

## CHALLENGES OF INTERNATIONAL ADOPTION IN BOSNIA AND HERZEGOVINA

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**Abstract** Adoption is a special form of family-legal protection of children without parental responsibility, which establishes the parental relationship. We distinguish adoption that takes place within the borders of one country, i.e. internal adoption, and cross-border adoption, i.e. international adoption. The international element can appear in subjects of adoption, i.e. with regard to their citizenship, domicile or habitual residence, and the place of adoption. The focus of the work is the legislative framework in Bosnia and Herzegovina for cases of international adoption, especially the situation of establishing the international adoption of a domestic citizen in Bosnia and Herzegovina and the situation of establishing the international adoption of a foreign citizen abroad in the service of child healthcare and child welfare. Considering the numerous challenges that exist in this matter, the existence of a complete and high-quality normative framework is a *condicio sine quo non* for successful and legally valid international adoption. In this context, and aware of the importance of the Hague Convention on Adoption from 1993 and the need to harmonize the legislation of Bosnia and Herzegovina with the *acquis* of the European Union and the comparative trends in comparative law, proposals for *legiferenda* were made.

**Keywords**

international adoption,  
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decisions on adoption

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## 1 Intrudaction

The family is primarily a social group but also a legal institution that is not easy to define in a universal way, bearing in mind that it is a term that is fluid and subject to the influence of numerous factors that are not necessarily of a legal nature (Dražkić, 2011, p. 48; Ponjavić & Vašković, 2019, p. 55). Precisely because of the fact that it is a changing category, family law regulations often do not contain a definition of family. Bosnia and Herzegovina's legislation belongs to the group of rare ones that contain a definition of family.

Accordingly, in the Family Law of the Republika Srpska<sup>1</sup> and the Family Law of the Brčko District of Bosnia and Herzegovina<sup>2</sup>, the family is defined as the living community of parents and children and other blood relatives (Article 2). The Family Law of the Federation of Bosnia and Herzegovina made a small step forward in this sense by defining the family as a life union of parents and children and other blood relatives, in-law relatives, adoptive parents and adoptees and persons from cohabitation if they live in a joint household (Article 2). Thus, the traditional view of the family, which implies a woman and a husband with their own biological offspring, has undergone significant changes. Completely new atypical family structures have developed.<sup>3</sup> Some of them represent "social normality" today, while others are still the subject of debates and discussions. Namely, it is no longer unusual for families to consist of parents and adopted children.

Adoption is a noble act that implies care and concern, providing a warm home and love to children who have been left without biological parents. It is considered the best form of protection for children without parental responsibility. As a developed legal institute, adoption appears already in the legislation of slave-owning states with certain differences<sup>4</sup>, but primarily in the service of the adopter's interests: expanding the family, securing heirs, preserving property. Today, in modern laws, the goal of

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<sup>1</sup> Official Gazette of Republika Srpska, no. 54/2002, 41/2008, 63/2014 i 56/2019 – Constitutional court decision.

<sup>2</sup> Official Gazette of Brčko District Bosnia and Herzegovina, no. 23/2007.

<sup>3</sup> New family structures are emerging, which are closely related to the fact that, in addition to traditional heterosexual marriage, new forms of legally recognized partnerships between persons of the same sex are emerging. The so-called "Regenbogenfamilien" (in German) or "rainbow families" consist of homosexual partners and children. In addition, the changed image of the family is influenced by the development of reproductive medicine. In this context, we are talking about surrogacy, which implies an arrangement based on an agreement, where a woman (surrogate mother) agrees to carry the pregnancy and give birth to a child ordered by a person or persons (intended parents), who will assume parental rights over the child after birth. (Đuraković & Alihodžić, 2020).

<sup>4</sup> On historical genesis of adoption see in: Jakovac-Lozić, 2001, pp. 1–30.

adoption is primarily to protect the interests of the adopted child. By providing a child with parents, a home and a family, adoption basically imitates the parental relationship (Bubić & Traljić, 2007, pp. 108–109) - *adoptio naturam imitatur*.

In our law, adoption is defined as a special form of family-legal protection of children without parents or without adequate parental responsibility, which establishes a parental or kinship relationship (Article 91 Family Law Act F BiH and Article 76 Family Law Act BDBH), i.e. adoption between adoptive parents and adopted children establishes the relationships that exist between parents and children, with the aim to provide the adopted child with the same living conditions as the children who live in the family (Article 10 Family Law Act RS).

In addition to purely domestic adoption, i.e. adoption that takes place within the borders of one country, where both the adoptive parents and the adopted child are citizens of that country and have their domicile and/or habitual residence there, there is also international adoption, i.e. adoption with an international element. Recent events in the Republic of Croatia drew wider public attention to the issue of international adoptions.<sup>5</sup> Disputed cases of international adoption related to Bosnia and Herzegovina, which were accompanied by numerous newspaper articles, also occurred in the past during the war.<sup>6</sup>

The focus of this work is international adoption, and after defining the concept, we will analyze the normative framework in Bosnia and Herzegovina, point out numerous challenges and give *de lege ferenda* proposals for its improvement.

## 2 The Notion of International Adoption

International adoption is an institute of international family law by which adoptive parents acquire parental responsibility over a child with whom they are not biologically related, and in which there is an international element. The international

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<sup>5</sup> The drama with eight Croatian citizens who tried to adopt four children from the Democratic Republic of the Congo, after which the children were taken from them in Zambia, and they themselves ended up in custody under suspicion that the documents were forged, for the first time in Croatia exposed the scale of the problem of inter-country adoption in the worst possible way. <https://www.jutarnji.hr/vijesti/hrvatska/medunarodno-posvojenje-zadnja-je-opcija-za-djecu-zasto-ovo-je-iskljucivi-razlog-15295454> (page access 16 February 2023).

<sup>6</sup> Before the Milan Juvenile Court, there was a process of adoption of children who were taken from the Sarajevo Orphanage "Ljubica Ivezić" to Italy in the summer of 1992. <https://www.klix.ba/vijesti/bih/utvrđeni-podaci-za-jos-dvoje-djece-u-italiji-iz-doma-ljubica-ivezic/070304005> (page access 16 February 2023).

element can appear in the subjects - the adopter/s and the adoptee are of different citizenship or have domicile/habitual residence in different countries, and in the content - the adoption decision was made in another country.

In the literature, we encounter different conceptual definitions. Interstate adoption refers to adoption in which the child changes the country in which he lived until then, regardless of the citizenship of the adopter, while international adoption implies different citizenships of the adopters and adoptee without moving the child to another country (Hoško, 2019, p. 320). Interethnic and interracial adoption implies the adoption of a child from a different ethnic or racial group and cultural environment from the adoptive parents (Laklija & Šagi, 2020, p. 13). Given that in practice the adoption of a child from another country is both interstate and international, and often interethnic and interracial, in the context of this paper we will use the name international adoption, due to its comprehensiveness.

From the point of view of Bosnia and Herzegovina, the existence of an international element in the subject would mean that the adoptive parents and the adopted child have different citizenships and/or live in different countries. Here we can distinguish two situations: first, the adoptive parents are citizens of another country and want to adopt a child who is a citizen of Bosnia and Herzegovina, and second, the adoptive parents are domestic citizens and want to adopt a child from another country. In the first case, adoptive parents - foreign citizens come to Bosnia and Herzegovina with the desire to adopt a child - a domestic citizen. After a successful adoption procedure, they can leave Bosnia and Herzegovina with the child, which is more often the case, or continue to live in Bosnia and Herzegovina. In the second case, adoptive parents - domestic citizens go abroad with the intention of adopting a child - a foreign citizen. Given that the adoption decision was made abroad, the international element also appears in the content. Adoptive parents can decide to return with the child to Bosnia and Herzegovina after the adoption has been completed or to remain living in the country of which the child is a citizen. Certainly, in both of these cases it is possible for all of them to move to a third country together - the adoptive parents and the adopted child.

In addition to these two situations that we have singled out and that we will analyze in the following, it is also possible for adoptive parents, foreign citizens, to adopt a child who is also a foreign citizen in Bosnia and Herzegovina, whether they have the same or different citizenship, as well as for local citizens to adopt abroad, a child who is a citizen of Bosnia and Herzegovina or a third country. However, these situations are rare, although the migration of children from certain parts of the world due to war events and economic uncertainty can lead to such internationally recognized adoptions.

This paper focuses on the international adoption of a child who is a domestic citizen and the international adoption of a child who is a foreign citizen. Each of the above-mentioned situations is normatively regulated, with the fact that in the first situation we focus on the provisions on the rights of foreigners, provisions on international jurisdiction and choice of law rules, and in the second the provisions regulating the matter of recognition of foreign decisions and acquisition of citizenship. Otherwise, the matter of international adoption is regulated in Bosnia and Herzegovina by the already mentioned family laws and the Law on resolving conflicts of laws with the regulations of other states in certain relations from 1982, which was passed by the former SFRY (hereinafter: ZMPP).<sup>7</sup>

In the following, we will analyze the relevant provisions of the current legislation specifically for each of the above situations with notes related to other possible situations.

### **3 International Adoption of a Child who is a Domestic Citizen**

In a situation where the adoptive parents are foreign citizens and want to adopt a child who is a citizen of Bosnia and Herzegovina, there are several important questions which determine the adoption procedure itself. The first question is related to the right of foreigners to adopt a domestic citizen, the second is the question of the international jurisdiction of the authority for implementing the adoption

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<sup>7</sup> Official Gazette of the SFRY No. 43/1982, 72/1982. The law was adopted into the Bosnian legal system by the Decree with legal force on the adoption and application of federal laws that are applied in Bosnia and Herzegovina as republican laws. Official Gazette of the RBH No. 2/1992. The decree was confirmed by the Law on Confirmation of Decrees with Legal Force, published in the Official Gazette of the RBH, No. 13/1994.

procedure, and the third question refers to the choice of the applicable law for establishing the adoption.

### 3.1 The Right of Foreigners to Adopt

When there are foreign citizens in the role of adoptive parents, one or both of them, the first question that the competent authority asks itself is the right of foreigners to adopt. If we take into account the purpose of adoption as an institution of family law, which is the protection of children without parental responsibility, it is logical that this right should also be available to foreign citizens as a general right. This is especially true if we take into account that Bosnia and Herzegovina is a signatory to the UN Convention on the Rights of the Child from 1989<sup>8</sup>, the provisions of which undoubtedly indicate not only that foreigners have the right to be adopted, but also that foreigners will not be denied the right to adopt because they are not local citizens<sup>9</sup>. However, we can note that the Convention allows states to regulate the right of foreigners to adoption as a relatively accessible right, that is, that right be conditioned by the fact that no suitable solution can be found within the domestic framework (Varadi et al., 2010, pp. 466–467).

In Bosnia and Herzegovina, the legislator decided to regulate the right of foreigners to adopt a domestic citizen as a relatively accessible right.<sup>10</sup> The Family Law of the

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<sup>8</sup> The United Nations Convention on the Rights of the Child was adopted on November 20, 1989 (at the 44th Session of the United Nations General Assembly, by Resolution 44/25), and entered into force on 2 September 1990. It binds Bosnia and Herzegovina from 1 September 1993, based on the notification of succession. Based on the Annex to the FBH Constitution (Official Gazette of FBH, number 1/94), the Convention has the force of constitutional provisions.

<sup>9</sup> 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 and they shall: (a) *Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;* (b) *Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;* (c) *Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;* (d) *Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;* (e) *Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.*

<sup>10</sup> The right of a foreigner to adopt a foreigner, whether they are of the same or different citizenship, is regulated in most countries, including Bosnia and Herzegovina, as a general right. In these situations, the question arises as to how the matter is resolved by the national regulations of adoptees. In practice, the problem boils down to the need to obtain the opinion of the competent guardianship authority in the country of which the adoptee is a citizen or in the country of his residence (Muminović, 2006, p. 158).

Federation of Bosnia and Herzegovina stipulates that the adoptive parent can also be a foreign citizen, if the adoption is in the best interest of the child and if the child cannot be adopted in Bosnia and Herzegovina with the prior approval of the federal authority responsible for social welfare affairs (Article 95, par. 2 and 3).<sup>11</sup> It follows from this that this right for foreigners is threefold conditioned: the existence of the "best interests of the child", the impossibility of adoption in Bosnia and Herzegovina and the obtaining of prior approval from the competent authorities.

The best interest of the child is a fundamental principle that must be observed by the authorities who apply the law in all procedures related to the child. However, the abstract character of this principle imposes the need to concretize, objectify and specify its content in each specific case, by considering numerous factors and elements. So, the basic question is what does the best interest of the child mean in cases of international adoption. This is especially important if one takes into account the most common consequence of such an adoption, which is the relocation of a child, a local citizen, to another country, which is often associated with a change in culture, tradition and origin. The assessment of this is given by the guardianship authority based on the child's educational, health, moral, financial and spiritual well-being, trying to establish the sincere intention and desire of the adoptive parents to provide the child with a safe home and love. When assessing the existence of the best interests of the child in cases where one or both adoptive parents are foreign nationals, it is necessary to determine, among other things: the existence of eligibility and conditions on the part of the adoptive parent which are standardized in the law of the country of which the adoptive parent is a citizen; adaptation of the child to the family of adoptive parents with whom it was already placed and who took care of its care and upbringing; connection of the adoptive parent's origin to Bosnia and Herzegovina; domestic citizenship of one adoptive parent; the existence of a blood

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<sup>11</sup> The Family Law of the Brčko District of Bosnia and Herzegovina sets the same conditions in Article 80, paragraph 2 also citing particularly justified reasons. The Family Law of the Republika Srpska contains a somewhat different wording and prescribes in Article 147 that the adoptive parent can only be a citizen of Republika Srpska, and that exceptionally the adopter can also be a foreign citizen if there are particularly justified reasons for this, with the approval of the administrative body responsible for social policy affairs. This wording opens up a series of dilemmas related to the right to adoption by citizens of the Federation of Bosnia and Herzegovina. Although in practice no distinction was made between citizens of the Republika Srpska and the Federation of Bosnia and Herzegovina, we welcome the proposed changes to the Family Law of the RS, which are in the parliamentary procedure, and which are included in Article 174 stating that the adoptive parent can only be a citizen of Bosnia and Herzegovina (par. 1), with the provision that the adoptive parent can also be a foreign citizen, if there are particularly justified reasons for this, especially if adoptive parents cannot be found among domestic citizens for a particular child (paragraph 2). Proposal of the Family Law, Government of the Republika Srpska, Banja Luka, December 2022.

or in-law relationship between the adopter - a foreign citizen and the adoptee, and the reasons why the child could not be adopted in Bosnia and Herzegovina (Ceribašić, 2018, pp. 55–56). In this context, it is particularly important to take into account and respect the child's opinion, his attitude and wishes regarding potential adoptive parents, which implies, obtaining the child's consent after a certain age.<sup>12</sup> A special challenge when assessing the best interests of an adopted child in the context of making a decision on adoption from a foreign citizen as adopter is to determine when it will be considered that the child could not be adopted in Bosnia and Herzegovina. It is not specified in the family legislation<sup>13</sup>, and in the Instructions on the methods of determining the suitability of a child and a person who wishes to adopt a child and the method of making an opinion and the suitability of a child<sup>14</sup>, it is only stated that in cases where a foreign citizen appears as the adopter, it is necessary to obtain documentation that proves that the child not could be adopted in Bosnia and Herzegovina (notices from other guardianship authorities, statements of potential adopters given on the record, etc.). One of the reasons for the impossibility of adopting a child in Bosnia and Herzegovina is undoubtedly the health condition of the child. The results of research conducted by UNICEF in Bosnia and Herzegovina in 2017 show that disabled children (2.6 percent as well as children of Roma nationality) 1.3 percent are adopted very rarely, and considering their representation in the system of alternative care (17.7 percent and 8.5 percent) have significantly lower chances of being adopted than children of other nationalities and children with typical development (UNICEF, 2017, p. 47). Therefore, it is very clear that disabled children fall into the category of "difficult to adopt children". It is generally considered that in addition to disabled children and children of Roma nationality, the group of "difficult to adopt children" also includes children who have experienced abuse or neglect, HIV-positive children, children who were exposed to the influence of alcohol or drugs in the prenatal period, as well as all children who might be expected to have problems in the future (Raguž, 2022, p. 5). Therefore, international adoption should be viewed, among other things, as an opportunity to

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<sup>12</sup> Article 12 of the UN Convention on the Rights of the Child from 1989 prescribes the obligation of states to enable the child's participation in proceedings concerning matters relating to him and guarantees the child the right to express his own opinion in those proceedings if he is capable of formulating his opinion and respecting it in accordance with the child's age and maturity. The child can be heard through an intermediary or in person.

<sup>13</sup> For example, in Serbian law, it is considered that adoptive parents cannot be found among domestic citizens if more than a year has passed since the date of entry of information about the future adoptee in the Single Personal Adoption Register, leaving the possibility that the competent minister may allow the establishment of adoption to a foreign citizen before the expiration of that period, if it is in the best interest of the child (Article 103, paragraphs 2 and 3 of the Family Code of the Republic of Serbia).

<sup>14</sup> „Official Gazette FBH“, No. 17 from 12th April 2006.



increase the chances of adopting disabled children, as well as other categories of children that are more difficult to adopt (Kožarić, 2022, p. 31), which directly contributes to their well-being and the protection of their rights.

The advantages of adoption in relation to institutional care of children are visible in the recent Decision of the Constitutional Court of Bosnia and Herzegovina, which states, among other things that, "... at the time of the incomplete adoption the appellant was five years and four months old. He was qualified as a high-risk child who could not speak intelligibly, or almost not speak at all, was overweight and had a diagnosis of mild epilepsy. Immediately after the adoption, the appellant hired a speech therapist who during the time taught him to speak correctly and fluently. Then he had regular therapy, given that one foot had a slight deformity. At the same time, the appellant enrolled him in a sports club for preschool children, and he used therapy for mild epilepsy. After adoption, the child began attending a Montessori kindergarten where he learned English, at the age of seven he began attending a French school in Sarajevo, and today he speaks French fluently. At the same time, he started swimming and skiing, playing the guitar. It was further pointed out that due to his settled life, he stopped using therapy for epilepsy in 2017, that he now plays the guitar, plays sports and develops into a healthy and cheerful person.<sup>15</sup> In conclusion, it can be said that the best interest of the child is to provide him with a family environment in which his needs will be met and proper growth and development will be ensured, even in cases where this means moving to another country (Jakovac-Lozić, 2006, p. 22).

Exercising the right to one's own opinion is related to a certain age and level of maturity. In the family legislation of the Federation of Bosnia and Herzegovina and the Brčko District, the obligation of the child's consent to incomplete adoption is prescribed if the child is older than ten.<sup>16</sup> All three family laws regulate two forms of adoption – complete and incomplete (Article 91 paragraph 2 Family Law Act FBH; Article 149 Family Law Act RS; Article 76 paragraph 2 Family Law Act BDBH). Incomplete adoption establishes a kinship relationship between the adopter and the adoptee and his descendants. With this form of adoption, there is no termination of the relationship with the biological parents and relatives (if they are known), and in

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<sup>15</sup> Decision in case AP 3040/21 from 5th October 2021 ("Official Gazette BH", no. 66/21), pp. 7–8.

<sup>16</sup> Article 87, paragraph 2 of the Family Law of BD BH and Article 103, paragraph 2 of the FBH Family Law, which requires, in addition to age, the ability to understand the meaning of adoption.

case of termination of an incomplete adoption, the relationship with the biological parents is reactivated (Bubić & Traljić, 2007, p. 110). A child can be adopted in this way up to the age of 18. On the other hand, full adoption establishes a kinship relationship between the adopter and all his relatives with the adopted child and his future descendants. The child is fully incorporated into the adopted family and the relationship with the biological parents ends. The termination of the relationship with the biological parents does not occur only in the case when the child is adopted by the stepmother or stepfather (Bubić & Traljić, 2007, p. 110). This adoption is indissoluble. Considering that it is entirely possible to adopt only a child up to the age of 10, it follows that the consent of the child is not necessary for establishing a complete adoption.

It is important to emphasize that respect for the child's opinion also depends on the assessment of his interests, that is, if the guardianship authority assesses that the child's position is in conflict with his interests, it may decide differently from the expressed opinion (Bubić & Traljić, 2007, pp. 138–139). In the domestic legal theory, in the context of determining and verifying whether the adoption will be in the child's best interest, the importance of probation foster care placement is particularly emphasized, whereby, when the adopter is a foreigner, the probation placement should be carried out entirely on the territory of the country of which the adoptee is a citizen, that is, on the territory of Bosnia and Herzegovina (Ćeranić, 2022, p. 305). The primary goal is to prevent the abuse of international adoption and achieve the purpose for which the institute is intended, which is to find a suitable family for children who are denied parental responsibility in order to ensure and enable a normal childhood full of love, protection and security, both material and non-material, all in the best interest of the child.

The second condition - "if the child cannot be adopted in Bosnia and Herzegovina" is quite clumsily set. The question arises: did the legislator mean by this that adoptive parents who are citizens of Bosnia and Herzegovina cannot be found for the child? If that was meant, then it should have been prescribed<sup>17</sup>, such as is the case in the legislation of the Republic of Serbia<sup>18</sup> (Varadi et al., 2010, p. 468; Ročkomanović, 2012, p. 157). The proposal of the Family Law of the Republika Srpska tries to

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<sup>17</sup> According to Muminović, "the condition set in this way is based on a spatial determinant and is meaningless" (Muminović, 2006, p. 159, fn. 258).

<sup>18</sup> Article 103 Family Law Act Republic of Serbia, Official Gazette RS no. 18/2005.

overcome this dilemma by specifying that the adoptive parent can also be a foreign citizen, if there are particularly justified reasons for this, especially if adoptive parents cannot be found among domestic citizens for a particular child.<sup>19</sup> In this way, there remains a doubt as to whether the condition on the impossibility of adoption in Bosnia and Herzegovina is also applicable in a situation where foreign nationals are in the role of adopting a child, a local citizen, with the intention of remaining living in Bosnia and Herzegovina after the successful completion of the adoption procedure.<sup>20</sup>

So, in this situation, the child was adopted in Bosnia and Herzegovina and continues to live there with his adoptive parents. If we follow the principle of subsidiarity, which is known and recognized in convention and comparative law, priority is given to taking care of children in the country of their origin, compared to some other country.

Such a position is taken in the UN Convention on the Rights of the Child from 1989<sup>21</sup> and in the Hague Convention on Adoption from 1993<sup>22</sup>, which are important sources when it comes to international adoption. Similar solutions can be found in the law of the Republic of Croatia<sup>23</sup>. The goal of international adoption as a subsidiary solution is to try to give the child the right to adequate care in the country of origin in order to remain in the same cultural, religious and social environment and thus achieve continuity in development.<sup>24</sup> Subsidiarity imposes the obligation to find suitable permanent family care for the child, first in the country of origin, and then in another country, with the possibility of deviating from this principle when

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<sup>19</sup> See Fn. 11.

<sup>20</sup> Analogously, the question of applying this condition is also actualized in a situation when, for example, domestic citizens living abroad establish the adoption of a child, a domestic citizen, in Bosnia and Herzegovina with the aim of moving abroad.

<sup>21</sup> See Article 21 point b.

<sup>22</sup> See Article 4 point b The Hague Convention on the Protection of Children and International Cooperation in Matters of International Adoption was adopted at the seventeenth session of the Hague Conference on Private International Law on May 29, 1993. Today, it includes 105 countries, of which all EU member states and our neighboring countries, Serbia and Montenegro are its signatories. Bosnia and Herzegovina is not a signatory to this Convention. <https://www.hcch.net/de/instruments/conventions/status-table/?cid=69> (20 January 2023).

<sup>23</sup> Croatian family legislation is also based on the subsidiarity of international adoption, allowing it only exceptionally when it is in the best interest of the child, giving priority to all other forms of child care over international adoption. Institutionalization of children is even preferred over international adoption (Hoško, 2016, pp. 77–81).

<sup>24</sup> In the country of origin, a child can be taken care of in various ways - foster care and similar forms of care, kafala (institute of Sharia law), adoption, and even care within a specific institution (Hoško, 2019, p. 321).

the circumstances of the specific case require it.<sup>25</sup> If we summarize the above, we can conclude that the domestic legislator, prescribing this condition, was primarily thinking of the dislocation of the child with the aim of establishing adoption.

The third condition refers to obtaining the prior approval of the authority responsible for social policy. In the Federation of Bosnia and Herzegovina, it would be the Federal Ministry of Labor and Social Policy, which, within the Sector for Social Protection and Family and Child Protection and the Department for Family and Child Protection, processes cases of adoption by foreign citizens.<sup>26</sup> In the Republika Srpska, the competent authority is the Ministry of Labor and Social Protection of the Republika Srpska, and in Brčko District it is the guardianship authority - Department of Health and Other Services of the Government of Brčko District BH, Sub-Department for Social Protection - Center for Social Services.<sup>27</sup> Prior approval is given on the basis of an analysis carried out by the competent guardianship authorities, i.e. centers for social work. Namely, centers for social work, as bodies responsible for carrying out the adoption procedure, have information on the suitability for adoption of children from the area of their local jurisdiction, as well as data on persons who are interested in adopting a child (domestic and foreign citizens). The procedure for submitting a request for prior consent is regulated by appropriate by-laws<sup>28</sup>, according to which the guardianship authority is obliged to request prior approval. In theory, this solution has been rightly criticized for a number of reasons, due to the volume and importance of the work of the guardianship authorities in the process of establishing international adoption, as well as possible impermissible influences on employees in these authorities, as well as problems with the material and personnel structure in Bosnia and Herzegovina (Ćeranić, 2015, p. 255). Therefore, we propose a solution similar to the one in the legislation of the Republic of Serbia, according to which foreign adoptive parents

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<sup>25</sup> Examples of deviations would be cases of adoption among relatives, when the child, despite moving to another country, continues to grow up in the environment of the extended family. Also, some authors believe that the relocation of a child within the framework of international adoption should have priority over the institutional care of the child (Parra-Aranguren, 1994, par. 123; Meese, 2005, p. 164; Steltzner, 2003, pp. 128–132; Hoško, 2019, p. 321).

<sup>26</sup> See the webpage of Federal Ministry [https://fmrsp.gov.ba/?page\\_id=2013](https://fmrsp.gov.ba/?page_id=2013) (31 January 2023).

<sup>27</sup> We do not consider the provision contained in the Family Law of the BD BH, according to which the same authority carries out the adoption procedure and gives prior approval, to be good. This is because, in a hierarchical sense, the authorizing body should be "above" the guardianship authority.

<sup>28</sup> Instructions on the procedure for adopting children in the Republika Srpska (Official Gazette of the RS No. 27/2004), Instructions on the methods of determining the suitability of a child and a person who wishes to adopt a child and the method of drafting an opinion on suitability for adoption (Official Gazette of the FBH, No. 17 /2006).

submit the application in person through the competent ministry<sup>29</sup>, which facilitates the adoption process and guarantees legal certainty (Ćeranić, 2015, p. 255).

### **3.2 International Jurisdiction Rules**

The guardianship authority, that is, the center for social affairs, is responsible for implementing the adoption procedure. The international jurisdiction of this body in cases of international adoption is regulated by Article 74 PIL Act. Exclusive international jurisdiction is provided for in the case when the adopted person is a domestic citizen and is domiciled in Bosnia and Herzegovina (Article 74, paragraph 1). This consequently means that the decision of a foreign authority on adoption will not be recognized if these assumptions are met (Article 89). The local jurisdiction is determined according to the guardianship body of the child's place of domicile, i.e. the child's place of residence, if the child's place of domicile cannot be determined (Article 105 of the FBH Family Law Act).<sup>30 31</sup>

The guardianship authority has a special international competence to decide on the establishment of adoption if the adopter is a citizen of Bosnia and Herzegovina and has a domicile in Bosnia and Herzegovina (Article 74, paragraph 2), and if the spouses adopt jointly, it is sufficient that one of them fulfills these criteria (Article 74, paragraph 3). In the context of international adoption, when the adopters are foreign citizens who adopt a local citizen in Bosnia and Herzegovina, we consider this provision inoperable, especially if we have in mind the mentioned provisions on local jurisdiction.

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<sup>29</sup> See Article 312 paragraph 2 Family Law Act of the Republic of Serbia.

<sup>30</sup> The same solution is contained in the Family Law Act of the RS – Article 161 paragraph 2 and Family Law Act BD BH - Article 88 paragraph 1.

<sup>31</sup> The PIL Act does not contain rules on the general international jurisdiction of non-judicial bodies, so it is an open question whether the rules on international jurisdiction can be derived from the rules on local jurisdiction, as it is expressly prescribed for judicial jurisdiction. See Article 26 of the Law on Civil Procedure Act of FBH (Official Gazette of FBH, No. 53/2003, 73/2005, 19/2006 and 98/2015); Article 26 of the Law on Civil Procedure Act of the RS (Official Gazette of the RS, No. 58/2003, 85/2003, 74/3005, 63/2006, 105/2008 – Constitutional Court decision, 45/2009 – Constitutional Court decision, 49/2009, 61 /2013 and 109/2021 – Constitutional Court decision), and Article 21 of the Law on Civil Procedure Act of the BD BH (Official Gazette of the BD BH, No. 28/2018 and 6/2021). We consider it justified to extend the effect of the rules on the local jurisdiction of guardianship authorities, which are contained in the family law legislation, to the rules on international jurisdiction.

Given that Bosnia and Herzegovina is a complex country, the provisions of the Law on the Resolution of Conflict of Laws and Jurisdictions in Status, Family and Inheritance Relations Act from 1979 (hereinafter: ZRSZN)<sup>32</sup> are also important. According to the provision of Article 38 paragraph 2, if jurisdiction is determined on the basis of citizenship of Bosnia and Herzegovina, the authority of the territorial unit in whose territory the person has domicile or residence is competent, and if he does not have domicile or residence in the territory of Bosnia and Herzegovina, the authority of the territorial unit of which he is a citizen is competent (Dika et al., 1991, p. 243).

### 3.3 Choice of Law Rules

After the domestic authority determines that it is internationally competent in the procedure for establishing an international adoption, it will proceed to determine the applicable law. The applicable law will give us an answer to a series of questions related to active and passive adoptive capacity, i.e. admissibility of adoption, conditions that must be met on the part of the adopter and the adoptee, possible bans on adoption, the need for the consent of the child or other persons (parents or guardians), the need for consent of a spouse, approval for adoption and the like (Eisner, 1953, pp. 326–327). In private international law of Bosnia and Herzegovina the most important connecting factor is *national statute*, whether in the form of application of common nationality of the adopter and adoptee or cumulative application of their national laws. The relevant moment for determining citizenship is considered to be the moment of adoption (Dika et al., 1991, p. 147). PIL Act prescribes that the conditions for establishing adoption (and termination of adoption) are governed by the law of the country of which the adopter and the adopted are nationals (Article 44, paragraph 1). If their nationalities are different, which is the most common case in international adoptions, the legislator, in an effort to provide full legal certainty to all parties to the proceedings, and to ensure the international validity of the adoption, prescribed the cumulative application of the laws of both countries of which they are nationals (Article 44 paragraph 2 PIL Act),

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<sup>32</sup> Official Gazette of SFRY 9/79 and 20/90. ZRSZN applies to the entire territory of Bosnia and Herzegovina, and it was adopted from the former SFRY, Official Gazette of the RBH 2/92 and 13/94, Official Gazette of the Serbian People in BH 21/92 and Official Gazette of the BD BH 1/2000. The original text of this Act was adapted by Prof. Dr. Valerija Šaula to the constitutional structure and legislative jurisdiction established by the Constitution of Bosnia and Herzegovina, entity and cantonal constitutions, and the Statute of Brčko District, as well as other valid laws in Bosnia and Herzegovina (Šaula, 2008).

and if the spouses jointly adopt, the laws of the state of which the adopted person is a national and the laws of the state of which both spouses are nationals are cumulatively applicable. Ordinary cumulation is required, which in principle makes it difficult to establish adoption, since it will only be possible if stricter conditions prescribed by any of the relevant laws are met (Varadi et al., 2010, pp. 333–334; Pak, 2000, pp. 414–415; Muminović, 2006, pp. 165–167; Bosnić, 1999, pp. 138–139). In this way, they try to prevent "limping" adoptions that are valid in one country and not in another.

This practically means that the establishment of the adoption of domestic national in Bosnia and Herzegovina will only happen if the conditions and assumptions prescribed by the family legislation of Bosnia and Herzegovina are met. If we take the FBH Family Law Act<sup>33</sup> and full adoption<sup>34</sup> as an example, this would mean, in short, that the adoptive parent cannot be a person who has been deprived of parental responsibility, a person who has been deprived of or limited legal capacity and a person who does not provide sufficient guarantees that he will properly exercise parental responsibility, as well as a person whose spouse has one of the aforementioned circumstances (Article 97 of the FBH Family Law Act).

Also, neither a blood relative in the first line, nor a brother or sister can adopt, but neither a guardian can adopt a ward until the guardianship authority relieves him of his duties as a guardian (Article 93, paragraphs 2 and 3, Family Law Act FBH). An adoptive parent can only be a person between the ages of 25 and 45 and who is at least 18 years older than the adopted person, with certain exceptions: if there are particularly justified reasons; if adoptive parents jointly adopt the same child, it is sufficient that only one of them meets these conditions; if the adoptive parents adopt several children - brothers and sisters, they can adopt even if only one of them is between the ages of 25 and 45 and if, with regard to the adoptive parent, there is an age difference of 18 years in relation to only one child (Article 96 Family Law Act FBH).<sup>35</sup>

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<sup>33</sup> Considering the complex state organization of Bosnia and Herzegovina and the constitutional division of legislative jurisdiction when it comes to private law relations, the field of family law relations is regulated by the family laws of the Federation of BH, Republika Srpska and Brčko District of BH. Among these laws, there are certain differences in terms of standardizing the conditions for establishing adoption.

<sup>34</sup> All three family laws recognize two types of adoption: complete and incomplete (Article 91 paragraph 2 Family Law Act FBH, Article 149 Family Law Act RS, Article 76 paragraph 2 Family Law Act BDBH).

<sup>35</sup> The same is envisaged by Article 81 Family Law Act BD BH. In the Republika Srpska, there is no prescribed age limit for adoptive parents, but it is required that the adoptive parent be at least 18 years older than the adopted child (Article 151 paragraph 2 Family Law Act RS).

A child can be fully adopted by married partners jointly, and by the stepmother or stepfather of the child being adopted, but also by non-marital partners who have lived in a cohabitation for at least five years (Article 102 Family Law Act FBH).<sup>36</sup> Only a minor child can be adopted, and a child up to the age of 10 can be fully adopted (Article 101 Family Law Act FBH).<sup>37</sup> A child cannot be adopted before the expiration of three months from its birth (Article 94 paragraph 1 Family Law Act FBH). Also, a child of minor parents cannot be adopted, with the exception that this child can be adopted after one year from his birth if there is no possibility that he will be raised in the family of the parents or other close relatives (Article 94, paragraph 2 Family Law Act FBH).<sup>38</sup> Given that adoption is possible even when the adoptee has living parents, their express consent is required in relation to the type of adoption (Article 98 Family Law Act FBH). In certain cases, parental consent is not required.<sup>39</sup>

The application of only domestic law in the process of establishing an international adoption is possible thanks to *renvoi*<sup>40</sup> and *public order*.<sup>41</sup> Namely, the application of domestic law due to *renvoi* occurs in the case when the adoptive parents are foreign nationals and have their domicile or habitual residence in Bosnia and Herzegovina, and the choice of law provision of their national law, to which our choice of law provision referred, takes the domicile or habitual residence as the connecting factor. Such a scenario is possible nowadays, because more recent codifications of private international law increasingly prescribe habitual residence instead of or in addition

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<sup>36</sup> Likewise, Article 158 Family Law Act RS, Article 86 paragraph 1 and 2 Family Law Act BDBH, with the fact that, according to the Family Law Act FBH and Family Law Act BDBH, cohabiting partners who have lived in a cohabitation for at least five years can also fully adopt (Article 102 paragraph 2 Family Law Act FBH, Article 86 paragraph 3 of the Family Law Act BDBH).

<sup>37</sup> Likewise, Article 86 paragraph 1 Family Law Act BDBH, while in Republika Srpska only a child up to the age of five can be fully adopted (Article 157 Family Law Act RS).

<sup>38</sup> Likewise, Article 79 Family Law Act BDBH. In the Republika Srpska, there is no minimum age limit, but from Article 3 of the Ministry of Health and Social Welfare's Instructions on the Procedure for Adoption of Children (Official Gazette of the RS, No. 27/2004), according to extensive interpretation it can be concluded that at least 40 days must elapse from the day of birth.

<sup>39</sup> Article 99 Family Law Act FBH prescribes: "*Adoption does not require the consent of the adoptee's parents: a) who has been deprived of parental responsibility b) who does not live with the child, and has largely neglected the care of the child for three months; c) who is a minor and is not capable of understanding the meaning of adoption; d) who has been limited or deprived of legal capacity; e) whose place of residence is unknown for at least six months, and during that period he does not take care of the child.*"

<sup>40</sup> By applying the institute of *renvoi*, reference to foreign law means not only reference to substantive provisions of foreign law, but also its conflict of law rules. After the reference is made to foreign law, the choice of law rules of that law can return to Bosnian law or refer further to another foreign law (Article 6 PIL Act).

<sup>41</sup> Foreign substantive law will not be applied if it contradicts by the Constitution established foundations of social organization, that is, if it is contrary to the fundamental values of domestic law (Article 4 PIL Act).



to citizenship as the connecting factor in this matter<sup>42</sup> (Kostić-Mandić, 2017, pp. 399–400; Hoško, 2019, pp. 326–328). It is also possible to refer to the law of a third country, if the adoptive parents have their domicile or habitual residence in that country, and not in the country of which they are citizens. Domestic law would find its application as a result of intervention by the institute of public order, which could be activated in Bosnia and Herzegovina if, for example, the foreign applicable law prescribed the sameness of race or religion as a condition of adoption.

The form of adoption is governed by the law of the state in which the adoption is established (Article 44 paragraph 4 PIL Act). Alternative application of another law, e. g. *lex causae* for adoption, is excluded<sup>43</sup> (Dika et al., 1991, pp. 30–32 and 147). It is important to point out that the consent of the competent authority, which is required in the rules for the establishment of an international adoption, is a substantive, not a formal requirement, and is subject to the national statute, not the law of the state of establishment of the adoption (Dika et al., 1991, p. 147).

#### **4 International Adoption of a Child who is a Foreign Citizen**

In a situation where the adoptive parents are domestic citizens and want to adopt a child who is a foreign citizen, and live with him in Bosnia and Herzegovina, that is, when the adoption procedure is completed abroad, it is necessary to recognize the foreign adoption decision. In addition, the provisions related to the acquisition of citizenship of Bosnia and Herzegovina are also significant.

##### **4.1 Recognition of a Foreign Adoption Decision**

The procedure and assumptions for recognition of a foreign decision on adoption depends on the legal system of the state where the adoption procedure was finalized. Bosnia and Herzegovina is not a signatory to the 1993 Hague Convention on Adoption, which establishes a system of cooperation between the central authorities of the signatory states (see Article 6) and mandates the automatic recognition of

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<sup>42</sup> See for example Article 89 paragraph 2 PIL Act of Montenegro (Official Gazette of Montenegro, no. 1/2014, 6/2014 – correction., 11/2014 – correction., 14/2014 i 47/2015 – correction) and Article 43 paragraph 3 PIL Act of Croatia (Official Gazette, no. 101/2017).

<sup>43</sup> This means that the application of Article 7 PIL Act is excluded in case of the form of adoption, the provision which normally applies to most legal acts/transactions, and which alternatively foresees the application of either the law of the place where the legal act was concluded/made, or the law applicable to the content of the legal act.

adoptions based on the Convention in all signatory states<sup>44</sup>, and which foresees opposition to public order (taking into account the best interests of the child) as the only reason for refusal of recognition (see Article 24).<sup>45</sup> Therefore, in Bosnia and Herzegovina, the valid legal framework in this matter is the PIL Act.

The recognition procedure is started by the interested party, the adoptive parents, by submitting a request for recognition and confirmation of the legal validity of the foreign decision (Article 87 PIL Act) to the competent court in Bosnia and Herzegovina. Jurisdiction *rationae materiae* belongs to higher courts, in the Federation of Bosnia and Herzegovina - cantonal courts, in the Republika Srpska - district courts, and in the Brčko District of Bosnia and Herzegovina - the appellate court. Territorially competent are the courts in whose territory the recognition procedure should be carried out, that is, when it comes to matters of status, it is the court in whose territory the corresponding registers of civil status are kept. Otherwise, the recognition procedure itself is not specifically regulated in our private international law, but some principles are accepted in practice, the most important of which are those related to the absence of an oral hearing, the prohibition of meritorious review of a foreign decision and the examination of assumptions exhaustively listed (Muminović, 2006, p. 97).

Recognition of a foreign decision on adoption will not occur if any of the negative assumptions are met. First, according to Article 88 PIL Act, recognition will be refused on the objection of the person against whom the recognition is sought if his right to be heard was violated in the proceedings in the country of origin of the decision. In the context of international adoption, this assumption could eventually be fulfilled in relation to persons who normally give their consent to adoption, such as the biological parents of the adoptee, the spouse of the adopter and the adoptee. Second, according to Article 89 PIL Act, recognition will be refused if there is a violation of the rules of exclusive jurisdiction of domestic authorities. Given that the exclusive jurisdiction of domestic authorities is provided for only in the event that the adoptee is a domestic citizen domiciled in Bosnia and Herzegovina, in situations of international adoption of a foreign citizen, this assumption is not relevant. Third,

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<sup>44</sup> According to Article 23 of the 1993 Hague Convention on Adoption recognition is automatic, which means that no special procedure is required, if the competent authority of the state where the adoption was finalized issued a certificate that the adoption was based on its provisions.

<sup>45</sup> The public order clause, as usual, should be narrowly interpreted in the way that public order covers only the fundamental principles and values of a certain legal order (Parra-Aranguren, 1994, par. 426).

according to Article 90 PIL Act, recognition of a foreign decision will be refused if in the same matter and between the same parties there is a legally binding decision of a Bosnian court or other authority, i.e. if another foreign decision made in the same matter is recognized in Bosnia and Herzegovina.

Also, a foreign decision will not be recognized if it is in conflict with the foundations of social organization established by the Constitution (Article 91 PIL Act). When applying the institute of public policy, a couple of generally accepted rules should be kept in mind. It is about the necessity of the connection of the legal situation with the *lege fori*, and the need to respect only the effects of a foreign decision. The institute of public policy must be interpreted restrictively, which means that the authority applying the provisions will refer to the institute of public policy only if there has been a violation of the fundamental values of domestic public order. What these fundamental values are, each country determines for itself by choosing those provisions of domestic law that it considers to be fundamental principles and giving them the character of provisions of public order (Duraković, 2009, pp. 776–779; Duraković et al., 2020, pp. 1–13; Meškić & Duraković, 2022, pp. 25–48). Provisions on the protection of human rights represent an important part of the content of public policy. The leading instrument for the protection of human rights in Europe is the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), and its most important provisions in the context of international adoption are Article 8 – the right to respect for private and family life and Article 14 – prohibition of discrimination (see more Duraković, 2019, p. 69–93). The protection of guaranteed rights and freedoms is achieved through the European Court of Human Rights (hereinafter: ECtHR).<sup>46</sup> Therefore, when considering a violation of public policy, the practice of this court in adoption cases is extremely important.<sup>47</sup>

Finally, a foreign decision will not be recognized if there is no reciprocity - de facto reciprocity (Article 92 paragraph 1 PIL Act). The existence of reciprocity is assumed,

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<sup>46</sup> Decisions of the ECtHR are not only of an advisory nature, but are binding on all the signatory states of the ECHR.

<sup>47</sup> For example, *X. and the other v. Austria*, case app. No. 19010/07, 19. 2. 2013; *Gas and Dubois v. France*, case app. No. 25951/07, 15. 3. 2012; *Negrepontis-Giannis v. Greece*, case app. No. 76240/01, 3. 5. 2011; *E. B. v. France*, case app. No. 43546/02, 22. 1. 2008; *Wagner and J. M. W. L. v. Luxemburg*, case app. No. 76240/01, 28. 6. 2000; *Pini and others v. Romania*, case app. No. 78028/01 and 78030/0122, 22. 6. 2004; *Pla and Puncernau v. Andora*, case app. No. 69498/01, 13. 7. 2004; *Odièvre v. France*, case app. No. 42326/98, 13. 2. 2003; *Fretté v. France*, case app. No. 36515/97, 26. 2. 2002.

until the interested party proves otherwise, and if there is doubt, a subsequent explanation is given by the Ministry of Justice of Bosnia and Herzegovina (Article 92 paragraph 3 PIL Act).

In addition to these general presumptions for the recognition of a foreign decision, the PIL Act provides a special regime for decisions concerning personal status. Thus, if it is a foreign decision related to the personal status of domestic citizens, recognition will not occur if the applied substantive law significantly deviates from our law (Article 93 PIL Act). Facilitated recognition is provided for decisions concerning the status of persons who are nationals of the country of origin of the decision in such a way that the assumptions of international jurisdiction, respect for public order and reciprocity do not have to be met (Article 94 PIL Act). If a foreign decision refers to the personal status of foreigners who are not nationals of the country of origin of the decision, cumulative fulfillment of the assumptions of the PIL Act and the assumptions prescribed in the state of which the person is a national is required (Article 95 of the PIL Act).

## 4.2 Acquisition of Citizenship

After the foreign decision on adoption is recognized in Bosnia and Herzegovina, as a rule, the question arises of the possibility for the child to acquire the citizenship of Bosnia and Herzegovina.

The issue of citizenship is regulated by the Constitution of Bosnia and Herzegovina<sup>48</sup>, the Law on Citizenship of Bosnia and Herzegovina<sup>49</sup>, the Law on Citizenship of the Federation of Bosnia and Herzegovina<sup>50</sup> and the Law on Citizenship of the Republika Srpska.<sup>51</sup> The basic principle is that all persons who have the citizenship of Bosnia and Herzegovina also possess the citizenship of one of the entities.<sup>52</sup> In order to solve the problem of dual entity citizenship, the entity laws stipulate that upon acquiring a new entity citizenship, the previous entity citizenship is lost *ex lege*. As can be noticed, the regulations from the Brčko District of Bosnia and Herzegovina are missing. Namely, this territorial unit does not foresee

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<sup>48</sup> Article I, point 7, Annex 4 The General Framework Agreement for Peace in Bosnia and Herzegovina.

<sup>49</sup> Official Gazette BH, No. 22/2016 – consolidated text.

<sup>50</sup> Official Gazette F BiH, No. 34/2016 i 98/2016 – correction.

<sup>51</sup> Official Gazette RS, No. 59/2014.

<sup>52</sup> Article I/7 sub paragraph a. Constitution BH.

a separate citizenship, in addition to the citizenship of Bosnia and Herzegovina, for its citizens, but they have the right to choose and change their entity citizenship.<sup>53</sup> Citizens of Bosnia and Herzegovina, who reside in the Brčko District of BH, acquire the citizenship of one of the entities, either on the basis of the law or upon request according to their own choice.<sup>54</sup>

The mentioned laws regulate that the citizenship of Bosnia and Herzegovina/Federation of Bosnia and Herzegovina/Republika Srpska can be acquired by adoption.<sup>55</sup> According to these laws, a child under the age of 18 who is fully adopted by a citizen of Bosnia and Herzegovina after the entry into force of the Constitution acquires the citizenship of Bosnia and Herzegovina/Federation of BiH/Republika Srpska.<sup>56</sup>

## **5 Challenges in the Field of International Adoption**

International adoption is looked upon favorably, and people willing to accept a child from another country in order to enable him to develop normally are admired and respected. Unfortunately, the economic crises, poverty, war events and natural disasters that we are witnessing in the 20th and 21st centuries are fertile ground for couples to have a child, and in connection with this, for various criminal activities. It is important to emphasize that international adoption is primarily aimed at protecting children, and not at meeting the needs of adults or obtaining financial benefits for individuals, agencies or various charitable organizations.

UNICEF, as the leading United Nations agency that cares about the quality of life of children and youth, has taken a clear position on the international adoption of children in times of war, serious natural disasters and other crises, stating that children who are separated from their parents in such times should not be put up for adoption until it is determined with certainty that they have no surviving parents or relatives. Chances are high that despite not having parents, they have relatives who can take care of them, so the priority is to return the children home and not put them up for adoption (Mellon, 2016).

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<sup>53</sup> Article 12 paragraph 2 Section II Statute BD BH.

<sup>54</sup> Article 30 Law on Citizenship of BH, Article 28 Law on Citizenship FBH, Article 30 Law on Citizenship of RS.

<sup>55</sup> Article 5 point c. Law on Citizenship BH, Article 4 point c. Law on Citizenship FBH, Article 5 point g. Law on Citizenship RS.

<sup>56</sup> Article 8 Law on Citizenship BH, Article 7 Law on Citizenship FBH, Article 10 Law on Citizenship RS.

International adoption is a good basis for child trafficking. It is very often realized between adopters from developed and rich countries and adoptees from poor and underdeveloped countries. Given that it is a relatively high amount of money per realized international adoption, it often contributes to corruption, kidnapping and trafficking of children in poor countries from which children are adopted, which is against the UN Convention on the Rights of the Child from 1989.<sup>57</sup>

## 6 Proposals de Lege Ferenda

The existence of a complete and high-quality normative framework that governs the matter of international adoption is important because of the various challenges faced by all participants in this process. A significant contribution to its more complete arrangement was made by the Hague Conference on Private International Law by adopting the Hague Convention on Adoption from 1993. The Hague Convention on Adoption from 1993 is the most significant international instrument in the matter of international adoption. It solved the problem of the validity of international adoptions in a high-quality way, establishing a very efficient regime of mutual recognition of foreign decisions, while avoiding the problems of determining the applicable law and determining international jurisdiction. The Convention applies when a child who has a habitual residence in one signatory state - the country of origin has been relocated, is moving or will be relocated to another signatory state - the receiving state, either after his adoption in the country of origin by a married couple or by a person with habitual residence in the country of reception, either for the purposes of such adoption in the country of reception or in the country of origin (Article 2).

It is therefore necessary that the child moves from the country of origin to the country of reception. The goal of the Convention is to establish a system of cooperation through central authorities between the signatory states in order to protect the child and its best interests and to prevent the illegal abduction, sale or trafficking of children, and to ensure the recognition of international adoption based on the Convention in all signatory states (Article 1). Persons with habitual residence in one signatory state who wish to adopt a child with habitual residence in another

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<sup>57</sup> Article 35 of the UN Convention on the Rights of the Child from 1989 obliges states to take all necessary measures to prevent abductions, trafficking and sale of children, and Article 21 point a. mandates that consents to adoption must be given knowingly and that counseling will be conducted if necessary.

signatory state shall submit a request to the central authority in the state of their habitual residence (Article 14). After the central authority of the receiving country determines that the applicants are eligible and suitable for adoption, it will send a report to the central authority of the country of origin of the child (Article 15). If the central authority of the country of origin of the child determines that the child is eligible for adoption, it will prepare a report with all necessary data, consents, confirmations, approvals and deliver it to the central authority of the receiving country (Article 16). A decision on establishing an adoption made in one signatory state - the child's country of origin (Article 17) is automatically recognized in other signatory states (Article 23). Recognition could only be refused on the ground of violation of public policy, with the fact that the Convention significantly narrowed the possibility of using this institution by explicitly apostrophizing "the best interest of the child (Article 24).

The Hague Convention on Adoption from 1993 is an important international source, which provides for high standards of protection of the best interests of the child in international adoption procedures. Therefore, we suggest the competent authorities in Bosnia and Herzegovina to take all necessary steps in the process of signing and ratifying this Convention. In this way, we would complete the Bosnian normative framework in the matter of international adoption and provide the necessary protection to children who will be in the process of international adoption.

Considering that this year - 2023 marks forty years since the entry into force of the PIL Act in Bosnia and Herzegovina<sup>58</sup>, and aware of the fact that the social, economic, legal and political circumstances of its application have changed in relation to the moment of adoption and entry into force of this Act, and having in mind the fact that Bosnia and Herzegovina is obliged to fulfill, among others, the obligations of harmonizing its legislation with the *acquis* of the European Union in the field of private international law, as well as modern tendencies in comparative law, on the way to European integration, the legislator in Bosnia and Herzegovina faces the obligation to reform the PIL Act. Future legislative intervention in the matter of international adoption should go in the direction of accepting habitual residence as an additional connecting factor, in addition to nationality, for

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<sup>58</sup> At the time it was enacted, the Act was considered one of the most modern codifications of private international law. After the dissolution of the Socialist Federal Republic of Yugoslavia, this Act was adopted into the legislation of successor states, including Bosnia and Herzegovina.

determining the applicable law and as additional criteria, in addition to nationality, for determining international jurisdiction. As an example, we can take the legislation of Montenegro and Croatia.<sup>59</sup>

## 7 Conclusion

Adoption is a special form of family-legal protection of children without parental responsibility, which establishes the parental relationship. We distinguish adoption that takes place within the borders of one country, i.e. internal adoption and adoption in which there is an international element, i.e. international adoption. The international element can appear in subjects of adoption, i.e. their nationality, domicile or habitual residence, as well as in the place of adoption decision. The focus of this work relates to the situation of international adoption of a domestic citizen in Bosnia and Herzegovina and the situation of international adoption of a foreign citizen abroad.

When deciding on procedures for the establishment of international adoptions, the competent authorities of Bosnia and Herzegovina have at their disposal a number of provisions contained in the three family laws and the PIL Act, which relate to the rights of foreigners, the determination of the applicable law, the establishment of international jurisdiction and the recognition of foreign decisions on adoption, which can successfully protect the best interest of the child. It is up to them to use the applicable legal solutions appropriately and in accordance with the best interests of the child.

Considering the numerous challenges that exist in this matter, and aware of the importance of the Hague Convention on Adoption from 1993 and the need to harmonize the legislation of Bosnia and Herzegovina with the *acquis* of the European Union and contemporary trends in comparative law, it would be necessary to reform the existing legislative framework in Bosnia and Herzegovina. In this sense, it is necessary, on the one hand, to accede to the Hague Convention on Adoption from 1993, and on the other hand, to accept habitual residence as an additional connecting factor, along with nationality, for determining the applicable law and as an additional

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<sup>59</sup> See Article 89 paragraph 2 and Article 133. Montenegro PIL Act and Article 43 paragraph 3 and Article 52 Croatian PIL Act.



criterion, along with nationality, for determining international jurisdiction. In this way, we would fulfill our obligations in the process of European integration, modernize domestic law and provide full security and protection to children in the process of international adoption.

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## Legislation, Acts, Regulations and Court decisions

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Decision of the Constitutional Court of Bosnia and Herzegovina, Decision in case AP 3040/21 from 5th October 2021: Official Gazette BH, no. 66/21).

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Family Law Act of the Republika Srpska, Official Gazette of Republika Srpska, no. 54/2002, 41/2008, 63/2014 i 56/2019 – Constitutional court decision.

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### Povzetek v slovenskem jeziku

Posvojitve je posebna oblika pravne zaštite otrok, ki ne uživajo starševske skrbi, ki vzpostavi starševski odnos. Razlikujemo med posvojitvijo, ki poteka znotraj meja ene države, to je notranjo posvojitvijo, in mednarodno posvojitvijo. Mednarodni element se lahko pojavi pri subjektivni posvojitvi, glede na njihovo državljanstvo, prebivališče ali običajno prebivališče ter kraj posvojitve. Osredotočenost dela je na zakonodajnem okviru v Bosni in Hercegovini za primere mednarodne posvojitve, zlasti glede na situacijo vzpostavitve mednarodne posvojitve državljana Bosne in Hercegovine doma ter na situacijo vzpostavitve mednarodne posvojitve tujega državljana v tujini v okviru oskrbe otrok in otroškega blagostanja. Ob upoštevanju mnogih izzivov, ki obstajajo v tej zadevi, je obstoj celovitega in visokokakovostnega normativnega okvira condicio sine quo non za uspešno in zakonito mednarodno posvojitve. V tem kontekstu in ob zavedanju pomembnosti Haaške konvencije o posvojitvi iz leta 1993 ter potrebe po usklajevanju zakonodaje Bosne in Hercegovine s pravnim redom Evropske unije in trendi v primerjalnem pravu so bili podani de lege ferenda predlogi.

**Ključne besede:** mednarodna posvojitve, oskrba otrok, pravila o konfliktnih prava, mednarodna pristojnost, priznavanje tujih odločb o posvojitvi

