoption legislation with foreign elements based on three criteria, including: compliance with the Hague Convention No. 33, prevention of child trafficking for adoption for lucrative purposes and ensure the rights of related parties.

The Hague Convention No. 33 stipulates the common mandatory principles (*jus cogens*) in the activities of international adoption, the development of international adoption procedures among member countries, to create important legal guarantees in moving children from one country to another for the purpose of adoption, preventing the sale and purchase of children for adoption for lucrative purposes.

In the field of child adoption, the right to be adopted and the right to adopt children have been recognized by legal documents of our country. The refusal to settle for adoption because of being single or same-sex couples is a problem is extremely complex and sensitive, easy to assume to be a violation of human rights, does not according to Article 39 Civil Code 2015, under which all individuals have the right to adopt children.

The decision to adopt a child in a foreign country is an important issue for birth parents and guardians. Therefore, domestic law must comply with the Hague Convention No. 33, whereby the competent authorities of the Country of Origin must also ensure that parents or guardians have been consulted carefully about the consequences of adoption, especially keeping or terminate legal relationships between children and their original family.

The rights of children to be adopted are expressed in two ways: the right to be adopted and the rights of children to benefit from their adoption with foreign elements. Children have the right to express their opinions, they must be heard and informed on the consequences of being adopted overseas. Adopted children have the right to change their civil status, the right to know their origin, the right to keep their private information confidential, protected by the Government in case of necessity, supported find out information about origin; preserving Vietnamese cultural identity. The guarantee of the rights of birth parents and children depends on the level of development of the social work service system in settling adoption.

Chapter 2: Conclusion

The legislation on adoption with foreign elements is built on the basis of the general theory of adoption and the connection between the law on domestic adoption and adoption with foreign elements. A legal system for adoption with foreign elements must ensure conformity with the

Hague Convention No.33; ensure the rights of related entities including adopters, birth parents, guardians and children adopted; and prevent the purchase and sale, kidnapping of children and illicit profits from activities of international adoption.

Chapter 3: Actual situation of perfecting the law and the impact on practice of settling adoption with foreign elements in our country in the current period

3.1. The reality of the transposition of the Hague Convention No. 33 in the domestic legal system on adoption with foreign elements in our country

3.1.1. The scope of adjusting child adoption with foreign elements

Determining the scope of adjustment for child adoption with foreign elements under the Hague Convention No. 33 is a legal basis for determining jurisdiction and procedures for settlement, ensuring that the Convention is followed. Removing children from the Origin Country into the Receiving Country is the responsibility of the Member countries referred to in Article 19 of the Convention and shall be implemented only after meeting the conditions under Article 17c) of the Convention. The scope of application of the Hague Convention No. 33 has not been transposed domestically because at the time of the adoption of the Law on adoption, our country was not yet a member of the Convention. In fact, the Convention does not apply to Member Governments that do not establish international adoption cooperation with Vietnam under the Hague Convention No. 33. Therefore, the determination of scope of application The Hague Convention No. 33 became even more difficult and it was not unanimous to identify procedures for resolving foreign adoption. In some cases, the Hague Convention No. 33 does not apply due to the conflict of the laws of some countries, specifically, foreigners who live and work in Vietnam from more than 1 year or more adopt a Vietnamese child is a child adoption with foreign elements case.

3.1.2. Procedures for settling adoption with foreign elements under the Hague Convention No. 33

Article 4 of the Hague Convention No. 33 stipulates that the Country of Origin must ensure that the adopted child is eligible for adoption. Currently, the law of our country does not prescribe procedures to certify children eligible for domestic adoption. This is also an incompatible point of domestic law with the Hague Convention No. 33.

The procedure set out in Article 17c) of the Convention is a mandatory procedure, expressing the censorship of the Central Authorities in international adoption procedures and ensuring that adopted children are admitted to the country and permanent residence in the receiving country. The law of our country is due to lack of international adoption procedures under the Hague

Convention No. 33 and procedures outside the Hague Convention. This is also an incompatible point between domestic law and the Hague Convention No. 33.

The current domestic law is not adequate resolution procedures for child adoption with foreign elements under Article 16 and 17c under) the Hague Convention No. 33. The procedure matching children do not yet apply to all children for foreign adoption and the mechanism of matching children is based only on the legal staff and the professional staff on social work and child protection does not involved.

3.1.3. Determine the applicable laws to the consequences of adoption with foreign elements

Because there are no regulations on the consequences of adoption with foreign factors, it can lead to two different understandings. Firstly, the consequence of child adoption with foreign elements is determined by the consequences of domestic adoption as stipulated in Article 24 Law on adoption . According to the laws of some countries such as Germany and Switzerland, in some cases the consequences of adopting children with foreign elements are only recognized according to the scope of consequences according to the law of the decision-making country, when the adoption is done outside of the Hague Convention No. 33. Secondly, the consequence of child adoption with foreign elements is determined according to the law of the country where the adopted child resides. However, this interpretation is not regulated in the Law on adoption . Under the framework of the Hague Convention No. 33, the decision to adopt Vietnamese children abroad will be automatically recognized in the form of full adoption if the adoption breaks the legal relationship existed before and irrevocably; otherwise, the decision to adopt a child will have consequences in the form of simple adoption, but can be converted to a fully adopted form if the law of the receiving country permits. In addition to the framework of the Hague Convention No. 33, the eligibility for adoption is dependent on the law of the country where the adopter permanently resides and the conditions for recognition are very strict. Where the adoption with foreign elements goes unaccredited that leads to "limping adoption"; this does not guarantee the interests of adopted children.

In case Vietnamese children are adopted in full adoption, they will have the first and last names of the adoptive parents and their foreign nationality, rights and obligations in accordance with the foreign law; children have the same rights as the adopters' biological children and are protected by the law of the country. In case of being determined by simple adoption, Vietnamese children do not automatically have foreign nationality and parent-child relationship between adopters and adopted children that exist along with the relationship between birth parents and children. In this case, the adoption may be canceled or terminated.

3**.2. Current situation of implementing the Hague Convention No. 33 in our country**

3.2.1. Implementation of the principles of jus cogens under the Convention

In the period of 2011-2017, many children with special circumstances, disabled children, children with serious diseases have found alternative families in foreign countries, and are cared for and cured of diseases in the advanced medical conditions. However, the number of Vietnamese children being inter-country adopted has not met the need to find alternative families of children; some children are not allowed to carry out procedures to find alternative families in the country. The main reason is that some legal regulations have limited the right to be adopted and the opportunity to find a replacement family in the country; some regulations are not compatible with the Hague Convention No. 33. In the process of implementation, the absence of criteria to determine the best interests of children can also lead to the adoption of children in foreign countries in case of unnecessary or extended search time domestic suspension or delaying the implementation of appropriate alternative care measures such as foreign adoption.

3.2.2. Practical implementation of legislation on adoption with foreign elements and human resources to ensure implementation

Since the Hague Convention No. 33 took effect in Vietnam, the work of institutional improvement is still limited, some amendments have not been revoked or it has prevented the settlement of adoption, in particular with children List 1. The Ministry of Justice does not have the authority to manage, check and monitor the receipt and use of donations after adoption, leading to concerns of countries with cooperative relations with Vietnam. Autorities and organizations involved in settling adoption with foreign elements have not yet been able to use the expenses for settling child adoption with foreign elements. Therefore, there are many localities that are not interested in the implementation of the Law on adoption and the Hague Convention No. 33. The local and central authorities have a lot of difficulties with the staff handling child adoption, the awareness of nurturing facilities has not kept up with the changes of the law and procedure of settlement according to the Convention.

3.3. Influence of the situation of improving law to practically settle adoption with foreign elements in Vietnam

Over the past time, the problem of avoiding the implementation of the Hague Convention No. 33 for some cases of Vietnamese children who are overseas students adopted in the country according to the laws of the host country has been raised, and a number of Vietnamese residing abroad returns to domestic adoption countries. The authorities have difficulty in recognition and registration adoption being done abroad for those cases. The majority of disabled children and serious diseases are settled for overseas adoption because the settlement process is

shortened, they are exempted from the procedures to find a domestic substitute family and exempt from the foreign adoption fees. Countries with cooperative relations with Vietnam are concerned about this issue.

Currently due to the financial mechanism of fees and expenses for settling adoption with foreign elements being congested in the locality, the local competent authorities do not have funding for settling adoption with foreign elements, nurturing facilities also look forward to donations from adoptive parents and foreign adoption agencies. This leads to the fact that nurturing establishments often ask/request foreign adoption agencies licensed to operate in Vietnam to support the cost of intensive health examination and health care for children. Donations (*dons*) before, during and after settling adoption without inspection and supervision makes some countries concerned with our cooperation.

Chapter 3: Conclusion

Since the implementation of the 1993 Hague Convention, the Law on adoption and Decree No. 19/2011/ND-CP have not been amended and supplemented to remove obstacles to implementation and strengthening measures to ensure the implementation of the Convention. Some provisions of Law on adoption with foreign elements are not effective, obstructing the implementation of law and some problems arising in practice are not regulated; the level of domestically legalization of the Hague Convention No. 33 is still not high, the regulations on procedures for settling adoption with foreign elements are not yet consistent with the Convention. Therefore, there have been certain impacts on the quantity and quality of the child adoption witch foreign elements in recent years. This is also stemming from uneven implementation of law, low enforcement of institutions, especially financial mechanisms to encourage domestic adoption and separation foreign adoption with humanitarian assistance.

Chapter 4: Proposing a number of solutions to improve the legislation on adoption with foreign elements in our country in the new scene.

4.1. Concepts, meanings and the need to improve the legislation on adoption with foreign elements in our country

4.1.1. The concept of improving the legislation on adoption with foreign elements

The concept of improving the legislation on adoption with foreign elements is the amendment, supplementation, abolition or promulgation of new domestic law provisions, ensuring compliance with the Hague Convention No. 33, remove barriers to the implementation of the Convention and create legal guarantees for the rights and interests of children. In addition, this is meant to strengthen the implementation of the Hague Convention No. 33 and the Law on adoption with foreign elements in our country.

4.1.2. The meaning of improving the legislation on adoption with foreign elements

The improvement of the legislation on adoption with foreign elements is in order to give prominence to the general compulsory principles of the Hague Convention No. 33 as the principle of best interests and priority of domestic adoption; resolving conflicts on adoption conditions, consequences of adoption with foreign elements; recognition of adoption decisions with foreign elements made by foreign competent authorities in the context of Vietnam being a member of the Hague Convention No. 33.

The improvement of the legislation on adoption with foreign elements increases the ability of implementation of the law and the Hague Convention No. 33. This is because, the responsibilities of some agencies are not clear yet, there is not a smoothness in directing the implementation of the law. Inter-agency coordination is still difficult because there is a "cut-off" between the legal system of child adoption and the legal norm on children.

4.1.3. The need to improve the legislation on adoption with foreign elements in our country

The need to improve the legislation on adoption with foreign elements is based on the needs of a large number of children with special circumstances that need to find alternative families, the needs of competent agencies and the contingent of officials involved settling adoption with foreign elements, the need to use adoption services and the need to complete policies and enforcement mechanisms.

Regarding the number of children with special circumstances, there are about 1.4 million children with special circumstances nationwide, of which about 156,000 children are abandoned; there are about 170,000 children who have received respite care from their families and individuals but have not been reviewed and assessed the need to switch to adoption; regularly there are about 21,000 children living in nurturing facilities. Meanwhile, only about 1.7% of children with special circumstances live in nurturing facilities for domestic and foreign adoption. The situation for children to live permanently in nurturing facilities does not guarantee children's rights, not in line with the general trend in the world.

The functions and tasks of the central authority in international adoption under the Hague Convention No. 33 were given to the Department of Adoption in accordance with Decision No. 639/QD-BTP of the Minister of Justice. Due to limited legal authority of Adoption Department, the competence to implement the Hague Convention No. 33 is still very limited, especially in solving "hot" issues such as issues of donations (dons) directly to a high degree, causing competition between foreign adoption agencies of countries, delaying the listing of children needing to find alternative families in localities.

Under the current regulations, the competent Government authorities according to Clause 1, Article 22 of the Hague Convention No. 33 are the local Government authorities including: nurturing establishments, Department of Labor, Department of Justice and provincial People's Committees. In recent years, finding alternative families for children can only be done at nurturing establishments designated by the provincial People's Committee, limiting the right to adopt children of children with special circumstances living in nurturing facilities not specified. In the locality, there is a lack of multidisciplinary staff involved in settling adoption with foreign elements to assess children's family, social, health, and psychological conditions, counseling children and birth parents during the process of proceeding.

The government management autorities also faces difficulties in determining the scope of management for activities of foreign adoption agencies licensed to operate and foreign child adoption offices, and there are also incidents of directly contacting nurturing facilities and donating directly to nurturing establishments to introduce children for inter-country adoption. As for the need to use domestic adoption services, because the current law does not have regulations on designated domestic organizations, when Vietnamese citizens adopt domestic or foreign children, it will be difficult.

Regarding policies, the government does not have a policy to support child adoption for children with special circumstances when adopted, the policy of maintaining the original family to avoid separation of children from the family of blood, there is no mechanism to link mesures forster care and adoption.

For the principle of financial transparency, some basic concepts such as "do not affect adoption" and "non-project support" do not have specific guidelines. The mechanism to ensure compliance with the principle of separation of humanitarian support and child adoption lacks specific regulations, without the inspection and supervision of government autorities.

4.2. Proposing a number of solutions to improve the legislation on adoption with foreign elements in our country in the new situation

4.2.1. Domestically transposition of the Hague Convention No. 33

- In order to domestically legalize the Hague Convention No. 33, the term "*substitute family*" should be replaced by the term "*adoptive family*" in accordance with international practice, the legal system of children and avoid confusion; use the term "*international adoption*" instead of the term "*adoption with foreign elements*" in accordance with the Hague Convention No. 33 and in accordance with the tendency to resolve adoption in the world. International adoption is the responsibility between countries, not limited to individual agreements.

- Additional provisions to determine the scope of application of the Hague Convention No. 33 to ensure that the Convention is uniformly applied between countries and in each specific case. From there, supplement the order and procedures for settling international adoption under the Hague Convention No. 33 and international adoption cases outside the Convention. It is necessary to limit the resolution of child adoption for children in the nursing facilities, to prevent direct contact between foreign adopted children or foreign adoption organizations and birth parents, guardians or child custodians.
- Additional regulations on the consequences of adoption with foreign elements, transformation and recognition of adoption, in order to ensure the adoption and integration of children for overseas adoption with foreign adoptive parents. The important content of the imposition of the consequences of adoption with foreign elements that must determine whether to maintain or completely terminate the previously existing legal relationship between children and birth parents; whether or not the decision to children be international adopted is canceled. It is recommended to specify two types of adoption that are complete and simple to suit international practices. Adoption in full form is suitable for abandoned children, orphaned children, both parents and birth parents agree with the form of full adoption. At the same time, it is necessary to legalize the clause 1 of Article 27 of the Hague Convention No. 33 on the recognition of international adoption decisions and the provision of adoption abroad without the Hague Convention No. 33.
- Abolish a number of provisions that hinder the implementation of the principle of domestic adoption priority such as Clause 2, Article 3, Clauses 1 and 2, Article 6 and Article 11 of Decree No. 19/2011 / ND-CP so as not to discriminate.
- Additional provisions to determine domestic adoption conditions ensure the interconnection between domestic adoption and international adoption, guarantee that there is no discrimination on the subject of children being adopted.

4.2.2. Complete legal conflict rules

- Additional provisions determine applicable laws on conditions of adopters in case the adopter is a couple with different nationalities or different places of residence; conditions of foreign / permanent resident children in Vietnam to be adopted.

4.2.3. Strengthening mechanisms to ensure implementation of the Hague Convention No. 33

- Proposing to abolish Article 7 Law on adoption to separate adoption with foreign elements and humanitarian support.

- Changing financial mechanism and strengthening financial resources for nurturing facilities: expenses for settling adoption with foreign elements under Article 12 Law on adoption must be considered contributions of foreign adoptive parents under the Hague Convention No. 33 so that the localities have additional funding for settling adoption with foreign elements, limiting financial dependence with foreign adoption agencies.

- Develop policies to support family protection/preservation to implement the principle of prioritizing domestic adoption. In the long term, the government must have policies to support families in the country to adopt children and adoption policies must be associated with social protection policies.

4.2.4. Improving institutions implementing the Hague Convention No. 33

- Improving the functions and tasks of the Central autority in international adoption: promoting the role of the inter-branch working group to ensure implementation of the Hague Convention No. 33 in the orientation and policy making of international adoption, strengthening the authority and functions of the Central autority (Department of Adoption, Ministry of Justice) to separate the function of appraising dossiers to handle international adoption, avoid "the situation of being the judge in one's own case", strengthening the function of checking and supervising the implementation of the Hague Convention No. 33 nationwide and government management of adoption with foreign elements; internalizing the functions and tasks of the Central autority in the system of legal documents on adoption with foreign elements to ensure Department of Adoption, the Ministry of Justice can fulfill the duties of the Hague Convention No. 33.

- Establishing an authorized adoption organization to perform intermediary tasks in accordance with the law, supporting Vietnamese citizens to adopt domestic or foreign children, and ensuring the implementation of social work services in settling adoption.

- Improving the functions and tasks of the interdisciplinary working group implementing the Hague Convention No. 33, in the long run, it can become an interdisciplinary organizational structure at the Central autority in international adoption of Vietnam as model of some countries in the world.

4.2.5. Building titles of social workers in child adoption

With a large number of children with special circumstances as mentioned above, the preparation and assessment of the need for adoption is an essential requirement. The contingent of social support workers is responsible for training domestic adopters; assessing the economic, family and social conditions of adopting persons and the health, psychological and

characteristics of the adopted children; preparing for adopters and domestic adoption children. The law on social workers needs to be adopted soon.

Chapter 4: Conclusion

Improving the legislation on adoption with foreign elements must comply with the direction of the Party and the government in the work of building and perfecting the law; at the same time, it is necessary to ensure the consistency and appropriateness between the domestic Law on adoption and other legal documents related and consistent with the Hague Convention No. 33 which Vietnam is a member; in particular, difficulties must be solved in practical implementation of the Convention.

The main solution to perfecting the law on adoption with foreign elements in the new period is focused on 4 cores of the legal system. Specifically, it is necessary to continue legalizing the jus cogens principles of the Hague Convention No. 33; changing financial mechanisms to ensure adoption with foreign elements are no longer associated with humanitarian assistance; strengthening measures and priority policies for domestic adoption. Regarding organization of implementation, strengthening the roles and tasks of the inter-agency working group and the Central autority in international adoption. In terms of human resources, building a contingent of multi-disciplinary officials, titles of social workers on adoption and establishment of domestic adoption agencies.

CONCLUSION

The legislation on adoption with foreign elements is not only limited to legal regulations that directly regulate the adoption of foreign elements but must also be based on the general legislation on adoption and interconnection with domestic adoption rules. The improvement of the legislation is also reflected in the implementation of the law, the institutions to ensure implementation, information and human resources to ensure implementation. Therefore, perfecting the law on adoption with foreign elements must be based on those four core systems. At this same time, the legislation on adoption with foreign elements must also be closely associated with the legal system on children, policies to care for and protect children with special circumstances, civil legislation, marriage and family legislation and legislation on civil status. The improvement of the legislation aims to ensure compliance with the Hague Convention No. 33, to remove obstacles to the implementation of the Convention and to improve the system for international adoption in our country to protect the rights and interests of children with special circumstances./.