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GENDER BIAS AND THE LAW:

**LEGAL FRAMEWORKS
AND PRACTICE FROM
BOSNIA & HERZEGOVINA
AND BEYOND**

SARAJEVO, 2017

Majda Halilović, Callum Watson,
Heather Huhtanen and Mylène Socquet-Juglard

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Bosnia & Herzegovina and beyond

Sarajevo, 2017

GENDER BIAS AND THE LAW

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Excerpts from reviews

This publication is the first comprehensive review of gender bias in criminal and civil legal practice and court rulings in the Western Balkans and makes an important contribution to the topic internationally. The Gender Bias and the Law Handbook answers the question, Why Does Gender Matter?, covering topics such as implicit and explicit gender bias, domestic violence, sexual assault, divorce, custody, witness credibility, labor law, pensions and inheritance. This resource will provide members of the judiciary, legal practitioners and professors and students of the law in Bosnia and Herzegovina with the opportunity to advance their critical thinking and legal impartiality in relation to the influence of gender bias. The influence of gender bias, whether implicit or explicit, has been well documented in societies and legal practice across the world. It is therefore the unique charge of those whose responsibility it is to uphold the rule of law to insure that all individuals are equal before the law, and accountable to the law. It was my pleasure to review this excellent resource and it is my hope that it will be widely read and used by judges, practitioners and professors alike.

Lynn Hecht Schafran
Director, National Judicial Education Program, US

Taking into consideration that law school curriculums are not gender sensitive enough and that the gender dimension of law, as well as stereotypes in creating and applying law, should not be overlooked, this Handbook is a useful piece of literature not only for students, but also for those who apply the law. The Handbook is written using an appropriate methodology, so that thematic units have clear aims, expected results, summaries and resources for additional research, which makes the Handbook valuable in the literature for legal education. Considering the choice of thematic units, applied methodology, additional resources and, finally, the authors who participated in the development of the Handbook, it is justifiable to say that the Handbook will be used in legal education and received with interest by law students.

Previous academic experience shows that law students are interested in gender equality topics. Besides fulfilling students' academic and research interests, the Handbook Gender Bias and the Law has multiple uses, not only as framework that offers information, but as a resource that opens up new perspectives in studying the most sensitive aspects of law concerning sexuality and sexual identity, family and inheritance issues, achieving property rights and issues of witnessing before courts. Legal education cannot remain blind to gender differences and the influence of stereotypes in creating laws, as well as the enjoyment and protection of rights. Apart from increasing the gender awareness of students, the gender sensitivity of professors should not be forgotten as a vehicle for improving good quality legal education in Bosnia and Herzegovina. This is the key reason for the Handbook, and its use in legal education fulfils the goals for which it was written.

Professor Jasna Bakšić-Muftić
Faculty of Law, University of Sarajevo




About the handbook and possibilities for its use

Although often unnoticed or ignored, gender bias is prevalent in all legal systems across the world, and Bosnia and Herzegovina (BiH) is no exception. The consequences of gender-based bias and discrimination affect everyone, from legal professionals to women and men who seek to assert their rights through the justice system. Gender bias can affect the atmosphere in courtrooms, the presentation of cases, the decisions of judges, and even whether cases come to court. By reducing and eventually eliminating these prejudices, the justice system has the potential to become more effective, democratic, and fair.

The Atlantic Initiative (AI) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) have been working with judges and prosecutors from across BiH to address the topic of gender bias since 2011, within the context of the Gender and Justice Reform Project. During project activities, judges and prosecutors have highlighted the importance of ensuring that the skills they have learned in identifying and overcoming manifestations of gender bias are also passed on to the next generation of legal professionals. In response to this need, and with a view to engaging law scholars on the topic, in order to further our understanding of how gender bias presents itself in specific local contexts, DCAF and AI sought to facilitate the development of a handbook on gender bias specifically directed at law students in BiH.

Between February and September 2016, 11 university law professors from across BiH met regularly in a series of workshops to develop the different thematic units, meant to address the impact of gender bias in legal practice. Each of these workshops focused on identifying gender bias in a specific field of law by reviewing existing legal frameworks as well as relevant domestic, regional, and international research. Written content, exercises, and discussion topics were then drafted with the aim of helping law students appreciate how gender bias is present in both the law and the application of law, and how these prejudices can adversely affect the administration of justice.

The work of these consultant professors, with the facilitation and organization of AI and DCAF, has resulted in this Handbook. While the thematic units they developed could theoretically be delivered as a standalone course, they have been primarily designed to complement existing courses on different aspects of criminal, civil, and family law in order to mainstream gender across the curriculum. However, it is important to stress that the first two thematic units provide a basic introduction to the concepts of gender and gender bias and are therefore recommended as a pre-requisite for all other units in the series. The remaining units may stand on their own, providing enough content for one or two 45-minute sessions. Alternatively, some professors may prefer to integrate individual exercises or components into their existing units. Students pursuing master's and doctoral degrees may find that these units provide an overview of how gender bias affects their specific field of law, and may direct them toward further reading if they wish to explore a given topic in more detail.



The units are based around applicable domestic, regional, and international legal frameworks and draw upon legal theory, practical examples, and research in the sociology of law from both BiH and abroad. Each unit is reinforced by relevant literature, included in an annex (much of which had not previously been translated), which students can reference to enrich and expand the scope of their knowledge. Furthermore, each unit is designed to support modern, interactive teaching practices and contain video links, discussion topics, practical exercises, and case studies.

The purpose of the Handbook is to provide law students with a greater awareness of the existence of gender bias in court proceedings and to expand their understanding of how gender bias is manifested in the application of law within the social context of BiH. Students can use the Handbook in its entirety, or in parts, in a variety of ways: to prepare for lectures, to study for exams, or to expand their knowledge of law. Ultimately, the goal is that future legal professionals will be better equipped to identify and overcome explicit and implicit bias in their work. In addition, as interest in this topic grows within the academic sphere, it is important that scholars are able to support legal practitioners by also furthering their understanding of how gender bias manifests in the specific context of BiH.



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Thematic Unit 1:

Why Gender Matters

Learning outcomes – by the end of this unit, you will be able to:

1. Define what “gender” means as a concept distinct from “sex”.
2. Understand that gender is a socially-constructed phenomenon that varies by location and over time.
3. Discuss the effect that gender stereotypes can have in the legal context.

Background reading:

Shelby Quast, “Justice Reform and Gender (Tool 4)” in *Gender and Security Sector Reform Toolkit*, eds. Megan Bastick and Kristin Valasek (Geneva: DCAF, OSCE/ODIHR, UN-INSTRAW, 2008). **web:** <http://www.dcaf.ch/Publications/Justice-Reform-and-Gender-Tool-4>

Saduša Redžić, “Šta je pol, a šta rod?” *Studije Roda Blog*, 8 March 2015. **web:** <http://www.studijeroda.net/2015/01/sta-je-pol-sta-rod.html>

Summary: Thematic Unit 1 is focused on the definition of sex and gender and emphasizes the importance of the impartiality of the judiciary with regard to gender. This unit begins with an exploration of the notions of fairness and impartiality within the context of the law and the judicial system. It calls into question whether jurists as individuals – judges, prosecutors, and lawyers – can ever be completely neutral and objective in applying the law. As the law is inextricably linked with its social and cultural context, it is influenced by the dominant values and attitudes of a given time and place. In striving for impartiality and fairness, judicial professionals need to have the self-confidence to recognise their own biases and the flexibility to entertain alternative points of view with an open mind. This, however, flies in the face of an indispensable myth that lies at the very heart of the legal system: that judges and other legal professionals are always impartial. This discussion is followed by an exploration of the concepts of gender and gender bias in the legal context. The unit concludes by highlighting that understanding gender and identifying gender-based misconceptions are critical skills for those working in the legal profession, because they enhance the ability to develop strong legal arguments by distinguishing the facts of a case from fallacious claims founded on gender-based stereotypes. Thus, an understanding of gender and gender bias is essential for judges to be able to make impartial decisions.



1.1. Introduction

There is arguably no other field where the importance of fairness and impartiality are so intrinsically linked to institutional effectiveness and credibility as in the case of the judiciary. Indeed, court systems have the central responsibility of even-handedly dispensing justice in order to establish, maintain, and enforce the rule of law. That law is assumed by many to be fair, impartial, and free from influence. This assumption is often extrapolated to the justice system as a whole, and by extension, to the legal practitioners responsible for implementing the law. But written and codified law is distinct from the implementation of that law. Written laws can be impartial, even objective, and can embody, promote, and enforce principles of justice such as fairness and equality. But can individual legal practitioners, judges, prosecutors, and attorneys be neutral and objective? In other words, can legal practitioners apply the law impartially?

This represents a central question confronted by legal practitioners and scholars throughout the world: whether the application of laws through individual practitioners can result in fair and impartial decision making. Essentially, can legal practitioners implement the law outside the influence of their feelings and opinions? The researchers assert that the answer to this question is that they cannot; and in principle, the very design of court systems is meant to counterweigh this reality. That is, if the implementation of the law were a truly objective process then we would not expect to see modifications to court decisions, let alone complete reversals by second instance, appellate, and supreme courts – but we do. Thus, this research assumes that the application of objective law is in fact, subjective. In other words, the law is open to varied interpretation and understanding by practitioners who hold unique values, feelings, opinions, and indeed, biases. This ultimately results in differing legal opinions, including dissenting opinions and appellate and superior court reversals. Thus, in practice, the law is not static and unchanging, but an evolving system that is vitally informed both by broader socio-cultural contexts and by individual legal practitioners.

It is therefore not surprising that the intersection of codified law and its implementation has been studied by legal anthropologists in contexts across the world.¹ Sally Falk Moore, a legal anthropologist who has published extensively on cross-cultural, comparative legal theory found that regardless of the legal system, context, or continent, legal practitioners can be found using, abandoning, bending, sidestepping, replacing, and reinterpreting the law.²

-
- 1 For example, see: Lawrence Rosen, *Law as Culture: An Invitation* (Princeton, N.J.; Woodstock: Princeton University Press, 2008); and Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978). For an idea of how the sociology of law operates in practice, see: Nahda Younis Shehada, *Justice without Drama: Enacting Family Law in Gaza City Sharīa Court* (Maastricht: Shaker Publishing, 2005); and Sally Engle Merry, “Everyday Understandings of the Law in Working-Class America,” *American Ethnologist* 13, no. 2 (May 1986): 253–270.
 - 2 Moore, *Law as Process*, 4.

In addition to socio-cultural-political values, the implementation of the law is further influenced by the different categories of identity – sex, gender, race, ethnicity, religion and class – represented among individual legal practitioners and court users. In other words, “...the ways in which race or gender have been constructed in society at large [are] inseparable from the rules of evidence or the presumptions at work in... courthouses.”³ Thus, the law is inextricably linked to, and informed by, the socio-cultural context in which it exists; and thereby influenced by the prevailing ways of thinking and understanding within that context.

Yet, the influence of socio-cultural elements or characteristics of identity are not, in and of themselves, problematic in law. While legal practitioners may not be objective, they may still be able to achieve a fair and impartial approach by taking into account the socio-cultural factors and categories of identity that are present in all societies. Justices L’Heureux-Dubé and McLachlin noted in the Canadian Supreme Court case *RDS v R*:

*...while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.*⁴

Indeed, impartiality and fairness require self-awareness and flexibility – acknowledgement of the subjective influence of the individual and a conscious effort to avoid the use of stereotypes and remain open.

*True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.*⁵

But, legal practitioners must come to terms with the idea that the “notion that judges are invariably impartial is an indispensable myth used to sustain faith in the legal system.”⁶ Because impartiality is importantly linked to awareness, [it is vital that there is] awareness within the judiciary of gender, gender-based stereotypes, and gender-based attitudes, or a lack thereof, in order to [mitigate] the potential influence of gender on the impartial delivery of justice.

Source: Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014), 11-16.

3 Rosen, *Law as Culture*, 65.

4 Reg Graycar, “Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment,” *International Journal of the Legal Profession* 15, nos. 1 and 2 (2008): 76.

5 Ibid.

6 Ruth Hertz, “Gender Experiences of a Judge in Germany,” in *Gender and Judging*, ed. Ulrike Schultz and Gisela Shaw, Oñati International Series in Law and Society (Portland, Oregon: Hart Publishing, 2013), 259.

1.2. What is gender?

Sex refers to biological or physical attributes such as sexual and reproductive organs, specific hormones, and specific chromosomes (i.e. XY/XX) that we use to differentiate male from female. This also includes what are called *secondary sex characteristics* that are specific to each sex following puberty but are not essential to reproduction. Secondary sex characteristics include the development of facial and body hair, the distribution of muscle mass and fat tissue, and changes in voice pitch. While not common, it is possible to be born with biological or physiological characteristics from both sexes. Also not common, but possible with medical advances (hormone therapy and surgery), is what may be considered a change of sex; but this is not a naturally occurring process, meaning that a person's sex does not change in the absence of medical intervention.

Gender refers to the social characteristics, roles, behaviours, and attributes assigned to men and women in any given socio-cultural context. Gender also refers to the relations between and among men and women. Just like society and culture, gender changes over time and varies depending on the socio-cultural context. Thus, the term gender is purposefully used instead of the term sex to emphasise the fact that many of the differences between women, men, girls, and boys are not natural facts, but rather products of a changing socio-cultural context.

Sex is biological.

Sex refers to the biological, physiological and anatomical features with which people are born. Sex is defined by reproductive organs (e.g. testes and ovaries), male and female chromosomes (e.g. XY and XX), male and female hormones (e.g. testosterone and oestrogen) and secondary sexual characteristics (e.g. muscle mass and facial hair). Sex is unchangeable and fixed in the absence of medical intervention (surgery or hormone therapy).

The terms male, female and intersex refer to SEX.

Gender is learned.

Girls and boys are taught and assigned different social characteristics, roles, behaviours and activities within a particular socio-cultural context on the basis of their sex.

Gender roles are changeable over time and vary within and across societies and cultures. This means gender roles are not the same in all socio-cultural contexts, and within one socio-cultural context they will change and develop in relation to the changes experienced by that society.

The terms masculine, feminine and transgender refer to GENDER.

Source: Geneva Centre for the Democratic Control of Armed Forces, "Gender Equality and Security Sector Reform," SSR Backgrounder Series (Geneva: DCAF, 2015).

In practical terms, males are usually defined as those who have male sexual reproductive organs and females are usually defined as those who have female reproductive organs. For example, it is possible for women to get pregnant but not for men. These are differences between men and women that are innate and fixed (at least in the absence of medical-surgical intervention).

In contrast, acquired or learned differences can include behavioural stereotypes such as different approaches to communication, shopping, travel, romance, diet, and so on. While many of these differences may be based in some truth, it is important to remember that they are acquired and are not related to the ‘nature of women’ or the ‘nature of men’.

Gender also impacts the roles or work associated with men and women. For example, women are almost always associated with the provision of family care – bearing and caring for children, caring for a husband or elderly parents, caring for the home, preparing meals, etc. Men, on the other hand, are routinely associated with being breadwinners or the ‘head of the household’. This association often confers both economic authority and social/political authority onto the man in a family (e.g. the husband or father). These roles are changeable and flexible, however, and in many societies, there are increasing numbers of men responsible for family care and women responsible for primary economic support of the family. Thus, these roles are not innate and are not attached to sex, but are rather an implication of gender.

The following images illustrate how gender roles and stereotypes change – and have changed – over time and across cultures:



Source: Chloe Chapin, “Boys Don’t Wear Pink,” *Sex and Status Blog*, January 11, 2012

As suggested by these famous paintings of boys, pink was not always perceived as a colour meant only for girls. Rather, red was seen to symbolize passion and strength; it was seen as a masculine colour and pink was understood simply as the “little red”. It was not until the 1940s that pink was associated with little girls (and women), and separate merchandise for girls and boys did not begin to flourish until the advent of prenatal testing in the latter part of the 20th century.⁷ Today, it can be difficult to find clothing that not colour-coded by gender.

The picture below is of Sisa Abu Daooh, an Egyptian woman who took on a male identity over 40 years ago, following her husband’s death. As an uneducated woman, the only option she had to support herself and her daughter was to find another husband. Instead, she chose to dress as a man, working first in construction and, when she became too old for that, as a shoe cleaner – also a man’s job in Egypt.⁸

7 Jeanne Maglaty, “When Did Girls Start Wearing Pink?” *Smithsonian*, 7 April 2011. Available at: <http://www.smithsonianmag.com/arts-culture/When-Did-Girls-Start-Wearing-Pink.html> (accessed 7 February 2017).

8 Jared Maslin, “Egyptian Woman Reveals 42-Year Secret of Survival: Pretending to Be a Man,” *New York Times*, 25 March 2015.



Source: *New York Times* (Bryan Denton).


This story illustrates that, regardless of our sex – whether we are male or female – our experience of the world is linked to how we dress or behave. In other words, gender can and does limit or increase our access to resources, choices, and opportunities in life.

1.3. Gender stereotypes in the legal realm

Now that we've defined gender and gender-based stereotypes, let's think critically about the ways in which gender and gender-based stereotypes may appear in the law, in the development of law, and within legal practice (see Activity Handout – Annex 1).

✂ Activity: Gender Stereotypes and the Legal Realm

1. Break participants into small groups.
2. Ask participants to identify gender-based stereotypes that could potentially influence the law (written law – substantive and procedural), its implementation (legal practice – substantive and procedural), and/or representation of men and women within the legal realm. For example, what gender-based stereotypes might disadvantage or harm men or women? *Allow 20 minutes for the group to identify answers.*
3. Facilitate a large group discussion (allow 30 minutes) by asking each smaller group to share one or two of the gender-based stereotypes they identified, as well as the consequences of these stereotypes. See if the larger group has any other consequences to add. If needed, the following examples can be used to supplement this discussion (*use the remaining time for a large group dialog that helps students begin thinking about the role of gender in the legal realm*):
 - a. *Stereotype: "Women exaggerate and/or provoke sexual harassment or assault (by wearing provocative clothing or flirting)"*
Potential consequences: Cases of women victims of sexual assault are not taken seriously or even addressed by courts.

- 
- b. *Stereotype: “Women are often overly emotional and have trouble getting facts and numbers right”*
Potential consequence: Women appearing as witnesses in court may be perceived as less credible than men, particularly in the areas of math, science, economics, etc.
 - c. *Stereotype: “Men are not good at raising children or being nurturing”*
Potential consequence: Men are not considered a good choice for custody in divorce/ custody cases, even if the father is more capable or has played a greater role in caring for the children.
 - d. *Stereotype: “Men are naturally more violent and are more likely to engage in criminal behaviour”*
Consequence: The penalties for male perpetrators of criminal domestic violence are at or below minimum sanctions because this kind of behaviour is viewed as normal.
 - e. *Stereotype: “Men are stronger than women and thus cannot be victims of domestic violence”*
Potential consequence: Men may not bring cases of domestic violence to the police and judiciary.

1.4. Conclusion

As noted above, gender refers to the social characteristics, roles, behaviours, and attributes assigned to men and women in a given socio-cultural context. Gender shapes how we see ourselves and how we see others. It has an impact on who we see as authoritative, trustworthy, and credible and who we see as unreliable and dishonest.

One of the skills of a legal professional is to identify the facts in a case and distinguish them from assertions based on misconceptions, stereotypes, and other forms of flawed reasoning. An understanding of gender, including of the gender-based misconceptions that may be harboured by ourselves and others, enables a judge to rule in a more impartial way and enables other legal professionals to develop more solid argumentation.

The importance of gender in different cases varies; but it is very clear in some instances, such as in cases of gender-based discrimination, domestic violence, sexual and gender-based harassment, and divorce. However, it is important to remember that gender plays a role in all legal contexts, and is therefore something that must be considered in all legal analyses.

1.5. Exercises

Annex 1: Small Group Activity Handout

Gender Stereotypes – Definitions

- **Stereotype:** An overgeneralized belief about a particular group of people
- **Gender:** Social roles, behaviours, attributes, and responsibilities assigned, established, and/or taught on the basis of sex (male or female).
- **Gender Stereotypes:** Overgeneralized beliefs about the ‘nature’ of men and women, including about their core characteristics, strengths and weaknesses, and natural predispositions to certain roles/responsibilities, etc.
 - *Example:* Women are naturally more nurturing and caring
 - *Example:* Men are naturally more logical and rational

Annex 2: Optional Warm-up Discussion

The following example should be considered a guide; the case study could be replaced by a local case that is more familiar to the students and instructor(s).

Do male and female judges rule differently?

*Case Study for discussion: Safford Unified School District v. Redding (2009) (US)*⁹

- 13-year old schoolgirl Savana Redding was taken to the assistant principal’s office, where he produced her day-planner containing knives and other contraband, including one over-the-counter and four prescription-strength painkillers (banned without prior permission).
- She accepted that the day-planner was hers, but said the contraband was not hers and that she had lent the day-planner to a friend.
- Redding’s bag was searched and nothing was found. The assistant principal sent her with a female administrative assistant to the (female) school nurse’s office so that the two women could search her clothes.
- She was told to remove her outer clothes, then shake out her bra and underclothes (exposing her breasts and pelvic area to some degree). No pills were found.
- When her mother heard of what had happened, she sued the school and three staff members for violating her daughter’s 4th Amendment rights (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”).
- The case ended up before the US Supreme Court in 2009, where they ruled 7-2 that Redding’s 4th Amendment rights had been violated but that individual school officials were entitled to qualified immunity because the unconstitutionality of the search had not been clearly established at the time.

⁹ US Supreme Court, *Safford Unified School District #1 et al. v. Redding*, No. 08-479, 531 F. 3d 1071, 25 June 2009. Available at: <https://www.law.cornell.edu/supct/html/08-479.ZS.html> (accessed 7 February 2017).



Gender in the US Supreme Court

- The first female judge on the US Supreme Court, Sandra Day O’Conner (seated 1981-2006), once said, “a wise female judge will come to the same conclusion as a wise male judge.”
- But in 2009, when the Savana Redding’s case was heard, the only woman on the Supreme Court was Ruth Bader Ginsburg (seated 1993-present). She filed an opinion agreeing that Savana’s rights had been violated but disagreeing that school officials were entitled to qualified immunity.
- Quoting from *New Jersey v. T.L.O.* (1985), she wrote: “A search ordered by a school official, even if ‘justified at its inception,’ crosses the constitutional boundary if it becomes ‘excessively intrusive in light of the age and sex of the student and the nature of the infraction.’”¹⁰
- Speaking to the press, Ginsburg later stated: “I didn’t think that my colleagues, some of them, quite understood [were not troubled by the search, because] they have never been a 13-year-old girl....It’s very sensitive for a girl.”
- One of her colleagues, Justice Stephen Breyer, had stated that, at school, he’d often had to strip to his underwear in the locker room and “people did stick things in my underwear.” Ginsburg responded that by having Redding stretch out her underwear for inspection by two school officials, the humiliation had been taken to another level.
- Ginsburg went on to claim that, as the only woman on the Court, she often felt her comments were ignored during justices’ private conferences, unless or until one of her male colleagues made the same point.

10 Ibid, Opinion of Justice Ginsburg. Available at: <https://www.law.cornell.edu/supct/html/08-479.ZX1.html> (accessed 7 February 2017). Also see: Neil A. Lewis, “Debate on Whether Female Judges Decide Differently Arises Anew,” *The New York Times*, 3 June 2009, http://www.nytimes.com/2009/06/04/us/politics/04_women.html?_r=1 (accessed 7 February 2017); and Bruce Weber, “Umpires v. Judges,” *The New York Times*, 11 July 2009, <http://www.nytimes.com/2009/07/12/weekinreview/12weber.html> (accessed 7 February 2017).



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Thematic Unit 2:

Gender Bias

Learning outcomes – by the end of this unit, you will be able to:

1. Define the term “gender bias”.
2. Understand how implicit gender bias affects legal decisions.
3. Explain how legal professionals can promote gender equality by consciously trying to overcome gender stereotypes and associations.

Background reading:

Jerry Kang et al., “Implicit Bias in the Courtroom,” *UCLA Law Review* 59, no. 5 (2012): 1124-1186. **web:** <http://www.uclalawreview.org/implicit-bias-in-the-courtroom-2/> **pdf:** <http://www.uclalawreview.org/pdf/59-5-1.pdf>

Justin D. Levinson & Danielle Young, “Implicit Gender Bias in the Legal Profession: An Empirical Study,” *Duke Journal of Gender Law & Policy* 18, no. 1 (Fall 2010): 1-33. **web:** <http://scholarship.law.duke.edu/djglp/vol18/iss1/1> **pdf:** <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1182&context=djglp>

Summary: Thematic Unit 2 provides a thorough overview of the concept of gender bias, detailing recent research which has demonstrated that all of us hold implicit biases and that members of the judiciary are no exception. The unit also explores the potential impacts of implicit bias in the application of law and outlines ways judicial practitioners can overcome implicit bias, with a view to upholding the rule of law in a fair and equal way.

2.1. Introduction

The term **gender bias** was coined in the US to describe the unequal treatment or expectations of an individual or group, based on their sex. Research efforts in the US sought to uncover how attitudes and behaviours toward women and men, based on stereotypes about their ‘true nature’ and ‘proper role’, might lead to things like pervasive sexual harassment, biased legal outcomes, and unfair promotional policies, among other forms of discrimination, or bias.¹¹

¹¹ Lynn Hecht Schafran, “Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts,” *Women’s Rights Law Reporter* 9 (1986), 109; Lynn Hecht Schafran, “Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges,” *Judges’ Journal* (Winter 1985), 12; and Norma J. Wikler, “Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts,” *Court Review* (Fall 1989), 6.

🗨️ Discussion question:

We can all agree that the role of the judiciary is to...

- *uphold the Rule of Law,*
- *apply the law in a fair and impartial manner, and*
- *dispense justice equally and objectively;*

so, does that mean we can simply apply the following formula?

the facts + the law = legal decision

In other words, is there anything else to it?

If it were as easy as that, wouldn't we see all judges in all courts come to the same conclusions? But we don't. Rather, dedicated and fair-minded legal-judicial professionals arrive at different decisions on the same cases, *despite reviewing the **same law** and the **same facts**.*

This is demonstrated by the very structure of most judiciaries or court systems in the world, which have both 1st and 2nd instance courts, as well as appellate courts and supreme courts. This is meant to ensure that decisions are checked, double checked, and even triple checked, with evidence scrutinized against the law multiple times and from multiple perspectives.


But why are these differences in perspective apparent?

In the end, judicial professionals cannot escape the fact that they are the sum of their combined experiences, knowledge, opinions, and beliefs. Like everyone else, they are unique individuals with varied childhoods and upbringings, and different religious affiliations, expertise, socio-political values, cultural backgrounds, life experiences, and educations.

2.2. Implicit bias

There is now a significant body of research that illustrates the impact of what is known as **implicit bias**, which refers to unconsciously held assumptions or stereotypes about specific social groups (gender, race, ethnicity, religion, etc.) that develop at a young age and become more ingrained over time. Implicit biases can exist even if a person develops an explicit (consciously adopted) non-biased world view – in other words, unconscious or implicit stereotypes can nonetheless remain.

Implicit biases result in subconscious attitudes, assumptions, and stereotypes that affect decision-making in all areas of our lives, from the choices we make while shopping to how we do our work.



Like gender stereotypes, **implicit bias is shaped by:**

- Religion
- Cultural tradition/custom
- Television, music, and entertainment (popular culture)
- Education
- Family, friends, and society

All people possess implicit biases to some degree. This is a natural way in which the human brain functions in response to our exposure to certain influences. Yet, we need to be aware of this, especially as judges and prosecutors, given the type of work we perform.

Researchers at three US universities have developed what is called the Implicit Association Test (IAT), to assess attitudes and beliefs that people may otherwise be unwilling or unable to report. The IAT is a computer-based test that measures response times to typical and atypical associations, presented visually. The person taking the test cannot consciously control the outcome, even if they answer the questions in an unbiased way. The test determines whether or not a person explicitly links typical associations – such as women and family – but also measures how long it takes for them to link women and family versus an alternative, such as women and career.

The test is based on the principle that:

- a fast response = an easy answer, consistent with an implicit association
- a slow response = a more difficult answer, inconsistent with an implicit association

“A decade of research using the IAT reveals pervasive implicit biases in every country tested, consistent with general social hierarchies – German over Turk in Germany, Japanese over Korean in Japan, White over Black in the US, men over women (on the stereotype of career vs family), light-skinned over dark-skinned, youth over elderly, straight over gay, and so on.”¹²

Try it:

*To illustrate how the test works, using the words for colours in combination with the colour of words, ask someone to say the **COLOUR** of the words in column #1 below (instead of reading them):*

¹² Jerry Kang, “Implicit Bias: A Primer for Courts,” prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America’s State Courts (2009), 3. Project Implicit, which administers the IAT in the US, was founded in 1998 by three scientists – Tony Greenwald (University of Washington), Mahzarin Banaji (Harvard University), and Brian Nosek (University of Virginia) – with the goal of educating the public about implicit social cognition and providing a “virtual laboratory” that would allow researchers to collect data on the Internet. Project Implicit also provides consulting, education, and training services on implicit bias, diversity and inclusion, leadership, applying science to practice, and innovation.

#1	#2	#3
WHITE	GREEN	WHITE
RED	PINK	PINK
BLUE	GREEN	RED
WHITE	RED	BLUE

Now, ask them to say the **COLOUR** of the words (again), this time in column #2:

#1	#2	#3
PINK	BLUE	YELLOW
YELLOW	RED	BLUE
WHITE	BLUE	WHITE
RED	WHITE	PINK

This example demonstrates how it is difficult for our conscious mind to override (or overcome) automatic (subconscious) associations. While we *can* say the colour of each word, even when the colour does not match what is written, it is more difficult and therefore takes longer.

🎥 **Video: American Bar Association, *The Neuroscience of Implicit Bias* (2010)**

YouTube: <https://youtu.be/kzz5Ae-Jqos> • **americanbar.org:** <http://bcove.me/x6fxgpgl>

Running Time: 21 minutes, 11 seconds

This video shows that no one is immune from implicit bias, including those of us who work in the legal field. However, we are the masters of our own minds; and can thus take active steps to address implicit bias.

How do you think you could do this?

- Be alert to situations in which you might hold an implicit bias toward a person or group.
- Speak out when you see cases in which implicit bias has affected judicial analysis and decision making.
- Consider whether your professional practices tend to contribute to, or help to overcome, implicit bias.

2.3. Gender bias

People usually hold implicit biases related to a variety of social groupings, of which gender is just one. Others include race, religion, ethnic origin, or social class. While it is important to recognise the many different forms of bias, gender bias can often be a useful entry point to exploring bias generally. This is because gender bias is somewhat constant; meaning, women and men have been treated differently (and unequally) in societies across the world and throughout recorded history. In addition, because families are usually made up of relatively even numbers of women and men, people often find it easy to consider their own experience as compared to family members of the opposite gender. In the context of family, people may also be able to see how notions of male and female gender roles vary from generation to generation.

The US National Judicial Education Program identifies three key aspects of gender bias:

- *Stereotyped thinking about the nature and roles of women and men*
Many implicit assumptions about the innate nature of women and men are based on stereotypes and lack any scientific foundation. These assumptions extend to how women and men should behave and the roles they should perform in society.
- *Devaluing what is perceived as “woman’s work”*
Paid work, which is more frequently performed by men, tends to be given a higher value than unpaid caretaking, which is predominantly performed by women and often taken for granted.
- *Lack of knowledge of the social and economic realities of women’s and men’s lives*
Professionals in decision-making positions often have no understanding of the lives led by the women and men most affected by their decisions. For example, a male judge may have no knowledge of what it is like to be a stay-at-home mother. However, even a judge who *is* a mother may not be able to appreciate the experiences of other mothers or understand why they make different choices than she would.¹³

Gender bias manifests in different ways in different areas of the law. The remaining units in this handbook will explore how gender bias affects the application of law in several of these different domains.

Problem-Based Case Scenario

1. Split class into small groups (5-7 per group)
2. Hand out the case scenario (below) and ask students to read and discuss it, and identify answers to the questions that follow (15-20 minutes)
3. Large group discussion – review the real ECtHR case (15 minutes)

¹³ Legal Momentum, “Overview,” <https://www.legalmomentum.org/overview> (accessed 30 January 2017). The authors would like to acknowledge Lynn Hecht Schafran for her contribution to this section through personal correspondence.



The Scenario

Father X is a Bosnian national who was born in 1975. In 2003, he signed a military service contract in which he undertook to “serve under the conditions provided for by law.” His primary duty was serving as a radio intelligence operator.

Following his divorce from the mother of his three children, he was left to raise the children alone. He applied for three years’ parental leave when his third child was still quite small; but his request was rejected because, according to the law, parental leave of that duration could only be granted to female military personnel. While he was initially allowed to take three months off from work, he was called back to duty only several weeks into this time off. Father X initiated a challenge of the military policy on parental leave within the court system, yet was unsuccessful. The court found that he was not entitled to the same parental leave as a mother.

Father X has now initiated a case within the constitutional court system of BiH, challenging the earlier ruling and arguing that the legal provisions outlining parental leave for the armed forces are unconstitutional and discriminatory.

Questions

1. Is this a form of discrimination? Why or why not?
2. How would you resolve this case?
3. Is this a form of discrimination based on international legal standards? Why or why not?

Case Review and Summary

In March 2012, the ECtHR published its Decision in the case of *Konstantin Markin v Russia*, which found that granting military servicewomen, and not servicemen, access to parental leave constituted a violation of Article 14 of the European Convention on Human Rights. The Court wrote that:

- “References to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on the grounds of sex. For example, States are prevented from imposing traditions that derive from a man’s primordial role and the woman’s secondary role in the family...”
- “The different treatment of servicemen and servicewomen as regards to entitlement to parental leave is not intended to correct the disadvantaged position of women in society or the **factual inequalities** between men and women...”
- The Court agreed with the applicant and identified that, “the difference in treatment cannot be justified by reference to traditions prevailing in a certain country.”
- The Court concluded that, “reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave and that the gender stereotype of women as primary child care provider and men as primary breadwinners cannot, by themselves be considered sufficient

justification for a difference in treatment any more than similar stereotypes based on race, origin, colour or sexual orientation.”¹⁴

2.4. Conclusion

The way in which law is implemented can reproduce and reinforce gender stereotypes, thereby limiting access and opportunities to men and women; or it can **promote gender equality by consciously trying to overcome gender stereotypes and associations.**

While legal practitioners, whether members of the judiciary or not, inevitably come to their profession with unique experiences, perspectives, opinions, and implicitly held assumptions, this is not necessarily problematic. What is problematic, is being unaware. This was explored in the Canadian Supreme Court by Justices L’Heureux-Dubé and McLachlin when they noted:

...the test for reasonable apprehension of bias established in jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence...

*True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.*¹⁵

And indeed, as these justices argued, we can:

- be alert, and override automatic biases;
- take steps to change the culture and practices that contribute to bias; and
- remain dedicated to the promise of justice.

Education and awareness are key to mitigating the effects of gender-based stereotypes and implicit gender bias (as well as other forms of bias) within the judiciary. This includes:

- Incorporating the topics of implicit and explicit bias into legal education and professional training, including discussion of how legal reasoning can be influenced by bias.
- Challenging the notion among legal practitioners’ that they are objective, as those who are most convinced in their own objectivity may be more prone to gender-biased thinking and behaviour.¹⁶

14 European Court of Human Rights, Decision, *Konstantin Markin v. Russia*, No. 30078/06, 22 March 2012. Available at: <http://hudoc.echr.coe.int/eng?i=001-109868#%7B%22itemid%22:%5B%22001-109868%22%5D%7D> (accessed 7 February 2017).

15 Reg Graycar, “Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment,” *International Journal of the Legal Profession* 15, nos. 1 and 2 (2008), 76.

16 Kang, et al., “Implicit Bias in the Courtroom,” 1124-1186.



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Thematic Unit 3.1:

Gender Bias and Domestic Violence

Learning outcomes – by the end of this unit, you will:

1. Understand how gender bias has influenced the development of legal frameworks in domestic violence cases.
2. Understand how gender bias impacts legal decision-making in cases of domestic violence.

Background reading:

Majda Halilović, *Survivor's Speak: Reflections on Criminal Justice System Responses to Domestic Violence in BiH* (Sarajevo: AI & DCAF, 2015). **web:** <http://www.dcaf.ch/Publications/Survivors-Speak-Reflections-on-Criminal-Justice-System-Responses-to-Domestic-Violence-in-Bosnia-and-Herzegovina>

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Summary: Thematic Unit 3.1 is focused on gender bias in domestic violence cases. The introductory part of this unit emphasizes the importance of a careful assessment of the facts, circumstances, and context in cases of domestic violence. Such an approach is necessary to minimise the influence of gender-based stereotypes and prejudices that may interfere with the impartiality of the investigation, trial, and sentencing. Though laws that criminalize domestic violence were adopted in the early 2000s and define it as an independent criminal offence in Bosnia, this type of offence is still treated differently than other offences that violate basic human rights and freedoms. This is mainly due to the prevalence of gender bias in the courts. The first section of this unit reviews the development of international and domestic legal frameworks, as well as the ways in which gender bias interferes with the fair and equal administration of justice in cases of domestic violence. The unit

also examines how to identify and consider mitigating and aggravating circumstances, based on an analysis of judgments in cases of domestic violence heard in BiH courts between 2004 and 2010.

3.1.1. Introduction

While BiH has the laws that criminalize domestic violence (DV) defining it as a separate criminal offence since 2003, it is still not investigated and prosecuted to the same extent as other criminal offences. This difference constitutes a violation of the basic human rights and freedoms of victims of domestic violence.¹⁷

Most, but not all, perpetrators of domestic violence are men; and women are disproportionately targeted for this kind of abuse (although women can target men in some cases). Because domestic violence is a reflection of gender inequality in the larger society and because perpetrators select their victims on the basis of their gender, DV is considered to be a form of gender-based violence. The Council of Europe (CoE) describes it as a form of “structural violence – violence that is used to sustain male power and control.”¹⁸ According to a 2005 World Health Organization (WHO) report, violence against women is “a global world problem with epidemic proportions.” Some 30% of all women are subjected to violence by an intimate partner or other family member at some point in their lives.¹⁹ As such, domestic violence constitutes a widespread issue, the consequences of which can be further aggravated when police, prosecutors, and judges fail to account for the devastating and harmful effects of gender bias when investigating and sentencing cases of DV.

The ability to carefully and critically evaluate the facts, circumstances, and context in cases of domestic violence – without the influence of gender-based stereotypes and prejudices – is a crucial skill for lawyers and judges, the latter of whom are most responsible for the equitable and impartial delivery of justice. Domestic violence is a complex socio-criminal issue, and legal professional must be aware that gender-based stereotypes can affect the fairness and impartiality of DV cases, from investigation to trial to the imposition of criminal sanctions, as well as in questions of custody, visitation, and alimony.

For much of history, in many countries and cultures, including in BiH, domestic violence was not viewed as violence at all. Instead, men were seen to have a right (and sometimes a duty) to discipline and dominate members of their family.²⁰ However, since the end of the 20th century, perspectives on domestic violence have evolved. It is no longer considered a matter that is isolated to the family sphere and should be tolerated, but a crime that is socially unacceptable. This evolution is reflected at the legal level as well, with the criminalization of domestic violence in many countries and the establishment of an international legal framework on DV.

17 Professor Dr. Ivanka Marković, Faculty of Law, University of Banja Luka and President of the Council for the Elimination of Domestic Violence in Republika Srpska.

18 Council of Europe, “About the [Istanbul] Convention,” <http://www.coe.int/en/web/istanbul-convention/about-the-convention> (accessed 8 February 2017). Also see the full text at: Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence*, 12 April 2011. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046031c> (accessed 8 February 2017).

19 World Health Organization, *WHO Multi-Country Study on Women’s Health and Domestic Violence against Women: Summary Report – Initial Results on Prevalence, Health Outcomes and Women’s Responses* (Geneva: WHO, 2005).

20 Kelly, Kristin A., *Domestic Violence and the Politics of Privacy* (Ithaca, NY: Cornell University Press, 2003).

3.1.2. Domestic violence and the legal framework

Historically, the prevailing socio-legal model has placed the family in the private sphere – and thus, outside the public sphere of politics, law, and government – and has prevented legal recognition of the crime of domestic violence, considered a family matter not meant to be regulated by the law. The impact of this *de facto* division between public and private spheres has been exacerbated by “the establishment of the individual household as the basic social unit of state society, [which] increased the power of the husband as the family’s public representative and deprived women of a... place of refuge in their natal kin group [family].... Especially as the household began to be seen as a microcosm of the social order, male authority within the household was reinforced ideologically and even legally.”²¹ Despite recent legal evolutions, many individuals and institutions remain influenced by the sociology of this long-prevailing model and continue to engage in practices that restrict victims’ access to safety, services, and justice.

Legal frameworks on domestic violence have been developed from this context, in which men are presumed to have authority over the family, and a family without a husband and/or father is afforded little or no importance in the politico-legal sphere. This points to wider norms, wherein dominant political, social, and judicial actors have not seen women as autonomous and independent. Instead, women have been equated with children, and considered to be the responsibility of men, at best, or the property of men, at worst.

The development of the international legal framework

International regulations on domestic violence, and strategies for confronting it, were initially established through a variety of charters, conventions, and resolutions of the United Nations – which are all rooted in a respect for the basic and fundamental human rights protected by international law. It is an international standard that domestic violence is indeed a violation of basic human rights, and a result and reflection of gender inequality. For example, the Preamble of the *Declaration on the Elimination of Violence against Women* from 1993 states that:

- “violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms...;” and
- “violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and...violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men...”²²

21 Stephanie Coontz and Peta Henderson, eds., *Women’s Work, Men’s Property: The Origins of Gender and Class* (London: Verso, 1986).

22 United Nations General Assembly, *Declaration on the Elimination of Violence Against Women*, No. A/RES/48/104, 20 December 1993. Available at: <http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed 8 February 2017).

The most crucial aspect of the international legal framework on domestic violence is that it abolishes the differentiation and division between public and private spheres. It considers an act that used to be viewed as a private matter as a public issue of global importance. International instruments and policies have also created international standards for the protection and assistance to victims, ensuring their safety and access to justice. However, these international principles and standards tend to remain in the domain of normative regulation, because of problems that arise in their practical application. Among them, notably, are the prevailing traditional gender stereotypes that assign men the role of a “leader” who can decide which issues pertain to the public or private sphere.

One of the most important international documents related to domestic violence is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which was adopted on 11 May 2011 in Istanbul and entered into force in 2014. The Istanbul Convention is the first legally binding instrument of the Council of Europe related to the prevention of this kind of violence, and it fulfils a number of non-binding recommendations made by the CoE on the prohibition of gender-based discrimination and on protection from violence, aimed at setting common goals and minimum standards for member States. The States parties to the Istanbul Convention are required to adapt their legal and institutional framework for its effective implementation.

The European Court of Human Rights (ECtHR)²³

In 1998, the ECtHR formally recognized potential state responsibility for private acts in *Osman v. United Kingdom*.²⁴ In the case, the Court developed a set of criteria to establish whether a state is in violation of its positive obligation to protect life. The court first assessed whether the state knew, or ought to have known, about a “real and immediate risk” to a person’s life, and then examined whether the state had taken reasonable measures within their powers to avoid the risk.²⁵

Collectively, these criteria have come to be known as ‘due diligence.’ They represent the first step in establishing the legal obligation of the state to take responsibility for what was once considered a private matter.

In 2008, in *M.C. v. Bulgaria*,²⁶ a rape case, the Court reinforced the importance of due diligence and state responsibility standards in cases of gender-based violence. The ECtHR held that “the authorities’ failure to impose sanctions or otherwise enforce [the perpetrator]’s obligation to refrain from unlawful acts was critical in this case and it amounted to a refusal to provide direct assistance that the applicant should have [had].”²⁷ In addition, while the Court allowed that States enjoy a “margin of appreciation” in providing protection to their citizens, including against rape and sexual assault, it ruled that the respondent State (Bulgaria) had not observed its positive obligation


23 The European Court of Human Rights is the enforcement mechanism for the European Convention on Human Rights. The Court is based in Strasbourg, France, and hears complaints from individuals alleging that their rights under the Convention have been violated. The Court can issue binding legal judgments that member States are obliged to enforce. BiH has been a member State to the Convention since 2002.

24 For a more detailed analysis of the obligations of States to solve problems of violence in the family under international law, see: Lee Hasselbacher, “State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and Legal Minimums of Protection,” *Northwestern Journal of International Human Rights* 8, no. 2 (Spring 2010): 190-217, 196.

25 *Ibid.*, 200.

26 *Ibid.*, 208.

27 *Ibid.*, 207.



under the European Convention on Human Rights to provide effective legal protection to the victim, and had failed to investigate the case in a thorough manner.²⁸

One year later, in the case of *Opuz v. Turkey*,²⁹ the Court again raised the need to consider the standard of due diligence in domestic violence cases, observing that “a crucial question...is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against [the perpetrator] despite the withdrawal of complaints by the victims.”³⁰

Before authorizing the prosecutor to continue with criminal proceedings, the ECtHR relies on and examines assorted criteria commonly considered in similar cases in other European countries, including:

- the gravity of the offence;
- whether the victim has suffered physical or mental injuries;
- whether the defendant used a weapon;
- whether the perpetrator threatened the victim;
- whether the defendant planned the attack;
- the consequences (including psychological) for children living in the household;
- the perpetrator’s likelihood of repeating the crime;
- the presence of a continuous threat to the health and safety of the victim or any person who has been or may be included;
- the current relationship between the victim and the accused;
- the consequences on the relationship if criminal proceedings continue against the will of the victim;
- the history of the relationship and previous violence; and
- previous criminal acts of the accused, particularly crimes of violence.

These criteria represent risk factors identified across fatal domestic violence cases.

An analysis of a large number of cases that have been brought before the ECtHR reveal that the Court has found that States must provide the most appropriate response in cases of domestic violence by applying the standard of due diligence, implying a thorough investigation and assessment of each case.

An evolution in legal decision-making regarding the division between the private and public spheres and the authority of men over their families is noticeable in the practice of the ECtHR. Between 1998 and 2009, the Court gradually changed its position on necessary due diligence and reinforced the obligation of States to work actively to prevent domestic violence, prosecute domestic violence, and protect victims of domestic violence. This means that all relevant facts and cir-

28 Final Judgement, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003. Available at: https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/M.C.v.BULGARIA_en.asp (accessed 8 February 2017).

29 *Ibid.*, para. 209.

30 Final Judgement, *Opuz v. Turkey*, No. 33401/02, 9 June 2009. Available at: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/ech/eng/ech-2010-1-002?f=templates\\$fn=document-frame.htm\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/ech/eng/ech-2010-1-002?f=templates$fn=document-frame.htm$3.0) (accessed 8 February 2017).


cumstances surrounding every case should be considered in the investigation and prosecution of domestic violence cases.

The domestic legal framework

In accordance with the multiple jurisdictions of criminal legislation in Bosnia and Herzegovina, each entity and the Brčko District regulate domestic violence in their legal codes. It could be argued that there are now two forms of protection from domestic violence in BiH, criminal law and misdemeanour law (an administrative or civil violation in common law systems). Criminal law provides penalties for perpetrators of domestic violence; while a misdemeanour law, the Law on Protection from Domestic Violence, sets out certain protective measures aimed at providing swift and efficient protection to victims of domestic violence. Despite some differences in the regulations in each entity, the legislation in each sends a strong message that, in Bosnia and Herzegovina, domestic violence is not a private matter that remains behind closed doors, but a serious violation of basic human rights and freedoms that will no longer be tolerated in Bosnian society.

The Criminal Code of the Republika Srpska, which entered into force on 1st October 2000, was the first legislation in the former Yugoslavia to introduce violence in the family or household as a criminal offence. Since then, regulations on this criminal offence have been amended several times; currently including the following:

- (1) “Whoever by violence, insolent or arrogant behaviour violates peace, life and health or mental health of a member of his family or family household, and by that brings about the physical or psychological integrity of a passive subject, shall be punished by a fine or imprisonment for a term between three months and three years.
- (2) If during the commission of the criminal offence referred to in Paragraph 1 of this Article, weapons, dangerous implements or other instruments suitable to inflict grave bodily injuries or harm person’s health have been used, the perpetrator shall be punished by imprisonment for a term between six months and five years.
- (3) If the commission of the criminal offence referred to in Paragraphs 1 and 2 of this Article has resulted in grievous bodily injury of the family member or impaired his health or if the criminal offence referred to in Paragraphs 1 and 2 of this Article has been committed against a minor or in a minor’s presence, the perpetrator shall be punished by imprisonment for a term between two and ten years.
- (4) If the commission of the criminal offence referred to in preceding Paragraphs of this Article has resulted in the death of the family member, the perpetrator shall be punished by imprisonment for a term between three and fifteen years.
- (5) Whoever kills a member of family or member of household whom he has abused previously, shall be punished by imprisonment for a term not less than ten years.
- (6) Whoever violates the protective measures against the domestic violence ordered by the court on the basis of the law shall be punished by imprisonment for a term between three months and three years.
- (7) For the purpose of this Chapter, family members or members of household shall be also understood to mean spouses or ex-spouses, their children and children of each of them, unwed partners or former unwed partners, their children and children of each of them, in-



laws up to the second degree of kinship regardless of the fact that the marriage union has ended, parents of current and former wed or unwed partners, relatives from full adoption in direct line without limitation, and in indirect line up to the fourth degree of kinship, as well as the relatives from partial adoption, persons linked by relation of guardianship, persons who live or lived in the same family household regardless of kinship, and persons who together have a child or have conceived a child, even though they had never lived in the same household.³¹

The Criminal Codes of the Federation of Bosnia and Herzegovina and the Brčko District regulate the crime of domestic violence in the same way, as follows:

- (1) “Whoever by violence, insolent or arrogant behaviour violates peace, physical integrity or mental health of a member of his family, shall be punished by a fine or imprisonment for a term not exceeding one year.
- (2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against a member of his household, shall be punished by a fine or imprisonment for a term not exceeding three years.
- (3) If in the course of the perpetration of criminal offence referred to in paragraphs 1 and 2 of this Article, a weapon, dangerous object or other instrument suitable to inflict grave bodily injury or impair health has been used, the perpetrator shall be punished by imprisonment for a term between three months and three years.
- (4) If, by the criminal offence referred to in paragraph 1 through 3 of this Article, a serious bodily injury was inflicted on a family member or his health is severely impaired; or if the criminal offence referred in paragraph 1 through 3 of this Article is perpetrated against a child or juvenile, the perpetrator shall be punished by imprisonment for a term between one and five years.
- (5) If, by the criminal offence referred to in paragraphs 1 through 4 of this Article, a death of a family member is caused, the perpetrator shall be punished by imprisonment for a term between two and fifteen years.
- (6) Whoever deprives of a life a family member whom he has been previously abusing, shall be punished by imprisonment for a term of no less than ten years or by long-term imprisonment.”³²

In Bosnian criminal law (in FBiH, RS, and Brčko), the purposes of punishment include:

- Having a preventive effect on perpetrators committing criminal acts (i.e., deterrence);
- Preventing the recidivism of perpetrators and encouraging rehabilitation; and
- Publicising criminal convictions in the community to acknowledge the value of the law.

Additionally, in 2010, the laws of the Federation and Brčko District were amended so that “protection and reparation to the victim of the crime” is another goal of punishment.

31 Criminal Code of the Republika Srpska, “Domestic Violence,” Article 208, Official Gazette of the Republika Srpska 49/03, 108/04, 37/06, 70/06, 73/10, 67/13.

32 Criminal Code of the Federation of Bosnia and Herzegovina, “Domestic Violence,” Article 222, Official Gazette of Federation of BiH 36/03, 37/3, 21/04, 18/05, 42/10, 42/11, 59/14, 76/14; and Criminal Code of Brčko District of Bosnia and Herzegovina, “Domestic Violence,” Article 218, Official Gazette of Brčko District of BiH 9/13.

In 2005, Republika Srpska and the Federation also adopted laws on protection against domestic violence, which were amended in 2013 and 2015. These laws provide for safeguards and sanctions, as well as a comprehensive framework for preventing and combating violence in the family. Unfortunately, some of the protective measures these laws prescribe are very rarely or never imposed.

Courts in BiH may issue the following protective measures against an abusive person in a family:

- 1) Removal from the dwelling;
- 2) A restraining order;
- 3) A prohibition of harassment and spying on the victim;
- 4) Mandatory psycho-social treatment;
- 5) Mandatory rehabilitation for an addiction; and
- 6) Temporary arrest and detention (FBiH only).³³

For the most part, domestic violence laws in BiH reflect international standards. Some minor changes in the criminal codes in each entity, including to laws on protection against domestic violence, could be made to strengthen the legal framework; but police, prosecutors, and judges can generally access the necessary legal mechanisms to actively prevent and prosecute DV cases and ensure protection to victims. In practice, however, adequate legislation does not necessarily manifest in adequate implementation and enforcement. And in cases of domestic violence, the implementation and enforcement of laws can be hindered by the detrimental effects of gender-based stereotypes and prejudices.

3.1.3. Gender bias: obstructing the fair and equal administration of justice in cases of domestic violence

Research shows that gender bias significantly influences the way the general public, as well as legal professionals, perceive and treat victims, perpetrators, and the issue of domestic violence. Gender-based stereotypes that men are naturally aggressive, that victims should behave in a certain way, and that only specific circumstances constitute a serious or “real” case of domestic violence, affect how cases are investigated, prosecuted, and convicted. Studies demonstrate that judicial professionals who have strong gender biases find it very difficult to spot domestic violence and recognize the responsibility of the perpetrator.³⁴ And, lawyers in the criminal justice system tend to present arguments and use tactics that they believe are most effective in the socio-cultural context in which they work.³⁵ As a result, gender bias and gender-based stereotypes can significantly affect the way in which judges identify and apply mitigating and aggravating circumstances in sentencing.

33 RS Law on Protection against Domestic Violence, Article 23, Official Gazette of the RS 102/12, 108/13, 82/15; FBiH Law on Protection against Domestic Violence, Article 9, Official Gazette of the Federation 20/13.

34 US Department of Justice, “Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence,” 15 December 2015. Available as a pdf at: <https://www.justice.gov/opa/file/799366/download> (accessed 9 February 2017). Also see: US DoJ Office of Public Affairs, “Justice Department Issues Guidance on Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence,” press release, 15 December 2015, <https://www.justice.gov/opa/pr/justice-department-issues-guidance-identifying-and-preventing-gender-bias-law-enforcement> (accessed 9 February 2017).

35 Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014).



Mitigating and aggravating circumstances

Criminal legislation in BiH requires that judges determine sentences based on provisions set out in law for a given offence as well as an assessment of how to best achieve the purpose of the punishment. Further, they must consider whether there are any mitigating and aggravating circumstances, which include “the motives for committing the offence, the degree of danger or injury to a person, property or thing, the circumstances in which the offence was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal offence, as well as other circumstances related to the offender.”³⁶

The 2011 OSCE report *Ensuring Accountability for Domestic Violence* found that courts in BiH identified mitigating circumstances in approximately 74% of the cases it studied in detail, while aggravating circumstances were cited in just 41% of the same cases.³⁷ Likewise, Bosnian courts very rarely pursue qualified forms of domestic violence (criminal charges), despite the clarity of the criminal code in this area. For example, beyond the basic criminal offence of domestic violence, the following may be considered as qualifying elements:

- the victim and the perpetrator are members of the same household;
- a weapon or dangerous instrument is used, or another means suitable for inflicting heavy bodily injuries or for harming a person's health;
- serious bodily injury or serious impairment of health is caused;
- the victim is a person up to 18 years old (a minor) or the offence was committed in the presence of such a person;
- the offence caused the death of a member of the family or household;
- a family member, who had been previously abused, was killed.


The most frequently cited aggravating circumstance in cases observed by the OSCE was a record of previous convictions. Yet, in any number of cases involving the use of weapons, the presence of minors, and grievous bodily harm, these factors were not identified as aggravating circumstances.³⁸ The OSCE reported that “the lack of inclusion of charges related to sexual violence in domestic violence cases when facts point to the existence of such violence is an area of concern requiring further enquiry.”³⁹

36 Criminal Codes of the Federation (Article 49), the RS (Article 37), and Brčko District (Article 49).

37 OSCE Mission to Bosnia and Herzegovina, *Ensuring Accountability for Domestic Violence: An Analysis of Sentencing in Domestic Violence Criminal Proceedings in Bosnia and Herzegovina, with Recommendations* (Sarajevo: OSCE, 2011), 21-23.

38 *Ibid.*, 29-30.

39 *Ibid.* This issue has been explored in a free web course created by the US-based National Judicial Education Program, “Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence Cases.” Available at: www.njep-ip-sacourse.org. Also see: Lynn Hecht Schafran, “Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence,” *Judicature*, January-February 2010.



On the other hand, the OSCE found that mitigating circumstances were frequently applied by courts in BiH, and that the courts predominantly recognized the following factors as mitigating circumstances:

- i. Accused's lack of prior convictions;
- ii. Accused's admission of guilt;
- iii. Accused's expression of remorse for the crime;
- iv. Accused's good behaviour before the court;
- v. Accused's status as a father or "family man"; and
- vi. Accused was incited by the victim to commit domestic violence.⁴⁰

In 2013, a panel composed of nine judges from across Bosnia and Herzegovina developed a *Judicial Benchbook on Considerations for Domestic Violence Case Evaluation*. The panel considered each of the mitigating circumstances mentioned in the OSCE report (and several more) and provided guidelines to judges on how these factors ought to be considered in future cases, in line with the laws of BiH. The following sections include excerpts from the *Benchbook*.

Accused's lack of prior convictions (i)

The *Benchbook* cautions judicial professionals to avoid automatically assuming that an incident of violence is isolated just because the accused perpetrator has no prior convictions. If an incident of violence was truly an isolated event, that fact would indeed be mitigating, ***but barriers that prevent victims from reporting DV mean that by the time a case has been brought to court, the abuse has usually been ongoing*** for a long time. In addition, even a single act of physical violence may be indicative of a long history of psychological violence.⁴¹

⁴⁰ OSCE Mission to BiH, 21-22.

⁴¹ Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo, DCAF, 2014), 17.

Duration of domestic violence over a long period of time (factual recidivism)

Recommendation:

Duration of domestic violence over a long period of time, if not included within the criminal offence, is considered an aggravating factor.

Explanation:

In cases involving domestic violence over a long period of time, it is justified – in accordance with the established facts of the case – to establish ongoing violence and abuse.

Analysis of court judgments in domestic violence cases in BiH illustrates the common defence counsel practice of claiming an incident of domestic violence to be an isolated instance that does not constitute *ongoing violence and abuse* – regardless of whether a criminal proceeding is conducted for a single incident or an extended offence. In this regard, the existence of ongoing violence and abuse can be proved by, among other things, establishing the existence of consequence(s) suffered by the victim as a result of the ongoing violence and abuse. This provides the possibility of identifying several combinations of jeopardizing “the protected good,” as stipulated by the criminal codes in relation to the criminal offence of domestic violence. In cases when the defence claims there is no ongoing violence and abuse, the court is encouraged to not lose sight of the possible existence of psychological consequences for the victim during the entire duration of domestic violence. Additionally, the court may benefit from paying special attention to the need and justification for the presentation of evidence aimed at establishing the victim’s possible psychological injuries, among others.

Source: Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo, DCAF, 2014), 17.

Accused’s admission of guilt (ii)

The *Benchbook* highlighted that ***defence counsel will sometimes enter a guilty plea to a basic form of domestic violence to avoid prosecution for a qualified offence***. With this in mind, judicial professionals are advised to reject guilty pleas to offences that carry sentences lower than qualified forms of domestic violence in the following situations characterised by aggravating circumstances:

- the defendant is a recidivist in domestic violence
- there is evidence that domestic violence was taking place over a long period of time
- the defendant used strangulation during the offence
- there is extreme dominance by the defendant over the victim
- the victim was placed in a safe house
- the victim is particularly vulnerable or children witnessed the violence.⁴²

42 Ibid., 35-36.

Accused's expression of remorse for the crime (iii)

While some expressions of remorse may be genuine, ***long-term perpetrators of domestic violence are often emotionally manipulative***. Their behaviour in public settings should not be taken as an indicator of how they behave toward their victim(s) in the home.

Remorse

Recommendation:

Defendant remorse is not automatically considered a mitigating factor.

Explanation:

Remorse represents the defendant's attitude towards the perpetrated offence. Depending on the facts in the criminal offence of domestic violence, the court may value it as an aggravating or a mitigating factor.

Courts are encouraged to take into consideration the history of violence (i.e. previous domestic violence/abuse that occurred before the subject case and court proceeding) when determining whether remorse constitutes a mitigating or aggravating factor. This includes whether the domestic violence is ongoing, the perpetrator's attitude towards the act of violence after the incident and his psychological attitude towards the consequences of the offence.

For example, if violence and abuse were ongoing then it is recommended that the expressed remorse should not be considered a mitigating factor. Rather, in these cases there is a possibility for the court to view the act of remorse as a dishonest gesture by the defendant and, accordingly, to consider *remorse* an aggravating factor.

Conversely, *remorse* may potentially be relevant as a mitigating factor when the defendant appears before the court for domestic violence for the first time and there is no other indication of ongoing or continuous abuse (e.g. social protection services, witnesses, etc.).

In any case, when determining the sanction the court is encouraged to place emphasis on the act of perpetration and all the circumstances of the case, rather than the fact that the defendant expressed remorse. Courts are encouraged to exercise increased caution and critical analysis when valuing the perpetrator's *remorse*, given the possibility that the defendant is intentionally deceiving the court and the difficulty of establishing whether the expressed remorse for the domestic violence is honest.

Source: Galić and Huhtanen, 28.



Accused's good behaviour before the court (iv)

Bad or uncooperative behaviour in court may result in a defendant being held in contempt of court and subject to additional sanctions. But this does *not* mean, by the same logic, that good behaviour should be considered a mitigating factor.

Defendant's "good behaviour" before the court

Recommendation:

A defendant's good behaviour before the court is expected and therefore is not considered a mitigating factor.

Explanation:

To avoid potential appeals because the court did not sufficiently value good behaviour or correct attitude before the court, it is advisable for the court to state explicitly in the judgment that "good behaviour" is expected from all defendants and other persons appearing before it, and therefore the court did not value this as a mitigating factor when deciding on the type and severity of the criminal sanction....⁴³

Conversely, if the defendant is in contempt of court and/or does not respect the other parties in a court proceeding, it is advisable that the court records this fact and mentions it in the explanation of the court decision (regardless of whether the defendant was sanctioned for contempt of court or not), although the court is not encouraged to value this behaviour explicitly as a separate aggravating factor.

Source: Galić and Huhtanen, 26-7.

Accused's status as a father or "family man" (v)

Courts may consider a defendant's family status as a mitigating factor based on a genuine concern to preserve the family and consider the best interests of any children who are present. This is misguided, though, because it downplays the severity of domestic violence on the family, the necessity of court intervention in stopping violence, and the fact that minors who witness domestic violence or its effects should be seen as secondary victims.

43 NB: In BiH, appeals have been recorded against sentencing by first-instance courts in DV cases on the argument that the good behaviour or correct attitude of the defendant in court was not sufficiently considered as a mitigating factor. Examples of such behaviour include treating the court and the damaged party with respect, showing care and attentiveness toward the victim(s), etc.

Defendant's family status

Recommendation:

A defendant's family status is not considered a mitigating factor, with one exception.

As an exception, the defendant's family status may be considered a mitigating factor in cases when the defendant is a parent of a juvenile child or children and the only person responsible for supporting the family, provided that the following conditions are met:

- the intensity of domestic violence is weaker, or it was an isolated incident of violence
- the violence is exclusively focused on the partner, and children did not witness the violence.

Explanation:

The court is encouraged not to lose sight of the fact that the existence of domestic violence negates the possibility of harmony within the family and directly undermines the foundation of a "healthy and functional family" as the basic cell of society. It is encouraged to avoid presumptions that marital status or parenting deserves higher social respect or is indicative of the defendant's moral character.

Thus, it would not be justified to value the fact that a defendant is a "family man" or "parent" as a mitigating factor automatically in a domestic violence case. The court is encouraged to value the *defendant's family status* as an independent mitigating factor with extreme caution. If family status is identified as a mitigating factor, the court is encouraged to establish a link with the other facts and circumstances of the case (e.g. the children's basic needs are not jeopardized in the family, the defendant is not a recidivist, etc.) that can, in a complementary way, justify qualification of family status as a mitigating factor.

Source: Galić and Huhtanen, 25-6.

Following the publication of the *Benchbook*, three working groups comprising a total of 37 judges from across BiH explored some of these factors in greater detail. Their findings are documented in a *Practice Guide*, which serves as an addendum to the *Benchbook*. From the *Practice Guide*, we can infer that cases in which a defendant's family status should be considered as a mitigating factor will be rare.⁴⁴

The *Practice Guide* cites research which explains that "domestic violence is more than an occasional incident of angry name-calling, or an isolated, one-time slap or shove between a husband and wife who are frustrated with one another."⁴⁵ A single incident of violence can only be considered to be isolated if there is no evidence that it fell within "a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion."⁴⁶

⁴⁴ Nenad Galić, ed., *Practice Guide: Domestic Violence* (Sarajevo: DCAF, 2016), 9.

⁴⁵ Michigan Judicial Institute, *Domestic Violence: A Guide to Civil and Criminal Proceedings*, 3rd ed. (Lansing, MI; Michigan Judicial Institute, 2013), 1-3.

⁴⁶ Michael Flood, "He hits, she hits: Assessing debates regarding men's and women's experience of domestic violence," Australian Domestic and Family Violence Clearinghouse seminar, Sydney, 6 December 2012, 2.

In addition, the *Practice Guide* highlights new research from the field of neuroscience demonstrating that children are victimised by the presence of domestic violence in their home, or committed against their caregiver, even if they do not see it occur. This implies that the only way children can avoid being victimised by the domestic violence committed against one of their parents is if they do not live in the same home and the parent is not their caregiver.⁴⁷

New Knowledge from Neuroscience

In infancy and young childhood, the human brain is extremely plastic, growing new neurons and making synaptic connections in response to sensory, perceptual, and affective experiences....

Developing brains are acutely sensitive to stress and to the internal state of the caregiver upon whom the child depends.... In a safe environment where the child has a nurturing relationship with a caregiver, moderate stress produces resilience. But in an unpredictable, tension filled, violent environment where the stress is inescapable, it becomes toxic, unleashing a storm of neurochemicals that result in “embedded stress.” Children learn to become fearful through this “fear conditioning,” which is strongly linked to anxiety disorders across the lifespan.

...Children persistently exposed to domestic violence live in an ongoing “alarm” state, with powerful stress hormones, particularly cortisol, repeatedly priming them to flee or fight. This alarm state has many negative consequences for brain development....

...Neuroscience now shows us that for children, chronic exposure to domestic violence also results in physical changes to the brain, impairment of brain function, and consequences for physical and mental health over the lifespan. [In other words,] toxic stress changes the architecture of the child’s brain.

Source: Lynn Hecht-Schafran, “Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience,” *The Judges Journal*, 53, no. 3 (Summer 2014), 33-37.

Accused was incited by the victim to commit domestic violence (vi)

This mitigating circumstance is particularly concerning. It is closely related to gender stereotypes and to the personal biases of judges. A study conducted in 2013-14 with representatives of the judiciary in BiH found that over 35% of respondents considered a victim’s behaviour (“difficult”, “argumentative”, “aggressive”, etc.) an important factor in determining the perpetrator’s sentence. Respondents were not asked to specify whether this factor positively or negatively affects their decision-making, but other research suggests that legal professionals sometimes draw on deep-rooted stereotypes in questioning whether a plaintiff has the characteristics of a “true victim.”⁴⁸ And these trends are not limited to BiH; in the framework of their mandate, the Special Joint Committee on Gender Bias from the US state of Maryland drew the following conclusions:

⁴⁷ Galić, *Practice Guide*, 18-19.

⁴⁸ Halilović and Huhtanen, 72.

... Too often judges and court employees deny the victim's experiences, accuse the victim of lying about her injuries, treat the cases as trivial and irrelevant, blame the victim for getting beaten, and badger the victim for not leaving the batterer [violent partner].⁴⁹

Trends of this nature may reveal underlying gender-based stereotypes and negative attitudes toward domestic violence victims. To view the “argumentative” or “difficult” behaviour of a victim in court as a mitigating circumstance is to somehow imply that the abuse they faced was justified, and that being demanding or provocative voids their victimisation.⁵⁰

The role of gender stereotypes in judicial decision-making

The judges who worked to compile the *Benchbook* found that gender-based stereotypes significantly influence how courts in BiH identify mitigating circumstances. In fact, there are no international or domestic legal requirements to view remorse, family status, or good behaviour as mitigating (or exculpatory) circumstances; their regular application in the context of domestic violence can thus be linked to the gender-based stereotypes pervasive in Bosnian society, which have contributed to the division between public and private spheres and to the maintenance of this division. In sentencing, the courts do have to consider the behaviour of a perpetrator after committing a crime, but perpetrators of domestic violence often have completely different personas in the public and private spheres. Moreover, showing remorse toward a victim after an act of violence is a common method of coercive control used by abusers, and not a sign that they intend to change their behaviour.⁵¹

Another gender-based stereotype with a strong influence on the prosecution and sentencing of domestic violence cases in BiH is the notion that men perpetrate gender-based violence because it is in their nature. In the 2013-14 research mentioned above, almost half of survey respondents agreed that “men are naturally more prone to violence.” That study included interviews, where researchers said members of the judiciary continued to express “a similar perspective” in person, “that the greater occurrence of male perpetrated gender-based violence is linked to men’s physical characteristics and nature. And this perspective seems to be held more by men than women...”⁵²

International research does not support the belief that gender-based violence is due to the ‘natural’ propensity of men to be violent. Indeed, studies indicate that biological factors such as physical strength are unimportant; instead, domestic and sexual violence takes place in contexts characterised by male dominance and entitlement, and a lack of gender equality.⁵³ Not only did judges and lawyers in BiH who participated in the 2013-14 research rarely raise these issues, few saw themselves as responsible for confronting dismissive attitudes toward gender-based violence in their communities.

49 Karen Czapanskiy and Tricia O’Neill, Maryland Special Joint Committee on Gender Bias in the Courts, *Report of the Special Joint Committee on Gender Bias in the Courts* (1989), v.

50 Halilović and Huhtanen, 72-73.

51 United Kingdom House of Commons Home Affairs Committee, *Draft Sentencing Guidelines – Overarching Principles: Domestic Violence and Breach of a Protective Order*, Third Report of Session 2005-6 (London: The Stationary Office Ltd, 2006), 17-18.

52 Halilović and Huhtanen, 77-79.

53 UN General Assembly, *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General*, No. A/61/122/Add. 1, 6 July 2006, 28-30. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No6/419/74/PDF/No641974.pdf> (accessed 9 February 2017). Also, see: Marianne Hester, Liz Kelly, and Jill Radford, eds. *Women, Violence and Male Power* (Buckingham: Open University Press, 1996).

If they genuinely believe that men’s violent behaviour is ‘natural’ and thus unpreventable, then it may actually be logical that they also believe any intervention by the criminal justice system is futile in terms of deterring future gender-based violence.⁵⁴

3.1.4. Gender bias and decision-making in cases of domestic violence

In 2011, the OSCE Mission in BiH analysed sanctioning practices in cases of domestic violence adjudicated in the country from 2004 to 2010. Their reporting showed that:

- In a majority of cases, a suspended prison sentence was issued (77.2% of cases, or 223);
- Custodial prison sentences were issued in very few cases (8.3% of cases, or 24); and
- Offenders were required to pay fines in about 1 in 8 cases (13.5% of cases, or 39).

In the Federation of BiH, data from 2010-2013 reflects these trends, but data from 2014 shows a decrease in suspended sentences and an increase in custodial imprisonment.⁵⁵


Year	Total guilty verdicts	Imprisonment	Monetary fine	Suspended sentence	Other
2010	337	11%	12%	74%	3%
2011	343	16%	6%	75%	3%
2012	409	10%	7%	81%	2%
2013	324	10%	6%	83%	1%
2014	311	26%	7%	65%	2%

One of the most significant findings of the OSCE research was that suspended prison sentences had been issued in over three-quarters of the cases included in the study. Most often, these were one-year in length, which is the minimum. Cases for which longer suspended sentences were given – with four years being the longest – were relatively uncommon. Furthermore, this research showed that suspended sentences were issued in response to a wide range of domestic violence offences, ranging from physical violence (beatings, slapping, and assault resulting in serious injuries and sometimes involving the use of weapons) to verbal abuse (including death threats and, in one case, a threat to cause miscarriage). In other words, the severity of the crime appeared to have little impact on the severity of the sentence, even in cases where qualified forms of domestic violence had been identified.⁵⁶

54 See: Marija Babović, et al., *Prevalence and Characteristics of Violence Against Women in BiH: 2013*, (Gender Equality Agency of BiH, 2013), 86 and 88. “Cultural factors are also strongly linked to the risks of domestic violence against women. Although the whole sample exhibits a high agreement with extremely patriarchal opinions about gender roles...this agreement is stronger in households where domestic violence takes place...” and “the ‘culture of tolerating violent conflict resolution methods’ increases the risk of domestic violence against women...”

55 Data from municipal courts in the FBiH, of guilty verdicts for violations of Article 222 of the Criminal Code.


56 OSCE Mission to BiH, *Ensuring Accountability for Domestic Violence*, 19.



Lenient sentences that are not proportionate to the facts and circumstances of domestic violence offences may signal the impact of gender-based stereotypes and bias held by legal professionals. For instance, the identification of mitigating circumstances is often influenced by the prevailing view that what happens within a family is a private matter to be resolved by the (usually male) head of household. Failures to assess aggravating circumstances, such as the use of weapons, the presence of children, or grievous bodily harm, suggests that even when BiH courts handle extreme cases of domestic violence, they do not truly consider the matter a “public” issue. Yet, when lenient sentences are issued by BiH courts, they play a role in strengthening gender bias in the implementation and enforcement of laws on domestic violence. The current case law on domestic violence, under the influence of these gender-based stereotypes and prejudices, contributes to and perpetuates a culture of impunity for perpetrators and thus presents domestic violence as an irrelevant crime. And minimal repercussions for domestic violence affects the willingness of victims to report the crime, seek help, or engage in criminal prosecution, thereby perpetuating the cycle of violence.

Furthermore, suspended sentences reinforce the assumption of perpetrators that they have a right to use violence to establish power and control over an intimate partner, or at least that this conduct will be tolerated. Lastly, when a second suspended sentence is awarded, rather than the original one being activated if its conditions are breached, courts send a message to victims, perpetrators, and the public alike that they do not see domestic violence as a serious danger to society.⁵⁷

57 Galić and Huhtanen, 9.



Thematic Unit 3.2:

The Risks, Causes, and Consequences of Domestic Violence

Learning outcomes – by the end of this unit, you will:

1. Understand the definitions, causes, risks, and typologies of domestic violence.
2. Understand the consequences of domestic violence.

Summary: Thematic Unit 3.2 examines the definitions, risks, causes, and consequences of domestic violence for women, children, and society at large. While exploring the dynamics of domestic violence and dispelling common myths related to its causes, this unit demonstrates why it is so important for legal practitioners to acquire in-depth understanding of these dynamics in order to deliver justice in a fair and adequate manner. Indeed, gender bias is reflected in the very beliefs and assumptions used to explain and understand domestic violence; and to the extent those beliefs and assumptions can be revealed, gender bias can be more effectively mitigated. In the final part of this unit, students will discuss domestic violence cases in a group setting.

3.2.1. Introduction


Domestic violence has a criminal-legal definition in most countries, but it also has a sociological definition, which frames domestic violence as “a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion...”⁵⁸

In the Convention on Preventing and Combating Violence against Women and Domestic Violence, the Council of Europe has defined DV to include:

*all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim...*⁵⁹

58 Michael Flood, “He hits, she hits: Assessing debates regarding men’s and women’s experience of domestic violence,” Australian Domestic and Family Violence Clearinghouse seminar, Sydney, 6 December 2012, 2.

59 Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence*, 12 April 2011.



International research, as well as studies conducted in Bosnia and Herzegovina, reveals that most perpetrators of domestic violence are former or current partners of their victims. Perpetrators rarely commit isolated acts but rather engage in “systematically repeated” incidents of violence, abuse, threats, and coercion.⁶⁰ This contrasts with the broadly-held opinion in BiH that domestic violence is typically a single incident resulting from stress, frustration, or momentarily low coping skills.⁶¹

As noted in Thematic Unit 3.1, there are a number of gender-based stereotypes and biases that have influenced the development of laws and policies related to domestic violence, as well as legal practices. It should not be surprising that so many of the ideas, assumptions, and opinions we have about domestic violence are influenced by stereotypes and biases; but if we really wish to combat domestic violence through legal and policy implementation, we must work to insure that our knowledge and understanding is factual, accurate, and up to date – for knowledge, just like law, changes and evolves.

3.2.2. Domestic violence: prevalence, causes, and risk factors

Domestic violence...cannot be explained with simple and individual theories that were used in the past. Today’s paradigm, which is completely accepted by international human rights standards, recognizes the structural nature of violence against women as gender-based violence, and describes this form of violence as one of the key social mechanisms used to force women into a subordinated position by men. It is also recognized that violence against women is a manifestation of an unequal power balance between women and men through history, which has led to men’s discrimination against women.⁶² A UN study on all forms of violence against women finds the main structural causes of this violence are patriarchy and other relations involving dominance and subordination, social-cultural norms of behaviour, customs and tradition, and economic inequality.⁶³ Actually, the main cause of violence against women is gender inequality, and domestic violence and other forms of gender-based violence (e.g. rape, sexual harassment) represent one of the main obstacles to achieving equality between women and men.

Source: Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo, DCAF, 2014), 11.

Unfortunately, domestic violence is relatively common. While most men do not commit domestic violence, the number of women and girls affected by DV and other forms of gender-based violence is uncomfortably high.

60 Marija Babović, et al., *Prevalence and Characteristics of Violence Against Women in BiH: 2013*, (Gender Equality Agency of BiH, 2013), 56.

61 Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014), 67.

62 Council of Europe, *Convention on Preventing and Combating Violence against Women*, Preamble.

63 See: UN General Assembly, *In-Depth Study on All Forms of Violence against Women*, 28-30.



Domestic violence statistics

In the United States:

- In their lifetimes, 1 in 3 women and 1 in 4 men are subjected to physical violence by an intimate partner. This violence is severe for 1 in 5 women and 1 in 7 men.
- In their lifetimes, 1 in 7 women and 1 in 18 men have been stalked by an intimate partner to the point that they have had serious fears about their own personal safety or that of someone close to them, including the risk of homicide.
- Domestic violence hotlines received more than 20,000 calls on a typical day.⁶⁴
- 45% of female homicide victims are killed by an intimate partner.⁶⁵

Questions for students:

- *Do you think the situation related to domestic violence is better in Bosnia and Herzegovina than in the US?*
- *Do you think women in BiH are exposed to domestic violence at the same rate as women in the US?*

In Bosnia and Herzegovina:

- 47% of women (47.2% in the FBiH and 47.3% in the RS) have been subjected to one or more forms of violence since they turned 15.
- 42% of women report being subjected to psychological violence, making it the most common form.
- 24% of women report being subjected to physical violence, making it the second most prevalent form.
- 72% of cases involve a perpetrator who is a former or current partner.
- Perpetrators commit acts of violence against young women more than against older women. (56.4% of women aged 18-24 are subjected to violence compared to 44.2% of women over 65).
- Perpetrators are just as likely to commit violence against disabled women and those in poor health as against those without any forms of disability or ill health.
- Domestic violence is usually systematically repeated and is not characterised by one-off incidents.⁶⁶

The causes of domestic violence

“Men are more aggressive. Just look at history – they have always waged wars. It is in their genetic make-up, and women are much more devoted to their families.”⁶⁷

64 See: National Coalition against Domestic Violence, “National Statistics,” <http://www.ncadv.org/learn/statistics> (accessed 23 November 2016).

65 Shannon Catalano, et al., “Female Victims of Violence,” No. NJC 228356, US Department of Justice, revised 23 October 2009.

66 Babović.

67 Halilović and Huhtanen.

This quote is from an interview with a female lawyer in BiH. It echoes the common gender-based stereotype that men are *naturally* more violent or aggressive. As noted in the previous unit, when gender-based stereotypes are incorporated into legal practice, the result is gender bias. Thus, it is important for legal professionals to understand the actual causes and explanations for domestic violence, to be able to avoid or at least mitigate the influence of gender bias. Indeed, the simplest answer as to why domestic violence occurs is that it is “a behaviour that is learned at the individual, family, community and socio-cultural level.”⁶⁸ If one or more of these levels models, teaches, or reflects gender inequality, male dominance, and the acceptability of male violence and abuse, then domestic violence can be learned and perpetuated from one generation to the next.⁶⁹ This helps explain why men commit more violence generally – because they have historically been granted the legal and political authority to do so, and this has been replicated at the individual, family, and community levels.

The more complex answer to why domestic violence occurs is that it is the result of various factors at various levels, which are closely linked to inequality between men and women, but no single factor alone causes violence. Rather, a number of factors combine to increase the likelihood that someone will perpetrate domestic violence, or be a victim.

Levels at which domestic violence is learned

- *Individual Level:* Factors in an individual’s biological and socio-personal history that increase the possibility of becoming a victim or perpetrator of violence. For example, attitudes or beliefs that support domestic and family violence, impulsive and anti-social behaviours, sense of entitlement, history of abuse or witnessing abuse, alcohol and drug abuse. Notably, the single greatest risk factor for being a victim of domestic or sexual violence is being a woman. And, men’s attitudes about gender equality and controlling behaviour toward women are major predictors of violence against women.
- *Relationship Level:* Factors within an individual’s closest relationships, such as social peers, intimate partners, and family members that increase their risk. For example, association with violent or sexually aggressive peers, emotionally unsupportive, physically violent, or strongly patriarchal family environment.
- *Community Level:* Factors on the community level such as relationships with schools, workplaces, and neighbourhoods can increase an individual’s risk. For example, a general tolerance of violence against women, a lack of support from police and judiciary, and weak community sanctions against perpetrators.
- *Societal Level:* Social or cultural norms create an environment that accepts or condones violence and inequality. For example, social, political, and economic inequality based on gender/sex, religion, ethnicity, etc. that is widely accepted and even enforced by the society.

Source: Nenad Galić, ed., *Practice Guide: Domestic Violence* (Sarajevo: DCAF, 2016), 12.

68 Nenad Galić, ed., *Practice Guide: Domestic Violence* (Sarajevo: DCAF, 2016), 11.

69 Ibid.



Risk factors associated with domestic violence

Perpetrators of domestic violence routinely deny their violent behaviour, attempting to minimise it or otherwise avoid taking responsibility by blaming it on someone or something else. They often claim that stress, mental illness, or the use of substances causes their behaviour or they blame it on a “dysfunctional” relationship. However, scientific research does not support such claims. Instead, it demonstrates that domestic violence is a learned behaviour consisting of a series of intentional acts.⁷⁰

While some factors may increase the risk of perpetrating domestic violence or being a victim of it, it is important to keep in mind that “**a risk factor is not a cause**, but can rather be seen as a factor that either lessens the inhibitions of the perpetrator (e.g. drugs/alcohol) or provides a false justification for their abuse (stress, unemployment, loss of temper).”⁷¹ Notably, the practice of denying, blaming, and minimizing domestic violence is often rooted in gender-based stereotypes or bias. For this reason, it is particularly necessary that legal practitioners can critically scrutinize the explanations provided by perpetrators in defence of their violent behaviour. Below are some of the factors recognized as risk factors for perpetration.

Risk Factors Associated with Domestic Violence

Drug and Alcohol Use/Addiction is associated with increased risk for both domestic violence perpetration and victimisation. Drug/alcohol addiction does NOT cause domestic violence – if alcohol and drug use caused violence, then everyone who consumed alcohol or used drugs would become violent. Yet not all perpetrators drink or use drugs, and most people who drink or use drugs do not perpetrate domestic violence (or other kinds of violence). For example, a study of 200 perpetrators found that a substantial proportion of perpetrators did not abuse alcohol or drugs. Even of those who were abusing substances, their use of violence was not limited to times when they were intoxicated. They also found that “alcohol and drug intoxication may lower inhibitions, but they also make for [good] rationalizations.”⁷² For those perpetrators who do use alcohol and drugs, it may increase the frequency and severity of domestic violence.⁷³ Moreover, for some perpetrators, both substance use and domestic violence appear to be linked to an underlying need for power and control related to gender-based distortions and insecurities.⁷⁴

70 Women’s Aid, “Domestic Violence: Frequently Asked Questions – Factsheet 2009,” 8. Available at: http://adventist.org.uk/_data/assets/pdf_file/0020/47036/Womens-Aid-Domestic-Violence-FAQ-2009.pdf (accessed 9 February 2017).

71 Galić, 12.

72 Neil Jacobson and John Gottman, *When Men Batter Women* (New York: Simon & Schuster, 1998).

73 William Fals-Stewart and Cheryl Kennedy, “Addressing intimate partner violence in substance-abuse treatment,” *Journal of Substance Abuse Treatment* 29, no. 1 (2005), 17.

74 Edward W. Gondolf, “Alcohol Abuse, Wife Assault, and Power Needs,” *Social Service Review* 69, no. 2 (1995): 274-284.

Economic Stress and Poverty is associated with increased risk for both domestic violence perpetration and victimisation – but it does not cause domestic violence to occur. While there is a correlation between income levels and domestic violence, there is more to the analysis; for example, a number of studies have linked the profile of lower socio-economic status men, who are not successful in the role of breadwinner, with a motivation to assert dominance through violence, including violence against women, as a means to achieve masculine status.⁷⁵ This research suggests that sexual conquest and asserting social and physical control over women may be a source of power and a measure of success for men who feel unsuccessful by traditional markers such as wealth. Moreover, some studies indicated that economically disenfranchised men often associate with one another male peer networks that collectively devalue women and regard them as legitimate victims who deserve physical and sexual abuse.⁷⁶

Mental illness is associated with increased risk for domestic violence perpetration and, in particular, victimisation. Early studies with domestic violence perpetrators revealed that they often test “normal” despite the need for control and presence of defensiveness, anger, a lack of empathy for mother or children, and a denial of abuse.⁷⁷ Studies examining the relationship between PTSD and domestic violence in male veterans have consistently found veterans with greater PTSD symptomology to have higher levels of anger, hostility, aggressiveness, anger reactivity, and domestic violence perpetration.⁷⁸ Notably, this anger, aggression, and violence is not solely directed within the family, suggesting that PTSD does not cause domestic violence, but can contribute to aggressive and violent behaviour more generally.... Perhaps most notable, mentally ill people are *more likely to be victims* than perpetrators of violent crime⁷⁹ and more likely to have experienced intimate partner violence than the general population.⁸⁰

Source: Galić, 12-13.

There is a significant correlation between victimization and alcohol and drug abuse. For example, according to research from the US, between 55 and 99 percent of women who have issues with substance abuse have been victimized at some point in their life.⁸¹ What’s more, between 67 and

75 See: Elijah Anderson, *Streetwise: Race, Class, and Change in an Urban Community* (Chicago: University of Chicago Press, 1990); Michael L. Benson and Greer Litton Fox, *When Violence Hits Home: How Economics and Neighborhood Play a Role* (Washington, DC: US Department of Justice, 2004); Jody Miller, *Getting Played: African American Girls, Urban Inequality, and Gendered Violence* (New York: New York University Press, 2008); and Chitra Raghavan, et al., “Community Violence and Its Direct, Indirect, and Mediating Effects on Intimate Partner Violence,” *Violence Against Women* 12, no. 12 (2006): 1132-1149.

76 See: Philippe Bourgois, *In Search of Respect: Selling Crack in El Barrio* (New York: Cambridge University Press, 2003); and Walter S. DeKeseredy, et al., *Under Siege: Poverty and Crime in a Public Housing Community* (Lanham, MD: Lexington Books, 2003).


77 Evan Stark, “Framing and Reframing Battered Women,” in *Domestic Violence: The Changing Criminal Justice Response*, eds., Eve S. Buzawa and Carl G. Buzawa (Westport, CT: Auburn House, 1993).

78 Kathryn M. Bell and Holly K. Orcutt, “Posttraumatic Stress Disorder and Male-Perpetrated Intimate Partner Violence,” commentary, *Journal of the American Medical Association* 302, no. 5 (2009): 562-564.

79 Linda A. Teplin, et al., “Crime Victimization in Adults with Severe Mental Illness,” *Archives of General Psychiatry* 62, no. 8 (2005): 911-921.

80 Kylee Trevillion, et al., “Experiences of Domestic Violence and Mental Disorders: A Systematic Review and Meta-Analysis,” *PLoS ONE* 7, no. 12 (2012): e51740 [doi:10.1371/journal.pone.0051740].

81 Kim T. Mueser, et al., *Integrated Treatment for Dual Disorders: A Guide to Effective Practice* (New York: The Guilford Press, 2003).



80 percent of women in alcohol and drug treatment programs are victims of DV.⁸² Thus, while treating alcohol and drug addiction might be an important component of comprehensive intervention efforts, it is important to recognize that substance use/abuse, by the victim or perpetrator, does not *cause* domestic violence and that treating a substance abuse problem will not alone bring an end to a pattern of domestic violence.

And, while research reveals that perpetrators of DV may have higher lifetime rates of alcoholism, antisocial personality disorder, and depression than non-perpetrators, they do not have higher rates of other psychiatric conditions.⁸³ Anti-social personality disorder and depression constitute risk factors for domestic violence perpetration, but are not considered causes of domestic violence; in other words, their presence may contribute to DV perpetration but many people with these disorders will never commit violence. However, *victims* who experience mental health conditions are more at risk of DV. Compared to women with no mental health disorders, for example, women with depressive or anxiety disorders, or PTSD, have been found to be 2.5 to 7 times more likely to be victimised by perpetrators of DV than women without these disorders.⁸⁴

To fully understand the roles these factors can play, it is helpful to draw upon some theories from criminology. Many criminologists argue – with the support of rather persuasive data – that individuals who engage in criminal behaviour often belong to peer groups of people who commit similarly deviant acts. DeKeseredy and Schwartz set out to examine whether this could also apply to men’s violence against women; but this involved turning the theory on its head, because gender inequality is a mainstreamed but “unacknowledged norm” in societies and institutions across the world. In other words, domestic violence and other crimes stemming from gender inequality cannot really be viewed as deviant because they are so pervasive.

DeKeseredy and Schwartz found that, while factors such as economic stress and alcoholism do not alone predict whether a person will perpetrate domestic violence, men who perpetrate domestic violence often belong to informal ‘male support groups’ that condone or even encourage abusive behaviour. For example, unemployed men who feel humiliated by the fact that they are not the breadwinner in their family and use violence to assert their position as head of the household often socialise with other unemployed men who do the same. These peers may even goad men to beat their wives by ridiculing them as inferior if they do not.⁸⁵ It should be noted that this kind of male peer dynamic is not limited to economically disadvantaged men; studies show that it is also prevalent among privileged men, for example at universities and colleges.⁸⁶ Men are more likely to join these groups if they experience risk factors such as economic stress, alcoholism, and PTSD. But by the same logic, male support groups that condemn violent behaviour and instead provide alternative means for men to earn respect in society – such as through active parenting – can help to prevent domestic violence.⁸⁷

82 Judith B. Cohen, et al., “Abuse and violence history of men and women in treatment for methamphetamine dependence,” *American Journal on Addictions* 12, no. 5 (2003): 377-385; and William R. Downs, “Alcohol Problems and Violence Against Women: Report of Summary Findings,” No. 96-WT-NX-0005, United States Department of Justice, 11 May 2001.

83 Stephen H. Dinwiddie, “Psychiatric Disorders Among Wife Batterers,” *Comprehensive Psychiatry* 33, no. 6 (1992): 411-416.

84 Ibid.

85 Walter S. DeKeseredy and Marin D. Schwartz, *Male Peer Support & Violence against Women: The History & Verification of a Theory* (Boston: Northeastern University Press, 2013), 71-87.

86 Peggy Reeves Sanday, *Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus*, 2nd ed. (New York: New York University Press, 2007).

87 DeKeseredy and Schwartz, 87.

As noted previously, these risk factors are sometimes used by perpetrators to deny their responsibility in committing domestic violence. Perpetrators may blame their behaviour on their partner, someone else, or *something* else to minimize their abuse. Yet, the rationale for this defence often centres on gender-based stereotypes and biases. For example, mental illness is a more common risk factor for victimization than perpetration, and perpetrators have been known to instrumentalise the mental state of their victim, claiming their partner is ‘crazy’ and has exaggerated an every-day fight or is fabricating stories of abuse. This claim relies on the stereotype that women are hysterical, emotional, and lack credibility, and the fact that it is commonly made illustrates how perpetrators can turn their victim’s vulnerabilities, in this case mental illness, into an avenue for denial.

Similarly, the use of alcohol and drugs is sometimes asserted to minimize or even deny culpability on the one hand, or apply culpability on the other. For example, perpetrators may claim they don’t remember or did not know what they were doing when they physically assaulted their partner, because they were under the influence of intoxicants. Ironically, if it was the victim who was under the influence of drugs and alcohol, a perpetrator might claim that their partner was so ‘out of control’ that they had to physically intervene to prevent them from hurting themselves or others. This rationale is arguably based on widely-held gendered notions of who may or should consume intoxicants, and again, on gender-based stereotypes about women’s lack of self-control.

3.2.3. Domestic violence typology

Researchers have identified three typologies of domestic violence relationships, based on the control mechanisms used by the abuser within the relationship, the motives of the abuser, and the existence of a pattern of controlling behaviour by the abuser:

- *Situational couple violence* is the most common form of intimate partner violence. It becomes part of a relationship when a disagreement turns into angry quarrelling and then escalates into violence. This type of violence can be mild or severe, and may even be isolated, but a recurring pattern of such violence is extremely dangerous. Still, this type of violence is less likely to escalate over time and result in physical injury. Situational couple violence is almost as likely to be perpetrated by women as by men, though men tend to do more serious harm as abusers. Notably, situational couple violence does not involve the aim of domination and control by one or both individuals in the relationship.
- *Domestic violence battering* (also called “intimate terrorism”) occurs independent of conflict or disagreement and is less frequent than situational couple violence. However, ***it is this type of domestic violence that is most likely to cause severe harm***. Domestic violence battering is distinguished by a pattern of both violent and non-violent behaviours that are rooted in attempts to dominate and control a partner, and almost always involves men abusing women. Perpetrators control their partners by combining violence with other tactics, such as threats and intimidation, economic and psychological abuse, isolation, and the assertion of male privilege.
- *Violent resistance* by victims – usually women – occurs when an abuser’s attempts to dominate are physically challenged. This physical resistance is often transitory due to the capacity of many abusers to physically dominate their victim, and most women who resist violently soon adopt other strategies to cope with abuse.⁸⁸

88 Michael P. Johnson, “Patriarchal Terrorism and Common Couple Violence: Two forms of violence against Women,” *Journal of Marriage and the Family* 57. no. 2 (1995): 283-294.

Johnson's control typology of intimate partner violence⁸⁹

	Domestic Violence Battering	Nasilni otpor	Situacijsko nasilje među partnerima
Aim	To control a relationship	To escape an "intimate terrorist"	To "win", get attention or get even
Defining characteristics	Repeated violence, or the use of a single violent act as a lasting control mechanism (coercive threat of repetition)	Victim reacts to defend or retaliate against their partner's abuse	Violence occurs when conflicts escalate, usually ends if conflict is resolved
Perpetrator	Only one; dominant role in relationship	Only one; the victim	Potentially both parties
Frequency of violence	Often frequent	Very infrequent, often a one-time occurrence	Tends to be infrequent or isolated
Severity	Victims may fear for their lives, even if abuse is largely psychological	May be very violent	Life-threatening behaviour is rare but not unheard of

An appreciation of this typology can help legal professionals understand the situations that lead to reports of domestic violence, including when men claim to have been victimized. This is important because while men are sometimes victims, studies suggest that "men may be over-reporting instances of being victims of domestic violence" when they are actually the perpetrators.⁹⁰ A 2009 analysis of arrest reports for domestic violence found significant gender-based differences in men versus women perpetrators, determining that men were significantly more likely to be repeat offenders and to display considerably more intense and severe violence than women.⁹¹ And yet, despite women's involvement in fewer and less severe incidents, women were three times more likely to be arrested than men.⁹²


Johnson's typology can help us interpret the data compiled in research. It is likely, for instance, that many of the women arrested on domestic violence charge have committed acts of violent resistance. Abusers who are subjected to violent resistance often see the incident as an opportunity to harness the force of the law to both punish and delegitimise their victim. This is especially the case when violent resistance causes visible injuries; and particularly when victims have only minor or no obvious physical injuries, having been targeted primarily by *psychological* violence.

89 See: Denise A. Hines and Emily M. Douglas, "Intimate terrorism by women towards men: Does it exist?" *Journal of Aggression, Conflict and Peace Research* 2, no. 3 (2010): 36–56; Michael P. Johnson, *A Typology of Domestic Violence* (Boston: Northeastern University Press, 2008); Michael P. Johnson, "Types of domestic violence: Research evidence," presentation, the Interdisciplinary Research Center on Family Violence and Violence against Women (CRI-VIFF), Montréal, 1 March 2013; and Callum Watson, *Preventing and Responding to Sexual and Domestic Violence against Men: A Guidance Note for Security Sector Institutions* (Geneva: DCAF, 2014).

90 Marianne Hester, *Who Does What to Whom? Gender and Domestic Violence Perpetrators* (Bristol, UK: University of Bristol and the Northern Rock Foundation, 2009), 7.

91 *Ibid.*, 9.

92 *Ibid.*



Johnson’s typology also helps to explain how women can be abusers (and not just as an act of resistance) of men who may be physically stronger. The violence in these cases is largely linked to emotional control, so that physical strength is not necessarily important. While this is less common, it is possible for a woman to emotionally subordinate a male victim without resorting to physical violence, for example through coercion, such as if the male victim fears being arrested for violently resisting.

3.2.4. Domestic violence: the dynamics of power and control

Sociological research has shown that cases of systematic domestic violence are associated with complex dynamics of power and control. Perpetrators use violence to dominate their partners and control their actions, responses, and feelings. These findings contradict generally-held assumptions about how the nature of men, alcohol, and mental illness relate to domestic violence. Indeed, **domestic violence is intentional** at the individual level, and is often supported or endorsed within a broader framework of gender inequality at the socio-cultural level.

This is why it is so crucial for legal responses to domestic violence to recognize the existence of gender bias – defined as:

- stereotyped thinking about the nature and roles of women and men;
- devaluation of women and what is perceived as women’s work; and
- lack of factual knowledge of the social and economic realities of women’s experiences and lives.

Moreover, recent studies illustrate why legal responses based on outdated theories of domestic violence are likely to be ineffective. Responses that treat violence merely through the lens of a substance abuse problem or marital dysfunction will not address the fact that a violent abuser seeks to gain and maintain power and control.

To prevent or mitigate the influence of gender bias, legal practitioners must familiarize themselves with the dynamics, strategies, and behaviours associated with domestic violence at the individual level. The Domestic Abuse Intervention Project (DAIP) developed the “Power and Control Wheel” (shown below) to illustrate and explain the pattern of violent and abusive behaviour that occurs in domestic violence relationships.⁹³ The “Power and Control Wheel” describes the different methods abusers use to gain and maintain power and control over a partner, observed through many years of interviews with victims and abusers. It illustrates the relationship between physical and sexual violence – something which may be threatened often but only followed through on occasionally or even never – and the role of intimidation, coercion, manipulation, and economic control to assert day-to-day authority over the relationship and the home.

⁹³ Different versions of the “Power and Control Wheel” are available online at: www.theduluthmodel.org/training/wheels.html (accessed 10 February 2017).


Furthermore, the “Power and Control Wheel” reflects research on the use of coercive control by abusers – a technique also used in hostage situations and prisoner-of-war camps. In this way, abusers primarily control victims through coercion and punishment; and the effectiveness of the technique is based on the cumulative effect of a series of small acts that imply a significant risk of serious injury or death to the victim. Coercive control techniques are thus psychological in nature, so that the physical strength of the victim does not determine their vulnerability.⁹⁴



Coercive control in the context of domestic violence does differ from its use in hostage and POW situations in some respects. Still, while hostages and POWs are physically prevented from leaving their detention, many victims of domestic violence report that they feel imprisoned even if they could theoretically leave their homes at any point. In the words of historian Linda Gordon, “one assault does not make a battered woman; she becomes that because of her socially determined inability to resist or escape.”⁹⁵

94 Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (New York: Oxford University Press, 2007), 200-205.

95 Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence: Boston, 1880-1960* (Urbana: University of Illinois Press, 2002), 285.



Perpetrators tend to use trial and error to determine how best to control their victims. They may threaten to destroy sentimental objects or harm the children and pets. In combination with limits to victims' access to support networks (including informal friend groups, more formal associations, or government services), abusers slowly gain control over all the spaces in which their victims can assert any autonomy. Some abusers may even formalise this control, with a 'contract' that details how the victim should behave, where they are allowed to go, at what time and under what conditions. In such cases, victims may believe they can avoid violence only if they report on their movements by mobile phone and return by a specified time.⁹⁶

Domestic violence victims face routine, minor violent episodes designed to undermine and erode their sense of self. A survey of women in domestic violence shelters in the US found that they had faced an *average* of 69 assaults per year. Perpetrators may justify these assaults by claiming their victim must be punished for breaking a 'rule' or for underperforming their 'duties'; but often, the demands made of victims are unachievable or the perpetrator will find fault in any case, so the violence is inevitable. The psychological effects of this are so extreme that some battered women have reported trying to censor their own thoughts because they felt their abuser could read their mind.⁹⁷

While not all domestic violence abusers are perpetrators of systematic abuse, judges, prosecutors, and allied professionals who understand the dynamics of power and control inherent to DV cases are better equipped to handle them. For example, what is presented as a first-time or isolated incident of domestic violence may just be the first time a perpetrator has been arrested and appeared before the court. Additional inquiry will very often reveal a history of abuse – including physical, sexual, and psychological violence. Conducting comprehensive case evaluations will enable the judiciary to identify those incidents which truly are isolated and those which constitute a pattern of abuse and violence. A legal system that acknowledges the existence of gender-based stereotypes and of different types of domestic abuse is more likely to provide the most effective and efficient response.

⁹⁶ Stark, *Coercive Control*, 205-208.

⁹⁷ Stark, *Coercive Control*, 209.

3.2.5. Domestic violence: consequences

Women who are exposed to domestic violence [often] suffer mental health problems as a result – such as depression, anxiety, and posttraumatic stress disorder...

A study by the World Health Organization (WHO) on violence against women found that pregnant women who had experienced physical or sexual partner violence, or both, reported more induced abortions.⁹⁸ That study also demonstrated significant associations between sexual violence in a relationship and unintended pregnancy and/or abortion.⁹⁹ Further, research shows that [in addition to physical and psychological harm] being in a relationship with an abusive partner can impact women's sexual decision-making and their level of control over contraceptive methods, sometimes resulting in unintended pregnancy and abortion.¹⁰⁰ Some studies also show that violence can increase if a husband and his family desire a male child and his wife bears or is carrying a female child.¹⁰¹

...An intimate relationship is reasonably expected to be a place of security, trust, and affection; and violence in intimate relationships, especially sexual violence, is often experienced as a serious violation that leaves victims feeling confused, angry, ashamed, betrayed, and in a persistent state of fear that they may be attacked again....¹⁰²

Lynn Hecht Schafran...argues that witnessing violence and being exposed to it are different experiences with different consequences.

*Articles about domestic violence sometimes describe children as witnesses, a problematic term for two reasons. First, 'witness' implies a passive bystander, whereas children are deeply engaged with everything that happens in their family environment. Second, a child might never see or hear the physical or sexual abuse yet be profoundly harmed by the atmosphere of fear in which he or she lives. The preferred terminology is children 'exposed' to domestic violence.*¹⁰³

98 World Health Organization, *WHO Multi-Country Study*.

99 Christina C. Pallitto, et al., "Intimate partner violence, abortion, and unintended pregnancy: Results from the WHO Multi-country Study on Women's Health and Domestic Violence," *International Journal of Gynecology and Obstetrics* 120, no. 1 (2013): 3-9.

100 Elizabeth Miller, et al., "Reproductive Coercion: Connecting the Dots between Partner Violence and Unintended Pregnancy," *Contraception* 81, no. 6 (2010): 457-9; and E. Emenike, S. Lawoko, and K. Dalal, "Intimate partner violence and reproductive health of women in Kenya," *International Nursing Review* 55, no. 1 (2008): 97-102.

101 Meerambika Mahapatro, et al., "Domestic Violence during Pregnancy in India," *Journal of Interpersonal Violence* 27, no. 15 (2011): 2999-3015.

102 David Finkelhor and Kersti Yllo, *License to Rape: Sexual Abuse of Wives* (New York: Holt, 1985).

103 Lynn Hecht Schafran, "Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience," *The Judges' Journal* 53, no. 3 (Summer 2014).

The negative effects of domestic violence on children are well documented.¹⁰⁴ Children in violent homes [even if they are not the primary victim of abuse] are more likely to be victims of physical and emotional violence themselves and grow up with a number of various other associated consequences.¹⁰⁵ Typically, children exposed to domestic violence respond in one of two ways: they become quiet and withdrawn or loud and aggressive.¹⁰⁶ A review of the literature shows that these children develop more emotional and behavioural problems and are prone to take more unnecessary risks.¹⁰⁷ A study from Northern Ireland shows that domestic violence also negatively affects the educational attainment of children, along with their self-esteem and ability to form relationships.¹⁰⁸ Other research shows that children exposed to violence in the home exhibit significantly poorer verbal skills than their peers and that domestic violence indirectly affects the intellectual abilities of children through its influence on maternal depression and the quality of the home environment.¹⁰⁹

A 2006 UNICEF report estimated that as many as 275 million children worldwide were exposed to violence in the home – a number it qualified as conservative because many countries have no data to determine this number, as is the case in BiH. In the report, UNICEF urged that serious attention be brought to the issue of children’s exposure to domestic violence and confirmed other research findings that violence affects the learning, social skills, behavioural control, and emotional health of children.¹¹⁰ This is especially important for children in their first few years of life, as they are particularly vulnerable due to the key developmental stages of infancy and early childhood; and yet, domestic violence is actually more prevalent in the homes of younger children than those of older children.¹¹¹

...The consequences for children who are exposed to violence and who grow up in violent homes are not limited to individual-level effects; and a number of studies show that there are inter-generational impacts of domestic violence. In what Brown and Bzostek call a “disturbingly prophetic pattern,” male children exposed to violence are more likely to be abusers as adults and female children exposed to violence are more likely to be abused.¹¹² Similarly, compared to non-abusers, abusers are much more likely to have had violent fathers. Domestic violence is a learned behaviour, after all, and the children of batterers learn that violence is normal in intimate relationships.¹¹³

Source: Majda Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in BiH* (Sarajevo: Atlantic Initiative/DCAF, 2015), 50-55.

104 Joy D. Osovsky, “Children Who Witness Domestic Violence: The Invisible Victims,” *Social Policy Report* IX, no. 3 (1995): 1-16.

105 Todd I. Herrenkohl, et al., “Intersection of Child Abuse and Children’s Exposure to Domestic Violence,” *Trauma, Violence and Abuse* 9, no. 2 (2008): 84–99.

106 Dorothy Byrne and Brian Taylor, “Children at Risk from Domestic Violence and their Educational Attainment: Perspectives of Education Welfare Officers, Social Workers and Teachers,” *Child Care in Practice* 13, no. 3 (2007): 185–201.

107 Stephanie Holt, Helen Buckley, and Sadhbh Whelan, “The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature,” *Child Abuse and Neglect* 32, no. 8 (2008): 797–810.

108 Byrne and Taylor.

109 Alissa C. Huth Bocks, Alytia Levendosky, and Michael A. Semel, “The Direct and Indirect Effects of Domestic Violence on Young Children’s Intellectual Functioning,” *Journal of Family Violence* 16, no. 3 (2001): 269–290.

110 UNICEF, *Behind Closed Doors: The Impact of Domestic Violence on Children* (New York: 2006). Available as a pdf at: <http://www.unicef.org/media/files/BehindClosedDoors.pdf>

111 Brett V. Brown and Sharon Bzostek, “Violence in the Lives of Children,” *CrossCurrents*, no. 1 (August 2003).

112 Ibid.

113 David A. Wolfe and Peter G. Jaffe, “Emerging Strategies in the Prevention of Domestic Violence,” *Domestic Violence and Children* 9, no. 3 (1999): 133-144.

3.2.6. Critical thinking and discussion: the impact of DV

📺 **Video: California Attorney General's Office, First Impressions: Exposure to Violence and a Child's Developing Brain (2008)**

YouTube: <http://youtu.be/brVOYtNMmKk>

Running Time: 14 minutes, 43 seconds

- After viewing the video, ask participants for *their* first impressions.
- Facilitate a short discussion. Explain that the video is intended to illustrate how children are impacted at the individual, familial, community, and societal levels by domestic violence, and outline how this harms children and contributes to future generations of abuse.
- Abusers learn to be violent by observation and experience – within their families, communities, and society at large – and thus form conceptions of the appropriate roles of men and women. Boys who witness their fathers beating their mothers are *seven times* more likely to abuse their own spouses. Violent behaviour is reinforced when peers and authorities fail to sanction perpetrators for using violence and abuse against their family or partners, as well as in general.

Note how important it is for the judiciary to have a common understanding about the factors that cause and contribute to domestic violence in order to provide an effective, comprehensive, and consistent response.

3.2.7. Scenario-based problem analysis: applying the law on domestic violence

*Split students into groups of 4 and instruct them to debate, discuss, and decide one of the following cases. The students must identify and assess **aggravating and mitigating circumstances** in their case and decide an **appropriate sentence**. After ½ hour, ask each group to report to the whole class.*

Case Scenario I:

Husband A and Wife B have been married for 23 years. The police were called to their home. B had a slightly red and swollen area on her right cheek bone and one small scratch on the left side of her neck. A had scratch marks, some with blood, on his forearms and on the top of his hands. B reported that A was angry because she had visited a friend in the city and was wearing nice clothes. B also reported that, during the argument, A grabbed her around the neck and began to squeeze. To make him stop, B said she tried to scratch his hands and arms. Afterward, she said he slapped her hard on the left cheek. B claims that her husband has been abusive to her for years and that he always tells her where she can go, who she can see, and what she can wear.

Additional information in the case file:

- *A witness statement from the couple's adult daughter who lives with her husband in another city.* The adult daughter reported that her mother, B, is an alcoholic who does not take good care of her dad, A. She says that B drinks instead of doing housework or preparing meals, and sometimes screams at A. The daughter was not present during the incident, but does not think her father would strangle or choke her mother and does not consider her father to be violent or abusive. However, she does admit that her father sometimes forbids her mother to go to certain places or wear certain clothes.
- *A report from the local centre for social work, indicating that B has contacted them on two occasions – once by telephone and once in-person.* On both of these occasions, B claimed to live with constant psychological abuse and threats of physical violence.
- *A police statement from A in which he denies choking his wife and says that she attacked him.* A told police that he slapped B in self-defence. He claims she is an alcoholic and does nothing in the home. He says he works and makes the money and still has to do all the shopping, because she is often too drunk to do it herself. The police further noted that A is left handed.

Case Scenario II:

Husband C and Wife D have been married for 10 years. They have two small children together (5 and 7 years old). On 15 October, the police were called to their home by a neighbour after their 7-year old child was seen crying outside the house with no coat and shoes. When the police arrived, C was very calm while D was shouting and crying. Both children were in the room with them, crying. There are no visible injuries on either C or D, but D claims that C grabbed her by her upper arms and shook her after she disagreed with him about a financial matter. C reports that he may have gently grabbed his wife by her upper arms, but says he did not shake her.

Additional information in the case file:

- The police asked both C and D whether the children were present during their fight. They both said that the children were in the house, but in another room. Neither parent is aware that the 7-year old one was outside without a coat or shoes during their fight.
- The police spoke with the 7-year old, who told them: “sometimes daddy cleans his gun when he is angry and that scares mommy.”
- The police noted that C is a rising political figure in the community and is generally held in high esteem.
- *A witness statement from the neighbour, an elderly widow.* The neighbour indicates that she has heard shouting from the house at least once a month. She says C is very polite and very nice and that D is always at home and does not go out very often. She reports that D does not receive visitors except for members of C's family.



Case Scenario III:

Boyfriend E and Girlfriend F have been living together for six months. F reported to the police that when she tried to break up with E, he threatened to kill her and himself. She reported that he also kicked down the bathroom door (which had a large hole at the bottom) and threw some of her belongings around the apartment, breaking a number of picture frames and a large mirror.

E appeared before the court for this incident and was given a three-month suspended sentence for a first-time offence that caused no bodily injury.

After this suspended sentence was issued, F packed a small bag and went to stay at her sister's house. She told E that she wanted to move out as soon as she could find a place to live. E immediately began to text and call F repeatedly – alternating between issuing threats and begging her to return to their home. Two days after F left for her sister's house, E showed up at her workplace and began shouting at her, calling her a “whore.” He told F: “If you don't come back home by tonight, I will make you come back.” F's colleagues called the police, but E had already left by the time they arrived.

Additional information in the case file:

- The police found 21 text messages from E on F's phone. Many of the messages were threats to physically harm F, to destroy her property, to get her fired from her job, to spread rumours about her, etc.
- The police asked F about any kind of physical abuse she may have suffered. She said that E hurt her physically, but did not specify when or how it happened or the nature of the abuse. The police asked F whether E hit, kicked, strangled, or slapped her. She answered negatively, began to cry, and asked the police to mention only the text messages in their report.
- The police reviewed E's cell phone and noted that all sent and received text messages had been deleted, and that all deleted messages had been deleted permanently so that the phone held no record of past text messaging activity. E's phone did indicate that he had called F's number repeatedly for the previous two weeks.
- *A witness statement from two of F's colleagues.* These colleagues confirm that E came to F's place of work, shouted at her, refused to leave, then threatened her and was generally scary and aggressive.
- *A witness statement from F's sister.* F's sister says she believes that E is physically abusive but that F does not talk about it. She reports seeing bruises on F's upper legs when she changed her clothes the previous day.



Case Scenario IV:

Son G lives with his Father H and Mother J. G is 47 years old and has been diagnosed with Post Traumatic Stress Disorder due to experiences during the war. He has a slight disability and walks with a limp. G does not work but receives a small stipend from his disability insurance. His parents are in their late 70s; H works for the District Public Works Department, and J is a housewife who has a heart condition and is in generally poor health.

G was recently arrested after returning to his parents' home drunk, shouting at them, knocking his mother to the floor, and breaking dishes. When police were called to the home, they observed signs of a fight and noted that J could not walk as the result of an injury from her fall. They offered her medical attention but she declined. H and J were both very concerned about their son being arrested, and begged police not to detain him. G claimed he did not remember anything.


Additional information in the case file:

- The police noted that G's parents did not want their son to be prosecuted for domestic violence, asking instead that he receive medical treatment for his mental illness and alcohol addiction. H admitted that his son drinks regularly and often comes home in a state of anger and distress.
- Individually, H told police he is worried that G could really hurt J at some point, and that she is inclined to protect G at all costs.
- Both H and J admitted that they have no family or friends to help them, and they have limited resources. All their relatives have moved to nearby countries.



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Thematic Unit 4:

Gender Bias in Cases of Rape, Attempted Rape, and Sexual Assault

Learning outcomes – by the end of this unit, you will:

1. Understand how gender bias affects cases of rape, attempted rape, and sexual assault.
2. Understand how gender bias affects perceptions of victims and perpetrators.
3. Understand how gender bias can impact analysis of rape and other forms of sexual assault and thus impede the fair and equal dispensation of justice.

Background reading:

Ivana Radačić, *Seksualno nasilje: Mitovi, stereotipi i pravni sustav* (Zagreb: TIM Press, 2014).

Lynn Hecht Schafran, “Barriers to Credibility: Understanding and Countering Rape Myths,” n.d.
pdf: http://www.nationalguard.mil/Portals/31/Documents/J1/SAPR/SARCVATraining/Barriers_to_Credibility.pdf

Summary: The introductory part of this unit defines the criminal offense of rape and looks at the medical and psychological consequences of rape on survivors. The unit then outlines the evolution of understandings of rape through international and domestic legal frameworks. Then, the unit explores the fact that, although rape is clearly regulated by law, the extent that it is perceived and processed as a criminal offense is coloured by gender-related attitudes, prejudices, and beliefs among members of the judiciary – which consequently influences the administration of justice. Academic research, including from BiH, shows that judges, prosecutors, and lawyers base their decisions not only on available facts, but sometimes, consciously or not, on their views of the appropriateness of the sexual behaviour of the accused or the victim. This unit demonstrates that stereotypes and biased attitudes can thus significantly and negatively impact the outcome of criminal cases and legal proceedings. The unit elaborates on examples from BiH case law in which myths regarding cases of rape, attempted rape, and sexual assault have had a negative impact on the investigation, prosecution, and ultimately on the fair application of law.

4.1. Introduction

“Rape is a culturally fostered means of suppressing women. Legally we say we deplore it, but mythically we romanticize and perpetuate it, and privately we excuse and overlook it.”¹¹⁴

Rape, in accordance with applicable legislation in the Federation and Brčko District of BiH, is a “criminal offense against sexual freedom and morality.” The Criminal Code of the Republika Srpska classifies acts of rape as “criminal acts against sexual integrity.” The basic form of the offence is punishable by imprisonment of 1 to 10 years or 2 to 10 years, while more serious forms of the crime may result in a longer sentence (e.g. 3 to 15 years or a minimum of 10 years). In this way, legislators have recognised rape as a serious crime that can be punished with significant time in prison.

Still, though rape is a criminal offence that is subject to formal social condemnation, it is still glorified in much of popular culture, through movies, music, and literature. And in fact, for many years in Europe and North America, rape was viewed as a crime against property, meaning that if a woman was raped and the perpetrator was found, the rapist was expected to compensate her father or husband for damage to their property.¹¹⁵ While laws on sexual violence have evolved, a specific focus on the behaviour, actions, and choices of *victims* has remained. Arguably, that focus is rooted in the notion that a victim’s choices, engagement in particular activities, or behaviour are causative factors in sexual assault. And this reveals a continued prevailing belief that a victim is responsible, even if only in part, for their own experience of sexual violence.

This focus on the victim reflects gender-based attitudes, values, and stereotypes that define how women (and men) are ‘supposed’ to behave – wherein rape and sexual violence are largely seen as a consequence for stepping outside of accepted social lines. But victims of forced sexual acts are not just women; men, heterosexual and homosexual, and children are also victimized. And sexual assault and rape are social and sociological phenomena with significant consequences, especially on the mental and physical health of the victim.

One consequences of rape can be the victim's death, frequently by suicide or sexually transmitted infection. However, the psychological effects – which, initially, may not be as visible as physical injuries and can therefore be given too little attention, can be more severe and long-lasting than physical effects. In fact, approximately one-third of rape victims develop PTSD.¹¹⁶ Symptoms of PTSD include memory loss, flashbacks (known as intrusive recall), nightmares, insomnia, mood swings, difficulty concentrating, panic attacks, and severe depression and anxiety.

114 Victoria Billings, *The Womansbook* (Los Angeles: Wollstonecraft, 1975).

115 Susan Caringella, *Addressing Rape Reform in Law and Practice* (New York: Columbia University Press, 2009).

116 Dean G. Kilpatrick, Christine N. Edmunds and Anne Seymour, *Rape in America: A Report to the Nation* (Arlington, VA: National Victim Center and Crime Victims Research and Treatment Center, 1992), 7.

4.2. Legal Framework

Domestic legal framework

Legal frameworks for rape in BiH are relatively straightforward. Whereas many countries limit the definition of rape to acts of sexual intercourse committed by a male perpetrator against a female victim, legislation in BiH is gender neutral and incorporates any sexual act equivalent to sexual intercourse.¹¹⁷

Article 203 of the Criminal Code of the Federation of BiH establishes that:

- (1) Whoever coerces another by force or by threat of immediate attack upon his life or limb, or the life or limb of someone close to that person, to sexual intercourse or an equivalent sexual act, shall be punished by imprisonment for a term between one and ten years.
- (2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article in a particularly cruel or humiliating manner or if on the same occasion a number of perpetrators perform a number of acts of sexual intercourse or equivalent sexual acts against the same victim, shall be punished by imprisonment for a term between three and fifteen years.
- (3) If, by the criminal offence referred to in paragraph 1 of this Article, the death of the raped person is caused, or serious bodily injury is inflicted on the raped person or his health is severely impaired, or the raped female is left pregnant, the perpetrator shall be punished by imprisonment for not less than three years.
- (4) The punishment referred to in paragraph 2 of this Article shall be imposed on whoever perpetrates the criminal offence referred to in paragraph 1 of this Article out of hatred on the grounds of national or ethnic origin, race, religion, sex or language.
- (5) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against a juvenile, shall be punished by imprisonment for not less than three years.
- (6) Whoever perpetrates the criminal offence referred to in paragraphs 2, 3 and 4 of this Article against a juvenile, shall be punished by imprisonment for not less than five years.
- (7) If, by the criminal offence referred to in paragraph 2 of this Article, the consequences referred to in paragraph 3 of this Article are caused, the perpetrator shall be punished by imprisonment for not less than five years.¹¹⁸

Article 193 of the Criminal Code of the Republika Srpska establishes that:

- (1) Whoever compels another person to sexual intercourse or any other sex act by force or threat of immediate attack upon life or body, or life or body of someone close to that person, shall be punished by imprisonment for a term between one and ten years.

117 For more on the acts this encompasses, see: Clare McGlynn and Vanessa E. Munro, *Rethinking Rape Law: International and Comparative Perspectives* (Oxfordshire, UK: Routledge, 2010), 172.

118 Official Gazette of the Federation of BiH 36/03.

- (2) If the criminal offence referred to in Paragraph 1 of this Article was committed against a minor or in a particularly cruel or degrading manner or if at the same occasion the victim was raped by several perpetrators or if the criminal offence has resulted in grievous bodily injury or a serious impairment of health or pregnancy of the female victim, the perpetrator shall be punished by imprisonment for a term between three and fifteen years.
- (3) If the criminal offences referred to in Paragraphs 1 and 2 of this Article have resulted in the death of the victim, the perpetrator shall be punished by imprisonment for a term not less than five years.
- (4) Whoever compels another person to sexual intercourse or any other sex act by serious threat of disclosing some information that would harm his reputation or reputation of someone close to that person or by threat of any other serious harm, shall be punished by imprisonment for a term of between six months and five years.¹¹⁹

Article 200 of the Criminal Code of the Brčko District establishes that:


- (1) A person who compels another person to sexual intercourse or an act equal to sexual intercourse by use of force or by threat of direct attack on life and body of that person, or life and body of somebody close to that person, shall be sentenced to prison from one to ten years.
- (2) If the offence referred to in Paragraph 1 of this Article was committed in an extremely brutal or humiliating way, or if several sexual intercourses, or sexual acts equal to them, involving the same victim were committed by several persons, the perpetrator shall be sentenced to prison from three to fifteen years.
- (3) If the offence referred to in paragraph 1 of this Article resulted in death of the raped person, or grievous bodily injury, or serious impairment of health, or pregnancy of the raped person, the perpetrator shall be sentenced to at least three years of prison.
- (4) A person who commits the criminal offence referred to in paragraph 1 of this Article because of intolerance regarding ethnic or national origin, race, religion or language, shall be imposed the sentence referred to in paragraph 2 of this Article.
- (5) A person who commits the criminal offence referred to in paragraph 1 of this Article against a juvenile, shall be sentenced to at least three years of prison.
- (6) A person who commits the criminal offences referred to in paragraphs 2, 3 and 4 of this Article against a juvenile, shall be sentenced to at least five years of prison.
- (7) If the criminal offence referred to in paragraph 2 of this Article resulted in consequences referred to in paragraph 3 of this Article, the perpetrator shall be sentenced to at least five years of prison.¹²⁰

International legal framework

International understandings and legal definitions of rape and sexual assault have shifted over time, largely in terms of how the law recognises women's (and men's) bodily and sexual autonomy. The law has thereby moved away from associating rape and other forms of sexual assault with dishonour and with notions of 'spoiled' property. Yet not long ago, these offences were not considered violent crimes but moral ones, and were blamed on victims.

¹¹⁹ Official Gazette of the Republika Srpska 49/03, 108/04.

¹²⁰ Official Gazette of the Brčko District of BiH 10/03, 45/04, 6/05, 21/10.



Notably, even in the 1907 Hague Convention, rape was “delicately coded as a ‘violation of family honour and rights.’”¹²¹ But what was initially defined as a crime of family dishonour – placing the burden on the victim and their family – has eventually been recognized as a crime against an autonomous individual and a violation of her or his rights and freedoms. Two of the most important international documents that codify elements of the crime of rape are the Istanbul Convention and the European Convention on Human Rights.

The Convention on Preventing and Combating Violence against Women and Domestic Violence (The Istanbul Convention)¹²²

The Istanbul Convention is a Council of Europe initiative that came into force in August 2014. It is the first legally-binding instrument intended to prevent, protect against, and prosecute different forms of violence against women, including domestic and sexual violence. BiH was among the first eight states to ratify the Convention.

The Istanbul Convention defines sexual violence, including rape, as:

- a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
- b) engaging in other non-consensual acts of a sexual nature with a person;
- c) causing another person to engage in non-consensual acts of a sexual nature with a third person.¹²³

The Convention also specifies that “**consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.**”¹²⁴ This means that consent is predicated on more than the dynamics between the victim and the perpetrator. Rather, assessing whether consent was voluntary relies also on the overall context in which the crime occurred.

The European Convention on Human Rights & Case law of the European Court of Human Rights

The European Court of Human Rights has ruled that rape constitutes a form of torture and is a violation of Article 3 of the European Convention on Human Rights (the right not to be subjected to torture, inhuman, or degrading treatment).¹²⁵ In a 2003 ruling, the Court noted that evidence of physical resistance by the victim was still a *de facto* and *de jure* requirement in many countries to prove cases of rape, and emphasized the importance of instead focusing on a **lack of consent** in

121 Rhonda Copelon, “Rape and Gender Violence: From Impunity to Accountability in International Law,” *Human Rights Dialogue* 2, no. 10 (2003). Available at: https://www.carnegiecouncil.org/publications/archive/dialogue/2_10/articles/1052.html (accessed 12 March 2017).

122 Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence*, 12 April 2011. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046031c> (accessed 8 February 2017).

123 *Ibid.*, Article 36.

124 *Ibid.*

125 European Court of Human Rights, “Factsheet: Violence against women,” February 2017. Available at http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf (accessed 11 February 2017). Also see: Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 11 February 2017).

investigating and judging rape cases.¹²⁶ As such, under Articles 3 and 8 of the European Convention on Human Rights, member states (including BiH) must punish and prosecute **“all non-consensual sexual acts, even in the absence of physical resistance.”**

Rulings of the European Court of Human Rights thus illustrate an evolution in legal understanding and practice when it comes to rape and sexual assault. Previous standards requiring proof of physical force and physical resistance in cases of rape failed to appreciate that threats and coercion are effective means by which to commit non-consensual sexual violence. Moreover, these standards placed a greater burden of proof on victims to demonstrate that they had resisted the perpetrators who attacked them. The Court’s shift toward an evidentiary standard of non-consent more appropriately imposes the burden of proof on the perpetrator. And critically, the Court’s removal of the need to prove physical resistance by victims recognises that the circumstances in which rape occurs may prevent victims from resisting.

4.3. Gender bias in the context of rape, attempted rape, and sexual assault cases

Legislators have an important role in facilitating fair and equal access to justice in cases of rape and sexual assault in BiH. While the law does prescribe imprisonment for the crime of rape, sentencing decisions are shaped by the values, attitudes, and gender-related prejudices and beliefs held by members of the judicial community.

Gender-based stereotypes are ingrained, transmitted through family, religion, music, schooling, society, and every other way in which we learn from and experience the world. For this reason, the impact of gender-based stereotypes is neither clearly visible nor well understood. As such, the impact of gender bias can be – and often is – pernicious and detrimental, affecting how we perceive and assess who can be a victim of rape or sexual violence and who can be a perpetrator.

Gender bias in rape cases can result in “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists... creating a climate hostile to rape victims.”¹²⁷ Fundamentally, gender bias can result in social conditions that enable the denial and/or justification of rape and sexual assault, allowing perpetrators to act with impunity. What’s more, gender bias can mean that blame is not only shifted away from perpetrators, but is shifted on to victims for their own victimisation.

Generally, society endorses a stereotypical “real rape narrative” featuring a “real victim,” implying:

[A woman] who has little-to-no relationship to the offender, is virtuous and going about legitimate business, was above reproach in behaviour prior to the rape, reports a single occurrence, was raped by an unambiguously bad offender, has demographic characteristics that signal power, influence or sympathy, shows visible,

¹²⁶ Final Judgement, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003. Available at: https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/M.C.v.BULGARIA_en.asp (accessed 8 February 2017).

¹²⁷ Jacqueline M. Gray, “Rape myths beliefs and prejudiced instructions: Effects on decisions of guilt in a case of date rape,” *Legal and Criminological Psychology* 11, no. 1 (2006): 75-80.

*appropriate expressions of trauma, and is open to help.*¹²⁸

Research from many countries, including BiH, reveals that legal practitioners, like the public in general, may hold gender-based stereotypes associated with what constitutes appropriate sexual behaviour for men and women. In the context of sexual assault and rape cases, such stereotypes and biases can significantly and negatively impact criminal and legal outcomes.¹²⁹ Indeed, a gender bias task force in the United States found that women victims of rape and sexual assault were routinely judged on their appearance, demeanour, lifestyle, and reputation, yet defendants were not subjected to this kind of scrutiny.¹³⁰ A study conducted in the Zagreb district courts by Croatian scholar Ivana Radačić came to similar conclusions. In one case, for example, a victim was asked why she had not reported being raped until the day after the crime was committed.¹³¹ Radačić also noted that victims of rape and sexual assault who did not conform to the stereotype of a “real victim” in the eyes of police and the judiciary were continually met, throughout the judicial process, with distrust and suspicion, and were accused of false reporting – purportedly out of revenge or regret following consensual sexual activity.¹³²

Research demonstrates that legal practitioners are likely to perpetuate these kinds of gender biased narratives during rape and sexual assault trials in which they focus on the victim rather than on the perpetrator or on the crime itself. The behaviour of victims before, during, and following an assault is typically subject to intense scrutiny in court: *Were they drinking alcohol? How were they dressed? Did they accept a ride in the perpetrator’s car or an invitation into the perpetrator’s home? Did they physically resist?* and, *Did they call the police or seek medical help?* How victims behave during their trials is also subject to scrutiny and can critically impact their perceived credibility by prosecutors and judges. Many “judges and jurors have definite expectations about the way rape victims should behave on the witness stand.... In a case involving a sexual assault...one juror said the victim was disbelieved because her demeanour ‘just didn’t coincide with what we felt a victim should behave like.’”¹³³

In a study conducted in BiH, one judge remarked that:

*It all plays a part, especially if the witness is a young woman; if she is testifying for a crime [that took place] late at night, I hear comments about what she was doing out that late in a bar. They ask if she frequently changes boyfriends. Lawyers try to destroy the credibility of witnesses in that way. Some behaviours are OK for young men but not for young women. For that reason, young women... avoid testifying in court. [Lawyers] comment on how she dresses, and those comments are not made about men.*¹³⁴

128 Mary P. Koss, “Restoring Rape Survivors: Justice, Advocacy, and a Call to Action,” *Annals of the New York Academy of Sciences* 1087, no. 1 (2006): 212.

129 Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014).

130 Richard C. Kearney and Holly Sellers, “Sex on the Docket: Reports of State Task Forces on Gender Bias,” *Public Administration Review* 56, no. 6 (1996), 590.

131 Ivana Radačić, “Kazneno djelo silovanja: pitanja definicije, (ne)odgovornosti za otklonjivu zabludu” *Hrvatski ljetopis za kazneno pravo i praksu* 19, no. 1 (2012), 117.

132 Philip Rumney, “False Allegations of Rape,” *The Cambridge Law Journal* 65, no. 1 (2006): 125-158.

133 Lynn Hecht Schafran, “Barriers to Credibility: Understanding and Countering Rape Myths,” n.d.

134 Halilović and Huhtanen, 80.

Role play: The Rape of Mr. Smith

Read or perform the following role play and then answer the questions.

Police Officer: “Mr. Smith, you were held up at gunpoint on the corner of First and Main?”

Mr. Smith: “Yes.”

Police Officer: “Did you struggle with the robber?”

Mr. Smith: “No.”

Police Officer: “Why not?”

Mr. Smith: “He was armed.”

Police Officer: “Then you made a conscious decision to comply with his demands rather than resist?”

Mr. Smith: “Yes.”

Police Officer: “Did you scream? Cry out?”

Mr. Smith: “No, I was afraid.”

Police Officer: “I see. Have you ever been held up before?”

Mr. Smith: “No.”

Police Officer: “Have you ever GIVEN money away?”

Mr. Smith: “Yes, of course.”

Police Officer: “And you did so willingly?”

Mr. Smith: “What are you getting at?”

Police Officer: “Well, let’s put it like this, Mr. Smith. You’ve given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure that you weren’t CONTRIVING to have your money taken from you by force?”

Mr. Smith: “Listen, if I wanted –”

Police Officer: “Never mind. What time did this holdup take place, Mr. Smith?”

Mr. Smith: “About 11:00 P.M.”

Police Officer: “You were out on the street at 11:00 P.M.? Doing what?”

Mr. Smith: “Just walking.”

Police Officer: “Just walking? You know that it’s dangerous being out on the street that late at night. Weren’t you aware that you could have been held up?”

Mr. Smith: “I hadn’t thought about it.”

Police Officer: “What were you wearing at the time, Mr. Smith?”

Mr. Smith: “Let’s see...a suit. Yes, a suit.”

Police Officer: “An EXPENSIVE suit?”

Mr. Smith: “Well yes. I’m a successful lawyer, you know.”

Police Officer: “In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be good target for some easy money, isn’t that so? I mean, if we didn’t know better, Mr. Smith, we might even think that you were asking for this to happen, mightn’t we?”

Questions

1. Is Mr. Smith’s testimony credible?
2. Is the police officer showing signs of bias?
3. If we replaced the character of Mr. Smith with Ms. Smith, a young and talented lawyer, would the testimony be more or less credible?

Irrespective of your own answer to question 3, do you feel that Ms. Smith would be seen as more or less credible by the police and in the courtroom?

Gender and the Judiciary – the 2014 study carried out in BiH – highlighted some examples of gender bias in the context of rape, attempted rape, and sexual assault, from real cases. Here are two examples:

[A] defence lawyer, discussing a defendant who she represented in a sexual assault case, acknowledged that her client had “sexual intercourse” with an underage girl but said the girl was manipulative and “known to be promiscuous.” The lawyer further noted that while the defendant admitted to “rough sex,” she did not believe that the girl had been unable to resist, because her client was drunk. She elaborated that, according to the defence psychiatrist, the girl was psychopathic, seductive, and sexually liberal. Finally, the lawyer explained that her client was sentenced to only two years for rape because the court correctly identified the aforementioned circumstances as mitigating factors.

This anecdote represents a potentially problematic line of criminal-legal reasoning – suggesting that because the defendant was drunk he was particularly vulnerable to the seduction of an underage girl. There may also be two possible criminal-legal contradictions present in this case. In the first place, the BiH criminal code clearly classifies “sexual intercourse” with a child (or sexual abuse of a child) as a criminal offense.¹³⁵ If the girl was under fourteen years old, then any sexual intercourse was a crime in its own right. In the second place, despite this lawyer’s assertion that drunkenness constitutes a mitigating factor, the BiH criminal code specifically notes that intentionally being under the influence of alcohol does *not* constitute a mitigating factor.¹³⁶ The outcome of the case suggests that members of the judiciary may also adhere to the belief that the alleged promiscuity, seductiveness, and sexually liberal attitudes of an underage girl, and the drunkenness of a perpetrator, are mitigating factors.

...Along with comments made by defence counsel, a judge also reflected on a case she presided over, involving child sexual abuse. This judge expressed concern about the way a prosecutor handled the case when it was re-assigned to him. She relayed the following:

There was a case where an underage daughter reported rape by her father. The female prosecutor made an indictment and she got very involved in the case. However, she went on maternity leave and the case was taken over by a male prosecutor who had a completely different attitude toward the case. He was very subjective – one time he even remarked that he believed the business of this man was unfairly suffering because of the case.

135 A child is defined as a person under the age of fourteen (14). Article 207 of the Criminal Code of FBiH and Article 204 of the Criminal Code of Brčko District both specify that “sexual intercourse with a child” is a crime; and Article 195 of the Criminal Code of RS specifies that “sexual abuse of a child” is a crime. A juvenile is defined as someone who has not reached the age of eighteen. In the Federation, sexual offences against juveniles, while not considered a separate crime, constitute an aggravating condition and therefore include a higher minimum penalty per Article 203 of the Criminal Code.

136 Criminal Code of the Federation of BiH, Article 36§3, Official Gazette of the FBiH 36/03; Criminal Code of the Republika Srpska, Article 14§3, Official Gazette of the RS 49/03; and Criminal Code of the Brčko District, Article 36§3, Official Gazette of Brčko District 10/03.

There was a case where an underage daughter reported rape by her father. The female prosecutor made an indictment and she got very involved in the case. However, she went on maternity leave and the case was taken over by a male prosecutor who had a completely different attitude toward the case. He was very subjective – one time he even remarked that he believed the business of this man was unfairly suffering because of the case.

Source: Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014).

Myths about rape, attempted rape and sexual assault

“Real’ victims of rape and sexual violence report the crime”

It is a commonly held belief that victims of rape or other forms of sexual violence are victimised because of risks they took or ‘bad’ behaviour in which they engaged. In other words, these crimes are not seen as only the fault of the perpetrator. And because victims of these crimes are just as familiar with this social narrative as anyone else, they are likely to feel guilt, shame, and a sense of responsibility for what happened to them. This can translate into reluctance or fearfulness to disclose and report the crime. In addition, victims often know their aggressors and are frightened that by reporting a crime, they may destroy their family, lose their job, or experience public shame and humiliation, further contributing to the reluctance of many to report.

“It is hard for men to resist their sexual impulses”

The assumption that the behaviour of men is driven purely by instinct is based neither on fact nor on sound logic, and its message actually disempowers men in insidious and far-reaching ways. When men (and women) are taught that men cannot be expected to control their responses to stimuli, that they are fundamentally incapable of making rational and moral decisions related to their personal sexual agency, then men are thereby absolved of all physical and sexual responsibility.¹³⁷ This gender-based stereotype is offensive and, if applied in the legal context, has broad consequences far beyond cases of rape and sexual violence. For example, in cases of paternity, child custody, and child support; for, if men cannot control their sexual behaviour, how can they be responsible for reproduction?

“When a woman says no, she actually means yes and just likes to be forced”

Societal norms have attuned both men and women to see men as dominant and, in contrast, women as obedient and passive. This feeds myths that eroticise men’s power to justify abuse and domination. However, lacking consent, domination does not equate to pleasure but to violence and defilement.

137 Mieke Eerkens, “When Judges Assume That Men Cannot Control Their Own Sexual Urges,” *The Atlantic*, July 2013.



“Men cannot be victims of rape”

The statistics available to us demonstrate a high incidence of sexual victimisation even among men. Male victims tend to report even less frequently than female victims, though, mainly due to the stigma and fear of being labelled homosexual (which is itself a crime in some countries). Research on the rape of men confirms that most crimes of rape committed against men are perpetrated by heterosexual men. Furthermore, while societal narratives suggest that women cannot sexually assault men, studies indicate that, in some cases, they do.¹³⁸

“Rape and other forms of sexual violence are only committed by strangers”

Studies show that approximately 80% of rapes are committed by someone the victim knows or is related to.¹³⁹ This challenges assumptions of safety that many people associate with family, friends, and acquaintances and therefore have trouble believing otherwise; meaning, this myth can be deeply held and difficult to contest.

“Consent is implied...or continuous”

Consent is the “permission for something to happen or agreement to do something: no action can be made without the consent of all partners.”¹⁴⁰ Consent can be given initially and then withdrawn. Consent implies notions such as mutuality (equal power) and the absence of coercion, threats, or ambiguity. When gender-based stereotypes are present, “consent [can become] entangled in a number of mutually supportive mythologies which see sexual assault as masterful seduction, and silent submission as sexual enjoyment.”¹⁴¹



Consent is implied... or continuous

138 Callum Watson, *Preventing and Responding to Sexual and Domestic Violence against Men: A Guidance Note for Security Sector Institutions* (Geneva: DCAF, 2014).

139 Schafran, “Barriers to Credibility.”

140 Legal Momentum, *Raped or Seduced? How language Helps Shape our Response to Sexual Violence*, webinar, NJEP, 15 April 2013, <https://www.legalmomentum.org/resources/raped-or-seduced-how-language-helps-shape-our-response-sexual-violence> (accessed 16 February 2017).

141 Jamie Kohen, et al., Berkman Center for Internet and Society at Harvard Law School, Online Lecture and Discussion Series, “Violence Against Women,” *Module 4: The Guises of Rape*, 8 March 2000, <http://cyber.law.harvard.edu/vawoo/module4.html> (accessed 16 February 2017).



Source: Alli Kirkham, "What If We Treated All Consent Like Society Treats Sexual Consent?" *Everyday Feminism*, 23 June 2015. Available at: <http://everydayfeminism.com/2015/06/how-society-treats-consent/>

4.4. Exercise: Case Scenarios¹⁴²

Divide students into groups of 5 to 7. Distribute cases among the groups and ask that they analyse them with an eye for gender stereotyping. One student will then introduce the group, and explain their case and opinion to the rest of the students.

Case 1

A victim's son had a friend to their house late at night. The victim, her son, and his friend talked for a while and watched TV together. The victim's son fell asleep and the victim was headed toward her bedroom when the friend – the accused – forcefully pushed the victim into her bedroom, locked the door, and threw her on the bed. She tried to push him off and shout for help, but he placed his hand on her mouth to silence her and used his superior strength to forcibly perform sexual intercourse.

What did the court say?

The court found that, considering the limited resistance by the victim and the intimate atmosphere of the evening (watching TV and talking at night while the victim was wearing pyjamas), the accused could not have been aware that he was doing something contrary to the will and without the consent of the victim. Therefore, the court accepted that the accused honestly believed the victim had voluntarily participated in intercourse, and rejected her explanation that her son could not hear her cry for help because he was sleeping. The court also emphasized that the victim eventually surrendered, although a psychological expert had testified that the victim reacted to the attack with fear. Lastly, the court found that the force used by the accused could be a part of practicing sexual intercourse and that his placing a hand on the victim's mouth could be seen as an encouragement to avoid waking her son.¹⁴³

- Which myths about rape, attempted rape, and sexual assault are evident in this case?
- What is your opinion of the court's decision?

Conclusion

We can conclude that the decision of the court in this case was influenced by the myth of the “real” victim of rape – a description that the victim in this case did not fit because she did not offer considerable resistance, because the rape was not committed by a stranger, and because the crime was not immediately reported.

¹⁴² Cases from: Ivan Maričić, *Maskulinitet u sudskim presudama o silovanju* (Zagreb: Center for Women's Studies, 2015).

¹⁴³ Ivana Radačić, *Seksualno nasilje: Mitovi, stereotipi i pravni sustav* (Zagreb: TIM Press, 2014).

Case 2

A minor from a difficult family situation came late in the evening to have a cigarette with a friend at a club, the manager of which was the accused. When the friend left, the accused and the victim were alone. The accused prevented the victim from leaving, saying that he wanted sex. When she refused, and resisted by striking him with a billiard cue and trying to hit him with an ashtray, he used his superior physical strength to overpower her, grabbing her and carrying her to another room and, despite her best efforts to repel him including by scratching him with her nails, he raped her.

What did the court say?

Despite the fact that the victim resisted forcefully and both she and the accused suffered visible injuries, the judge held that the use of force by the accused was not strong enough to constitute rape and did not continue for the full duration of intercourse. The court also stated that the victim would have had more bruises if she had really resisted the aggressive behaviour of the perpetrator.

Since the accused did not have any injuries from being hit with the cue stick, the court considered this defensive reaction from the victim as irrelevant. In the same way, the court saw her failed attempt to throw an ashtray at the accused as an act of surrender. And because the accused was under the influence of alcohol, the court held that the victim's behaviour was provocative but not a rejection of sexual intercourse. The fact that the accused stopped engaging in intercourse after his victim said she was menstruating was considered by the court as a mitigating circumstance; the court concluded that a real rapist would not behave in this way. Throughout the trial, those who spoke in court demonstrated a belief in an authoritarian model of masculinity in which sexuality is associated with aggression and men's violence against women is socially acceptable.¹⁴⁴

- Which myths about rape, attempted rape, and sexual assault are evident in this case?
- What is your opinion of the court's decision?

Conclusion

While the fact that the accused was under the influence of alcohol is taken as a mitigating factor, the victim's behaviour is assessed as negative in accordance with the stereotype of a "real" victim (her arrival at the club late at night, her request for cigarettes, and choice to stay at the club thereafter). The man in this case is portrayed as unable to understand rejection, even when hit by a billiard cue, which builds on a stereotype of men as inherently dominant. Though this could be viewed as a negative stereotype, the court translated this into mitigating circumstances in support of the accused.

¹⁴⁴ Ibid.



Case 3

A husband entered the apartment of his wife when the two were separated and no longer lived together. After a verbal argument in which he repeatedly threatened to throw her from the third floor, he physically attacked her, punching her in the mouth and forehead and causing injuries. He then ordered her to strip naked, pushed her onto the bed, and sexually penetrated her.

What did the court say?

The court held that relevant force was used in this case, but that since it was used during an argument related to marital problems caused by alleged adultery on the part of the wife, the husband's reaction was due simply to jealousy. To reinforce its conclusion, the court highlighted the fact that the complaint of the victim focused on threats sent by the accused to her and their children, not just on the rape. The court also held that the victim did not resist her husband aggressively enough that he realized his actions were non-consensual. The court issued a guilty verdict with a suspended sentence for the crime of domestic violence, excluding the count of rape on the argument that there was a lack of evidence.

- Which myths about rape, attempted rape, and sexual assault are evident in this case?
- What is your opinion of the court's decision?

Conclusion

It is evident that jealousy was viewed by the court as a relevant and justifying factor for violence in this case. In finding additional justifications for the behaviour of the accused, the court focused its attention on assessing the behaviour of the victim. The court's conclusion that the victim did not resist convincingly enough reinforces the negative conceptualization of men that they lack the intelligence to judge whether or not a woman is giving sexual consent unless she rejects his advances with extreme violence. Furthermore, this implies that men lack the self-restraint to control their desire for power and domination. Instead of punishing this kind of behaviour, the court effectively sanctioned it as an inherent part of a men's nature, thus feeding into the myth that "real" men cannot prevent themselves from committing rape and sexual violence.

Case 4

After overconsuming alcohol, the victim was nearly passed out in the street when the accused approached her, posing as a police officer, and asked her to accompany him to the "police station." He took her into the courtyard of the nearby building and told her that he wanted to have sex. The victim tried to escape by jumping from a small wall, hurting herself in the process. The accused caught her, held her arm firmly, and pulled her back into the courtyard, where he ordered her to lie down and raped her.

What did the court say?

The court ruled that the accused had clearly engaged in sexual intercourse with the victim against her will, as she had used force to resist the attack. They also noted that the perpetrator had taken advantage of the victim's intoxicated state and listed this as an aggravating factor. The court further took into account that the victim had suffered abuse in her childhood and was thus quick to realise what the perpetrator was trying to do. And while the defendant had not used direct physical force in the process of performing sexual intercourse, the court acknowledged that his threat to use force, his superior physical strength, and the victim's intoxicated state made it difficult – or even dangerous – for her to resist. The court was convinced that the victim had clearly expressed her non-consent to sexual intercourse and found her lack of physical resistance to be of no legal consequence.

- Which myths about rape, attempted rape, and sexual assault are evident in this case?
- What is your opinion of the court's decision?

Conclusion

This verdict allows us to highlight the fact that secondary victimization is not a universal experience for all victims. This last example indicates that some judges are educated about and conscious of gender bias and rape myths.

4.5. Conclusion

Societal norms that tolerate rape and sexual assault are pervasive, and they influence each one of us subconsciously, to a greater or lesser extent. Gender bias, revealed in rape myths and stereotypes, particularly impacts our understanding of such crimes. And the fact that there is often little physical evidence to corroborate the accounts of victims in cases of rape and sexual assault means that judicial investigation and decision-making can be particularly influenced by gender-based stereotypes. This has an effect on investigations, prosecutions, and sentencing in these cases, and as a result, on the proper application of the law.


In addition, gender biases that play out in both society and the courtroom can lead individuals to view victims as responsible for their victimisation. This arguably impacts the willingness of victims to report crimes or participate in prosecutions. And this means that gender biases also act to limit access to justice.

Legal professionals and lawmakers are responsible for ensuring that gender-based stereotypes and gender biases do not affect the provision of justice in cases of rape and sexual violence. While this constitutes a broader societal issue, it is especially crucial that legal professionals exercise leadership in shifting norms, particularly within the legal system but also as part of a larger effort to develop social narratives that do not blame victims and do not give perpetrators impunity.



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Thematic Unit 5:

Gender Bias in Cases of Divorce

Learning outcomes – by the end of this unit, you will be able to:

1. Understand how gender inequality in society influences the issue of divorce.
2. Understand the role the justice system plays in promoting the equality of men and women by overcoming gender bias in rulings in divorce cases.
3. Discuss how economic gender inequality leads to gender bias in the division of property and in decisions on spousal maintenance.
4. Understand how gender bias has influenced the development of legal frameworks and decisions in child custody cases.
5. Discuss how economic gender inequality leads to gender bias in child support decisions.

Background reading:


Tess Wilkinson-Ryan and Deborah Small, “Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining,” *Law and Inequality* 26, no. 1 (2008): 109-132. **pdf:** http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2432&context=faculty_scholarship

Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014). **web:** <http://www.dcaf.ch/Publications/Gender-and-the-Judiciary-The-Implications-of-Gender-within-the-Judiciary-of-Bosnia-and-Herzegovina>

Cynthia A. McNeely, “Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court,” *Florida State Law Review* 25, no. 4 (1998): 891-956. **pdf:** <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1419&context=lr>

Angela Melville and Rosemary Hunter, “‘As Everybody Knows’: Countering Myths of Gender Bias in Family Law,” *Griffith Law Review* 1, no. 1 (2001): 124-138. **pdf:** https://kar.kent.ac.uk/1719/1/R_Hunter_As_everybody_knows_2001.pdf

Family laws in the Federation of BiH (Official Gazette of the FBiH 35/05 and 31/14), the Republika Srpska (Official Gazette of the RS 54/02 and 63/14), and the Brčko District (Official Gazette of Brčko District 3/07).



Summary: This unit focuses on how gender bias can affect the implementation of laws on divorce, the division of property, spousal maintenance, child custody, and child support. The unit begins with an overview of the international and domestic legal frameworks, before looking at how the law is implemented in practice. While the law in BiH generally espouses a high level of gender equality, its implementation is still influenced by gender bias – both in terms of the socioeconomic effects of gender inequality in society and related to persistent attitudes that men should be breadwinners and women should be caregivers. The unit concludes by highlighting how, by recognizing and addressing gender bias in the application of family law, courts can significantly impact the quality family life and facilitate both parents playing an important role in raising their children.

5.1. Introduction

BiH law provides for full equality of spouses, in accordance with constitutional provisions that proclaim anti-discrimination. Yet, in practice, implementing the law in a way that is devoid of gender bias is difficult. In divorce, cases can be viewed as comprising up to five legal components: the basis of the divorce, the division of property, spousal maintenance, and where the couple have children, child custody and child support decisions.¹⁴⁵

In all legal decisions in divorce cases, there is a tension between maintaining the status quo established during the marriage to the greatest extent possible, and ensuring that the settlement does not discriminate against either party. This can be challenging due to the different roles women and men tend to play in marriage: men often make greater financial contributions and women usually make greater caregiving contributions.

Thus, there is a risk that women lose out financially in divorce settlements because spousal maintenance payments do not sufficiently compensate them for the economic opportunities lost to the caregiving roles they played. Furthermore, discrimination in the labour market means that women are likely to earn less than their former husbands. On the other hand, men who focused on their career to support their families may subsequently be prevented from playing a meaningful role in their children’s upbringing due to gender bias in child custody decisions.


Being conscious of the potential for gender bias in the application of family law in cases of divorce is an important mechanism for improving levels of gender equality in society as a whole.

5.2. Legal Framework

The evolution of family laws in BiH

The Kingdom of Yugoslavia (1918-1941) was divided into several different juridical areas; in certain parts, the 1811 Austrian General Civil Code was applied, while in others, the 1844 Serbian Civil Code was in force. And in predominantly Muslim areas, Sharia law ruled family relations. Inherent in each of these legal frameworks was a bias that reflected patriarchal views of the roles of men

¹⁴⁵ Herma Hill Kay, “No-Fault Divorce and Child Custody: Chilling out the Gender Wars,” *Family Law Quarterly* 36, no. 1 (2002), 30.



and women in society. For example, the Austrian Code designated the husband as the head of the family and his wife legally obliged to follow his orders.¹⁴⁶ Under the Serbian Code, no legal capacity was granted to married women; and under Sharia law, husbands could divorce their wives without specifying any reason.¹⁴⁷

The Socialist Federal Republic of Yugoslavia (SFRY) aimed to eliminate these discriminatory provisions by bringing the protection of marriage and the family under the authority of the state.¹⁴⁸ Notably, it sought to address the discriminatory treatment of woman in relation to economic rights, inheritance, custody of children, and the status of ‘illegitimate’ offspring. Indeed, Article 24 of the Yugoslav Constitution inscribed women’s equality as a central principle, stating that: “women have equal rights with men in all fields of state, economic and social-political life.”¹⁴⁹

When the Basic Law on Marriage Law (BLM) of the SFRY was introduced on 3 April 1946, women were given the right to divorce for the first time.¹⁵⁰ The BLM also stipulated that marriage was regulated by civil law, that spouses were to be recognized as social and economic equals, that both parents were responsible for the care and upbringing of their children, and that illegitimate and legitimate children were to be treated equally.¹⁵¹ While this did create some degree of social change, especially in terms of its impact on women’s employment and on men’s willingness to take on some domestic tasks, attitudes were especially slow to change in the private sphere.¹⁵²

Although child custody laws were gender-neutral, their implementation reflected entrenched social attitudes regarding the roles women and men play in a family. Of 11,952 divorces in 1973 that involved dependent children, custody was awarded to the mothers in 8,644 cases (72% of the time) and to the fathers in only 2,570 cases (22% of the time).¹⁵³ These decisions clearly reflected real social trends, such as the fact that women often play a greater role in children’s upbringing and that, in cases where domestic violence is the cause of divorce, the abusive partner is more often male. What is less clear is the role that gender bias may have played in this judicial decision-making. In other words, how might assumptions that women are naturally better at raising children have influenced these outcomes?

When family laws were transferred from state level jurisdiction to the republic level (or autonomous province level) through constitutional amendments in July of 1971, there was no immediate adoption of a new law in the Republic of Bosnia and Herzegovina.¹⁵⁴ Instead, the federal BLM remained in force until 1979, when BiH finally adopted its own family law.¹⁵⁵ Among the changes it introduced were the option of divorce by mutual consent (no-fault) and the harmonization of the rights of illegitimate children to support and inheritance.¹⁵⁶

146 See: Mira Alinčić, “Law and the Status of Women in Yugoslavia,” *Columbia Human Rights Law Review* 8, no. 1 (1976), 346. Paragraph 91 of Austrian General Legal Code.

147 Ibid. Paragraph 920 of the Serbian Civil Code.

148 Ibid., 347.

149 Chiara Bonfiglioli, “Becoming citizens: the politics of women’s emancipation in socialist Yugoslavia,” *Citizenship in Southeast Europe*, 24 October 2012, University of Edinburgh. Available at: http://www.academia.edu/3025842/Becoming_citizens_the_politics_of_womens_emancipation_in_socialist_Yugoslavia (accessed 16 February 2017).

150 Official Gazette of the SFRY 28/65.

151 Alinčić, 347.

152 Ibid., 349.

153 Ibid., 356-7. In the remaining cases, custody was given to a third person or an institution.

154 Official Gazette of the SFRY 29/71.

155 Official Gazette of the Socialist Republic of BiH 21/79, with amendments 42/89.

156 Alinčić, 356-8.

A third phase in the development of the legal framework started with the adoption of family laws in the Federation of BiH, the Republika Srpska, and Brčko District of BiH in 2005. The issues of divorce, custody, spousal maintenance, child support, and division of property are thus currently regulated by these laws, at the entity level.¹⁵⁷

The international legal framework

The most important international instruments addressing the topics of this unit, all of which have been ratified by Bosnia and Herzegovina,¹⁵⁸ include:

- *The Universal Declaration of Human Rights*, which entitles men and women to equal rights during marriage and during its dissolution (Article 16);
- *The International Covenant on Civil and Political Rights*, which, among other things, allows for the suppression of judgements in divorce cases to protect a child's best interests (Article 14);
- *The International Covenant on Economic, Social and Cultural Rights*, which states that the "widest possible protection and assistance should be accorded to the family," including for the care of dependent children (Article 10);
- *The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which obligates that countries consider granting families of migrant workers involved in cases of divorce authorizations to remain (Article 50);
- *The Convention on the Nationality of Married Women*, which states that a woman's nationality is not automatically affected by the act of marriage or divorce, or if her husband changes his nationality (Article 1); and
- *The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, which provides international mechanisms to recover child support and other forms of family maintenance.

Two other international instruments are also particularly relevant – the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and The Convention on the Rights of the Child.¹⁵⁹ Article 16 of CEDAW obliges states to take measures to eliminate discrimination in any matters related to marriage and family. Like the Universal Declaration of Human Rights, Article 16 guarantees women and men equal rights during marriage and at its dissolution, but it also affords them equal parental rights irrespective of marital status as well as equal rights to acquire, own, manage, enjoy, and dispose of property. The Convention on the Rights of the Child requires courts to prioritise the best interests of a child in any actions involving children (Article 3), states that children cannot be separated from their parents against their will unless it is in their best interest (Article 9), and gives children the right to regularly access both of their parents unless this runs against their best interests, even if the parents live in different countries (Articles 10 and 11).

157 See: Official Gazette of the FBiH 35/05 and 31/14; Official Gazette of the Republika Srpska 54/02 and 63/14; and Official Gazette of Brčko District 3/07.

158 See: Constitution of BiH, Annex I. Available at: <http://www.parlament.ba/data/dokumenti/pdf/vazniji-propisi/Ustav%20BiH%20-%20E.pdf> (accessed 12 March 2017).

159 See: United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, No. 34/180, 18 December 1979. Available at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (accessed 20 February 2017); and United Nations, *Convention on the Rights of the Child*, No. 44/25, 20 November 1989. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf> (accessed 20 February 2017).

The European legal framework

At the European level, the following instruments are particularly important:

- *The European Social Charter*, which affords a right to social, legal, and economic protection to families (Article 16) and especially to mothers and children, irrespective of their marital status (Article 17);
- *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), which guarantees equality between spouses (Article 5); and
- *Protocol 7 to the ECHR*, which guarantees, among other things, equality between spouses in their rights and responsibilities during marriage, at its dissolution, and in their relations with their children (Article 5).

The European Union has not succeeded in harmonizing legislation across EU member countries, although it has simplified the cross-border enforcement of spousal maintenance settlements. Known as “Brussels I,” European Council Regulation No. 44/2001 of December 2000 allows someone receiving spousal maintenance payments to sue their former spouse, should the need arise, through the courts in their country of residence.¹⁶⁰ Similarly, spousal maintenance obligations issued in one EU state are enforceable in another.¹⁶¹ In 2010, the new Lugano Convention effectively extended the provisions of this regulation to Iceland, Norway, and Switzerland.¹⁶² This was reinforced in 2011 by Regulation 4/2009, known as the “Maintenance Regulation,” which provided those entitled to spousal maintenance payments with access to European Enforcement Orders. Legal aid covers all the legal costs to complainants in these cases and enforcement is achieved through cooperation between a designated Central Authority in each EU country.¹⁶³

The most recent development in the European legal framework for family law has been the European Union Divorce Law Pact, also known as “Rome III,” which came into force in June 2012. It applies to 16 member countries and focuses on clarifying the criteria used to decide which country has jurisdiction in legal separation and divorce cases, especially in the case of international marriages or when one or both parties no longer live in their home country.¹⁶⁴

5.3. Gender bias in divorce

Historically, divorce cases have been marked by high levels of gender bias. As noted above, divorce as a legal instrument was available only to men in BiH until 1946. What’s more, before the introduction of no-fault divorce in 1979, decisions on the division of property, spousal maintenance, and child custody were partly punitive.¹⁶⁵ These decisions were influenced by the court’s assessment

160 Council of the European Union, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 22 December 2000, Article 5 (2).

161 *Ibid.*, Article 57.

162 Citizens Information, “EU and Family Law,” 10 June 2013 http://www.citizensinformation.ie/en/birth_family_relationships/eu_and_family_law.html (accessed 17 February 2017).

163 *Ibid.*; Council of the European Union, Council Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 18 December 2008.

164 Council of the European Union, Council Regulation (EC) No. 1259/2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, 20 December 2010.

165 Kay, 30-31.

of who was at fault for the breakdown of a marriage; an assessment inevitably shaped by social norms regarding the expected roles of wives and husbands. Proving fault in divorce is challenging, and was even more so when domestic violence was poorly understood. And the historical obligation of the court to try and reconcile the parties created obstacles to accessing divorce, especially for wives, who are more often the abused party.

The introduction of no-fault divorce meant that spousal maintenance was considered by the law as a form of family solidarity.¹⁶⁶ Still, to this day, spousal support and child custody decisions are often viewed as punitive, especially by contributing spouses who do not have primary custody. When judicial professionals share this view, spousal maintenance payments may be set so low as to prevent the recipient from maintaining a reasonable quality of life, or violent parents may continue to receive unsupervised access to their children. Perceptions of the behaviour of each party in court based on stereotypes of gender-appropriate conduct can also lead to gender bias in divorce-related decisions.

Divorce law in BiH

Divorce is currently regulated under family law in each entity – in the Brčko District, Articles 39-41; in the Federation of BiH, Articles 41-44; and the Republika Srpska, Articles 52-56.

In the **Republika Srpska**, the law remains similar to the one that was in force in Yugoslavia. There are essentially two kinds of divorce, contested (non-consensual) and uncontested (consensual), and proceedings can be initiated by one or both spouses.¹⁶⁷

There are two grounds for divorce in the RS:

1. “Severe and permanent disturbance of the matrimonial bond making life in common intolerable.” This can be due to a fault in the behaviour of one or both spouses, or a faultless breakdown in relations between the two.
2. Disappearance of the spouse with no information about him or her for more than two years. The divorcing spouse must prove both that their spouse has disappeared and that the two-year period has elapsed.¹⁶⁸


In the **Federation of BiH and the Brčko District**, the law has been updated to reflect just a single ground for divorce – a “severe and permanent disturbance of the matrimonial bond.”¹⁶⁹ The removal of the rest of this phrase, “...making life in common intolerable,” fundamentally shifts how the law perceives divorce. Before this change, decisions about whether the grounds for a divorce were legitimate depended on satisfying the court that the couple’s common life had indeed become intolerable; a standard which implies that the court must attempt to preserve marriages as a matter of public interest. Updates to the law effectively moved divorce into the private sphere, where either spouse has the right to divorce if they deem that the matrimonial bond has been ruptured for any

¹⁶⁶ Nerimana Traljić and Suzana Bubić, *Bračno pravo* (Sarajevo: University of Sarajevo Faculty of Law, 2007), 128.

¹⁶⁷ Suzana Bubić, “Family Law in Bosnia and Herzegovina” in *The International Survey of Family Law*, ed., Andrew Bainham (The Hague: Martinus Nijhoff, 1998), 56.

¹⁶⁸ Ibid.

¹⁶⁹ See: Article 41 of FBiH Family Law and Article 39 of Brčko District Family Law.



reason.¹⁷⁰ This has been reinforced by evolutions of the law in both the FBiH and the Brčko District that allow for no-fault divorce (by mutual agreement).¹⁷¹ Marriage annulment is also possible and can be initiated by either spouse, any interested person, the public prosecutor, or the guardianship board on the grounds that one spouse was ineligible for marriage (because they were a minor, were already married, or are a close relative) or the marriage was not for the purpose of establishing a common life.¹⁷²

In any contested divorce, the court must be satisfied that the grounds for divorce have been met. In the Republika Srpska and the Brčko District, this is achieved through a process known as “reconciliation,” the primary focus of which is to reconcile the parties and re-establish marriage if possible. In the Federation, the revised family law instead uses the term “mediation” (which is compulsory if the couple has children, and optional otherwise).¹⁷³ While this difference may appear to be a semantic, these terms reflect how approaches to divorce vary in the entities. While reconciliation aims to remove or resolve the causes of divorce, mediation primarily seeks to facilitate communication between parties exercising their right to divorce. In other words, a mediator does not attempt to re-establish a marriage but to foster a process.¹⁷⁴

The rules for mediators in the FBiH stipulate that, beyond social workers, other people may also provide mediation services if they meet basic criteria. They must:

- be a citizen of BiH;
- possess legal capacity (be of sound mind);
- be in sufficiently good health;
- have passed a professional exam in their field or profession;
- have adequate premises to provide services (a room for mediation, a waiting room, and a separate toilet), which meet minimum sanitary, technical, and hygiene requirements and are wheelchair accessible;
- have completed a university education (in philosophy, psychology, law, political science, or social work); and
- have a minimum of three years’ work experience.¹⁷⁵

The way this law is written brings about several challenges in practice. First, although many mediators in the Federation are trained as lawyers or social workers, the educational background of mediators may be in an area that is largely unrelated to this work. Second, couples with children are offered an exemption from the obligation to seek mediation only in cases where an abusive partner fails to appear. This means the abused partner is still obliged to attend the mediation procedure despite the risk of being exposed to further physical and psychological violence. This runs contrary to standards set by the Council of Europe and the EU, and also to provisions in the Federation’s Law on Protection from Domestic Violence, which stipulates that restraining orders be issued in cases of

170 Džamna Duman and Midhat Izmirlija, “Legislativna reforma u BiH (II),” *Institut Posredovanja u Porodičnom Zakonu FBiH*, 10 August 2007.

171 See: Article 42 of FBiH Family Law and Article 39 (1) of Brčko District Family Law.

172 Bubić, 55.

173 See: Article 45 of FBiH Family Law.

174 Duman and Izmirlija.

175 “Pravilnik o uvjetima koje mora ispuniti fizička i pravna osoba ovlaštena za posredovanje između bračnih partnera prije pokretanja postupka za razvod braka,” Official Gazette of the Federation of BiH 5/06.

domestic violence and that victims be given protection.¹⁷⁶

Negotiating divorce in practice

Divorce reconciliation and mediation processes are also subject to gender bias. These kinds of negotiations reflect both early social conditioning and the way in which women and men are perceived by judges, lawyers, and others throughout the process. For instance, from a young age, girls who display assertiveness during disagreements are often labelled pejoratively as “bossy,” “difficult,” or “big-headed;” but boys who display the exact same behaviours frequently receive praise for being “strong” or “self-assured.”¹⁷⁷ Over time, these social signals become ingrained so that women are more likely to be polite and cooperative in negotiations.

Studies have found that women’s negotiating behaviour is typically described by others as “childlike,” “eager to soothe,” and “gullible,” whereas men are described as “aggressive,” “forceful,” and “competitive.”¹⁷⁸ And, gender inequality in society means that women also tend to display much less self-entitlement and hold themselves in lower esteem.¹⁷⁹ Women are more likely than men to show empathy during negotiations, too.¹⁸⁰ Overall, these factors keep women from faring as well as men at the negotiating table.

Even more confounding, if women display the assertive behaviours that are successful for men, women *still* do poorly in negotiations.¹⁸¹ To add insult to injury, social science research has shown that women conform more to passive gender roles when gender stereotypes are implicitly activated beforehand.¹⁸² When judges ask women (and do not ask men) about their sexual behaviour during divorce settlements, this is exactly the kind of trigger that prompts women to negotiate more passively.¹⁸³

Divorce negotiations also feature several specific social aspects, although the literature is divided on why women and men behave in certain ways. Some argue that women have a greater tendency to feel guilt and shame, especially if they have initiated the proceedings. Guilt – an emotion that psychologists have described as “self-directed anger” – may arise even if a wife was not at fault for the breakdown of the marriage, because she is asking her husband to contribute “his” income or property to help support her. Feelings of shame are rooted more in a sense of dishonour or a failure to live up to social expectations, such as those of the “perfect wife.”¹⁸⁴

176 Law on Protection from Domestic Violence, Official Gazette of the FBiH 22/05, Article 9.

177 Amy Sheldon, “Talking Power: Girls, Gender Enculturation and Discourse” in *Gender and Discourse*, ed., Ruth Wodak, (London: Sage Publications, 1997), 227

178 Sandra Bem, “The Measurement of Psychological Androgyny,” *Journal of Clinical and Consulting Psychology* 42 (1974), 155-156.

179 Tess Wilkinson-Ryan and Deborah Small, “Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining,” *Law and Inequality* 26 (2008), 110.


180 *Ibid.*, 115.

181 *Ibid.*, 119.

182 *Ibid.*, 119-120.

183 Halilović and Huhtanen, 64.

184 Judith G. McMullen, “Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce,” *Duke Journal of Gender, Law and Policy* 19 (2011), 58-59 and 68-69.



However, these characterisations themselves may reflect gender-based stereotypes regarding the nature of women, held by some psychologists. As increasing numbers of women become employed and educated, and divorce has become more socially accepted, marriage is viewed as less important in terms of shaping a woman's identity and her level of satisfaction in life. Still, women who do experience feelings of guilt and shame generally feel entitled to less during divorce negotiations.

While men may also feel guilt or shame, over time, these feelings can turn to anger. At this point, husbands may downplay the contributions of their wives during their marriage.¹⁸⁵ And while husbands may feel guilty about the welfare of their children, they are more likely to seek increased custody to boost their quality of life rather than give more property or child support to the primary care-giver of their children (usually the ex-wife).¹⁸⁶

In divorce proceedings, women tend to be more comfortable *asking* for spousal maintenance and child support than *negotiating* for their share of property. Asking is polite; negotiation, on the other hand, is a power game based on claiming one's entitlement.¹⁸⁷ Given that women generally feel less entitled and tend to be the underdogs in negotiations, evidence suggests they simply avoid negotiating when possible, even if this results in having to accept a poor settlement. Alternatively, it would likely be humiliating for many men to ask a financially wealthier wife for spousal maintenance, and most would probably instead prefer to negotiate their share of marital property.

5.4. Gender bias in divorce settlements: the division of property and spousal maintenance

To fully understand the purpose of spousal maintenance and the division of property, it can be helpful to study its original function. Historically, the state conferred power to male heads of household by giving them control over the earnings and assets of their family members. In fact, it was impossible for a woman to earn any income without permission from the head of the family and, in many cases, women could not own property.¹⁸⁸

When divorce was first legalised, in most countries it could only be initiated by the husband, or because of his bad behaviour. Divorce did not end the responsibility of a husband to provide for his wife's needs, though. Had this been the case, women would have been pushed into homelessness and poverty or the state would have to take on the burden of their upkeep. Instead, former husbands were given the responsibility of assigning a proportion of their assets (property and/or maintenance) to their former wives to meet future needs (e.g., rent/mortgage and basic living costs).


Over time, divorce has increasingly grown to be seen as a negotiation between equal parties – much like private contract negotiations between two companies. As such, the concept of equality has emerged as the leading principle, in place of needs assessment, during the division of property. In other words, if a couple constitutes two equal partners in marriage, their property and assets should be divided equally between them upon divorce.

185 McMullen, 73-74.

186 McMullen, 75.

187 Wilkinson-Ryan and Small, 110-112, 121, 130.

188 Frances E. Olsen, "The Myth of State Intervention in the Family," *Journal of Law Reform* 18, no. 4 (1985), 852-853.



Spousal maintenance is now viewed as a way to maintain the status quo of both spouses, in terms of their quality of life, and honour that both have made contributions to the marital estate. These include financial contributions but also household maintenance and caregiving roles, which is intended to mitigate the fact that the spouse (usually the wife) who takes on a majority of caregiving is often at a financial disadvantage after divorce. It is worth noting that property is often of greater value to a spouse than spousal maintenance. Property can often be used as collateral to secure loans and, in the case of real estate, provides shelter. Furthermore, property may appreciate in value or can be used to generate income above what is received in spousal maintenance payments. And, as a one-off payment, an exchange of property is more easily enforceable than regular spousal maintenance payments that a former spouse may stop paying or attempt to re-negotiate. In this way, property as payment can give an abused spouse a clean break from their abuser and prevent that abuser from continuing to threaten them, with the non-payment of spousal maintenance.

The legal framework in Bosnia and Herzegovina

Spousal maintenance is regulated by the family laws of each entity: Articles 203-212 in the Brčko District; Articles 224-233 in the FBiH; and Articles 241-268 in the RS. During a divorce (or annulment) procedure, a spouse can request provisional measures for spousal maintenance and the division of property from the judge: Articles 226 and 283-285 in the Brčko District; Articles 216, 249, and 373 in the FBiH; and Articles 74 and 266 in the RS.

One spouse can request maintenance from the other, or it can be ordered by a judge within the first three years after divorce. While spousal maintenance is not designed as a remedy to any fault for the breakdown of the marriage, it can be refused if the spouse who requests it was “guilty of rude or unseemly conduct during the marriage” and “without good cause.” Claims may be dismissed if they are unjust, if both parties have reached a point of financial independence, or if the marriage was so short that the financial situation of each spouse is effectively unchanged from before the marriage. The conditions for maintenance of a spouse are that:

- He or she lacks sufficient financial means and cannot raise it from property.
- He or she is not capable of work or cannot gain employment.

Maintenance is granted for a set time, and then reviewed. At this point, the recipient can apply for an extension or the amount of maintenance can be adjusted based on a review of each party’s finances. Maintenance is terminated if the claimant dies, remarries, or is no longer in a financial situation that requires it.¹⁸⁹

In the context of spousal maintenance, it is important to note that BiH ratified the 2007 Hague Child Support Convention.¹⁹⁰ State parties to this Convention have a central authority (in BiH, the Department for International Legal Assistance and Cooperation in the Ministry of Justice) that facilitates the enforcement of spousal maintenance payments without judging the merit of the settlement itself. This authority also has powers to provide legal aid and to simplify and expedite procedures as

¹⁸⁹ Bubić, 58.

¹⁹⁰ Hague Conference on Private International Law, *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 23 November 2007. Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131> (accessed 17 February 2017).

appropriate to ensure prompt and effective enforcement.¹⁹¹ The Convention applies to neighbouring countries, including Montenegro from 1 January 2017. BiH only recognizes the Convention as applying to child support, and not to spousal support.

Regarding the division of property, the family laws of the FBiH (Articles 255-257) and the Brčko District (Articles 232-234) are different than legislation in the RS (Articles 272-277). In the FBiH and the Brčko District, the law stipulates that property should be divided into equal parts (50/50). In the RS, while each spouse is entitled to a half of their joint property in principle, one spouse can claim a larger proportion by clearly demonstrating that he or she made a larger contribution. However, this does not apply to property that was not shared before the marriage or which was given to one spouse as a gift or through inheritance. The RS law raises questions about the valuation of contributions made by spouses; for example, housework and care work are systemically undervalued in society, and it is likely that primary caregivers – nearly always wives – are disproportionately affected by this provision.¹⁹²

The division of property

Discussion question:

Should the division of property be based primarily on the needs of each party, or should property be divided equally?

Some women's rights advocates support dividing property by the principle of "two equal halves" rather than based on need (which is often greater for wives than husbands), because:

- It fosters the social norm of equality within marriage;
- When women and men are given equal symbolic value (rather than women being given 'protective' status) in private matters, the notion that they are also equal in the public sphere is reinforced, for example in the labour market;
- Suggesting women have greater needs than men may reinforce social fallacies that they are biologically weaker and that gender equality therefore cannot exist; and
- Providing for the needs of women as caregivers inhibits their (re-)entry into the labour market, thereby reinforcing gender stereotypes at the macro level and women's dependency on (potentially abusive) men at the micro level.¹⁹³

¹⁹¹ Ibid.

¹⁹² United Nations Human Settlement Programme, *Housing and Property Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro* (Nairobi: United Nations, 2005), 57-58.

¹⁹³ Martha Albertson Fineman, "Societal Factors Affecting The Creation of Legal Rules For Distribution of Property at Divorce," in *At the Boundaries of Law: Feminism and Legal Theory*, eds., Martha Albertson Fineman and Nancy Sweet Thomadsen (Abingdon: Routledge, 2013), 272.

Advocates of needs-based division of property usually put forth the following arguments:

- Where the failure of a marriage was the fault of one party (often the financially wealthier party), they should not be absolved from their obligations to provide for the primary caregiver.
- Although we have moved toward more equality in society, dependency still exists: children are dependent on primary caregivers and, by extension, primary caregivers are dependent on primary breadwinners.
- In adulthood, a primary caregiver may not have a legal obligation to provide for his or her children, but they do have a moral and emotional obligation, for which the breadwinner should be responsible.
- The career of a primary breadwinner benefits from the choices of a primary caregiver; if the breadwinner ceases to provide for the primary caregiver, they become dependent on the state, making others indirectly share the burden.¹⁹⁴


Approaches to the division of property: gender bias and the “equality” principle

Through the lens of gender bias, the “equality” principle is a misnomer, because even an “equal” division of property – one that adequately accounts for the contributions of a female primary caregiver to the marital assets – will tend to advantage men over their former wives. There are two reasons for this. First, there is an assumption that by instituting a ‘clean financial break,’ men and women will contribute equally to the maintenance of any remaining dependents (usually children, including adult children). Yet, it is almost always the wife who performs the bulk of caregiving and has less time to dedicate to paid work. Second, women around the world earn less than men for the same work, due to gender bias in the workplace, and marriage can actually compound this when women take maternity leave. This both reduces the number of years of experience she has and interrupts her career progression (women are not always able to return to their jobs at the same pay level or with the same promotion prospects).

Even in childless marriages, wives often move to new locations where their husband’s career prospects are enhanced, at the expense of their own. And women who do not want or do not have children may still be overlooked for promotion by employers due to the “risk” that they may get pregnant.¹⁹⁵ Finally, the ‘clean financial break’ principle does not always consider the pensions each party will receive in the future. A main breadwinner’s pension will likely be larger, and in some cases a caregiver will not have contributed enough years to even qualify for a pension (See Thematic Unit 9). Of course, the size of a breadwinner’s pension will have increased due partly to the fact that they were able to do paid work while their spouses did unpaid caretaking.

¹⁹⁴ Fineman, 270.

¹⁹⁵ Lejla Somun-Krupalija, “Mainstreaming Gender and Equal Opportunities for Women in the Wood, Light Manufacturing and Tourism Sectors [in Bosnia and Herzegovina],” USAID and SIDA, 29 May 2010, 14.



There are further challenges in terms of how the equality principle is implemented in practice. In BiH, it is often the case that divorced women live in rented flats with their children, while their former husbands remain in the family home. The reasons vary, but include the difficulties women face in hiring lawyers and the impacts of domestic violence. The courts themselves can represent an additional complication, sometimes making unreasonable demands during hearings on the division of property. In one case, a woman was asked after 20 years of marriage to prove how much she had invested in joint property which she had built together with her husband.¹⁹⁶ What's more, husbands sometimes take advantage of these lengthy judicial processes to sell joint property in a bid to remove it from the marital estate and prevent their wives from receiving a fair share.¹⁹⁷

Approaches to the division of property: gender bias and the “needs-based” principle

There is also the potential for gender bias in needs-based approaches. Historically, this bias would have been much more obvious, for property was assumed to belong to the husband, who was only expected to give up a small percentage of his assets to meet the needs of his former wife. Now, the needs of both parties are considered, but there is a tendency for these needs to be reflective of the roles each party played during the marriage.¹⁹⁸ Where wives are concerned, this can mean a focus on their past role as caregiver and not, for example, on the need to pursue new economic opportunities in the future.

Furthermore, women who do work full-time and do not have children may be perceived as having needs equal to those of their husbands. But this does not account for the fact that women have relatively limited career prospects due to gender bias in the labour market, especially older women. In other words, needs-based approaches often exhibit gender biases by constraining women who play traditional roles and undervaluing the needs of those who do not.¹⁹⁹

To mitigate gender bias in the division of property, settlements must recognize that husbands and wives have equal rights to property, but that they have not had equal opportunities to accumulate wealth in the past nor will they going forward. Marriage tends to have a negative impact on a woman's earning potential because of the caregiving roles she takes on, while it has a positive impact on a man's, because he is freed from household tasks. An *equitable* division of property is not, therefore, an *equal* division. Instead, what the primary caregiver (usually the wife) has sacrificed, both in terms of income lost during the marriage and limited future prospects, must be considered. Women's care work is often unseen, undervalued, and taken for granted, meaning that settlements which consider these 'invisible' contributions are likely to be perceived as unfair by husbands. This is particularly likely to be true if a division of property settlement he perceives as unfair is accompanied by a child custody settlement which he believes denies him a meaningful role as father.

196 Majda Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in BiH* (Sarajevo: Atlantic Initiative/DCAF, 2015).

197 Ibid.

198 Katharine T. Bartlett, "Feminism and Family Law," *Family Law Quarterly* 33, no. 3 (1999), 486.

199 Fineman, 276-277.

Spousal maintenance

Determining spousal maintenance

In deciding spousal maintenance, the first task is to assess need. (Note that in this context, the need referred to is that of the spouse only; the need of any dependent children is calculated separately and called ‘child support.’) Both parties have a right and an obligation to maintain themselves, but this can disadvantage the primary caregiver – often a woman – who usually must continue to play a caregiving role, but also has to find paid employment or demonstrate that he or she is not capable of work or cannot find it.

In most countries, the law is vague on when, and to what extent, women must seek paid work or perform care roles after divorce. This increases the risk that judges are influenced by their personal biases, and may potentially decide for lower spousal maintenance payments when women do not conform to them.

Research on how the gender of judges impacts spousal maintenance decisions has resulted in varied outcomes. Studies from France and the Netherlands found that the gender of judges had no discernible effect on the outcome of these cases.²⁰⁰ Studies in Poland and Brazil, on the other hand, found that female judges were harsher than their male counterparts on housewives, because they felt that all women should follow their personal example of financial independence.²⁰¹

Similarly, there is some disagreement within feminist legal scholarship as to whether granting women high spousal maintenance payments is empowering or disempowering. Some argue that it values women’s caregiving contribution on par with paid work; and, if housewives do not perform these roles, they would be done by paid caregivers, cleaners, and nannies. However, others assert that high maintenance payments act to reinforce stereotypes that push women to take on the bulk of caregiving. Indeed, some women who work while at the same time receiving spousal maintenance payments are accused of neglecting their children.²⁰²

It can be interesting to look also at male caregivers. Stay-at-home husbands who are dependent on spousal maintenance payments from their former wives are likely to face social ridicule. There have also been cases in which men have lost custody of their children on the basis of dubious gender-based accusations.²⁰³ Clearly, there is gender bias in the context of divorce against both men and women who deviate from their traditional gender roles.

200 Bregje Dijksterhuis, “Women Judges in the Netherlands,” in *Gender and Judging*, eds. Ulrike Schultz and Gisela Shaw, Oñati International Series in Law and Society (Portland, Oregon: Hart Publishing, 2013), 277.

201 From Poland, see: Małgorzata Fuszara, “Women Lawyers in Poland under the Impact of Post-1989 Transformation,” in *Women in the World’s Legal Professions*, eds. Ulrike Schultz and Gisela Shaw, Oñati, International Series in Law and Society (Portland, Oregon: Hart Publishing, 2003), 376–377; From Brazil, see: Eliane Botelho Junqueira, “Women in the Judiciary: A Perspective from Brazil,” in *Women in the World’s Legal Professions*, eds. Ulrike Schultz and Gisela Shaw, Oñati International Series in Law and Society (Portland, Oregon: Hart Publishing, 2003), 445–449.

202 Penelope E. Brian, “Reasking the Woman Question at Divorce,” *Chicago-Kent Law Review* 75, no. 3 (2000), 726.

203 Gene C. Coleman, “Gender Bias in the Family Courts of Canada: Fact or Fantasy?” Presentation to Fathers Are Capable Too (FACT), 16 March 1999.



Negotiating spousal maintenance

As mentioned above, gender bias is often a factor in negotiations because women are socialised to *ask* for things not *negotiate* for them. Asking tends to be based on concrete calculations, whereas negotiating is usually much more uncertain. Studies suggest that when entitlements are clear (e.g. spousal maintenance payments are based on concrete figures drawn from a household budget), women are more comfortable asking for them. Without this clarity, women are inclined to lower their demands.²⁰⁴

Uncertainty tends to favour men for several reasons. Women are likely to experience more negative emotions during negotiations and are also generally more risk averse. This means that they tend to make smaller demands, and especially if they think this will deter their husbands from fighting for child custody. What's more, if negotiations break down, the decision goes to a court; women who are financially dependent on their husbands are incentivised to avoid this, because they cannot afford strong legal representation and because appearing in the courtroom may subject them to unpleasant adversarial tactics, threats, and gender biased attitudes. Men, on the other hand, are more likely to gamble with these risks if they think a court settlement may offer them a better outcome.²⁰⁵

Rule-based systems (derived either from the law itself or from non-binding guidelines) would help ensure that women are treated fairly in decisions on spousal maintenance and the division of property. This would also benefit men who do not conform to traditional gender roles. In such systems, the courts, and by extension lawyers, have less discretion to discriminate based on their own conceptions of appropriate gender-based roles.

Enforcing spousal maintenance

A degree of gender bias is also present in the enforcement of spousal maintenance payments. In the former Yugoslavia, spousal maintenance was deducted directly from wages by employers. Nowadays, particularly due to the large number of people engaged in unreported employment, it is impossible to apply such a model. This is further complicated by the number of people who work abroad and by the fact that some divorcees found themselves living in different countries after the breakup of Yugoslavia.²⁰⁶ Thus, despite already having been placed in a financially precarious position, the complainant must usually bear the burden of taking the defendant back to court, and proving both their entitlement to spousal maintenance and that the defendant has avoided paying it.

The non-payment of spousal maintenance is a criminal offence punishable by a fine or imprisonment (3 years in the Brčko District and the FBiH; 1 year in the RS or 2 years if non-payment resulted in serious consequences).²⁰⁷ However, in practice, it is difficult for someone in financial trouble to undertake the process of bringing their former spouse to court and meeting the required burden of proof. In this way, the manner in which the law is enforced can intensify existing gender inequalities.

204 Wilkinson-Ryan and Small, 123-126.

205 Wilkinson-Ryan and Small, 124-125.

206 Clare Palmer and Kathryn Ramsay, "Refugee Women and Domestic Violence: Country Studies: Bosnia and Herzegovina," Refugee Women's Resource Project, Asylum Aid, March 2002, 36-37.

207 See: Criminal Code of the Brčko District, Article 210, Official Gazette of Brčko District 10/03, 45/04, 6/05, 21/10; Criminal Code of the Federation of BiH, Article 223, Official Gazette of the FBiH 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16; and Criminal Code of the Republika Srpska, Official Gazette of the RS 49/03.

The vast majority of spousal maintenance cases involve a man making the maintenance payments. Decisions on spousal maintenance that leave women financially less well-off reinforce economic inequality, especially when men do not fully adhere to those decisions. And, when domestic violence has played a role in divorce, the fact that the burden is on the recipient to ensure that spousal maintenance is paid gives abusive former partners a tool by which to exert power over their victim even after the marriage has ended.

5.5. Gender bias in divorce settlements involving children: child custody and child support

*“When by birth a child is subject to a father, it is for the general interest of families and for the general interest of children, and really for the interest of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father but leave him the responsibility of exercising the power which nature has given him by the birth of the child.”*²⁰⁸

Historically, in much of Europe and the United States, children have been seen as the property and legal responsibility of their father alone. If parents separated or, in jurisdictions that allowed it, a father divorced a mother, he would retain custody of the children. This rule was based on the rationale that men had access to resources with which to support the children; and, almost all women were financially dependent on male relatives.²⁰⁹

However, notions of family, fatherhood, and motherhood have changed significantly over time. Major social shifts brought about by the industrial revolution required fathers to work in factories and confined mothers to the domestic sphere, which resulted in the stereotypical image of fathers as breadwinners and mothers as the caretakers.²¹⁰ Near the end of the 19th century, the “tender years” doctrine emerged and the previous gender bias of courts in favour of fathers swung instead toward mothers, who were seen as the inherently more natural custodial parent for young children. The courts began to attribute a greater importance to motherly love than to any affection or involvement shown by fathers. Yet, while prevailing social attitudes viewed the mother-child bond as vital to the emotional development of infants, courts still favoured placing teenage boys with their fathers as it was believed that their superior economic resources better placed them to care for and prepare young men for the world of work.²¹¹


In the years following the Second World War, the “tender years” doctrine was eventually challenged by the entry of women into the workplace. And the same arguments used to challenge gender bias against working women were used to oppose perceived gender bias against fathers in child custody. The child rights movement also began to influence the debate, and by the last third of the 20th century, the “best interests of the child” was the dominant guiding principle in BiH and beyond. This

208 House of Lords, *Agar-Ellis v. Lascellas*, 24 Ch. D. 317 (1883). Available in: *The Law Times Reports*, 5 April 1884.

209 Andrew Shepard, “Best Interests of the Child,” Child Custody Project, 2014, <http://childcustodyproject.org/essays/best-interests-of-the-child/> (accessed 18 February 2017).

210 Cynthia A. McNeely, “Lagging Behind The Times: Parenthood, Custody, and Gender Bias in the Family Court,” *Florida State Law Review* 25, no. 4 (1998): 891-956.

211 Shepard.



shift was formalised by the adoption of the Convention on the Rights of the Child (CRC), which came into effect in 1990.²¹²

This approach is theoretically more gender neutral, because it is the child's interests that have primacy over those of the father and the mother. But in practice, social gender norms influence how the best interests of a child are assessed.²¹³ Provisions from the CRC that should be considered alongside the best interests of the child are:

- Article 9 (separation from parents) – children have the right to live with their parents, and to stay in contact with both parents if they do not live together, unless it is contrary to their best interests.
- Article 12 (respect for the views of the child) – children have the right to express their views on matters that affect them, and have these opinions taken into account in judicial processes in accordance with their age and level of maturity. This does not affect the rights of parents to express their opinions on matters that affect their children.²¹⁴

The legal framework in BiH

When the parents of a child do not live together in a family (i.e. they never cohabited or are divorced), the court has the power to decide which parent the child will live with, based on the recommendations of the guardianship authority. Parents can present an agreement to the court but must demonstrate that it is in the best interests of the child.²¹⁵

During divorce (and annulment) procedures, a judge can order provisional measures to protect minor children.²¹⁶

The law stipulates that child support payments are based both on the needs of the child and on the income of the parents, and can be adjusted according to changes in need or income.²¹⁷

Child custody in BiH

Family laws in the FBiH, the Republika Srpska, and the Brčko District are gender neutral; the word “parent” has come to replace any gender-specific references to mothers or fathers. Thus, these legal texts themselves do not indicate a preference as to which parent a child should be entrusted.

Although the law of the Federation stipulates that parents shall care for children jointly, equally, and by mutual agreement, in practice, implementation of this varies. The main provisions of the Republika Srpska law also indicate that both parents shall jointly enjoy rights, and that they are equal in the implementation of those rights. If parents live separately, though, it is the parent with

212 The CRC was signed by Yugoslavia in 1990 and ratified in 1991. See: United Nations, *Convention on the Rights of the Child*.
213 Shepard.

214 United Nations, *Convention on the Rights of the Child*.

215 Article 125 in the Brčko District; Article 142 in the FBiH; and Article 18v in the RS.

216 Articles 226 and 283-285 in the Brčko District; Articles 216, 249, and 272 in the FBiH; and Articles 74 and 266 in the RS.

217 Articles 194-202 in the Brčko District; Articles 213-218 and 234-242 in the FBiH; and Articles 231-240 and 253-268 in the RS.

whom the child lives that shall exercise parental rights. A court may restrict or deny visitation rights to the other parent in accordance with the best interests of the child.

What legal experts often misunderstand is that child custody arrangements do not change the fact that both parents still have parental responsibilities. While there is some flexibility in terms of how the rights and duties that constitute parental responsibility can be organised within a particular context, the best interests of the child are always the primary consideration. In other words, a custody decision is a way of *organising* the parental responsibilities of both parents, not of *transferring* them all onto one parent. Indeed, to maintain the principle of equality, the court must “burden” the other parent with duties so that he or she carries equal parental responsibility. In this sense, “equal” implies an equal *share* of responsibilities, not the *same* responsibilities.²¹⁸

While laws in BiH do not prescribe whether children should live with their mother or father after divorce, custody is given to mothers in the vast majority of cases. This is evidenced by data from both the Federation and the Republika Srpska.²¹⁹

Parent who was granted custody following divorce in the FBiH

	2011	2012	2013	2014	2015	TOTAL	%
Mother	454	456	548	1,515	590	3,563	80.9
Father	112	145	138	129	162	686	15.6
Joint	28	27	24	31	46	156	3.5

Parent who was granted custody following divorce in the RS


	2011	2012	2013	2014	2015	TOTAL	%
Mother	300	353	377	367	397	1,794	77.6
Father	87	79	92	78	82	418	18.1
Joint	18	27	13	16	26	100	4.3

The role of gender bias in child custody decisions

The degree to which gender bias plays a role in this trend of mothers receiving custody at such a higher rate than fathers was examined in a 2014 study on the implications of gender in BiH judiciary. Using online questionnaires and data from individual interviews, researchers demonstrated that judicial professionals were influenced by gender bias in awarding child custody. However, assessing the specific impact that this bias had on outcomes in custody disputes was beyond the scope of the study.

218 Duman Džamna, *Ostvarivanje roditeljskog staranja - savremeni pravni okvir*, PhD dissertation, Faculty of Law, University of Sarajevo, 2014.

219 See: Federation of BiH Institute for Statistics, *Women and Men in the Federation of Bosnia and Herzegovina* (Sarajevo, 2016), 22; and Republika Srpska Institute of Statistics, *2016 Statistical Yearbook Republika Srpska* (Banja Luka, 2016), 88.



The perpetuation of rigid gender roles in BiH society means that, for the most part, mothers continue to be primary caregivers and fathers are unable or unwilling to work fewer hours in order to care for their children. Thus, in many cases, parents (and the children) agree that the mother will receive custody, or the courts decide that this is in the best interests of the child. Simply put, the elimination of gender bias in cases of child custody may have no statistically significant effect on their outcomes, and would certainly not lead to a 50-50 split of custody between mothers and fathers.

Research [has] identified strongly held gender-based stereotypes associated with parenting and child rearing among legal practitioners and members of the BiH judiciary. All but 4 of the 30 individuals interviewed in [one] study indicated that they believe placing children with their mothers is the best practice. Judges, lawyers, and defence counsel alike asserted that entrusting children to the mother is fair and in the best interest of children. One lawyer took this point further by asserting that BiH law stipulates that custody of children be awarded to the mother – which is factually incorrect. This illustrates how gender-based stereotypes and attitudes can sometimes even override legal reality.

Interviewees consistently reported that it is best for children to stay with the mother due to the “natural connection between a mother and child.” Additional explanations were provided in the following terms:

- *There is a stronger bond between a mother and a child*
- *Mothers are natural caregivers*
- *Mothers take better care of children*

Interviewees felt these factors were especially pertinent in cases where the children were five years old or younger. They claimed that in such cases the type of housing available to the mother, the type of work the parents do, and the financial situation of each parent were less relevant than keeping the children with their mother. In addition, a number of interviewees reported that when fathers are awarded custody, it is generally in cases when the mother does not want custody or has an alcohol or drug dependency.

Interviewees also expressed the belief that mothers often end up with primary custody of children because fathers are passive and do not petition for custody; in some cases they do not even ask for visitation rights. A number of interviews conducted with attorneys for this research suggest that fathers may not petition for custody because they believe judicial practice will automatically place children with the mother, regardless of factors that might support giving custody to the father. About one third of judicial professionals interviewed thought that fathers generally do not want full custody. However, they admitted they do not really know the reason fathers do not petition for custody. Nonetheless, one female judge indicated that courts do consider the option of giving custody to fathers....

...Approximately one third of interviewees expressed the belief that fathers are often given unfairly limited visitation rights following divorce or separation....Similarly, several interviewees discussed the struggle fathers have in maintaining contact with their children and getting the help they need to contest custody awards and/or enforce visitation orders....

Researchers also inquired in interviews about what makes a “fit parent” or “good spouse.” Interviewees reported that in child custody and divorce cases, the morality and behaviour of a wife and mother is likely to be scrutinized in the courtroom, whereas the behaviour of a husband or father is generally not considered. For example, several interviewees disclosed that the practice of making allegations against a wife or mother for adultery is generally accepted by judges even though the topic of adultery should not be relevant in determining child custody. In addition, two women judges reported during their interviews that the issue of adultery does not come up with respect to husbands or fathers. Over one third of questionnaire respondents indicated that whether the mother works outside the household is important. Because the questionnaire did not require respondents to indicate a positive or negative correlation to this factor, it is unclear whether being a stay-at-home mom is considered a positive factor or if working outside the home is considered a positive factor....

Interviews and the questionnaire results both revealed that gender-based stereotypes related to parenting influence the opinions and perspectives of legal practitioners and members of the BiH judiciary. Arguably, such gender-based stereotypes and attitudes can thereby impact judicial decision making and substantive legal outcomes....


Several interviewees noted that judges condone the practice of examining the sexual behaviour of women in divorce cases. However, the sexual behaviour of men was not reported to be explored in the courtroom, or at least not to the same degree or frequency as that of women....

[On the other hand], men can be confronted with gender-based stereotypes that cause court professionals to assume they are simply not as capable or appropriate as women in the role of primary caregiver. This may have little to do with their actual interest, ability, or experience in parenting. No matter which parent is advantaged or disadvantaged, gender-based stereotypes as the basis for judicial decision making can clearly be problematic in the resolution of child custody cases, and especially to efforts to decide such cases impartially....

The ECHR [has] held that states cannot impose and enforce traditional gender roles and gender-based stereotypes through judicial decision making, saying:

*The gender stereotype of women as primary child care providers and men as primary breadwinners cannot, by themselves, be considered sufficient justification for a difference in treatment any more than similar stereotypes based on race, origin, colour or sexual orientation.*²²⁰

²²⁰ Decision, *Konstantin Markin v. Russia*, No. 30078/06, 22 March 2012. Available at: <http://hudoc.echr.coe.int/eng?i=001-109868#%7B%22itemid%22:%5B%22001-109868%22%5D%7D> (accessed 7 February 2017).



Thus, while mothers in BiH may in some cases have a greater interest in or more developed capabilities related to child rearing, there are also some fathers who are better able and positioned to be the primary custodian of a child. It is recommended that BiH courts avoid *de facto* legal decision making on the basis of gender stereotypes that posit women as better parents than men. Courts are encouraged to adopt a policy designed to support the best interests of the child, outlining measures to critically evaluate which parent is in the best position to be the primary caregiver.

Source: Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: AI and DCAF, 2014), 61-66.

In recent years, men have increasingly complained that they are unfairly treated by courts in child custody decisions. This is an international trend, but is also true in BiH, where fathers have established an organization to advocate for fathers' rights and for changes in legal practice.²²¹ Many fathers have protested that courts overlook their contributions in raising their children due to gender bias. This results in child custody settlements in which their only contribution is financial, beyond a few weekend visits. Decisions of this sort send the false message that men are uninterested in playing an active role in parenting when in fact a court has prevented them from doing so.²²²

Cynthia McNeely explains that, like mothers, fathers face pressures and stereotyped assumptions about their roles. "Indeed, if many fathers are behaving according to their societally prescribed roles as primary familial breadwinners, then it is patently unfair to deprive them of a meaningful relationship with their children simply because they spend their day in the workplace to provide for their children, rather than in the home caring for their children in person. Both forms of caretaking are essential to raising children, and one should not be perceived as more worthy than the other."²²³

221 For example, see: Ivana Bilić, "Borba za starateljstvo: Nejednakost roditelja pred sudom," *Radio Slobodna Evropa*, 17 April 2014, <http://www.slobodnaevropa.org/content/borba-za-starateljstvo-nejednakost-mame-i-tate-pred-sudom/25353136.html> (accessed 18 February 2017).

222 Cathy Meyer, "Dispelling the Myth of Gender Bias in the Family Court System," *Huffington Post*, 10 July 2012.

223 McNeely.



Discussion:

Gender bias in cases of child custody

Elaborate on the following questions:

- *Why do you believe mothers are awarded custody in almost all cases, despite the gender-neutral nature of the law?*
- *Is the practice of awarding custody primarily to mothers simply an example of gender bias or are there objective reasons for it?*
- *Are mothers burdened by this practice?*
- *Does this practice relieve fathers of their parental caretaking obligations?*
- *Is this practice a sign that fathers are less capable or less willing parents?*

There may be some objective reasons that mothers are favoured by the courts. For example, men are much more frequently the perpetrators of domestic violence (see Thematic Units 3.1 and 3.2), which is sometimes the cause of divorce. It is also possible that many children express a preference to live with their mother, who they have spent more time with (because mothers tend to work fewer hours outside the home). Still, this should not preclude joint custody.


While many mothers may seek full custody, this does limit their opportunity to pursue careers and deviate from traditional gender roles. Moreover, if a woman requests joint custody, she may face social pressure and accusations that she is an “undevoted” mother.

Fathers often have financial obligations to their children in the form of child support, regardless of custody. And given the limited success of some custody cases, many men are encouraged not to pursue custody by their lawyers. However, not pursuing custody should not be viewed as a sign that they are lesser parents or do not want to care for their children.

Conversely, women who defy gender roles can also face bias in custody decisions. Although judges are supposed to apply the “best interests of the child” principle, stereotypes about gender roles have led them to deny custody to women who work outside the home, have sexual relationships after separating from their husband, or otherwise fail to measure up to traditional notions of motherhood. In some cases, fathers have obtained custody even while exhibiting minimal interest in child rearing, simply by virtue of the fact that they have remarried or are more financially well-off than the mother. A lack of understanding about which factors to consider when applying the “best interests of the child” standard has substantially advantaged the negotiating position of fathers in divorce proceedings.

Mitigating the influence of gender bias in decisions on child custody

One way to overcome the impact of gender bias in child custody cases is to employ more scrutiny in determining the best interests of the child. Yet, family laws provide little guidance on how this should be determined; and while most judges undoubtedly strive to be as objective as possible, there is a high risk that their implicit gender bias influences their decision-making.



In an analysis of relevant laws, the Human Rights Ombudsman of BiH identified problems related to implementation of the “best interests” principle, highlighting in particular those cases in which courts had failed to challenge the authority of parents in determining the best interests of their child. The UN Committee on the Rights of the Child has urged BiH to “strengthen efforts” toward fully implementing the best interests of the child standard so that it is “appropriately built [into] legal provisions, judicial and administrative decisions and projects, and programs and services that affect the children.”²²⁴

The process by which custody decisions are made could be more transparent if judges documented the factors they considered in each case, instead of stating only that the decision is based on their subjective analysis of the best interests of the child. If judges were obliged to provide detailed explanations of their findings on the record, as well as their rationale, it would be easier to identify which cases were influenced by the gender biases of judges.²²⁵

On a different yet related note, matters of domestic violence cannot be overlooked in decisions of child custody. Yet in BiH, courts give little regard to this question when deciding on custody, and unsupervised visitation rights have been given to parents who are violent with their partners and even when protection orders are in place.²²⁶ Research on domestic violence against women indicates that courts fail to take a history of DV into account when making decisions on child custody for several reasons:

The first is that domestic violence often goes unreported, or delays in reporting it make it hard for victims to substantiate their claims. The second is that judges tasked with making custody decisions sometimes fail to recognise the effects of domestic violence on those present in their courtrooms, or they may not understand how violence against a partner also affects children. The third reason is that domestic violence charges are not heard in the same court and hence family courts consider it a separate issue, a practice seen as unfair by battered women.²²⁷

Source: Majda Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in BiH* (Sarajevo: Atlantic Initiative/DCAF, 2015)


In addition to the courts, the Centres for Social Work play an important role in mitigating the influence of gender bias in child custody settlements. When advising the court, social workers should advise against giving unsupervised visitation rights to parents who have perpetrated violence and should ensure that any concerns one parent has about leaving their children with the other are properly investigated. Moreover, they can facilitate the implementation of custody arrangements in a way that is fair to and safe for both parents. For example, in several cases in BiH, a mother who has

224 “Report by Human Rights Ombudsman of Bosnia and Herzegovina on the Implementation of Optional Protocol to the Convention on the Rights of a Child Related to Trafficking in Children, Children’s Prostitution and Children’s Pornography,” Sarajevo, December 2009, 5.

225 Ibid.

226 Halilović.

227 Daniel G. Sounders, “Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns,” National Online Resource Center on Violence Against Women, October 2007. Available at: http://vawnet.org/sites/default/files/materials/files/2016-09/AR_CustodyREVISED.pdf (accessed 18 February 2017).



a protection order against her children's father has come into close contact with him in the process of delivering the children.²²⁸ Enforced visitations are also often avoided by parents because they impose a high level of stress on their children. The Centres for Social Work can play a role in empowering parents who have been abused or discriminated against; but their inaction can also reinforce gender bias.²²⁹

Child Support

Determining and Negotiating Child Support

Determining and negotiating child support is challenging in many of the same ways as determining spousal maintenance. However, it is important to note the difference between the two concepts. Spousal maintenance and the division of property refer to partitioning the marital estate based on the fact that both spouses are entitled to their fair share. Spousal maintenance is intended to be a provisional measure that ends when a recipient becomes financially self-sufficient, either through paid income or remarriage. Whether or not a spouse has children should not impact how much spousal maintenance they receive. But, if they are the primary caregiver for children, this may prevent them from becoming fully financially independent and thus prolong the time they receive spousal maintenance.

Child support, on the other hand, is based on the notion that both parents have an obligation to contribute to their children's upbringing. These obligations depend on the needs of each child and continue until they reach adulthood and complete their education. As mentioned before, rule-based systems are more effective than negotiated settlements in ensuring that women – usually the recipient of child support – receive a fair amount.

While it may seem relatively straightforward to calculate child-related costs for the purpose of drawing up a settlement between parents, in practice, the process is more complicated. Parents are often willing to pay child support, but they may resent other factors in the divorce settlement, such as alimony payments, the fact that they do not have more or any custody of their children, and the division of property. Indeed, even in cases of no-fault divorce, it is easy for the parties to misperceive decisions about financial matters as indicators of who the court believes is at fault.²³⁰ Parents who pay child support may also find themselves in a paradoxical situation in which they want their children to have a good quality of life, but they do not want to subsidise their former spouse's quality of life. For this reason, child support is sometimes seen in a negative light as a form of 'hidden alimony.'²³¹


Then again, studies have shown several reasons why custodial parents – usually mothers – tend to play down their demands for child support. In some cases, child support-paying parents have pressured the custodial parent to accept lower payments under the threat of challenging the custody settlement. While these were likely empty threats, they are effective nonetheless. Research also suggests that when the custodial parent initiates the divorce, he or she is likely to reduce the size of

228 Halilović, 78-80.

229 Halilović, 80.

230 Kay, 32.

231 Marsha Garrison, "The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?" *Duke Journal of Gender Law & Policy* 8, 133.



their child support demand out of guilt. (Conversely, there are cases of child support-paying parents who have initiated their divorce offering more money than was requested, also out of guilt.)²³² Because the majority of custodial parents are women, there is a high risk that the tendency of mothers to demand less may intersect with gender bias to result in unfair child support settlements.

Enforcement of child support

The same legislation that criminalises the non-payment of spousal maintenance also applies to the non-payment of child support. Informal data indicates that, so far, no one has ever been sentenced to prison for this offence, despite research suggesting that the non-payment of child support is widespread. A 2013 survey of 1500 single parents found that child support was underpaid or unpaid in 75% of cases.²³³ Parents who are supposed to pay child support but don't rely on the fact that the criminal justice system in BiH is very slow in processing these cases, and they know that it might take years before their case comes to court.²³⁴

5.6. Conclusion

Family law reflects the values of our society at a given point in time. Its application can play a significant role in perpetuating gender inequality and reinforcing negative stereotypes that harm both women and men. It is worth highlighting, however, that the legal framework itself allows for a high level of gender equality if only legal practitioners are more aware of gender bias. By educating themselves on this issue, judges and lawyers have the potential to transform societies by enhancing gender equality on a broad scale. Acknowledging gender bias in cases of spousal maintenance and the division of property can impact the future prospects of spouses, especially those who play or have played caregiving roles; and this can have the secondary effect of improving their dependents' quality of life. In this way, judges and lawyers have the ability to change the lives of individuals in the short term, and society as a whole in the long term.

5.7. Annex: Problem-based scenarios, child custody decisions

Please read the following three divorce cases carefully and decide to whom you would award custody of the child(ren). Consider the relevant laws and note down all the reasons for your decision.

Case 1²³⁵


In 2008, a woman Lj.Č. initiated divorce proceeding against a man Č.Č., with whom she entered into marriage in 1997, in Ljubinje, Bosnia and Herzegovina. They have a 10-year-old son.

²³² McMullen, 69.

²³³ Ombudsman for Human Rights in BiH, *Specijalni izvještaj: Djeca u konfliktnim razvodima* (Banja Luka: Save the Children, 2013).

²³⁴ Selma Boračić-Mro, "BiH: Većina razvedenih roditelja izbjegava plaćati alimentaciju," *Radio Slobodna Evropa*, 7 August 2012, <http://www.slobodnaevropa.org/a/bih-vecina-razvedenih-roditelja-izbjegava-placati-alimentaciju/24669644.html> (accessed 18 February 2017).

²³⁵ Informed by a real case in BiH.



In her divorce complaint, Lj.Č. said that their marriage was good in the beginning and she and her husband had a good relationship. However, when Lj.Č. started earning money by singing at weddings and parties, and in a restaurant in Stolac, things began to change. Her husband was unhappy and tried to forbid Lj.Č. from accepting further offers of work. She ignored him; she liked music and was a talented singer, and the job was a source of both income and enjoyment for her. She said that her husband was very jealous, verbally abusive, and started threatening and beating her. Their child was mostly in care of Č.Č.'s mother, since they all lived in a family house together and she was at home during the day.

Č.Č. filed for divorce saying that Lj.Č. had brought shame on the family. One night, in October 2007, she came home from work and he threatened to strangle her. She ran away to her parents in Stolac. On one occasion, she returned to see the child, who seemed uncomfortable and distant in her company. She decided to file for full custody.

In court, Č.Č. claimed his wife often demonstrates inappropriate behaviour: she sings at parties, dances on tables, and takes off her clothes while hugging and kissing the guests. He considers this unladylike and unacceptable in the local culture. His acquaintances make fun of him and his wife, and the children at school tease their son. Č.Č. claims that his wife has no need for additional income because his salary as an architect is more than sufficient. He says that she has not paid any attention to their child for over two years and claims the court should give him full custody.

The local Centre for Social Work reports that attempts to reconcile the partners has failed. The mother has not seen her son for some time but has been sending him money by post. The father has a stable salary and is a successful architect. The child is an exemplary pupil in the primary school and is very attached to his father and his paternal grandmother; but when his mother is mentioned, he becomes distressed. In an interview with the social worker, the mother said that she could provide for the child in her parents' house. Although her elderly mother is unable to do any housework, her father is still able to provide some support with household chores. The child stated that he wants to live with his father and began crying at the possibility of being made to live with his mother, as he didn't want to change schools and leave his friends.

The Centre for Social Work suggested that custody be given to the mother on the basis that nurturing by the mother is essential for the development of a young child. In most cases, judges rely on the recommendations of the Centres for Social Work; but in this case, in spite of that recommendation, the court decided to give custody to the father, basing their decision on:

- the wishes expressed by the child; and
- that fact that awarding custody to the mother would cause unnecessary hardship and stress by making the child move to a new house and school

In addition, taking into consideration that both parents have a duty to care for the child, the court ordered that the mother pay child support of 200 KM (€100) per month.



Question for students:

- Do you see any gender bias in this case?
- Do you think the recommendation given by the social worker was appropriate?
- Was the decision by the court to disregard the recommendation of the Centre for Social Work appropriate in this case?
- Was the best interest of the child taken into consideration? How?
- Do you see any relevant factors that were overlooked by the court?

Note for the professor: The wife claimed that her former husband had committed domestic violence. If students do not notice this, it warrants further discussion.

Case 2²³⁶

In 2014, Dina left her husband after enduring years of an abusive and controlling marriage. He even threatened her with a gun, saying he would kill her if she ever left him. On several occasions, she called the police but later dropped the criminal charges against her husband after he threatened to take her children away and prevent her from seeing them. In court, she stated that she managed to find a job and rent a flat of her own after leaving her husband. He did not allow her to take their seven-year-old son but did allow her to take their 12-year-old daughter, as he is uninterested in raising a daughter. Dina has some financial help from her parents who live abroad. She filed for divorce two months after leaving her husband.

During the mediation process at the Centre for Social Work, Dina's husband claimed that she is an unfit mother, is immoral, and that she plans to move away to work and live elsewhere. The social worker recommended that custody of both children be entrusted to the mother, but the court did not fully agree. It decided instead to maintain the status quo, leaving the daughter with the mother and the son with the father. In its reasoning, the court listed some financial concerns related to the fact that the mother did not have a full-time job and did not own her apartment. In addition, it noted that she had been living apart from her son for 6 months.

The court recommended that the children have regular contact with each other and that they spend every weekend together, alternating between parents.

Later, when it was the mother's turn to take her son for the weekend, the father prevented him from leaving. Then, when it was time for him to return the daughter to the mother, he instead dropped her off at a police station in Hadzici. The police had to call Dina and asked her to collect her daughter.

Six months later, Dina alerted authorities to the fact that she had not had any contact with her son because he refused to see her. The only solution the court could offer was to enforce the decision by sending police officers to remove the son from his house by force every other weekend, which Dina refused because she felt this would be detrimental to her relationship with her son.

²³⁶ Informed by a real case presented in: Halilović.

A year on, the situation remained the same: the son refused any contact with his mother or sister. Clearly under the influence of his father, the boy (8 years old) told the Centre for Social Work that his mother and sister are prostitutes, and that he hates them and wants to kill them.

Questions for students:

- Is gender bias evident in this case? If so, how is it manifested?
- Are the best interests of the children honoured?
- Do you see any relevant factors that were overlooked by the court?
- What legal remedy should the courts use to facilitate visitations?

Note for the professor: The wife claimed that her former husband had committed domestic violence. If students do not notice this, it warrants further discussion.

Case 3²³⁷

A wife S.M. and husband T.M. filed for divorce in 2012 after the husband entered into a relationship, and subsequently moved in, with his wife's best friend, with whom he has lived ever since. S.M. and T.M. have a small baby who, at the time the case was deliberated by municipal court, was 12 months old and was being breastfed three times a day. T.M. was adamant that he wanted full visitation rights so that the child would stay with him for two nights, in another town, every other weekend. S.M. argued strongly against this arrangement on the grounds that she was still breastfeeding, and it would therefore be detrimental to the child.

In his ruling, the (male) judge said the child was old enough to stop being breastfed and that the mother was using breastfeeding as an excuse to keep the child from the father and punish him for his affair; a strategy the judge claimed he had seen women use in previous cases. The judge also asserted that it was in the best interests of the child to spend time with the father, and was very critical of the mother for not yet putting the child on formula.

Questions for students:

- Is gender bias evident in this case? If so, how does it manifest?
- Do you believe the judge ruled in the best interests of the child?
- How should the judge evaluate the mother's claim that the child needs to be breastfed?²³⁸

²³⁷ Informed by a real case from the US. See: "Judge to Mom: Stop Nursing Baby or Lose Custody," *The Healthy Home Economist*, 17 February 2017, <http://www.thehealthyhomeeconomist.com/judge-to-mom-stop-nursing-baby-or-lose-custody/> (accessed 19 February 2017).

²³⁸ The World Health Organization recommends all babies be exclusively breastfed for 6 months, with continued nursing until two years of age while transitioning to solid food. The American Academy of Pediatrics also recommends exclusive breastfeeding for 6 months, continued breastfeeding while transitioning to solid foods through 12 months, and then extended breastfeeding as long as it is mutually desired by mother and child.



Case 4:

An up-and-coming lawyer living in rural Herzegovina filed for divorce from her husband, a metalworker who became unemployed five years ago when his workplace closed down. The husband has not found work since then, but the wife has just accepted a position at a reputable law firm in Sarajevo. The husband contested the divorce; the wife claims that she can no longer tolerate being married to a “useless” man who lives off her salary and makes no financial contribution of his own.

The couple have three children, ages 3, 5 and 7. Given that the mother works long hours, the father takes on most of the household chores and child rearing. For example, he cooks all the weekday meals and takes the children to medical appointments and school. The 7-year girl is doing well in primary school, but her teachers are concerned that she behaves like a tomboy, a factor they attribute to her limited contact with the mother. The 5-year old boy has shown signs of being aggressive to other children in his pre-school. When the mother filed for divorce, she took the children on a summer holiday to Sarajevo and has not let them return for the beginning of the new school year. She applied for full custody of the children, claiming that the father is a bad role model. The father also applied for full custody on the grounds that he is the primary caregiver.

The Centre for Social Work recommended that the mother be awarded full custody and the father given monthly visitation rights and an equal share of school holidays. The social worker was concerned by the father’s lack of financial security and agreed with the mother that he is a bad role model, suggesting that the father’s influence was behind the aggression of the 5-year old son and the tomboyish behaviour of the 7-year-old daughter. The social worker believed this was an inevitable consequence of the children having too little contact with their mother at early stages in their development.

The court supported the recommendations of the Centre for Social Work in full, awarding full custody to the mother and stating that this was in the best interests of the children. The judge also told the father that he should try harder to find a job, in order to make a more meaningful contribution to his children’s upbringing.

Question for students when deliberating this case:

- Do you think the recommendations of the Centre for Social Work were appropriate?
- Do you see gender bias in this case?
- Were the best interests of the children taken into consideration? How?
- Do you see any relevant factors that were overlooked by the court?

Note for professor: The mother effectively kidnapped the children before the case went to court, and the court did not consider whether relocating the children was in their best interests.

 **Interactive exercise:**

Myths and dilemmas about parent-child relationships


15+ minutes

Professor: Choose from the following statements and ask the students to discuss whether they see evidence of gender biases in them. If you have a large group, you may wish to have students first discuss in smaller groups of 2-6 and then to ask them to share feedback with the class. *See suggested professor feedback in italics.*

- Fathers work longer hours, so they are never as involved as mothers in child care and they are not as naturally inclined to care for their children.
*When both parents work, both parents usually share child care and household responsibilities. Further, when parents divorce, mothers often take on more paid work.*²³⁹
- The Centres for Social Work are the best source for recommendations based on proven social and psychological facts.
While social workers may strive for this, they are not free from their own biases.
- Following divorce, fathers tend to avoid paying spousal maintenance and child support, and gradually decrease contact with their children.
In most of cases, fathers remain involved in the lives of their children and make regular spousal maintenance and child support payments.
- Most mothers are vindictive and use various strategies to prevent fathers from seeing their children.
Many parents agree on visitation, child support, and how to care for their children in a mutually satisfactory manner.
- Fathers usually work while mothers provide child care, which is why mothers should be awarded child custody.
*This was once the case, before mothers entered the workforce; but nowadays, it is common for both parents to work. And, while some mothers take time off from their careers when they have young children, many intend to re-enter the workforce once their children are in school full-time.*²⁴⁰
- If a mother has committed adultery, the burden is on her to prove that she is suitable to be the primary caregiver to her children.
Whether or not a mother has committed adultery has no bearing on her competence and capability to care for and love her children.

²³⁹ See: Nancy E. Dowd, "Work and Family: Restructuring the Workplace," *Arizona Law Review* 32 (1990), 444. The percentage of divorced mothers in the workplace ranges from 69% to 83%.

²⁴⁰ McNeelly.

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- A mother who works as a senior executive and travels frequently for work should not be awarded custody.


A mother who works and travels for work should be treated no differently than a father who does the same. Taking this into consideration as a special circumstance would punish women for working and wanting to provide for their families. Neither parent should be punished for needing to make short-term childcare arrangements with a responsible third party – be it a professional childminder, close friend, or relative – to allow them to meet the demands of their career.

- A woman who leaves her child behind with the father when they separate is a bad mother who should not be awarded child custody.

Sometimes, women in abusive relationships have no choice but to flee in order to save their lives, and they often have to make difficult decisions such as leaving a child behind in order to do so. Finding a way to leave her husband and then seeking a court settlement for child custody may be the best option available to some women.

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Thematic Unit 6:

Gender Bias in Cases of Sexual & Gender-Based Harassment

Learning outcomes – by the end of this unit, you will be able to:

1. Understand the root causes, prevalence, and consequences of sexual and gender-based harassment in the workplace.
2. Identify the relevant legal framework in BiH, the EU, and in international law.
3. Compare different legal approaches to sexual and gender-based harassment.
4. Understand how gender bias undermines the provision of justice in cases of sexual and gender-based harassment.

Background reading:

Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014).
web: <http://www.dcaf.ch/Publications/Gender-and-the-Judiciary-The-Implications-of-Gender-within-the-Judiciary-of-Bosnia-and-Herzegovina>

High Judicial and Prosecutorial Council of Bosnia and Herzegovina, “Guidelines for the Prevention of Sexual and Gender-based Harassment within the Judicial Institutions of Bosnia and Herzegovina,” February 2015. **web:** <http://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=56024>
pdf: http://www.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=30234

Summary: Thematic Unit 6 is focused on gender bias in cases of sexual and gender-based harassment (SGBH) in the workplace. As an introduction, the unit examines how sexual and gender-based harassment emerged as a legal concept in the 20th century, and how gender bias both influences understandings of what constitutes unwanted behaviour and can also make it difficult to prove. The lesson then provides an overview of the legal framework, definition, and regulation of sexual and gender-based harassment, both in terms of domestic laws at the entity and state levels as well as those in other European countries and internationally. The types, causes, and prevalence of SGBH, and the negative impact it can have on a person’s performance and future prospects in the workplace as well as on his or her mental health, are also summarised. The unit concludes by demonstrating that many common myths about sexual and gender-based harassment are, in fact, examples of gender bias.

6.1. Introduction and history

Sexual and gender-based harassment (SGBH) are, of course, age-old phenomena; but in legal terms, the concept of sexual harassment only emerged toward the end of the 20th century, to describe unwanted behaviours of a sexual nature that occur in the context of employment.²⁴¹ As understanding of this concept developed, these behaviours were increasingly seen as a form of gender-based discrimination that encompasses acts outside the narrow definitions of inappropriate *sexual* behaviour, and thus the term ‘gender-based harassment’ came into use.

The reasons the concept of sexual and gender-based harassment (SGBH) did not develop earlier include the fact that women’s rights movements in the first half of the 20th century were focused on securing more basic rights – such as women’s suffrage, divorce and property rights, the prevention of sexual violence, and facilitating women’s access to the labour market. (In other words, women had to concern themselves with getting into the workplace before they could concern themselves with fighting harassment in the workplace.) It was only during the rapid industrialization that began after the Second World War, in Yugoslavia and elsewhere, that women’s participation in the formal labour force alongside men began to increase significantly. Before this, in BiH, the majority of the population would have worked in agriculture.²⁴²

This is not to say that SGBH only takes place between men and women. Indeed, many cases have been documented in historically all-male environments such as in the armed forces; but at the time, these cases were labelled as hazing, bullying, or ‘harmless banter’. It is only recent advances in academic thought that have recognised the gendered nature of these kinds of violent behaviours. Nowadays, SGBH is recognised as a serious problem for a number of reasons. In addition to being a form of gender-based discrimination, which can lead to lawsuits, SGBH can also incur significant financial costs to employers by resulting in absenteeism, the use of sick leave, decreased productivity, poor workplace performance, and the increased turnover of skilled employees.²⁴³ While it is difficult to attach a figure to the actual financial costs, various studies have suggested that workplace harassment costs companies several hundred euros per employee per year; and this can translate into millions of euros for large companies.²⁴⁴


Perpetrators of SGBH feel entitled to exert power over one or several victims by exposing them to unwanted acts. In many cases, men feel entitled to commit sexual harassment against women because of their dominant role in society or in a particular profession. In other cases, a perpetrator seeks to demonstrate that he is “more of a man” or she is “more of a woman” than the victim. Supervisors in the workplace may not be actively involved in harassment, but can perpetuate it nonetheless when their gender biases prevent them from taking sexual and gender-harassment seriously.

241 While similar behaviours may also occur in the home or in public, these are categorised differently, as domestic violence or sexual assault for example.

242 Neven Andjelić, *Bosnia-Herzegovina: The End of a Legacy* (London: Frank Cass Publishers, 2003), 29.

243 Dierdre McCann, *Sexual harassment at work: National and international responses*, Conditions of Work and Employment Programme 2 (Geneva: International Labour Organisation, 2005).

244 For a discussion on figures, see: European Agency for Safety and Health at Work, *Calculating the cost of work-related stress and psychosocial risks* (Luxembourg: European Union, 2014). https://osha.europa.eu/en/tools-and-publications/publications/literature_reviews/calculating-the-cost-of-work-related-stress-and-psychosocial-risks (accessed 20 February 2017).



When it comes to the provision of justice in cases of SGBH, it is important that mediators, court staff, and judges recognise their own implicit biases and actively seek to mitigate their effects. Sexual and gender-based harassment is often committed against individuals who, because of bias, are afforded little respect and credibility; and yet, the onus is on the complainant to demonstrate that a particular form of behaviour was both *unwanted* and the primary cause of a decrease in their workplace performance. If legal professionals are influenced by gender bias, they risk allowing SGBH to continue by dismissing or minimising the claims of complainants. Alternatively, by recognising that complainants have been victims of serious and gender-based violations, judicial professionals can help break the cycle of impunity and diminish the sense of entitlement felt by harassers.

6.2. Legal Framework

State level framework

Harassment is defined by Article 5(1) of the Law on Gender Equality in Bosnia and Herzegovina as: “any unwanted behaviour based on gender that aims to harm [the] dignity of a person [or] group of persons and create [an] intimidating, hostile, degrading, humiliating or insulting environment or achieves such effect.”²⁴⁵ The Law on the Prohibition of Discrimination also defines harassment, as “discrimination in every situation when behaviour...aims for or has an effect of harming [a] person’s dignity and creating [an] intimidating, hostile, degrading, humiliating or offensive atmosphere.”²⁴⁶

As far as *sexual* harassment, the Law on Gender Equality represents the first time that this has been recognized as a criminal offence in BiH. Article 29 of the Law states that sexual harassment is punishable by a prison sentence of between 6 months and 5 years, and Article 30 allows for the imposition of a fine from 1,000KM to 30,000KM (€500 - €15,000) for failing to undertake appropriate and effective measures to prevent gender-based discrimination, harassment, and sexual harassment. Additionally, the Law mandates that employers and institutions introduce preventative mechanisms and develop workplace policies and institutions to help reduce and combat sexual harassment. This requirement acknowledges that it is more desirable and more efficient to prevent and resolve unwanted behaviour within institutions than to go through the courts.

Sexual harassment is defined in Article 5(2) of the Law on Gender Equality as “every unwanted form of verbal, non-verbal or physical behaviour of [a] sexual nature that aims to harm [the] dignity of a person or group of persons, or has such effect, especially when this behaviour creates [an] intimidating, hostile, degrading, humiliating or offensive environment.”²⁴⁷

²⁴⁵ Law on Gender Equality in Bosnia and Herzegovina, Official Gazette of BiH 16/03, 102/09 and 32/10, consolidated version of 25 March 2010. Available at: http://arsbih.gov.ba/wp-content/uploads/2014/02/GEL_32_10_E.pdf (accessed 22 February 2017).

²⁴⁶ Law on Prohibition of Discrimination, Official Gazette of BiH 59/09, Article 4§1. Available at: <http://arsbih.gov.ba/wp-content/uploads/2014/02/002-Anti-Discrimination-Law-.pdf> (accessed 22 February 2017).

²⁴⁷ Law on Gender Equality.

Entity level frameworks: Labour laws

Both harassment and sexual harassment were introduced recently into the labour laws at the entity level (in the FBiH in 2015 and in the RS in 2016), using almost identical wording. In both cases, harassment is described as “any unwanted action...aimed at or constituting a violation of [the] dignity of an employee or job seeker, which ultimately causes fear or hostility, [a] degrading or offensive environment.”²⁴⁸

Sexual harassment is expressly prohibited in Article 8 of the labour law of the Federation and Article 19 of the labour law of the Republika Srpska. It is defined as “any conduct, which by way of words or actions of [a] sexual nature intends to violate or constitutes a violation of [the] dignity of an employee or a job seeker, which causes fear and creates [a] degrading or offensive environment.”²⁴⁹ The definitions posited by each entity of discrimination do vary slightly, with the RS law citing “sex” but the FBiH law listing “gender” and “sexual orientation” as prohibited grounds for discrimination.

These laws go on to define gender-based violence at work as “any act inflicting physical, psychological, sexual or economic damage or suffering, as well as a threat of committing such acts which seriously constrains persons in their rights and freedoms based on the principle of gender equality at work or in relation to work.” They also mention mobbing, describing it as “a specific form of non-physical harassment in the workplace, which implies repeating actions by which one or more persons psychologically abuse and humiliate another person, and whose purpose or consequence is to undermine that person’s reputation, honour, dignity, integrity, working conditions or professional status.”²⁵⁰

The labour law in the Brčko District has not yet been modified to include harassment or sexual harassment.²⁵¹ However, it is important to note that individual acts which collectively constitute sexual and gender-based harassment can be prosecuted under criminal law (see, for example, Brčko District law on assault, rape, and coercion.)

Laws of the European Union (and its predecessors)

EU legislation has often been more progressive than that of its member states, and has tended to both reflect and influence legal developments in the United States.²⁵² The foundation for the European prohibition of sexual harassment in legislation was European Council Directive 76/207/EEC on “the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.”²⁵³

248 Labour Code of the Federation of BiH, Official Gazette of the FBiH 43/99, 32/00, 29/03, and 26/16. Available (in B/C/S) at: <http://fmrsp.gov.ba/s/images/stories/Zakon%200%20radu.pdf> (accessed 22 February 2017); Labour Code of the Republika Srpska, Official Gazette of the RS 1/16.


249 Ibid.

250 Ibid.

251 Labour Code of the Brčko District, Official Gazette of the Brčko District 7/00, 08/03, 33/04, 29/05 and 19/06. Available (in B/C/S) at: <http://skupstinabd.ba/ba/zakon.html?lang=ba&id=/Zakon%200%20radu%20Brc--ko%20Diskrikta%20BiH> (accessed 22 February 2017).

252 Anita Bernstein, “Law, Culture and Harassment,” *University of Pennsylvania Law Review* 142, no. 4 (1994), 1228-1231.

253 Council of the European Communities, “Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,” No. 76/207/EEC, 9 February 1976. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31976L0207> (accessed 20 February 2017).



When passed in 1976, the Directive did not explicitly mention sexual harassment and was focused on addressing discrimination in legal frameworks as opposed to developing regulations to actively counter discrimination. Still, Article 5(1), states that: “the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”²⁵⁴ Article 2 of the original Directive was amended in 2002 to state explicitly that harassment and sexual harassment constitute forms of discrimination. This amendment made Article 5 (quoted above) redundant and it was deleted.²⁵⁵

Article 2 of the 2002 Directive put an obligation on member states to revise or adopt sexual harassment laws by 2005; and it obligates new EU members to have such laws in place.²⁵⁶ In 2006, a third Directive – known as the Equal Treatment Directive – consolidated those from 1976 and 2002, among others.²⁵⁷ It offers the following definitions of harassment and sexual harassment (which are identical to those introduced in the 2002 Directive):

harassment: *where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*

sexual harassment: *where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*²⁵⁸

Article 26 of the 2006 Directive extends the scope of the application of harassment to cover acts that occur not only in the workplace, but also “in access to employment, vocational training and promotion,” and encourages employers and those responsible for such training to take actions to prevent sexual harassment in all of these contexts.²⁵⁹

The Equal Treatment Directive has several important features. First, it frames sexual harassment as a “violation of dignity” – reflecting an understanding that emerged in the 1980s. Thus, the physical nature of harassment is seen as less important than its emotional effect on the victim, which can include feelings of shame and humiliation. Second, by defining sexual harassment as “unwanted behaviour,” victims are empowered to define whether sexual harassment took place or not, and the motivations or intentions of the alleged perpetrator are irrelevant. Moreover, it is the *victim’s* culture that determines whether harassment has occurred, meaning arguments that certain behaviours are part of the institutional or national culture of the perpetrator are immaterial. Third,

254 Ibid., Article 5(1).

255 Council of the European Union, “Directive amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment...” No. 2002/73/EC, 23 September 2002. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0073&qid=1487986928701&from=EN> (accessed 22 February 2017).

256 Ibid., Article 2; and see: Kathrin Zippel, “The European Union 2002 Directive on sexual harassment: A feminist success?” *Comparative European Politics* 7, no. 1 (2009): 139-157.

257 Council of the European Union, “Directive on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast),” No. 2006/54/EC, 5 July 2006. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054&qid=1487986928701&from=EN> (accessed 22 February 2017).

258 Ibid., Articles 2(1)(c)-(d)

259 Directive 2002/73/EC. See: Preamble, para. 8 and 9.

the Directive stipulates that harassment is not limited to acts in which a perpetrator harasses a specific victim, but also includes behaviours that denigrate the working environment in general.²⁶⁰

The fact that sexual harassment is considered a form of discrimination in the European context has several other practical consequences. For one, a reverse burden of proof principle is applied, placing a greater onus on the defendant to demonstrate that a breach of equal treatment (such as sexual or gender-based harassment) did *not* occur.²⁶¹ Many EU countries actually apply this principle to all forms of harassment, even those that are not clearly discriminatory. But in some countries, including Austria, Germany, and Croatia, this principle has proven difficult to implement in practice because it is not regulated in procedural law.²⁶²

EU Law also prohibits homophobic harassment and, potentially, transphobic harassment (i.e. harassment of transgender people), with discrimination on the grounds of sexual orientation forbidden under Article 21 of the EU Charter of Fundamental Human Rights and any such discrimination in the workplace explicitly outlawed by Directive 2000/78/EC.²⁶³ As far as protections for people who identify as transgender and intersex, the European Court has ruled that negative treatment of people who have undergone or plan to undergo sex reassignment constitutes a form of discrimination on the basis of sex, but it is not clear if this also applies to people who do not have any intention of undergoing sex reassignment.²⁶⁴

Note, when sexual harassment occurs in the context of professional activities related to the access to and supply of goods and services, it is instead covered by similar provisions under European Council Directive 2004/113/EC.²⁶⁵

Laws of countries in the former Yugoslavia

Croatia

In 2008, Croatia incorporated European provisions on sexual harassment, including verbatim definitions of harassment and sexual harassment, into its Suppression of Discrimination Act and

260 Kathrin Zippel, “Gender Equality Politics in the Changing European Union: The European Union Anti-Discrimination Directive and Sexual Harassment,” working paper no. 134, Center for European Studies, Harvard University, 2006, 4-6. Available at: <http://aei.pitt.edu/9027/1/Zippel134.pdf> (accessed 22 February 2017).

261 Directive 2006/54/EC, Article 19.

262 Ann Numhauser-Henning and Sylvain Laulom, *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity* (Brussels: European Union, 2012), 19-20.

263 *Charter of Fundamental Rights of the European Union*, No. 2012/C 326/02, 26 October 2012, Article 21. Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012P/TXT> (accessed 22 February 2017); and Council of the European Union, “Directive establishing a framework for equal treatment in employment and occupation,” No. 2000/78/EC, 27 November 2000, Articles 1 and 2(b). Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078> (accessed 22 February 2017).

264 For example, see: EU Court of Justice, *P v S and Cornwall County Council*, No. C-13/94, ECR 1996 I-02143, 30 April 1996; and Dorota Pudzianowska and Krzysztof Śmiszek, *Combating Sexual Orientation Discrimination in the European Union* (Brussels: European Commission, 2014), 31.

265 Council of the European Union, “Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and service,” No. 2004/113/EC, 13 December 2004. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0113&qid=1487990105522&from=EN> (accessed 22 February 2017).

into amendments to its 2003 Sex Equality Act.²⁶⁶ Theoretically, both laws place the burden of proof upon the defendant in cases of sexual harassment; but in fact, most courts insist on making decisions based on an assessment of all the facts. Complainants in Croatia can choose one or several of four legal remedies: public apology, the prevention of a persistence of discrimination, a declaration that discrimination took place, and compensation. An employer can also be sued for compensation if they do not designate a specific staff member to address and administrate claims of harassment.

In practice, it has proven difficult to demonstrate that sexual harassment is specifically caused by discrimination, and hence it is more common for these cases to be treated as instances of “mobbing” or a “violation of a worker’s dignity.”²⁶⁷ One notable case from Croatia is *Udjbinac v HP*, in which an employee who was unhappy with the reorganisation of her tasks was invited by a board member to discuss her concerns and was then subjected to verbal abuse, including overtly sexist comments about women.²⁶⁸ The court ruled in favour of the plaintiff based on Article 4 of Croatia’s labour law, which prohibits the “violation of a worker’s dignity and sexual harassment,” but failed to provide any reasoning for the decision.²⁶⁹ As sex was the only potential basis for discrimination that was invoked, one can infer that this was judged to be a case of sexual harassment; and, though the court did not state the importance of this factor in its findings, it did explicitly state that the burden of proof lay with the employer. The court awarded damages of €65,000 so that the ruling would have a deterrent effect on both this and other employers.²⁷⁰

Former Yugoslav Republic of Macedonia

Macedonia amended its Anti-discrimination, Gender Equality, and Labour Laws with the aim of incorporating definitions of harassment found in the European Directives. In practice, however, these laws focus more on mobbing, and trade unions have tended to bring attention to this when bringing cases. Since the term “mobbing” is not used in European legislation, it is not clear exactly how EU provisions on harassment should be transposed into legislation on mobbing. This also means that the gender dimensions of mobbing have been understudied, partly because of a lack of data showing the extent to which mobbing incorporates sexual harassment, for example.²⁷¹ As a result, measures to prevent *sexual* harassment are not specifically mentioned in Macedonian law; so, while the burden of proof can be shifted in cases of discrimination or mobbing, in cases of sexual harassment, pursuing the perpetrator for mobbing is likely to be a more straightforward legal option.²⁷²

266 Anti-discrimination Law of the Republic of Croatia, Official Gazette 85/08, 112/12. Available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2008_07_85_2728.html (accessed 12 March 2017); and Gender Equality Law of the Republic of Croatia, Official Gazette 157/03, 82/08. Available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2008_07_82_2663.html (accessed 12 March 2017).

267 Goran Selanec, “Croatia” in *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity*, eds., Ann Numhauser-Henning and Sylvain Laulom (Brussels: European Union, 2012), 59-63.

268 Zagreb Civil County Court, Judgment, *Udjbinac v. HP*, No. LXXI-Pr-4266/05, 3 March 2010 (*Presudaopćinskoggrađanskogsuda u Zagrebu, Poslovnibroj No. LXXI-Pr-4266/05 u predmetu Udjbinac v HP od 3. ožujka 2010*).

269 Labour Law of the Republic of Croatia, Official Gazette 38/95. Available at: http://narodne-novine.nn.hr/clanci/sluzbeni/1995_06_38_758.html (accessed 12 March 2017).

270 Selanec, 64.

271 Most cases refer to mobbing in the public sector due to a victim’s political allegiances. Also, mobbing is defined as behaviour aimed at getting a worker to leave his or her position, which is not commonly the objective of sexual harassment.

272 Mirjana Najcevska, “FYR of Macedonia” in *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity*, eds., Ann Numhauser-Henning and Sylvain Laulom (Brussels: European Union, 2012), 187-194.

Evidence suggests that a legal framework focused in this way on mobbing is susceptible to gender bias. Only 5% of those who reported mobbing in research conducted by the Association of Trade Unions said they were targeted because of their sex.²⁷³ This may lead to the conclusion that sexual harassment is relatively rare, when in fact it is much more likely that sexual harassment simply does not fit the definition of mobbing. Thus, strategies to prevent mobbing are unlikely to address gender-based discrimination as a cause.

Cases in Macedonia related to sexual harassment are rare, and the reason may be demonstrated by one case from Skopje, in which a university professor was accused of sexually harassing numerous students. However, he was charged for the more serious crime of “committing a forceful sexual act based on abuse of position,” and found not guilty. Still, the university dismissed him for sexual harassment. He successfully sued for wrongful dismissal and defamation.²⁷⁴ Cases such as this one can both perpetuate cultures of impunity related to sexual harassment and reinforce myths that false allegations constitute a large proportion of cases.

Slovenia

Slovenia has incorporated European Directives on sexual harassment into several pieces of legislation – the 2002 Act Implementing the Principle of Equal Treatment (amended 2007), the 2004 Employment Relation Act (amended 2007), and the 2009 Regulation on Measures to Protect the Dignity of Employees in Public Administration. These latter two instruments contain provisions that oblige employers to provide a working environment free of harassment, including sexual harassment, by any perpetrator.²⁷⁵ While sexual harassment is explicitly defined as a form of discrimination, laws on the general prohibition of harassment do not specifically mention sexual harassment.

In Slovenia, a reverse burden of proof principle is in force for sexual harassment cases.²⁷⁶ Although Slovenian case law on sexual harassment is still scarce, there appears to be a tendency among complainants to sue their employer for a failure to provide a harassment-free work environment. In one case, for example, the Slovene Army was found liable for failing to prevent the verbal and non-verbal sexual harassment of two female employees. Notably, if an employer is ordered to pay damages to a victim of harassment, Slovenian law allows the employer to pursue the perpetrator of harassment for reimbursement of these damages.²⁷⁷

273 Ibid., 188.

274 Ibid., 192.

275 See: Directive 76/207/EEC (and further modifications); Council of the European Communities, “Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes,” No. 86/378/EEC, 24 July 1986; Council of the European Union, “Directive implementing the principle of equal treatment between person irrespective of racial or ethnic origin,” No. 2000/43/EC, 29 June 2000; Directive 2000/78/EC (with subsequent amendments in 2007); Directive 2004/113/EC (Article 45); and Directive 2006/54/EC (Articles 5-11).

276 Tanja Koderman Sever, “Slovenia” in *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity*, eds., Ann Numhauser-Henning and Sylvain Laulom (Brussels: European Union, 2012), 250-257.

277 Ibid., 255. Also see: High Labour and Social Court of Slovenia, Judgment, No. Pdp 499/2009, 3 March 2010.



International Frameworks

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not specifically mention sexual harassment, which is perhaps unsurprising as it was passed in 1979, before the term was properly established outside the United States. However, Articles 2, 5, 11, 12, and 16 of CEDAW oblige states to protect women from any forms of violence they may confront in the workplace or in any other area of their social life. Furthermore, in 1989, the Committee on the Elimination of Discrimination against Women recommended that parties to the convention include information on legislation meant to prevent and eradicate sexual harassment in their periodic reports.²⁷⁸ The Committee held further discussion on this topic in 1992, when the following clarifications were made regarding Article 11 of CEDAW:

- When women are subjected to gender-specific violence, such as sexual harassment in the workplace, equality in employment can be seriously impaired.
- Sexual harassment includes such unwelcome sexually-determined behaviour as physical contact and advances, sexually-coloured remarks, showing someone pornography, and making sexual demands either through words or actions. Such conduct can be humiliating and may constitute a health and safety issue; and, it is discriminatory when a woman has reasonable grounds to believe that her objection to this treatment would disadvantage her in her employment, including related to recruitment or promotion, or when it creates a hostile working environment.²⁷⁹

Actions of the United Nations General Assembly

In 1993, the UN General Assembly passed a non-binding Declaration on the Elimination of Violence against Women. Article 2 explicitly mentions sexual harassment:

Violence against women shall be understood to encompass, but not be limited to, the following:

...(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.

²⁷⁸ Bosnia and Herzegovina has followed this recommendation and has discussed sexual harassment in both of its CEDAW reports to date. The 2005 report discussed the work of the Gender Centres in this regard and the 2011 report mentions how media are being engaged to avoid broadcasting content that incites sexual harassment. See: CEDAW, “Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined initial, second and third periodic reports of States parties – Bosnia and Herzegovina,” No. CEDAW/C/BIH/1-3, 18 April 2005. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No5/315/63/PDF/No531563.pdf> (accessed 9 March 2017); and CEDAW, “Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined fourth and fifth periodic reports of States parties – Bosnia and Herzegovina, No. CEDAW/C/BIH/4-5, 21 December 2011. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.BIH.4-5.pdf> (accessed 5 March 2017).

²⁷⁹ UN Women, “General recommendations made by the Committee on the Elimination of Discrimination against Women,” <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 22 February 2017).

The International Labour Organization

The International Labour Organization (ILO) Convention concerning Discrimination in Respect of Employment and Occupation (C111), which entered into force in 1960, addresses sex discrimination but does not specifically refer to sexual harassment, as it was written before the term emerged.²⁸⁰ In 2003, the ILO Committee of Experts on the Application of Conventions and Resolutions (CEACR) offered a General Observation concerning Convention No. 111, noting that “sexual harassment is a form of sex discrimination and should be addressed within the requirements of the Convention.”

Through a survey of national legislation on sexual harassment, the Committee found that all definitions of sexual harassment contain certain key elements:

*(1) (quid pro quo): any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person’s rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person’s job; or (2) (hostile work environment): conduct that creates an intimidating, hostile or humiliating working environment for the recipient.*²⁸¹

The ILO subsequently included sexual harassment within the scope of their work and, in 2005, published a report entitled *Sexual harassment at work: National and international responses*.²⁸²

Laws in countries outside of Europe

The United States

While the act of sexual harassment has a much longer history, the term is thought to have originated in the United States some time before the 1970s. Then, in 1979, feminist legal scholar Catherine MacKinnon wrote an influential book entitled *Sexual Harassment of Working Women*, which explicitly linked sexual harassment with laws on sex discrimination.²⁸³ By 1986, the US Supreme Court had ruled that cases of sexual harassment could be heard within the context of the 1964 Civil Rights Act.²⁸⁴

A pivotal case in the United States as far as the treatment of sexual harassment within the legal system was *Jenson v. Eveleth Taconite Co.* The plaintiff, Lois Jenson, became the first woman to work at the Eveleth iron mine in Minnesota following an earlier affirmative action decision that had opened this work up to women. She was subjected to multiple forms of sexual harassment over a nine-year period, as were several of her female colleagues. When Eveleth Mines was investigated by


280 International Labour Organization, *Convention concerning Discrimination in Respect of Employment and Occupation*, No. 111, 25 June 1958. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (accessed 4 March 2017).

281 Advocates for Human Rights, Stop Violence against Women Project, “International Labor Organization,” 14 September 2007, http://www.stopvaw.org/international_labor_organization2 (accessed 22 February 2017).

282 Deirdre McCann, *Sexual harassment at work: National and international responses*, Conditions of Work and Employment Series, No. 2 (Geneva: International Labour Organization, 2005).

283 Anita Bernstein, “Law, Culture and Harassment,” *University of Pennsylvania Law Review* 142, no. 4, 1227.

284 *Ibid.*, 1236.



the Minnesota Human Rights Department and fined \$11,000, but refused to pay, Jenson embarked on a court battle that took over a decade, finally concluding in 1997. In the end, the case marked the first time that sexual harassment received class action status; and it resulted in a \$3.5 million settlement, which was divided between the 15 plaintiffs. The company incurred a further \$11.5 million in legal costs. The case critically shaped company culture in the United States, and after several more costly cases, many companies were prompted to take proactive measures to prevent sexual and gender-based harassment within the workplace. The case of *Jenson v. Eveleth Taconite Co.* was eventually documented in a 2002 book, *Class Action*, which was later fictionalised into the film *North Country*.²⁸⁵

6.3. Nature, scope, and effects of sexual and gender-based harassment

It is important to re-emphasise that sexual and gender-based harassment has two forms. On the one hand, it can be committed directly by the perpetrator against a specific victim. On the other hand, the acts of one or several perpetrators can be committed against unspecified victims through the creation of a hostile work environment. In reality, these forms are often present together, because hostile work environments usually signal to a perpetrator that they can harass a specific target with impunity.

Guidelines of the High Judicial and Prosecutorial Council (HJPC) on preventing sexual and gender-based harassment outline verbal, non-verbal, and physical forms of sexual harassment – which, while often but not always motivated by sexual interest or intent, is not explained by this alone. In fact, sexual harassment is essentially an expression of power. The perpetrator uses his or her dominant position to assert authority over the victim and feels a sense of entitlement to commit acts of a sexual nature.

Social gender inequality is the reason that most perpetrators of sexual harassment are male and most victims are female. However, in some cases, other factors come more strongly into play – such as workplace power structures – meaning that the victim may be male and/or the perpetrator may be female. In other cases, other forms of discrimination may make certain groups vulnerable to harassment, due to their age, religion, race, disability, or sexual orientation, for example. And, gender bias in the legal system, where dominant social groups have better access to justice and more credibility, contributes to the vulnerability of these groups.

²⁸⁵ Patricia E. Salkin, *Pioneering Women Lawyers: From Kate Stoneman to the Present* (Chicago, IL: American Bar Association, 2008), 122; Maud Dillingham, “The evolution of sexual harassment awareness,” *The Christian Science Monitor*, 14 November 2011, <http://www.csmonitor.com/USA/Society/2011/1114/The-evolution-of-sexual-harassment-awareness/Lois-E.-Jenson-v.-Eveleth-Taconite-Co> (accessed 22 February 2017); and Kristin Downey Grimsley, “A Hostile Workplace Into an Abyss of Sex Harassment at Eveleth Mine,” *The Washington Post*, 27 October 1996. Available at: <http://www.d.umn.edu/~epeters5/Cst1201/Articles/A%20HOSTILE%20WORKPLACE%20INTO%20AN%20ABYSS%20OF%20SEX%20HARASSMENT%20AT%20EVELETH%20MINE.pdf> (accessed 22 February 2017).

The HJPC Guidelines explain that verbal harassment includes but is not limited to:

- Demanding touches, hugs;
- Making sexual proposals;
- Making insults, comments, remarks or innuendos of a sexual nature;
- Unwanted calls for meetings, flirting or seeking sexual relations or sexual favours;
- Unwanted questions about sexual life;
- Making offensive sexual jokes or comments;
- Commenting on one's sexual (un)attractiveness;
- Writing sexually explicit or suggestive (SMS and e-mail) messages or letters;
- Spreading sexual rumours (including online);
- Preconditioning the realization of benefits and promotion at work with sexual favours; and
- Threats to punish a person who refuses to comply with sexual offers.²⁸⁶

Nonverbal sexual harassment is described as including but not limited to:

- Gestures and insinuations of a sexual nature; and
- Presentation, display or transmission of pornography, sexually explicit pictures, cartoons or posters or other sexual images (including online).²⁸⁷

And the Guidelines list physical behaviours that constitute sexual harassment as including but not limited to:

- Touches of a sexual nature, hugs, kisses;
- Pinching, stroking, kicking, squeezing another person;
- Unnecessary physical contact with the body of another person and undue familiarity (invasion of personal space); and
- Physical encroachment and attack.²⁸⁸

Gender-based harassment can also be verbal, non-verbal, or physical; but behaviours are generally not motivated by sexual intent but instead by discriminatory attitudes based on gender and a desire to make certain groups feel uncomfortable or unwelcome in the workplace. Gender-based harassment is frequently committed by perpetrators against victims of a different gender, but perpetrators also harass people of the same gender. For example, dominant men may attack other men who they perceive as weak or effeminate. In some cases, this can be motivated by homophobia, irrespective of whether the victim is actually (or openly) homosexual. Another example might be older, more senior women bullying younger female colleagues who they see as a threat. The HJPC Guidelines also outline gender-based harassment, as including, but not limited to:

286 High Judicial and Prosecutorial Council of Bosnia and Herzegovina, "Guidelines for the Prevention of Sexual and Gender-based Harassment within the Judicial Institutions of Bosnia and Herzegovina," February 2015, 6-7. Available at: <http://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=56024> (accessed 22 February 2017).

287 Ibid.

288 Ibid.

- Making inappropriate comments about a person's physical characteristics or behaviour on the basis of gender (e.g., a statement that women's place is in the home...);
- Making comments or treating someone badly because they do not behave in accordance with stereotypical gender roles;
- Coarse and vulgar humour or language in relation to gender/sex;
- Verbally abusing someone, threatening or ridiculing someone on the basis of gender/sex; and
- A hostile work environment towards members of a particular gender.²⁸⁹

Sexual and gender-based harassment can result in the dismissal of victims from their jobs when they complain or disengage from work cultures characterised by inappropriate jokes, teasing, or demands for sexual favours. Or victims may decide themselves to resign, to escape harassment. For this reason, legal experts, feminist activists, and researchers have argued that SGBH are forms of discrimination: they create hostile work environments, and thus hinder the recruitment, retention, and promotion prospects of groups of people based on gender.

Such work environments are the result of perpetrators' attempts to reinforce discriminatory gender norms within the institutional culture (for example, the acceptability of making comments that denigrate women) and thus make it difficult for certain groups to succeed in their work tasks.²⁹⁰

Sustained exposure to SGBH has serious effects on the health of victims, who have high rates of mental health and emotional problems such as stress, depression, self-blame, self-doubt, and a loss of self-esteem. Even when harassment occurs early in a victim's career, residual symptoms can linger into later life.²⁹¹ These symptoms may also have secondary effects on a victim's physical health, ranging from high blood pressure to insomnia to aches and pains.²⁹²

In a review of tens of studies on sexual harassment, Cortina and Berdahl found that over 15 addressed "organizational withdrawal," and showed that sexual harassment has serious negative occupational outcomes not only for victims but for entire organizations within which harassment occurs. Research indicates that victims engage in organizational withdrawal to avoid further exposure to sexual harassment. This means that they remain in the organization, but lose interest in their work and show higher rates of absenteeism, fatigue, and neglect of duties.²⁹³ Sexual harassment in the workplace is also associated with a lack of organizational commitment, performance, and productivity resulting in damaged relations, increased conflicts, and a decreased sense of workplace justice.²⁹⁴

289 Ibid, p. 8.

290 Zippel, "The European Union 2002 Directive on sexual harassment: A feminist success?"

291 Jason N. Houle, et al., "The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career," *Society and Mental Health* 1, no. 2 (2011): 89-105.

292 Rachael Rettner, "6 Ways Sexual Harassment Damages Women's Health," *Live Science*, 9 November 2011, <http://www.livescience.com/16949-sexual-harassment-health-effects.html> (accessed 22 February 2017).

293 Lilia M. Cortina and Jennifer L. Berdahl, "Sexual Harassment in Organizations: A Decade of Research in Review," in *The SAGE Handbook of Organizational Behavior*, vol. 1, *Micro Approaches*, eds. Julian Barling and Cary L. Cooper (London: Sage Publications, 2008), 469-497.

294 Sharon K. Parker, and Mark A. Griffin, "What is so bad about a little name-calling? Negative consequences of gender harassment, over performance demands, and psychological distress," *Journal of Occupational Health Psychology* 7, no. 3 (2002): 195-210.

These factors, coupled with lawsuits and employee turnover, can amount to significant financial consequences to both individuals and companies. Absenteeism, sick leave, poor performance, decreased productivity, a loss of valuable workers, and legal bills all impact an employer's bottom line. And while the actual financial costs of sexual harassment are difficult to measure, a survey of United States federal employees assessed that the US Government spent \$US 327 million (€310 million) in just two years (1992-1994) on expenses related to sexual harassment. It was estimated that federal employees themselves lost a further \$US 4.4 million (€4.2 million) due to the effects of sexual harassment during the same period.²⁹⁵

6.4. Prevalence of sexual and gender-based harassment

SGBH in Europe

Due to the many barriers to reporting and the different ways in which sexual and gender-based harassment are defined by and addressed in law, it is difficult to collect accurate statistics on the prevalence of SGBH. Further, the hostility of a work environment is subjective and hard to quantify. Thus, estimates of prevalence are usually drawn from anonymous surveys, which suggest that 30% to 50% of women and 10% of men across Europe have experienced some form of sexual harassment. Most of the harassment experienced by men is perpetrated by other men; but the majority of sexual harassment victims are women, harassed by men.²⁹⁶

SGBH in Bosnia and Herzegovina

To date, no comprehensive study has yet been undertaken to research the extent or prevalence of sexual and gender-based harassment in BiH. In a survey from 2013 that was limited to governmental employees, 16% reported the incidence of SGBH in their institution. These respondents reported that this harassment took several different forms, ranging from physical acts and non-verbal inferences to verbal harassment including sexually inappropriate jokes.²⁹⁷


Research from 2014, on the implications of gender within the BiH judiciary, did not aim to establish the prevalence of sexual harassment in BiH judicial institutions, but to examine awareness and knowledge on the topic. Still, it revealed that inappropriate sexualized jokes and comments – which could be interpreted as sexual or gender-based harassment – are not uncommon in these institutions, with 28% of respondents reporting having encountered this kind of discourse. In this light, it is interesting that almost 60% of the judges, prosecutors, attorneys, and court associates who participated in this research said they had little awareness and knowledge about sexual harassment policies and laws. And what's more, this study found a tendency on the part of some judicial professionals to trivialize and undermine the significance of sexual and gender-based harassment.²⁹⁸

295 US Metric Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges* (Washington, DC, 1994). Available at: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948> (accessed 22 February 2017).

296 European Commission, *Sexual harassment at the workplace in the European Union* (Brussels, 1998).

297 Agency for Gender Equality, "Istraživanje o spremnosti institucija BiH da provode obaveze iz zakona o ravnopravnosti spolova u BiH" (2013).

298 Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014).



With the introduction of the Gender Equality Law in 2003, sexual harassment began to receive more attention in BiH. Yet, since its adoption, only 11 cases of sexual harassment have been tried in the courts. This is due in part to the fact that trying sexual harassment through criminal law procedures is complex, long, and costly, demands a high standard of evidence, and requires an attorney to help plaintiffs navigate legal processes. The experience is sometimes so stressful that individuals choose to put up with sexual harassment instead. But another issue is the general lack of awareness-raising efforts, policies, and preventive mechanisms related to sexual harassment in workplaces.

6.5. Causes of sexual and gender-based harassment

The notion that sexual harassment is rooted in sexual interest has been disputed for a long time by feminist scholars. In 1979, Catherine MacKinnon's influential book *Sexual Harassment of Working Women* defined sexual harassment as a form of discrimination against women. The book gave greater visibility to the issue of sexual harassment and inspired both research and public interest in the topic.²⁹⁹ Nowadays, scholars broadly recognize that SGBH has a number of causes and that these behaviours are manifestations of unequal power relations in society and in any given workplace. The dominant position of men in society, and in many institutions, makes women vulnerable when it comes to sexual and gender-based harassment.³⁰⁰

Power relations also exist between different groups of women and men; which makes women and men who do not adhere to typical gender norms targets of SGBH. For example, women perceived as dominant or "masculine," or men seen as "effeminate," may be targeted. In these cases, the perpetrator may be of the same or a different gender.

In cases of *quid pro quo* harassment, a workplace superior abuses his or her dominant position to extract favours, including those of a sexual nature, from a subordinate. Gender bias is among the factors that results in subordinates often not being believed or taken seriously if they report such harassment.

When harassment is intended to create a hostile work environment for someone, rigid gender norms are sometimes the cause. For many men, being a provider for the family is central to their concept of masculinity, and hence women in the workforce may be perceived as a threat. In this context, sexual and gender-based harassment is a way that men seek to reassert their dominance over the workplace and re-establish it as a men's space. And by intimidating their female colleagues, men can discourage women from working at all, or can at least undermine their workplace success.

Women suffer harassment by men even when they occupy what are traditionally perceived as women's jobs, such as waitressing or secretarial work. In these cases, SGBH is aimed at reinforcing the inferior social value assigned to these roles and undermining women's sense of entitlement to better-paid or more respected jobs dominated by men.

299 Christopher Uggen and Amy Blackstone, "Sexual Harassment as a Gendered Expression of Power," *American Sociological Review* 69, no. 1 (2004): 64-92.

300 William Petrocelli and Barbara Kate Repa, *Sexual Harassment on the Job: What it is & How to Stop it*, 4th ed. (Berkeley, CA: Nolo, 2000).

6.6. Gender bias, and sexual and gender-based harassment

The causes discussed above are all linked to gender stereotypes about who should have power in the workplace and in society, how it is acceptable to maintain that power, how masculinity is expressed, and whether women are perceived in terms of their sexuality or skills. Because deeply ingrained and pervasive stereotypes such as these result in women being perceived and treated differently, SGBH are inherently linked to gender bias. Indeed, **SGBH are caused by gender bias, are a form of gender bias, and are perpetuated by gender bias.**

Discussion Question:

In what ways are sexual and gender-based harassment caused by gender bias, a form of gender bias, and perpetuated by gender bias?


Instructions: Split the class into three groups (or, alternatively, smaller groups can be assigned one of the three elements of the question). Give the students a few minutes to develop ideas/responses and then discuss their answers together. Alternatively, students could be asked to respond with reference to a specific case.

Let us examine each of these assertions in turn:

1) Gender bias is a cause of SGBH.

A perpetrator uses sexual and gender-based harassment to impose dominant behavioural norms associated with a particular gender on everyone else in the workplace. For example, it may have been commonly accepted in the past to make lewd, sexist remarks about women in many all-male workplaces. (In this case, even if some men were made to feel uncomfortable, they would not have felt free to speak up.) Although exposing female employees to these kinds of comments may make them feel unsafe, uncomfortable, or unwelcome, managers often argue that if women want to work in a given industry, it is up to them to adapt to the workplace culture. It is this gender bias, which favours not only men but a specific kind of masculinity, that empowers men to harass – because they know they can get away with it. In the worst cases of complicity, such behaviour may even boost a harasser's popularity and respect at work.

In the past, legal doctrine tended to align with this gendered perspective on SGBH. The culture that developed in male-dominated institutions was simply seen as a workplace norm, and its effect on women was ignored or downplayed by legal professionals. In this way, gender bias within the legal system contributed to the sense of impunity felt by perpetrators. However, recent changes in legislation have begun to counter this bias, in BiH and elsewhere. While sexual and gender-based harassment is still not being properly enforced in some jurisdictions, where it has been, there have been clear shifts in workplace culture due to changes in both the formal rules and regulations of



companies as well as the attitudes of managers and employees. It is only more recently, too, that the notion that men can be sexually harassed has been accepted, along with the understanding that this is also a result of gender bias. Katherine Franke, a legal scholar, has defined sexual harassment as a “technology of sexism” because “it perpetuates, enforces and polices a set of gender norms that seek to feminize women and masculinize men.”³⁰¹ Through this lens, men are seen as more masculine if they commit sexual harassment, and to women, this behaviour is a ‘reminder’ to take their subordinate, feminine place. Some men do not conform to the masculine stereotype, though – including those who refrain from or object to the harassment of women. These men can also become targets of SGBH and made to feel unwelcome in their workplace. As an example of this, imagine a male secretary who is persistently asked by his female boss to go on a date. If he reports this to a co-worker or a more senior manager because her advances make him uncomfortable and she has ignored his requests to stop, he risks being ridiculed because his rejection of her proposal does not fit stereotypes of male virility. Gender bias causes sexual and gender-based harassment in this way, by legitimising the unequal treatment of women who *do* conform to their gender roles and of men who *do not*.

2) SGBH are forms of gender bias.

Catharine MacKinnon was among the first legal scholars to advocate the view that sexual and gender-based harassment is a form of discrimination, in the early 1980s. Over time, lawyers successfully argued this point in courts, so that it is now recognised in many legal frameworks, including the BiH Law on Gender Equality.³⁰²

As noted above, SGBH can have serious effects on the health of victims, lowering their productivity at work and thus hindering their career advancement and quality of life. The risk of harassment can also have a deterrent effect, discouraging certain groups of men and women from entering traditionally male- or female-dominated professions. For example, this is one of the reasons proportionately few women have chosen to enter professions related to science, technology, engineering, and mathematics (STEM), which are still dominated by men. Conversely, men have been discouraged from entering professions such as nursing and hairdressing, where they not only face potential ridicule from their peers but may not be taken seriously in the instance they experience SGBH and report it. As such, sexual and gender-based harassment is a form of gender bias that is used to pressure women and men into following more traditional norms, so that their lives conform to social expectations, even if this makes them less happy and less financially successful.

3) Gender bias in the legal system can help perpetuate SGBH.

For a long time, SGBH in the workplace was considered an inevitable product of male and female interactions; human nature, it was thought, could not be escaped. From this perspective, some cases were argued in the US on the premise that no harm was done if the harassment was unintentional. But this ignored the fact that the workplace environment had facilitated gender-based discrimination and preserved cultures of inequality, subordination, and economic disadvantage for women.³⁰³ Even today, assessments of whether harm has been done and whether victims are “legit-

³⁰¹ Katherine Franke, “What’s wrong with sexual harassment?” *Stanford Law Review* 49, no. 4 (1997), 696.

³⁰² Law on Gender Equality, Article 3(2).

³⁰³ Catharine A. MacKinnon, *Women’s Lives, Men’s Laws* (Cambridge, MA: Belknap Press, 2007), 111-112.

imate” are heavily influenced by the gender biases of legal professionals in the courtroom. These biases, both implicit and explicit, persist in stereotypes and myths that create obstacles to justice, thus perpetuating discriminatory workplace cultures.

6.7. Common myths surrounding sexual and gender-based harassment

The following examples show how gender biases create myths that undermine the provision of justice.

- **Women like compliments and sexual attention, so why call it sexual harassment?**

This is a common misconception, coloured by gender bias, and it portrays women as sexual objects. Women do not like unwelcome sexualised compliments, uninvited touching, or undue attention from their colleagues directed at their looks and bodies instead of at their capabilities, skills, hard work, and professionalism. One of the reasons this myth is perpetuated is due to the stereotype that women mean “yes” when they say “no” – an example of gender bias that favours harassers in the workplace. There are also cases of women’s harassment increasing if they reject sexual advances, which prevents some from immediately speaking out.

- **Women are responsible for sexual harassment.**


This misperception is also very common. Indeed, victim blaming is frequently on display in court cases as well as in the media. This conveys a myth that the way a woman dresses or looks, or her friendly behaviour toward colleagues, can provoke uncontrollable biological urges that make any resulting sexual harassment her own fault. Conveying this message to women is a way of indirectly deterring them from reporting cases of sexual harassment or seeking some other remedy. According to the law, a perpetrator is directly responsible for sexual harassment, and an employer who allows a hostile work environment in which harassment occurs is indirectly responsible. The victim is not responsible.

- **Men are naturally prone to desire women; it can’t be helped.**

Sexual harassment is not about desire but about power, domination, and privilege. The idea that it is simply about men desiring women is grounded in the assumption that women are subordinate to men and ought to be sexually available on demand. And, the notion that men cannot control their desires is an excuse for those in powerful positions to harass women. Further, it is insulting to the large number of men who exercise self-control and do not play a role in harassment, yet it is also a way of preventing these men from speaking out; for, if they do, their masculinity is questioned.

- **If there is no touching or blackmail involved, there is no harm done.**

Sexual harassment includes making inappropriate jokes, posting sexually offensive content online, or frequently treating an employee in a sexualised manner instead of behaving respectfully and professionally – all of which can cause a victim to feel humiliated, fearful, and intimidated.



This creates an unpleasant and offensive work environment and creates stress among employees. Because psychological violence can affect victims just as much as physical violence, recent legal developments acknowledge non-physical forms of SGBH.

- **Sexual harassment is rare, so why give it so much attention?**

Sexual harassment is actually very widespread. Research shows that between 30% and 50% of women and 10% of men are victims of some form of sexual harassment.³⁰⁴ These figures justify the attention it has in the form of policies, awareness raising and other preventive efforts. Besides, those who are not at risk of sexual harassment are often unaware that it is taking place around them. Moreover, low reporting rates in a given institution or country are usually an indication of insufficient reporting rather than an absence of sexual harassment. This notion has been validated on many occasions through anonymous surveys.

- **The severity of sexual harassment has been exaggerated by women. It is just harmless flirtation.**

Flirtation that is unwanted is not harmless; victims themselves have emphasised this and their views are supported by medical science. In addition, studies indicate that very few harassers have sincere social intentions. Indeed, the notion that sexual harassment is exaggerated is an indicator of gender bias. And often, people who have never been affected by harassment simply do not take the time to understand the point of view of victims.³⁰⁵

- **Many women falsely report harassment, often just to get back at their employers.**

This stereotype is perpetuated by media, including Hollywood films that show manipulative women abusing sexual harassment policies in the workplace for personal gain.³⁰⁶ Yet, studies indicate that less than 1% of sexual harassment complaints are false.³⁰⁷ Moreover, many women do not file complaints even when they are justified in doing so, due to concerns that they will be met with suspicion or bias and that their own private life, habits, and morals will come under scrutiny.

- **If women ignore sexual harassment, it will stop.**

SGBH take place in and create hostile work environments. If a harasser acts with impunity once, it sends a message to the harasser and to others that such behaviour is tolerated in the institution. What's more, some harassers, and indeed some courts, have claimed that *ignoring* harassment is a way of encouraging the harassment.³⁰⁸

304 European Commission, "Sexual harassment at the workplace in the European Union."

305 Houle, et al.

306 For example, see: *Disclosure*, directed by Barry Levinson (1994; Warner Brothers). The film, based on the book by Michael Crichton of the same name, depicts a female employee who steals a promotion away from her boss by suing him for sexual harassment.

307 University of Oregon Counseling & Testing Center, "Sexual Harassment: Myths and Realities," <http://counseling.uoregon.edu/TopicsResources/StudentSelf-Help/SexualAssaultAbuseHarassment/SexualHarassmentMyths.aspx> (accessed 28 February 2017).

308 Kate Wheeling, "Why Do Some Men Both Help and Harass Women?" *Pacific Standard*, 19 October 2015, <https://psmag.com/why-do-some-men-both-help-and-harass-women-97abao36ab28?gi=37doc72oe283> (accessed 28 February 2017).

- **If a man is helpful to women in the workplace, he cannot be a harasser.**

It can be much more difficult for women to prove that men who are generally helpful and kind are also harassers. Unfortunately, this is not uncommon. So-called “benevolent sexism” or the “women-are-wonderful effect” is rooted in the notion that women must be taken care of by men. Men who display these attitudes often hold outdated views that their gestures entitle them to favours from the women they help. But these gestures and ensuing expectations, if unwanted, can constitute SGBH. Similarly, some men may help only those women who conform to their gender ideals and harass those that do not; in other words, imposing gender bias through carrots (kindness) and sticks (harassment).³⁰⁹

Feature story: *Initiatives to prevent SGBH in the judiciary of BiH*


In 2014, as part of a project on gender and justice in BiH, the Atlantic Initiative and DCAF formed and facilitated a 12-member working group of legal professionals to develop guidelines for the prevention of SGBH in judicial institutions. The effort was inspired by research indicating that legal professionals in BiH were under-informed about SGBH and that some even trivialized these behaviours. The working group consisted of law professors, court presidents, judges, disciplinary prosecutors, and representatives from the High Judicial and Prosecutorial Council (HJPC) and judicial training centres. Over the course of seven monthly, one-day workshops, the group developed a comprehensive set of guidelines that offer definitions of sexual and gender-based harassment and outline some non-threatening approaches to address it within court and prosecutors’ offices. These guidelines were adopted by the HJPC as policy; alongside implementation activities such as adding the policy to the HJPC website, showing a video to employees, distributing paper copies of the policy, and displaying posters at courts and prosecutors’ offices. The HJPC policy also obliges each institution to appoint advisors responsible for familiarising employees with the policy and handling complaints. These advisors undergo a specially-tailored workshop before performing their role. In these ways, judicial institutions are demonstrating their commitment to preventing SGBH and are also modeling for other employers an example of institutional efforts to do so.

6.8. Conclusion

While sexual and gender-based harassment may be relatively new to legal frameworks, various laws define and criminalise forms of SGBH that are as old as the workplace itself. Research has demonstrated that harassment occurs across professions and, as yet, no country has successfully eradicated it.

As we have seen, gender bias is a cause of SGBH, which is driven by the belief that some people are more entitled to be in the workplace than others based on their gender. SGBH is also a form of gender bias, and laws around the world – including in BiH – now recognise that it constitutes a

³⁰⁹ Ibid.



type of discrimination because it pressures people into pursuing careers socially ascribed to their gender and punishes those who do not. Finally, SGBH are perpetuated by gender bias. Managers who do not take harassment seriously and legal systems that do not address it adequately enable perpetrators to continue victimising their co-workers. The effects of SGBH are serious, impacting the victim, who can suffer serious physical and psychological effects, as well as both male and female colleagues who are forced to work in a hostile environment.

The legal system can serve to allow SGBH to perpetuate, but it can also help to prevent it. By ensuring that laws prohibiting SGBH are implemented in an unbiased fashion, courts can send the message that these behaviours will not be tolerated in the workplace. In the short term, this may prompt companies to do more to prevent SGBH, to avoid court cases. Over time, however, this response can help shape the attitudes of employers and employees, and encourage them to address harassment swiftly and fairly when it occurs. Ultimately, this will lead to more positive and productive work environments.

6.9. Annex: case studies for discussion

Please read the following two cases carefully, assigning one group of students to argue for the prosecution and one for the defence. Consider all relevant laws and note all other reasons for the lines of reasoning employed.

Case 1

A female PhD student filed a complaint with the Gender Equality Agency, alleging sexual harassment by her academic supervisor over a two-year period. She worked as paid research assistant to this supervisor; hence, he held sway over both her income and her academic future. She claimed that, more recently, he had begun to ‘stalk’ her by following her home and waiting outside her flat.


The respondent claimed that the relationship was mutual and thus there could have been no sexual harassment.³¹⁰

- *If you were prosecuting this case:* What further evidence would you seek and what suspicions would you have as to whether sexual harassment took place?
- *If you were the defence attorney in this case:* How would you defend the institution?

Case 2

Two young men were hired as assistant managers at a grocery store. After they stopped working at the store, they both filed complaints of sexual harassment with the labour union.

³¹⁰ Anti-Discrimination Commission Queensland, “Sex harassment case studies,” <https://www.adcq.qld.gov.au/resources/case-studies/sexual-harassment-case-studies> (accessed 1 March 2017). See entry titled: “Sexual harassment in education.”



The first of the men alleged that, shortly after he started working, a female colleague – also an assistant manager – began making sexual comments to him. A few months later, when she was promoted to store manager, the harassment continued. He reported that she told him about her sexual desires and past relationships with other male employees, and he claimed she would flash her breasts at him and find reasons to squeeze past him at the counter so that she could rub her body suggestively against his. The man said this was why he resigned after a year in the job.

The second complainant had a similar story. He said the store manager called him “baby” and told other employees that they were in a relationship. Discovering the other man left due to her harassment, the second man argued with the manager, and she suspended him. When he complained to the district manager, his contract was terminated for “unprofessional conduct.”³¹¹

- *If you were prosecuting this case:* What further evidence would you seek and what suspicions would you have as to whether sexual harassment took place?
- *If you were the defence attorney in this case:* How would you defend the company?

Case 3

Ms. Y, a clerk at a large computer store in Sarajevo, has been complimented by her supervisor, Mr. X., on many occasions. His comments have ranged from compliments on her sense of style to praise for her personality traits. In response, Ms. Y has expressed her gratitude for these comments. One day, Mr. X invited Ms. Y to have dinner with him at a restaurant, followed by drinks at his home. When Ms. Y realized that this dinner was to be a date, she gracefully refused the invitation. Mr. X then invited her again, but she again refused and explained that she was not interested in dating.

Over the course of the following days and weeks, Mr. X began to supervise Ms. Y’s work performance more closely. It had been well-known to Ms. Y’s colleagues that she occasionally arrived late for work, but Mr. X warned her that she risked dismissal if this continued. Mr. X then threatened to dismiss Ms. Y unless she somehow made him “forget” these violations. When she asked what he meant by “make him forget,” Mr. X said she knew what she had to do. The discussion ended there and Ms. Y did not communicate further to Mr. X, and she was subsequently dismissed.

- *If you were prosecuting this case:* What further evidence would you seek and what suspicions would you have as to whether sexual harassment took place?
- *If you were the defence attorney in this case:* How would you defend the firm?

³¹¹ US Equal Employment Opportunity Commission Youth at Work, “Two Young Men Report Sexual Harassment at New Jersey Grocery Store,” <https://www1.eeoc.gov/youth/case1.html> (accessed 1 March 2017).



Discussion Question:

Is an apology an adequate remedy for sexual harassment?

The following case is from Serbia, where sexual harassment is considered to be a violation of work discipline under the labour law:

In 2011, a female second lieutenant in the Serbian armed forces filed a complaint of sexual harassment to a gender advisor because she was harassed by her superior, a (higher ranking) full lieutenant. The harassment occurred when she went to talk with him about her potential promotion. He had changed the subject, offered her a drink, and begun to recount intimate details from his private life. When she said that she did not have time for a drink, he responded, “one has to relax a bit and have someone to make the everyday routine more interesting... these days, life is hard without fun.” He also offered to take the second lieutenant home, repeating that an invitation for drinks and dinner stood. After looking into the case, the gender advisor urged the full lieutenant to apologize to his subordinate for his discriminatory and degrading behaviour, and stated that he should refrain in the future from behaving in this way toward women.

Was the gender advisor’s response appropriate?

Should any further action have been taken with regards to the full lieutenant? And what about within the institution as a whole? (Consider the duty of an employer to address both individuals responsible for harassment and the environment in which it has taken place.)

6.10. References

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Thematic Unit 7:

The Impact of Gender Bias on Assessments of Credibility

Learning outcomes – by the end of this unit, you will:

1. Understand how gender bias influences, or can potentially influence, assessments of credibility of the parties in legal processes.
2. Be familiar with research and knowledge related to the role of different types of gender bias in assessing credibility.
3. Understand how gender bias can influence legal decision making by framing some parties as more or less credible than others.

Background Reading:


Lynn Hecht Schafran, “Credibility in the Courts: Why Is There a Gender Gap?” *The Judges’ Journal* 34, no. 1 (1995): 5-42.

Angela Melville and Rosemary Hunter, “‘As Everybody Knows’: Countering Myths of Gender Bias in Family Law,” *Griffith Law Review* 1, no. 1 (2001): 124-138. **pdf:** https://kar.kent.ac.uk/1719/1/R_Hunter_As_everybody_knows_2001.pdf

Diana Burgess and Eugene Borgida, “Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination,” *Psychology, Public Policy, and Law* 5, no. 3 (1999): 665-692. **pdf:** https://www.researchgate.net/profile/Diana_Burgess/publication/232572772_Who_Women_Are_Who_Women_Should_Be_Descriptive_and_Prescriptive_Gender_Stereotyping_in_Sex_Discrimination/links/5733997a08aea45ee838f99c.pdf

Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014). **web:** <http://www.dcaf.ch/Publications/Gender-and-the-Judiciary-The-Implications-of-Gender-within-the-Judiciary-of-Bosnia-and-Herzegovina>

Summary: Thematic Unit 7 is focused on the ways in which gender bias and gender stereotypes impact how the credibility of victims, witnesses, and other procedural subjects are assessed. The unit offers a general overview of the concept of procedural credibility and presents relevant research on gender bias. The particularly pertinent issue of how legal experts assess the credibility of women – whether they appear as victims, witnesses, other procedural subjects – is also explored. Research conducted in BiH has shown that women tend to be seen as less credible in the courtroom;



and this also applies to other individuals who do not conform to expected patterns of behaviour for their gender, such as male victims of rape and sexual harassment or men who seek custody of minor children. This unit stresses the duty of judicial professionals to confront their own prejudices and to consider credibility in a manner that allows them to make decisions fairly and equitably.

7.1. Introduction

According to *Black's Law Dictionary*, credibility is “the quality that makes something worthy of belief.”³¹² This may refer to a witness, who must be determined to be competent before his or her credibility is considered. But in the legal realm, the credibility of evidence, judges, prosecutors, other judicial practitioners, and court experts is also relevant.

In BiH, a country with a civil law system, credibility is seen as a relatively straightforward matter, and while the legal literature does address common threats to the credibility of witnesses and victims, gender bias is not usually discussed. In assessing credibility, legal professionals in BiH consider factors such as whether a witness has previously lied before the court, whether they are mentally capable of testifying, whether they have an interest in not telling the truth (such as being a spouse or family member of an accused), or if they have any previous convictions. As such, the assessment of credibility is seen as a clear-cut process, and legal professionals in BiH spend little time on the matter.

However, research published in BiH in 2014 demonstrated that gender bias, previously unrecognized by legal professionals in the country, may play a role in their determinations of credibility. This will be discussed in more detail later.


Unlike in civil law systems, the question of credibility is given much greater scrutiny in adversarial legal systems. Lawyers thus use a number of tactics to either strengthen or discredit the testimony of witnesses before judges and juries. In addition, they do not shy away from attacking the credibility of their fellow lawyers if they feel it will improve their case.³¹³ It is therefore unsurprising that legal professionals in countries with adversarial systems have a particular theoretical interest in credibility, which has resulted in a wealth of literature on the topic in places like the United States. Because witness testimony is a foundation of the trial system in both adversarial and civil law countries, this literature is highly relevant to legal professionals in all jurisdictions.

In a review of “credibility lessening tactics” used by attorneys, Sarah Ubel identified three key dimensions used to determine levels of credibility: perceived expertise, trustworthiness (i.e. lacking an interest in making nonvalid assertions), and goodwill. She noted that other scholars had considered the role of some additional dimensions, including “sociability, character, competence, composure, and extraversion.”³¹⁴ Although legal professionals strive to be impartial, many assessments of these dimensions are largely subjective and thus influenced by gender bias, as well as by stereotypes related to other factors such as age, level of education, race, and religion.

³¹² Bryan A. Garner, ed., *Black's Law Dictionary*, 9th ed. (Egan, MN: West Publishing, 2009).

³¹³ Sarah Ubel, “Credibility Lessening Tactics Utilized in the Courtroom by Male and Female Attorneys,” *Communication Law Review* 42, no. 2 (2008): 42-51. Available at: <http://commlawreview.org/archives/v8i2/credibility%20lessening%20tactics%20v8i2.pdf> (accessed 2 March 2017).

³¹⁴ *Ibid.*, 2.



This leaves a number of questions open for future legal professionals to answer themselves. Should we presume that every witness is credible unless proven otherwise? What really influences someone's credibility? Does a person's gender, level of education, race, or ethnicity genuinely make them more or less credible, or are these judgements based on our own biases? And what about the question of professional credibility; do we assess the credibility of male and female judges, prosecutors, legal professionals, and courtroom experts based purely on their professional knowledge and skill? Is a female expert witness perceived as having the same level of credibility as her male colleague? Do we see her as more credible than a man if she is giving evidence about a child's best interests, irrespective of her area of expertise?

7.2. How gender bias influences perceptions of credibility

The credibility of women has been held in particular suspect within the legal realm since some of the earliest legal codes were written, and this was reflected in early legal documents in the US and Europe.³¹⁵ In the Western Balkans, the Vinodol Statute – a legal code from 1288 and one of the oldest in the region – long ago established specific scrutiny of women's credibility, in Article 18.³¹⁶ It stated that a morally reputable woman put forward as a witness would be trusted only if all of the following criteria were met:

- there were no other male witnesses;
- the dispute was between women; and
- the offense was for 'cursing, wounding or beating.'³¹⁷

The Vinodol Statute characterized the testimony of women as subsidiary (if there are no male witnesses), relative (only in disputes involving women), and sufficient only in certain instances (verbal and physical acts). And Article 18 also incorporates subjective and gendered assumptions related to the characteristics of women, for example stipulating that they be "morally reputable."³¹⁸

We might like to think that this practice of mistrusting women's testimonies, or at least treating them as *less* trustworthy, was abandoned long ago. Yet, evidence indicates that the credibility of women continues to be subject to greater scrutiny, and that assessments of their credibility are coloured by stereotyped expectations of how women should behave generally and how they should hold themselves in court. Questions about women's sexual behaviour, mothering, career choices, appearance, and dress habits are still explicitly or implicitly integral in the minds of many legal professionals when assessing the credibility of women as victims, witnesses, or experts. Lynn Hecht Schafran, a legal scholar in the US, offers explanations as to why the credibility of women is still undetermined by gender biases and stereotypes.³¹⁹ In doing so, she identifies three types of credibility: collective, contextual, and consequential.


315 Lynn Hecht Schafran, "Credibility in the Courts: Why Is There a Gender Gap?" *The Judges' Journal* 34, no. 1 (1995): 5-42.

316 The Vinodol Statute is the oldest legal document written in the Croatian Chakavian dialect and the oldest record of the laws of the South Slavs.

317 Glorija Zoričić, "Kazneno procesno pravo po Vinodolskom zakonu," *Pravnik* 45, no. 90 (2011): 135-152. Available at: <http://hrcak.srce.hr/file/144398> (accessed 2 March 2017).

318 Ibid.

319 Schafran, "Credibility in the Courts."



Collective Credibility: This kind of credibility comes from belonging to a group seen as credible, which is not true of women as a group, historically. The law has traditionally grouped women with children, elderly, and the mentally impaired and has forbidden them from many social functions, including the ability to own property, enter contracts, or vote. Rape laws were once written in a way that placed the burden of proving their own trustworthiness on women victims. Although laws have since changed, social science and legal research reveal that women as a group are still perceived as less credible than men.

According to a 1988 report of the American Bar Association Commission on Women in the Profession, "women report that they are often treated with a presumption of incompetence, to be overcome only by flawless performance, whereas they see men attorneys treated with a presumption of competence overcome only after numerous significant mistakes. Minority women testified that adverse presumptions are even more likely to be made about their competence."³²⁰ Decades later, research in BiH confirmed that these dynamics still plague women in the judiciary.³²¹ Moreover, some women belong to several groups that lack collective credibility. An example from the BiH context would be Roma women, who face challenges to their credibility based on their ethnic group and their gender.

Contextual Credibility: The second form of credibility is contextual, referring to credibility that is dependent upon understanding the context of a claim. In other words, to assess a person's credibility, you must try to understand their experiences. When women talk about their life experiences in court, judicial professionals sometimes have little firsthand knowledge by which to relate, and this makes it harder for them to establish credibility. However, evidence suggests that when women's testimonies are preceded by briefings from expert witnesses on misunderstood topics such as sexual harassment, witnesses are seen as more credible.³²²

Consequential Credibility: There is also a type of credibility related to being seen as "someone of consequence, someone who matters and someone to be taken seriously."³²³ When people are taken seriously, their injuries and grievances are accepted as significant or important.³²⁴ An example of this consequential type of credibility is the way in which injustices done to female victims of rape within the context of domestic violence are minimised to avoid sending a "nice guy" (who may be a father and a breadwinner) to prison. One way of measuring relative levels of consequential credibility is to look at sentencing guidelines for different kinds of crime. For instance, are sentencing minimums for robbery harsher than for sexual assault?

Consequential credibility can be elusive for those who do not fit stereotypes about victims of given crimes. As men do not fit the stereotypical image of a victim of sexual violence, a male victim of a female perpetrator would likely have difficulty in asserting his consequential credibility, regardless of the severity of the crime.

³²⁰ American Bar Association Commission on Women in the Profession, "Report to the [ABA] House of Delegates," June 1988. Available at: <http://www.americanbar.org/content/dam/aba/migrated/women/womenstatistics/1988ReportToHouseOfDelegates.authcheckdam.pdf> (accessed 2 March 2017).


³²¹ Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative & DCAF, 2014).

³²² Schafran, "Credibility in the Courts."

³²³ Ibid.

³²⁴ Ibid.

Still, according to Schafran, it is women who tend to face challenges to all three types of credibility. Compared to men, women are seen as less competent and therefore less credible. On top of that, they must seek redress in courtrooms staffed by legal professionals who lack an understanding of their personal contexts and how a given crime may affect them. As a result, even when harm is proven, the punishment for perpetrators may be minimal.³²⁵ To remedy this, Schafran argues that serious efforts must be made to change how legal practitioners assess credibility and to encourage them to recognize their own biases.

 **Discussion 10 minutes**

Literature from the US and other countries that use an adversarial legal system offer plenty of evidence that legal professionals often undermine the credibility of witnesses, victims, and courtroom experts, and that defence and prosecution attorneys use gender to assess credibility. But what is the situation in BiH? Can you imagine this happening in BiH?

After students give their opinions, present the following research findings from BiH:

In a 2014 study, legal professionals in BiH initially rejected the idea that gender influences their assessments of credibility. They argued that many factors are considered, but not gender. Yet, some anecdotes indicate otherwise. One judge explained:

It all plays a part, especially if the witness is a young woman; if she is testifying for a crime [that took place] late at night, I hear comments about what she was doing out that late in a bar. They ask if she frequently changes boyfriends. Lawyers try to destroy the credibility of witnesses in that way. Some behaviours are okay for young men but not for young women. For that reason, young women...avoid testifying in court. [Lawyers] comment on how she dresses, and those comments are not made about men.

Furthermore, in the same study, approximately 40% of respondents said that their assessment of a victim's credibility was impacted by the victim's emotional state. The study did not determine whether this impact was positive or negative; but research from the US indicates that female rape victims who do not show visible signs of distress when giving testimony in court are less likely to be believed. In other words, if victims behave in a way that conforms with gender-based stereotypes, they are seen as more credible. However, scientific evidence shows that survivors of traumatic events react in many different ways to those events in various contexts and over time, irrespective of their gender.

325 Ibid.

7.3. Gender bias and credibility in practice

7.3.1. The credibility of victims

Assessing the credibility of victims is paramount to the legal process, and sometimes entire cases depend on it. Women are in an especially difficult position when it comes to trying to prove that they have been victims of domestic violence, sexual harassment, rape, marital rape, and war-time rape. These crimes frequently take place in private, often with no witnesses, and the credibility of the victim is thus given utmost importance in assessing the case.

The credibility of domestic violence victims

In domestic violence (DV) cases, women who contact the police often choose not to follow through with an investigation because they are too afraid of the abuser.³²⁶ Sometimes, women will contact law enforcement and then drop the charges several times. If a woman finally follows through with a case after withdrawing them in the past, she is likely to be met with scepticism about whether the violence actually took place at all.

One reason legal professionals may distrust female victims of domestic violence is related to a misunderstanding of their motivations for engaging with the criminal justice system. While judges, prosecutors, and lawyers are primarily concerned with determining whether or not to convict the accused party, the victim may be seeking to resolve more pressing issues – for example, collecting child support or recovering the family home in order to guarantee their own safety and that of their dependents. Some victims may also focus on getting their abusers the help they need. Once these goals are achieved, it may be logical from the victim’s perspective to withdraw their complaint in order to limit future contact with the perpetrator or avoid having to revisit traumatic experiences.³²⁷ This logic is often misunderstood by judicial professionals, however, some of whom see it as a sign that the perpetrator is no longer a threat or that the previous threat was exaggerated by the victim.³²⁸

Despite popular beliefs to the contrary, few victims seek to condemn or punish their abusers publicly; but if they do, it does not make their claim any less legitimate or them any less trustworthy.³²⁹ To appreciate this, and thus to appropriately assess the credibility of victims even if they behave reluctantly, legal professionals need an in-depth understanding of the dynamics and complexities of domestic violence. Otherwise, victims are likely to be misunderstood or their actions misinterpreted.

It is understandable that prosecutors sometimes find it frustrating when victims withdraw or recant their allegations. Evidence from many countries, including BiH, shows that prosecutors are hesitant to pursue domestic violence cases for this reason.³³⁰ And some prosecutors believe that vic-


326 Edna Erez, and Joanne Belknap, “Battered Women and the Criminal Justice System: The Service Providers’ Perceptions,” *The European Journal on Criminal Policy and Research* 6, no. 1 (1998): 37-57.

327 Edna Erez, “Domestic Violence and the Criminal Justice System: An Overview” *Online Journal of Issues in Nursing* 7, no. 1 (2002).

328 Ibid.

329 Ibid.

330 Majda Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in BiH* (Sarajevo: Atlantic Initiative/DCAF, 2015).



tims who fail to “cooperate” should no longer be entitled to the benefits of the legal system.³³¹ This is simply a failure on the part of these legal professionals to recognise that, for victims, convicting a perpetrator is often not their primary goal. These views are also based on the presumption that a cooperative victim is essential to the objective of prosecution.³³²

The credibility of domestic violence victims is also undermined when attorneys question their mental health in the process of defending their abuser. A defence attorney may argue, for example, that the victim was in fact the primary aggressor and that the abuser was acting to defend himself.³³³ Attorneys often highlight the contrast in appearance between their composed client and their more emotional, less credible-looking victim – who may have suffered through years of coercive control. In this way, the victim’s experience of abuse is minimised and it is implied that they are not a “real” victim.³³⁴

In truth, mental health sufferers are more likely to be targeted for many kinds of abuse precisely because they are seen as less credible, and perpetrators thus believe that they can act with impunity. Moreover, victims of domestic violence have often lived with violence for a long time, and may show classic signs of trauma including confusion and outbursts or displays of strange and erratic behaviour. Therefore, it is important that legal professionals are educated about domestic violence or, failing this, that expert witnesses testify in the courtroom to explain the effects of trauma on the victim.

The credibility of rape victims

In one British study, respondents said that they believed a rape victim was to blame if she had dressed provocatively or had gone home with her rapist.³³⁵ Ideas like these are engrained from a young age and the effect they have on public opinion makes it all the more difficult for victims to get the justice they deserve.³³⁶ Jurors and judges in rape cases often make decisions based on pre-conceived notions or implicit and explicit biases about what constitutes ‘real’ rape. What’s more, police officers and prosecutors are often disinclined to pursue sexual assault cases because of how difficult it can be to secure convictions in court.³³⁷

In rape cases – as the British study mentioned above highlighted – gender biases are amplified by social attitudes held in many countries, including in the West, that blame rape survivors for their own victimisation. In discussions of rape, it is common to hear talk of whether “she was dressed provocatively,” and “had a bad reputation.” Not only do both points wrongly imply that rape

331 Ibid.

332 Erez, “Domestic Violence and the Criminal Justice System.”

333 Ibid.

334 Ibid.

335 “Women say some rape victims should take blame – survey,” *BBC News*, 15 February 2010, http://news.bbc.co.uk/2/hi/uk_news/8515592.stm (accessed 2 March 2017). Also see: Metropolitan Police Authority, “Havens ‘Wake Up to Rape’ Research report,” MPA briefing paper 04/2010, 18 February 2010, <http://policeauthority.org/metropolitan/publications/briefings/2010/1004/index.html> (accessed 2 March 2017).

336 Tara Culp-Ressler, “For Young Women, Sexual Violence Is The New Normal,” *Think Progress*, 15 April 2014, <http://thinkprogress.org/health/2014/04/15/3426679/study-assumption-sexual-violence-normal/> (accessed 2 March 2017).

337 Tara Culp-Ressler, “Taking Sexual Assault Seriously Involves Testing Thousands Of Rape Kits First,” *Think Progress*, 10 December 2013, <http://thinkprogress.org/health/2013/12/10/3040811/rape-kit-backlog-joyful-heart/> (accessed 2 March 2017).

is a form of sexual attraction turned sour, but more importantly they place the blame squarely on the female victim and her sexuality.³³⁸

The emotions female rape victims do or do not express are also sometimes viewed as detracting from their credibility. For example, there is evidence that a female victim who does not cry or show other signs of distress when testifying in court will be seen to lack credibility, even though psychologists have long attested that not all rape survivors react to the trauma they have experienced in this way.³³⁹ And yet, if a woman becomes very upset or cries a lot in the courtroom she is dismissed as “hysterical” and may face threats from the judge to stop the proceedings; and if she expresses anger she is also likely to be dismissed, because in most cultures, angry women make most people – and especially men – uncomfortable.³⁴⁰

Men also face questions about their credibility if they do not fit notions of expected behaviour. If men are tearful, appear visibly upset, or demonstrate other behaviours that are not seen as traditionally masculine when they testify in court, they may be chastised, shamed, or accused of being manipulative. Clearly, gender bias about the emotional responses that are normal and appropriate for both men and women can play a role in undermining how the credibility of victims is perceived in the courtroom.³⁴¹

Furthermore, the research of Lynn Hecht Schafran on consequential credibility (or the inability of judicial professionals to give importance to the experiences of women) shows that women’s injuries are commonly minimised in rape sentencing, especially in cases involving non-strangers. But these are the bulk of rape cases, for victims know their attacker 80% of the time. Often, these rapists have no other criminal record despite the high likelihood that they are reoffenders. In many cases, these combined factors can lead victims to internalise societal blame for not avoiding or preventing their rape and can undermine their trust in the people who are supposed to help them, including in the criminal justice sector.³⁴²

Perceptions of minority communities and minority women have also contributed to issues of credibility. For example, judges and jurors in the US have been shown to trivialise violence against women of colour because they believe that these women come from “naturally” violent communities. This is reflected in cases of rape as well, in which the trauma experienced by women of colour is sometimes dismissed due to stereotypes that they are more promiscuous and inured to forced sex.³⁴³ While discrimination against minority women in the US is relatively well-known abroad, similar stereotypes exist in all countries, though they may be applied to different minority groups.

338 Hayley Rose Horzepa, “Does Gender Bias and Victim Blaming Put Both Sexes at Risk for Sexual Assault?” *Huffington Post*, 2 August 2011, http://www.huffingtonpost.com/hayley-rose-horzepa/male-rape_b_913643.html (accessed 2 March 2017).


339 Lynn Hecht Schafran, “Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist,” *Fordham Urban Law Journal* 20, no. 3 (1993): 450-451; Lynn Hecht Schafran, “Writing and Reading about Rape: A Primer,” *St. John’s Law Review* 66, no. 4 (1993): 979-1045. Also see: David Lisak, Arkansas Coalition against Sexual Assault, *The Neurobiology of Trauma*, YouTube video, 34:31, posted by ACASA Arkansas, 5 February 2013, <https://www.youtube.com/watch?v=pyomVt2Z7nc> (accessed 2 March 2017).

340 David Frazee, Ann M. Noel, and Andrea Brenneke, *Violence Against Women: Law and Litigation* (Deerfield, IL: Clark Boardman Callaghan, 1997).

341 Halilović and Huhtanen.

342 Schafran, “Credibility in the Courts.”

343 Frazee, Noel, and Brenneke, 1-6.



In BiH, gender stereotypes and misconceptions have been identified in assessments of the credibility of wartime rape victims. In one case, the judges considered the victim's testimony credible because her claim was authentic, concise, and consistent, as is usual practice. However, the judges also stated that the victim's credibility was strengthened by the fact that she did not seek compensation for the crime committed against her. This attitude is problematic because it implies that victims who seek compensation are less credible, even if this is their right according to both national and international legal frameworks.³⁴⁴

In another case of wartime rape before the BiH court, gender bias was clearly a factor when a victim's testimony was deemed not credible, resulting in the collapse of the case. The reasons for this assessment were multi-fold: First, the victim neglected to mention that she had been in a relationship with the accused before the war. Second, she hid her pregnancy when she was transferred to free territory. Third, she did not terminate her pregnancy when she arrived in free territory. In this example, we can see all three of Schafran's forms of credibility at play. The victim suffered from a lack of collective credibility both as a woman and as a rape victim. This was compounded by a lack of contextual credibility; the judges clearly did not understand the trauma and stigma associated with rape (and abortion, for that matter), particularly in the wake of a consensual affair with a married man from a different ethnic group, and how these challenges were amplified in the context of war. And finally, there was a lack of consequential credibility, as clearly the severity of the victim's ordeal was not appropriately considered.³⁴⁵

Another impactful but common misconception is that the victims of rape are always women and the assailants are always men. While studies estimate that 90% of rape victims are female, the remaining 10% of male victims face a number of legal obstacles related to gender bias.³⁴⁶ Rape by a woman is often seen as inconceivable because stereotypes dictate that men have inherently more strength and power than women.³⁴⁷ Male-on-male rape is also misunderstood, again because of false associations between rape and sexual attraction. Men who have been raped are often forced to demonstrate that they are not homosexual (which is irrelevant to a crime that is about power and control, not sexual attraction), that they weren't 'asking for it,' and that they are not trying to excuse homosexual behaviour they now regret.³⁴⁸

These stereotypes and their effects on public opinion are dangerous to both women and men. While these attitudes impact women in higher numbers, male victims who do report their rapes face considerable gender bias, and men are less likely to report rape because admitting to it is such a taboo.³⁴⁹ In this way, victim blaming and a fear of public shame continues to silence rape victims regardless of gender.

344 Court of BiH, Verdict, *Prosecutor v. Saša Baričanić*, No. S1 1 K004648 11 Kri (X-KR-05/111), 9 November 2011.

345 Court of BiH, Verdict, *Prosecutor v. Radmilo Vuković*, No. X-KRŽ-05/217, 13 August 2008.

346 Rape, Abuse & Incest National Network, "Victims of Sexual Violence: Statistics," <https://rainn.org/get-information/statistics/sexual-assault-victims> (accessed 2 March 2017).

347 Horzepa.

348 Callum Watson, *Preventing and Responding to Sexual and Domestic Violence against Men: A Guidance Note for Security Sector Institutions* (Geneva: DCAF, 2014), p. 27.

349 Horzepa.

7.3.2. The credibility of experts

📺 Video: Education and Employers Taskforce, #RedrawTheBalance (2016)

YouTube: https://www.youtube.com/watch?v=kJP1zPOfq_o

Running Time: 2 minutes, 7 seconds

In this video, children in a primary school in the UK were asked to draw three pictures (and to give names to the people they drew). They were asked to draw:

1. A firefighter
2. A surgeon
3. A fighter pilot

Then, they get to meet a real firefighter, surgeon, and fighter pilot.

After the video:

The video highlights that gender stereotypes become fixed at ages 5-7. With that in mind:

- Do you think this exercise would have the same outcome in BiH? (Because these nouns are gender specific in the local language, children would be asked to “Draw someone whose job is to put out fires.”)
- Would you feel comfortable if an all-woman team of firefighters arrived to put out a fire at your house, or if you were in a plane piloted by a woman, or if you had a female brain surgeon?
- Even if you would be comfortable with women in these positions, do you believe it is a risk as a legal professional to choose to use women experts as witnesses in cases related to arson, neurology, or aeronautics?

Research conducted in BiH has revealed conflicting views among judicial professionals on the influence gender has on assessments of the credibility of experts. During interviews for one study, a female judge observed that defence attorneys and prosecutors have a tendency to favour men over women when calling expert witnesses, especially for testimony in the field of economics. Other interviewees expressed similar opinions that this was especially true in certain fields related to mathematics, due to prevailing stereotypes that women have inherently less acuity in these areas.³⁵⁰

One female judge felt that factors beyond gender were considered, particularly the cost of experts’ appearance in court, noting:

There is a list, and experts are chosen from the list.... they look for someone who is relatively close [geographically] to reduce the costs [of transportation]. I have an example of a woman who is a

350 Halilović and Huhtanen, 86-7.



*building expert and everybody calls her because she is good.*³⁵¹

In all likelihood, it is both true that gender matters – whether intentional or not – and that other factors are also at play. The defence or the prosecution will always choose witnesses they deem to be most credible to the court in any given context. If they believe an expert will be viewed with more authority by judges due to their gender, then gender becomes an explicit factor in their decision making; and this usually results in the choice of men as experts. On the one hand, their own unconscious bias may lead defence attorneys and prosecutors to view men as more authoritative or to assume men are viewed that way, even if judges do not hold such a bias. Either way, choosing a male expert may seem like a rational choice of outcome-based thinking.³⁵²

It is also possible that there are higher levels of men in certain professions, and particularly in sectors that are frequently called to testify in the court system. Gender inequality in the labour market, then, is yet another factor. Determining the scale of the imbalance in gender representation among expert witnesses in BiH, and the reasons why, would be worthy of further inquiry.³⁵³

While research from BiH has not offered conclusive findings related to gender and the credibility of expert witnesses, international research is more conclusive in this respect. Studies indicate that men are not only more likely to appear as expert witnesses, but that when women do appear, they often act as part of an expert team rather than standing alone.³⁵⁴ This research has also found, however, that in some areas women are seen to have *more* expertise. For example, one study evaluated the effect of gender on the credibility of expert witnesses in cases of child custody by playing a recording of a simulated child custody hearing to a team of mock jurors. The jurors believed that the female expert had more credibility than the male expert when it came to determining which parent was more suitable as the primary custodian, suggesting that women are perceived as more capable than men at evaluating dynamics or issues related to stereotypically ‘female domains.’³⁵⁵

In a study by Larson and Brodsky that also used mock jurors, participants were shown video clips from a criminal murder trial.³⁵⁶ The mock jurors were asked to rate the expert witnesses, and rated the male experts as more “confident, trustworthy, likable, believable, and credible” than the female experts.³⁵⁷ Another study found that when assessing the credibility of women experts, likeability is a significant factor; but for men, this makes little difference in how their credibility is assessed.³⁵⁸ In other words, women must appear both likeable *and* competent in order to be viewed as legitimate experts in the courtroom. This puts female expert witnesses in a Catch-22 situation – they must demonstrate

351 Lists of Court Experts for both the FBiH and the RS are publicly available (in Bosnian). An examination of these lists generally revealed a clear gender imbalance in favour of men. In medicine, the disparity was particularly striking; only 15% of 137 experts listed were women. Several research and health reform initiatives have recorded considerably higher numbers of women in the medical field than are represented on the Court Experts list, noting rates well above 50%, particularly in certain specialties. For example, see: “From Family Medicine to Community Nursing: A Project in Bosnia-Herzegovina and its Potential for NCD Control and Prevention,” *Bulletin of Medicus Mundi Switzerland*, no. 128 (2013).

352 Amy P. Walters, “Gender and the Role of Expert Witnesses in the Federal Courts,” *The Georgetown Law Journal* 83 (1995), 638.

353 Halilović and Huhtanen.

354 Walters, 638.

355 R. A. Swenson, D. L. Nash and D. C. Roos, “Source credibility and perceived expertness of testimony in a simulated child-custody case,” *Professional Psychology: Research and Practice* 15 (1984): 889-898.

356 Bridget A. Larson and Stanley L. Brodsky, “When Cross-Examination Offends: How Men and Women Assess Intrusive Questioning of Male and Female Expert Witnesses,” *Journal of Applied Social Psychology* 40, no. 4 (2010): 811-830.

357 Ibid.

358 Tess M. Neal, et al., “Warmth and competence on the witness stand: Implications for credibility of male and female expert witnesses,” *Journal of the American Academy of Psychiatry and the Law* 40, no. 4 (2012): 488-497.

that they are just as competent as their male colleagues, sometimes by taking on roles or attitudes stereotypically assigned to men and associated with strength and assertiveness, yet must also adhere to social norms stereotypically assigned to women that dictate they be agreeable and flexible.³⁵⁹

7.3.3. The credibility of attorneys, judges, and prosecutors

Despite the tradition in the legal profession of valuing decorum, Ubel and others offer plentiful examples of how this is undermined by various forms of gender bias.³⁶⁰ Women in particular face challenges to their credibility as attorneys, judges, and prosecutors by three main means: overt intimidation, being ignored and disregarded, and seemingly innocuous gendered comments that distract from or dismiss a woman's professional expertise. While these behaviours were first identified in adversarial systems such as in the US, recent research has demonstrated that women in BiH also face these same three forms of professional deligitimisation.

Overt intimidation

When it comes to overt intimidation, legal professionals have reported being subject to foul and belittling language related to their gender and to statements that they do not belong in the legal domain.³⁶¹ And, in contrast to the prescribed practice of referring to judges as “your honour” and lawyers as “defence counsel” or “prosecutor,” interviewees in BiH reported hearing terms such as “young man,” “young woman,” or even “girl” being used to discredit legal practitioners in the courtroom. One male lawyer openly confessed in the courtroom to having difficulties working with a female prosecutor because he had sexual fantasies about her. And this occurs between judges, too, as in the case when one male judge turned to a female judge and asked, “what did you say, beautiful?”³⁶²

Comments such as these, which diminish or disparage, as well as use of terms like “dear” and “honey” – as experienced by two thirds of female attorneys in the US³⁶³ – create a hostile work environment for female legal professionals (and in fact make many of their male colleagues uncomfortable as well.) Furthermore, this kind of behaviour undermines the legal process. Judges should base their assessments of the credibility of legal professionals in their court not on their own attitudes toward particular groups of women and men, but on the basis of how defence counsel or prosecuting attorneys present argumentation.

Another method of intimidation that has been documented in research is an increased level of scrutiny of individuals who do not fit the stereotype of a ‘typical’ legal professional (often, women and younger staff), in regard to their application of procedural and other rules. This scrutiny is also sometimes accompanied by comments that ‘masculine’ subject matter is difficult for women to understand (thus undermining contextual credibility) or that a woman's judgement is clouded by her emotions.³⁶⁴ Again, this undermines

359 Tess M. S. Neal, “Women as Expert Witnesses: A Review of the Literature,” *Behavioral Sciences and the Law* 32, no. 2 (2014): 164-179. Available at: http://ppc.unl.edu/wp-content/uploads/2014/09/Neal_Women-as-Experts.pdf (accessed 3 March 2017).


360 Ubel.

361 Ibid.

362 Ibid.

363 Ibid.

364 Ibid.



due process and creates self-fulfilling prophecies that women and non-stereotypical men struggle to succeed as legal professionals. They are not, in fact, less talented; but they are not given a level playing field.

Being disregarded

Female legal professionals in particular face the challenge of being interrupted and ignored on a regular basis. At a symposium held in Brussels in 2013 entitled “The Judge is a Woman,” several European judges noted how male legal professionals tend to reinforce statements made by their male peers, with references such as “...as my colleague correctly noticed...,” while largely ignoring points made by their female counterparts.³⁶⁵

Even when women do get to speak, disinterested or dismissive body language or non-verbal communication by a judge can undermine the speakers’ credibility to other observers in the courtroom:

*If the jury senses a judge’s disinterest when a woman speaks, but has no red flag that his behaviour is gender-biased, the female attorney and her client lose their right to impartiality. Moreover, as legal transcripts do not record the judge’s body language, such bias is not apparent on appeal.*³⁶⁶

In this way, the implicit or explicit gender bias of a judge can influence the assessment of a legal professional’s credibility through non-verbal cues that they may not even realize they are communicating. And yet, clearly, if one party in a trial is ignored or believed less on the basis of their gender, the judicial process has been compromised.

In a related example from the political sphere, women in the Obama Administration struggled to have their voices heard in what was a traditionally male-dominated field until they adopted a strategy called “amplification.” When one female staffer made a point, another woman would repeat it, always crediting the original author. This way the point was neither overlooked nor reclaimed by a man. Over the course of the Obama presidency, the contributions of women began to be valued more equally and gender parity was achieved among senior White House staff.³⁶⁷

Gendered comments

The third way the credibility of female legal professionals is undermined is through gendered comments that are often unintentional – and may even include compliments. People who do not fit stereotypical gender roles associated with their profession are often both criticized and complimented on their outward appearance. Where women are concerned, comments on their clothing, physique, or hairstyle are commonplace (and men sometimes face comments if they are deemed to be ‘boyish,’ less-than-masculine, or overweight).³⁶⁸ Studies from a survey of legal professionals in BiH found that one in five respondents had heard jokes related to a colleague’s physical appearance.³⁶⁹ In an interview for that research, one male prosecutor reported that he was frequently

³⁶⁵ Halilović and Huhtanen, 88.

³⁶⁶ Jennifer A. Levine, “Preventing Gender Bias in the Courts: A Question of Judicial Ethics,” *Georgetown Journal of Legal Ethics* 1 (1987): 783-786.

³⁶⁷ Juliet Eilperin, “White House women want to be in the room where it happens,” *The Washington Post*, 13 September 2016. Available at: <https://www.washingtonpost.com/news/powerpost/wp/2016/09/13/white-house-women-are-now-in-the-room-where-it-happens> (accessed 3 March 2017).

³⁶⁸ Ubel.

³⁶⁹ Halilović and Huhtanen, 44.

teased for being overweight.³⁷⁰ Even where these comments are meant to be positive, they draw attention to the fact that a legal professional is somehow atypical, leading to judgements on their credibility based on factors besides the quality of their work.

7.4. Activity: examining credibility in a rape case

People v Iniguez (1994), Superior Court of San Diego County³⁷²

On June 15, 1990, the night before her wedding, at approximately 8:30 p.m., 22-year-old Mercy P. arrived at the home of Sandra S., a close family friend whom Mercy had known for at least 12 years and considered an aunt. Sandra had sewn Mercy's wedding dress, and was to stand in at the wedding the next day for Mercy's mother, who was unable to attend. Mercy was planning to spend the night at her own home.

Mercy met the defendant, Sandra's fiancé, for the first time that evening. The defendant was scheduled to stand in for Mercy's father during the wedding. Mercy noticed that the defendant was somewhat "tipsy" when he arrived. He had consumed a couple of beers and a pint of Southern Comfort [a strong liquor] before arriving at Sandra's. Mercy, Sandra, and the defendant celebrated Mercy's impending wedding by having dinner and drinking some wine. There was no flirtation or any remarks of a sexual nature made between the defendant and Mercy at any time during the evening.

Around 11:30 p.m., Mercy went to bed in Sandra's living room. She slept on top of a sleeping bag. She was wearing pants with an attached skirt, and a shirt. She fell asleep at approximately midnight. Mercy was awakened between 1:00 and 2:00 a.m. when she heard movement behind her. She was lying on her stomach, and saw the defendant, who was naked, approach her from behind. Without saying anything, the defendant pulled down her pants, fondled her buttocks, and inserted his penis inside her. Mercy weighed 105 pounds (48kg). The defendant weighed approximately 205 pounds (95kg). Mercy "was afraid, so I just laid there."


"You didn't try to resist or escape or anything of that nature because of your fear?"

"Right."

Mercy further explained that she "didn't know how it was at first, and just want[ed] to get on with my wedding plans the next day." Less than a minute after he started, the defendant ejaculated, got off of her, and walked back to the bedroom. Mercy had not consented to any sexual contact.

³⁷⁰ Ibid., 47.

³⁷¹ Superior Court of San Diego County, *People v. Iniguez*, No. So30379, 23 May 1994. Available at: <http://scocal.stanford.edu/opinion/people-v-iniguez-31548> (accessed 21 December 2016). This case is discussed by Lynn Hecht Schafran in "Barriers to Credibility: Understanding and Countering Rape Myths." Also see: Lynn Hecht Schafran, "Why Empirical Data Must Inform Practice," in *Violence Against Women: Law and Litigation*, eds., David Frazee, et al. (Deerfield, IL: Clark Boardman Callaghan, 1997); and Schafran, "Writing and Reading About Rape: A Primer."



Officer Fragoso, who interviewed Mercy several days after the attack, testified that she told him she had not resisted the defendant's sexual assault because, "She said she knew that the man had been drinking. She hadn't met him before; he was a complete stranger to her. When she realized what was going on, she said she panicked, she froze. She was afraid that if she said or did anything, his reaction could be of a violent nature. So she decided just to lay still, wait until it was over with and then get out of the house as quickly as she could and get to her fiancée [sic] and tell him what happened."

Mercy immediately telephoned her fiancé Gary and left a message for him. She then telephoned her best friend Pam, who testified that Mercy was so distraught she was barely comprehensible. Mercy asked Pam to pick her up at Sandra's home, grabbed her purse and shoes, and ran out of the apartment. Mercy hid in the bushes outside for approximately half an hour while waiting for Pam because she was terrified the defendant would look for her.

Pam arrived about 30 minutes later, and drove Mercy to Pam's house. Mercy sat on Pam's kitchen floor, her back to the wall, and asked Pam, "[D]o I look like the word 'rape' [is] written on [my] face?" Mercy wanted to take a shower because she felt dirty, but was dissuaded by Pam. Pam telephoned Gary, who called the police.

Gary and his best man then drove Mercy to the hospital, where a "rape examination" was performed. Patricia Aiko Lawson, a blood typing and serology expert, testified that there was a large amount of semen present in Mercy's vagina and on the crotch area of her underpants. A deep vaginal swab revealed that many sperm were whole, indicating intercourse had occurred within a few hours prior to the rape examination. ABO blood group, blood type B, which was consistent with the defendant's, but not Gary's or Mercy's blood type, was found on the internal and external vaginal swabs and on the underpants.

The following day, Mercy and Gary married. Gary picked up the wedding dress from Sandra while Mercy waited in the car. Neither Sandra nor the defendant participated in the wedding. The defendant was arrested the same day. When asked by the arresting officer if he had had sexual intercourse with Mercy, the defendant replied, "I guess I did, yes."

Dr Charles Nelson, a psychologist, testified as an expert on "rape trauma syndrome." He stated that victims respond in a variety of ways to the trauma of being raped. Some try to flee, while others are paralysed by fear. This latter response he termed "frozen fright."

The defendant conceded at trial that the sexual intercourse was non-consensual. The defendant testified that he fondled Mercy without her consent, pulled down her pants, had sexual intercourse, and thereafter ejaculated. However, defence counsel argued that the element of force or fear was absent. “So if he was doing anything, it wasn’t force or fear.... It’s a situation where it looks to him like he can get away with it and a situation where his judgment is flown out the window.... He keeps doing it, probably without giving much thought to it, but certainly there is nothing there to indicate using fear ever entered his mind. What he was doing was taking advantage, in a drunken way, of a situation where somebody appeared to be out of it.”

*The jury was instructed on the different definitions of rape and of sexual battery in California Law. **Rape is a felony** that carries a prison sentence of up to three, six or eight years.³⁷² **Sexual Battery can be either a felony or a misdemeanour** depending on the severity.³⁷³ For a rape conviction, the jury has to be convinced that sexual intercourse was “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.”³⁷⁴ The court clarified that fear “means, a feeling of alarm or disquiet caused by the expectation of danger, pain, disaster or the like.”³⁷⁵ It added that “verbal threats are not critical to a finding of fear of unlawful injury, threats can be implied from the circumstances or inferred from the assailant’s conduct.”³⁷⁶ Sexual battery on the other hand only involves the victim being unlawfully restrained.³⁷⁷*

The jury found the defendant guilty of rape. He was sentenced to state prison for the midterm of six years.

The Court of Appeals reversed this decision, concluding that there was insufficient evidence that the act of sexual intercourse was accomplished by means of force or fear of immediate and unlawful bodily injury. On the issue of fear, the court stated: “While the [defendant] was admittedly much larger than the small victim, he did nothing to suggest that he intended to injure her. No coarse or sexually suggestive conversation had taken place. Nothing of an abusive or threatening nature had occurred. The victim was sleeping in her aunt’s house, in which screams presumably would have raised the aunt and interrupted the intercourse. Although the assailant was a stranger to the victim, she knew nothing about him which would suggest that he was violent. [The] event of intercourse is singularly unusual in terms of its ease of facilitation, causing no struggle, no injury, no abrasions or other marks, and lasting, as the victim testified, ‘maybe a minute.’”

The court modified the judgment, reducing the defendant’s conviction of rape to the offense of sexual battery.

372 California Penal Code, Section 261, subdivision 2; and Section 264.

373 California Penal Code, Section 243.

374 California Penal Code, Section 261, subdivision 2; Schafran, “Why Empirical Data Must Inform Practice.”.

375 Superior Court of San Diego County, *People v. Iniguez*.

376 Ibid.

377 California Penal Code, Section 243.



Questions for discussion

1. The jury was asked to assess whether the defendant had non-consensual sexual intercourse with Mercy by means of fear of immediate and unlawful bodily injury.
 - a. How did the defence argue their point? On what grounds did they argue that there was insufficient evidence that the defendant intended to injure the defendant?
 - b. How would you argue the case from the perspective of the prosecution? What factors would you present as evidence that the victim was fearful of immediate and unlawful bodily injury?
2. Do you think that gender bias on the part of the appeals court judges affected their perceptions of the credibility of the victim, defendant, and/or expert witnesses in this case? How?
(Hint: consider Schafran's three dimensions of credibility.)
3. In what ways was the appeals verdict influenced by gender bias or misconceptions about rape?

Commentary


It is common that rape cases are viewed from the wrong side of the telescope, with the complainant rather than defendant often put on trial.³⁷⁸ This seems to have been the case here. Mercy had to prove why she did not physically resist or scream when somebody, uninvited, undressed and penetrated her. On the other hand, it was accepted as legitimate that a strange man would have approached a young woman to be married the next day and engaged in sexual intercourse with her without even considering whether she consented to it or not. Mercy was not believed even though she risked a lot by reporting the rape. We can see that Mercy is lacking *collective credibility* as a woman and a rape survivor.

Had the intercourse been consensual, it is more likely that Mercy would simply have kept the incident from anyone rather than making a false report of rape. Instead, she put herself through a medical exam and police questioning. There was even the risk that her wedding would be cancelled, her fiancé would leave her, and that she would be ostracised by her friends (e.g. Sandra). Mercy's behaviour therefore fits the pattern of a rape survivor.

This lack of *contextual credibility* is also evident in the appeal court's ruling on whether force was used. The judges fail to see the defendant's size and behaviour as threatening to Mercy. They also fail to see Mercy's reaction – “frozen fright” – as a typical manifestation of fear, and are unwilling to accept the testimony of experts (the psychologist and the policeman) who are much more familiar with the context at hand. Instead, the judges appear to have based their judgement on what they imagine they would do in the situation.

Mercy also lacks *consequential credibility*. By questioning the severity of the crime and overlooking the effect this would have on Mercy, the judges clearly do not see her as a person of consequence. On the contrary, their bizarre legal reasoning as to whether the defendant tried to instil fear in the victim seems to have been written for the sole purpose of sparing the defendant from prison

³⁷⁸ Frazee, Noel, and Brenneke.



for what they see as a trivial crime. Clearly, these judges held the defendant in higher esteem than the victim. Given that they know little about either party personally, this would appear to be based largely on gender bias.

It should have been straightforward for the prosecution to demonstrate in this case that the defendant caused Mercy to fear immediate and unlawful bodily injury. To begin with, it was self-evident that consent was not given because Mercy neither went to where the defendant slept nor invited him to where she slept. She would easily have been fearful, if not terrified, when a man twice her size suddenly appeared naked in the middle of the night. It can be reasonably assumed that Mercy predicted what was about to happen and decided that any resistance on her part would be futile. Mercy reasoned that to maximise her chances of avoiding potentially life-threatening physical injuries, she should remain as calm as possible. Since the defendant was a stranger to her, she could not have known how he might react if she resisted. Had Mercy not been afraid, she would obviously have reacted to avoid having sexual intercourse against her will.

In addition to gender bias, a number of social biases about rape victims appear to have affected the decision-making in this case. Common myths that seem to have come into play in this case include:

- *Rape is an infrequent crime committed by a sex-starved stranger who uses weapons and extreme force.* Rape is a far too common crime committed most often by a sexually active man against a woman he knows.
- *Rape victims always sustain physical injuries.* This is not necessarily the case; and even when physical injuries are documented, they cannot usually be used as evidence that sex was non-consensual.
- *A woman who has not sustained serious physical injuries has not been injured by rape.* Rape victims suffer major and prolonged psychological consequences, which are unfortunately often misunderstood in court, leading to lenient sentences for rapists.
- *A woman who is genuinely raped always physically resists.* Many women do not physically resist, as men's greater size and strength are enough to instil fear and convince them that resistance is futile. In addition, some women react to the situation of severe distress by dissociating during the event. They later report that their rape felt like a terrible dream. Other women report that their system of self-defence completely shuts down due to feelings of powerlessness.³⁷⁹

See Thematic Unit 4 for a full discussion on myths related to rape and sexual assault.

379 Ibid.



7.5. Conclusion

This unit has demonstrated that the straightforward definition put forward at the beginning of this unit does not reflect the complications of assessing credibility. Gender biases can and do affect how we assess the credibility of witnesses and experts, even for judges, prosecutors, and lawyers. This can have several negative consequences for the criminal justice system.


Firstly, it can influence how seriously different kinds of crime are treated. Secondly, it can cause the course of justice to be perverted as victims and experts are not believed when they tell the truth. And thirdly, it provides a distinct advantage to legal professionals who fit the stereotypical image of what a judge, prosecutor, or lawyer is supposed to look like and to victims who behave as they are stereotypically expected to, at the expense of everyone else.

Overcoming gender bias in assessing credibility is important. These biases are based on stereotypical attitudes and power dynamics in society that lead to discrimination and subordination of certain groups, and the justice sector plays an important role in both preventing and responding to these situations. It is therefore critical that anyone appearing before the court is treated fairly and equitably.

Judicial professionals must confront these biases and consider the question of credibility with more nuance, examining and reflecting on preconceived notions about victims and witnesses, and their motivations and reasoning. Without this thoughtfulness, there is a risk that biased assessments of credibility will undermine the delivery of justice and in fact perpetuate discrimination and inequality in society.

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Thematic Unit 8:

Gender Bias in Labour Laws

Learning outcomes – by the end of this unit, you will be able to:

1. Discuss some of the ways gender inequality manifests in the labour market.
2. Identify some of the key domestic, regional, and international legal frameworks that aim to counter gender bias in the workplace.
3. Understand many of the challenges to implementing these laws in Bosnia and Herzegovina.

Background reading:

Ghazala Azmat and Barbara Petrongolo, “Gender and the labor market: What have we learned from field and lab experiments?” *Labour Economics* 30 (2014): 32-40. **pdf:** http://personal.lse.ac.uk/PETRONGO/Azmat_Petrongolo_April2014.pdf


International Finance Corporation, *Women on Corporate Boards in Bosnia and Herzegovina, FYR Macedonia and Serbia* (World Bank Group, 2013). **pdf:** <http://www.ifc.org/wps/wcm/connect/coe2ab804fbo37b6ad8cefo098cb14b9/PublicationBalkansBD2013.pdf?MOD=AJPERES>

Lejla Somun-Krupalija, “Gender and Employment in Bosnia and Herzegovina - A Country Study,” Working Paper 4/2011 (Geneva: International Labour Office, 2011). **pdf:** http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_170832.pdf

Sanela Bašić and Milanka Miković, *Rodne (ne)jednakosti na tržištu rada u BiH: Ženska strana priče* (Sarajevo: Udruženje Žene ženama and FES, 2012). **pdf:** <http://library.fes.de/pdf-files/bueros/sarajevo/09705.pdf>

Radislav Lale, *Rodna ravnopravnost u radnom zakonodavstvu Republike Srpske* (East Sarajevo: University of East Sarajevo and the RS Center for Gender Equity & Equality, 2015).

Đorđe Marilović, *Gender Pay Gap (GPG)* (East Sarajevo: University of East Sarajevo and the RS Center for Gender Equity & Equality, 2015).



Summary: Thematic Unit 8 aims to increase general understanding of gender bias in the world of work, and how these biases affect labour laws and their implementation. After an overview of legislation on gender equality and non-discrimination, the unit examines several areas in detail: recruitment and admission to the labour force, equality of pay and benefits, parental leave, sexual and gender-based harassment, and gender equality on company boards. Discussion of each of these areas begins with a synopsis of the current situation in BiH, followed by an analysis of relevant domestic, regional, and international legal frameworks. The unit concludes by examining two contemporary debates in the field of gender and labour law – the use of affirmative action and the use of exemptions from gender equality legislation in professions considered to be key to national security.

8.1. Introduction

Despite largescale changes that have taken place over the last century, the historical legacy of the division of labour between women and men is still apparent. In BiH today, just under one third of working-age women are active in the labour force and there has been little change in this trend in recent years. The activity rate for women in 2016 was 32.1% and for men 54.9% (a gap of 22.8%), while the formal employment rate for women was 22.4% and for men 42.5% (a gap of 20.1%).³⁸⁰ This is above the average employment gap between men and women in the EU, which came down from 25% in the early 90s to near 14% in 2008 to under 12% by 2016.³⁸¹ However, no country has yet eliminated this gap.

Discrepancies in the treatment of men and women in the workforce stem from the past. Men have historically occupied paid occupations in the public sphere while women have taken care of children and performed unpaid tasks in the domestic sphere. Even where women did perform paid roles, these tended to be in domestic service to wealthier families and even then, most women tended to leave these roles once they were married.

Several major events that took place over the course of the twentieth century began to change this in most industrialised societies. With a large number of men fighting on the frontlines during two world wars, many women were encouraged to enter the labour force to meet the shortfall of labour in national workforces. Some women also contributed to the war effort more directly, in combat and military support roles. As a result, public attitudes toward women shifted dramatically, largely removing the taboo that had made it unacceptable for middle class women to hold jobs. In a way, the wars simply accelerated a shift that was already taking place – the increasing cost of living had made it too expensive for wealthier families to employ domestic servants, and women had begun to take jobs in more public workplaces, such as offices.

³⁸⁰ Agency for Statistics of BiH, *Labour Force Survey 2016* (Sarajevo, 2016), 25. Available at: http://www.bhas.ba/tematskibilteni/TB_ARS%202016_BS_ENG_.pdf (accessed 24 March 2017).

³⁸¹ See: European Commission, “European Semester Thematic Factsheet: Labour Participation of Women,” 14 November 2016. Available at: https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_labour-force-participation-women_en.pdf (accessed 24 March 2017); and Angela Cipollone, Eleonora Patacchini and Giovanna Vallanti, *Women’s Labour Market Performance in Europe: Trends and Shaping Factors*, CEPS Special Report No. 66 (Brussels: Centre for European Policy Studies, 2012). Available at: <https://www.ceps.eu/system/files/Women%20Labour%20Market%20Performance%20in%20Europe.pdf> (accessed 4 March 2017).

Another contributing factor was the emergence of the feminist movement and its critique of domestic slavery and the discrimination of women. These changes were codified in Article 24 of the 1946 Yugoslav Constitution, which recognised the equal rights of women and men in all fields of economic life. Furthermore, the 20th century saw the rise of the service sector and the decline of the manufacturing sector. Since the work was no longer about brute strength, for which men were perceived as having an advantage, but was about skill, the demand for female workers grew. And finally, more women began participating in higher education, allowing them to compete for a wider range of jobs.³⁸²

The gender gap in workforce participation is accompanied by several other related trends that will be explored in Section III of this unit. For example, women work more part-time jobs than men and earn less money for the same work. Some industries remain male-dominated, and others that are female-dominated tend to be less lucrative. In addition, women have fewer promotion opportunities and are less likely to work on company boards; men, on the other hand, still face obstacles to taking paternity leave should they wish to play an equal role in the upbringing of their children.

On top of this, countries with high levels of unemployment, such as BiH, tend to see larger gaps between women and men in workplace participation, for multiple reasons. First, when women temporarily leave the labour market (e.g. to have children), it takes them longer to find a job afterward. (Conversely, men tend to stay in one job until they find a better one.) Women are thus more likely to accept temporary contracts, which are more common in periods of financial uncertainty. Over time, this means that men accumulate more work experience, which gives them an advantage when applying for jobs later. Finally, when there are large numbers of applications for each vacancy, employers have a greater choice and often prefer men due to implicit or explicit gender bias. (Very simply, employers often choose to recruit people like themselves.)³⁸³ Thus, eliminating gender bias from the application of labour laws is all the more pertinent in BiH.

8.2. The legal basis for gender equality in the workplace


The prohibition of discrimination based on gender is an international norm and is reflected throughout the various legal frameworks in BiH. This section will examine how some of these frameworks apply to labour relations before providing an overview of regional and international institutions that contribute to the creation of gender-related norms in the workplace.

Foundational legal documents in Bosnia and Herzegovina

Article II (4) of the Constitution of BiH as well as articles in the entity-level constitutions (Article 13(1) in that of the Brčko District; Article 10 in that of the RS; and Article IIA 2(1)(d) in that of the FBiH) generally prohibit any type of discrimination, including gender-based discrimination. In addition, Annex I of the Constitution of BiH consists of 15 international legal instruments for the protection of human rights. Though the Constitution does not explicitly elaborate on gender-related

³⁸² Lisa Quast, “Causes And Consequences Of The Increasing Numbers Of Women In The Workforce,” *Forbes*, 14 February 2011.

³⁸³ Ghazala Azmat, Maia Güell and Alan Manning, “Gender Gaps in Unemployment Rates in OECD Countries,” *Journal of Labor Economics* 24, no. 1 (2005), 34-5.



aspects of labour law, relevant provisions can be found in documents in this annex, such as the International Covenant on Economic, Social and Cultural Rights (1966) and the Convention on the Elimination of All Forms of Discrimination against Women (1979). The Constitution of the Republika Srpska regulates these protections slightly differently in Article 40, explicitly stating that “Young persons, women, and disabled persons shall enjoy special protection in the workplace.” And, Article 36 affords special protections to families and mothers.

While in theory, these safeguards would appear to be fairly rigid, neither legal theorists nor constitutional legal practice have established a consensus on whether Annex I rights can be applied directly, or whether this has to be done through the institutions or Constitutional Court of BiH. Emerging practice would indicate that the provisions of documents listed under Annex I can only be asserted if a clear case of discrimination in the enjoyment of these rights has taken place. This legal approach is probably more effective when it comes to establishing the legal basis for a person’s right to freedom *from* gender-based discrimination, but less effective in putting an obligation on the state to provide equal opportunities to women and men *for* the achievement of gender equality.

Labour laws on the entity levels reiterate the guarantees found in the Constitution of BiH to full equality without discrimination, in line with international standards. These entity-level laws in the FBiH (Article 8) and RS (Articles 19-23) use similar language that defines both direct discrimination and indirect discrimination.³⁸⁴ Direct discrimination is defined as conduct that puts an employee or job seeker in a position that compares unfavourably to others in the same or similar situations, because of one of his or her personal characteristics. Indirect discrimination occurs when a provision, criterion, or rule is seemingly neutral, but it places certain employees at a disadvantage based on one of the listed grounds of discrimination, which include gender or sex. Each entity law provides a slightly different, non-exhaustive list of protected personal characteristics, but both prohibit discrimination on the basis of gender or sex.

This distinction in the law between direct and indirect discrimination is considered quite progressive, especially as indirect discrimination has become far more frequent than direct discrimination over time. For example, many women are dismissed from their jobs if they marry or become pregnant, but employers justify this with alternative explanations. This can make it difficult for a woman to prove discrimination has occurred; but relatively recent innovations in labour law mean that the burden of proof now falls on the employer. In other words, the employer must demonstrate that the discrimination did *not* take place.

While these frameworks are relatively progressive from a comparative legal standpoint, challenges remain to their implementation. The laws take a classical approach to protection through the court system, with the support of the state-level ombudsman institution. There are, however no labour courts in BiH, few effective labour unions, and the ombudsman institution lacks resources. This means that courts which do have competence in cases of workplace discrimination suffer from huge backlogs. The judges who handle these cases have little experience in this area of law and may also be influenced by gender bias. Nevertheless, employees have successfully sued their employers for discrimination in a handful of cases, and were awarded damages as a result.

³⁸⁴ The Labour Law adopted by the FBiH in 2016 uses masculine nouns as standard – a practice that is not considered to be gender sensitive – but the Law is innovative in the sense that, in Article 2, it explicitly states that the male form should be understood to include both genders.

International institutions and labour law

Much of the labour law in BiH seeks to incorporate European and international norms and best practices. This section presents some of the relevant standards on gender and labour law that have been developed in Europe, especially by the Council of Europe and the European Union, as well as those of the International Labour Organization and the United Nations at the international level.

European standards

Member states of the Council of Europe are bound by the Council's European Social Charter (1961) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Since 1996, the European Social Charter has guaranteed equal pay for women and men for equal work (Article 4(3)), maternity rights (Article 8), and equal opportunities and treatment in the workplace for women and men with family responsibilities (Article 27), along with prohibiting discrimination on the grounds of sex (Article 20) and sexual harassment (Article 26). The Convention on Human Rights prohibits discrimination, including on the grounds of sex, in Article 14.

The European Union also has a long history of labour law development, which is reflected in European Community law as well as in numerous directives. For example, the original version of the Treaty establishing the European Economic Community (1957) included then innovative provisions on equal pay for men and women (Article 119). The EU has adopted numerous relevant directives since then, mentioned below under specific thematic areas.


The EU Equal Treatment Directive (2006/54/EC) forbids direct and indirect discrimination at the workplace based on sex. This enables victims of discrimination to take legal action without fear of reprisals from their employers and binds all EU member states to remove discriminatory provisions from their national laws.

International standards

The International Labour Organization (ILO) was established in 1919 and is now the only tripartite UN agency. In other words, it brings together governments, employers, and workers' representatives from the 187 UN member states to set labour standards, develop policies, and devise programmes that promote decent work for all women and men. BiH has been a member of the ILO since 1993.

In 1944, the ILO adopted its Constitution, known as the Declaration of Philadelphia, which affirmed that "all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."³⁸⁵ There are also eight core ILO conventions that comprise the ILO Declaration on Fundamental Principles and Rights at Work (adopted in 1998). The ILO considers the principles in these eight conventions to be universal, meaning that they apply to all

³⁸⁵ International Labour Organization, *Declaration concerning the aims and purposes of the International Labour Organization*, 10 May 1944, II(a). Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO (accessed 4 March 2017). Also see: Roger Blanpain and Frank Hendrickx, eds., *International Encyclopaedia for Labour Law and Industrial Relations* (Alphen aan den Rijn: Wolters Kluwer, 2016), Supplement 163.



member states by virtue of their membership in the organisation, irrespective of whether they have been ratified or not (BiH has, however, ratified all eight).³⁸⁶

Two of these core conventions apply specifically to gender equality. The Equal Remuneration Convention (1951) stipulates that each member state “shall...ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value” (Article 2).³⁸⁷ And, in defining discrimination, the Discrimination (Employment and Occupation) Convention (1958) includes “any distinction, exclusion or preference made on the basis of...sex...which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation” (Article 1(1)(a)). And Article 2 obliges states to “pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”³⁸⁸

In addition, there are two other ILO conventions of particular relevance to gender and labour law. The Workers with Family Responsibilities Convention (1981) obliges states parties to “enable workers with family responsibilities to exercise their right to free choice of employment” and “take account of their needs in terms and conditions of employment and in social security” (Article 4). Parties to the Convention are also obliged to develop or promote public or private family services such as childcare (Article 5) and to prohibit family responsibilities from being a valid reason to terminate a person’s employment (Article 8).³⁸⁹ The Maternity Protection Convention (2000) compels states parties to guarantee women a minimum of 14 weeks of maternity leave, with cash benefits amounting to at least 2/3 of her previous salary and enough social welfare to cover her medical needs and provide a suitable standard of living (Articles 4 and 6). It also stipulates that pregnant or breastfeeding women should not be obliged to undertake tasks that might compromise their health or that of their child (Article 3).³⁹⁰

While the United Nations does not deal directly with matters related to labour, several fundamental documents detail basic principles of equality in the workplace. For example, the International Covenant on Economic, Social and Cultural Rights (1966) guarantees women and men equal working conditions (Article 7) and an equal right to enjoy all economic rights outlined in the document (Article 3).³⁹¹ Other instruments include the Convention on the Elimination of all Forms of Discrimination against Women (1979), which obliges states parties to “take all appropriate measures to eliminate

386 International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998. A Follow-up to the Declaration was added 15 June 2010. Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO (accessed 4 March 2017).

387 International Labour Organization, *Equal Remuneration Convention*, No. 100, 29 June 1951. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100 (accessed 4 March 2017).

388 International Labour Organization, *Convention concerning Discrimination in Respect of Employment and Occupation*, No. 111, 25 June 1958. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (accessed 4 March 2017).

389 International Labour Organization, *Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, No. 156, 23 June 1981. Available at: http://www.ilo.ch/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312301:NO (accessed 4 March 2017).

390 International Labour Organization, *Convention concerning the revision of the Maternity Protection Convention (Revised)*, No. 183, 15 June 2000. Available at: http://www.ilo.ch/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312328:NO (accessed 4 March 2017).

391 United Nations, “International Covenant on Economic, Social and Cultural Rights,” 16 December 1966. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 4 March 2017).

discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights” (Article 11).³⁹² As mentioned before, all of these documents appear in Annex I of the Constitution of BiH.

8.3. Examples from practice: gender bias in the workplace

This section highlights examples of workplace gender bias in practice. Each sub-section begins with a brief overview of current conditions, followed by an outline of related legislation from BiH, as well as European and international frameworks where relevant.

8.3.1. Gender bias in recruitment and admission to the workplace

As mentioned in the introduction, men outnumber women in the workplace in all countries, and the 20.1% employment gap in BiH is higher than the European average, although there is significant variation from one country to another.³⁹³ On top of this, women are slightly more likely than men to take part-time jobs. In 2016, 8.8% of all employed women in BiH worked part-time, whilst this number was just 5.7% for men.³⁹⁴ (It is important to note, however, that because full-time employment incurs a higher rate of tax, it is possible that a significant number of employers register staff as part-time even when they actually work full time. While this might provide short term gains, it can prevent workers from accumulating enough years of work to claim a pension further down the line and, hence, is problematic if more women find themselves in this position. For a full discussion, please see Thematic Unit 9.)

One of the reasons for this discrepancy in labour force participation appears to be discrimination in recruitment, especially against women who either have children or who employers suspect are of an age where they might become pregnant. This problem is particularly evident in private companies in BiH, where female candidates have been asked unauthorized questions about their future family plans, which is a violation of the law.³⁹⁵ NGOs in BiH have also reported several cases of illegal dismissals of women during pregnancy.³⁹⁶ The 2013 report of BiH to the Committee on the Elimination of All Forms of Discrimination against Women notes that low levels of women in the labour market are concerning because unemployed women in BiH tend to have a high level of education; this indicates gender bias on the part of the employers.³⁹⁷

392 United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, No. 34/180, 18 December 1979. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (accessed 4 March 2017).


393 Agency for Statistics of BiH, *Labour Force Survey 2016*; European Commission, “European Semester Thematic Fact-sheet: Labour Participation of Women;” and Cipollone, Patacchini, and Vallanti.

394 Agency for Statistics of BiH, *Labour Force Survey 2016*, 49.

395 Edita Miftari, ed., *The 3rd Alternative Report on the Implementation of CEDAW and Women’s Human Rights in Bosnia and Herzegovina, with Annex* (Rights for All and Helsinki Citizens’ Assembly, 2013), 18.

396 Ibid.

397 CEDAW, “Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined fourth and fifth periodic reports of States parties – Bosnia and Herzegovina,” No. CEDAW/C/BIH/4-5, 22 June 2011, para. 33(a). Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.BIH.4-5.pdf> (accessed 5 March 2017).



Another factor worth mentioning is the discrepancy between *where* women and men work. When it comes to formally employed women, most work in the service sector, especially in wholesale or retail trade, education, healthcare, social work, or jobs that are state-run and publicly funded. Women constitute less than one-fifth of those working in industry, whereas men are roughly equally represented in both the industrial and service sectors.³⁹⁸

Interestingly, women and men are represented equally in agriculture in BiH overall, but women do almost twice as much part-time agricultural work. While agriculture may be typically associated with men, this is partly due to gendered perceptions of farming as the *job* of a man but an extension of the domestic tasks of a woman. This is why 28% of women engaged in agriculture work did so on a part-time basis, compared to only 15% of men.³⁹⁹ In addition, as men are traditionally expected to play the role of the primary breadwinner, many have left their farms to pursue more lucrative work in the manufacturing sector.⁴⁰⁰ Their female relatives tend to continue to perform the more labour intensive jobs on the farm. However, global trends in rural development indicate that as farms modernise, tasks once performed by women are gradually increasingly done by machines operated by men.⁴⁰¹ We may therefore see men return to this sector in the future.

Legislation in BiH

Article 28 of the RS Labour Law prohibits an employer from asking a job candidate for information on their family situation, marital status, or future family plans. Paragraph 3 of the Article expressly forbids an employer from demanding a pregnancy test as a precondition for the commencement of employment. Exceptions can only be made to this prohibition when a competent medical authority determines that a job poses a significant risk to the health of mother and child.

Article 29 of the FBiH Labour Law states that an employer cannot demand information that is not directly relevant to the job, especially in accordance with Article 8 on the prohibition of employment discrimination, including gender-based discrimination.

8.3.2. Equal pay for equal work

Women in BiH not only have a lower level of access to the labour market when compared with men, but they also earn 46% less than men each year, one of the highest gender pay gaps in Europe.⁴⁰² In order to determine the causes and real effects of this discrimination against women in the labour market, the Agency for Gender Equality conducted a study of wage differences between women and men in BiH – in accordance with Recommendation 34 of the CEDAW Committee’s concluding observations on BiH’s fourth and fifth periodic report.⁴⁰³

398 Agency for Statistics of BiH, *Labour Force Survey 2016*, 49.

399 *Ibid.*

400 Somun-Krupalija, “Gender and Employment in Bosnia and Herzegovina,” 4.

401 Marilyn Carr and Martha Chen, “Globalization, social exclusion and gender,” *International Labour Review* 143, no. 1-2 (2004), 146.

402 Somun-Krupalija, “Gender and Employment in Bosnia and Herzegovina,” 6-7.

403 CEDAW, “Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina,” No. CEDAW/C/BIH/CO/4-5, 30 July 2013.

Although roughly equal numbers of men and women are represented at the highest (2,500 KM, €1,250) and lowest (200 KM, €100) pay grades, all other pay grades feature higher numbers of employed men than employed women. Men in unskilled jobs mostly receive a salary of between 200 and 400 KM (€100 - €200) per month, while women in unskilled jobs are mainly represented in the lowest pay grades and receive less than 200 KM (€100) per month in wages. On average, men in this lowest pay category earn 173.09 KM (€85) more than women every month.⁴⁰⁴

In general, the gap in pay between men and women in BiH decreases as levels of education increase. However, the difference is still significant; there is a 136.56 KM (€70) per month gap for those who left education at the end of primary school and a 112.71 KM (€55) gap for those who reached the end of secondary school. In terms of industries, the biggest differences in income between women and men were found in the manufacturing and retail industries, where women who had not attended university earned one third less than their male counterparts.⁴⁰⁵

Women are also more likely to work in jobs and fields where pension insurance is not always paid. As it is the case in other European countries, women in BiH are more often employed in “feminised” professions, such as education, health care, and the grey economy. In some of these jobs, women have temporary or fixed-term employment contracts, which adds to their financial insecurity.⁴⁰⁶

Legislation in BiH

Articles 12 and 13 of the BiH Law on Gender Equality regulate the issue of non-discrimination in employment on the basis of gender.⁴⁰⁷ It is thus important to emphasize that there are no legal grounds for paying women less than their male counterparts. Unlike in many countries, where it was once or is legal for employers to pay their female staff a lower wage, such discriminatory legal frameworks never existed in BiH. In practice, however, men are not only paid more, but they also have greater access to benefits, such as participation in committees and overtime work.

European and International Legislation

In applying the equal pay provisions of the EU Equal Treatment Directive (2006/54/EC), most countries interpret the notion of a salary very broadly. Earnings may include basic wages, in cash or otherwise, and various bonuses, tips, accommodation, wedding gifts, severance packages, sick leave compensation, and supplements for overtime work and similar additional compensation.⁴⁰⁸ Despite this, it is clear that legislation alone will not close the gender pay gap. The European Court of Justice has noted that women face significant difficulties when they try to take legal action in response to gender inequality; especially regarding pay. One of the biggest issues they found was a lack of transparency in employment. Without being able to access the amounts


404 Somun-Krupalija, “Gender and Employment in Bosnia and Herzegovina,” 6–7.

405 Ibid.

406 Miftari, 18.

407 Law on Gender Equality in Bosnia and Herzegovina, Official Gazette of BiH 16/03, 102/09 and 32/10, consolidated version of 25 March 2010. Available at: http://arsbih.gov.ba/wp-content/uploads/2014/02/GEL_32_10_E.pdf (accessed 22 February 2017).

408 Sacha Prechal and Susanne Burri, *EU Rules on Gender Equality: How are they transposed into national law?* (European Commission, 2009), 13-14. Available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/eurulesongenderequalitytranspositionfinal2009_en.pdf (accessed 4 March 2017).



different employees are paid and how these pay rates were decided upon, it can be difficult to prove discrimination.⁴⁰⁹

8.3.3. Workplace segregation

Workplace segregation today is the legacy of a historically gendered division of labour, whereby men tended to work in paid positions in the public sphere and women's work was less lucrative or unpaid, in the private sphere. New roles were gradually opened to women, and the occupations still usually dominated by women are those which were opened to them earlier on, such as nursing, primary school teaching, and secretarial work. Workplace segregation also has other dimensions related to ethnicity, race, age, and class – for example, in BiH, Roma people are associated with certain jobs, and it is not uncommon for construction sites to be largely staffed by migrant workers.

This segregation is problematic for two main reasons. For one, job segregation creates barriers that prevent people from outside the dominant group in a given profession from being recruited into it. And even if they are recruited, they may leave the profession after a short time if the working environment is hostile toward them. People who face this kind of discrimination are left with no options but to take on jobs that are typically associated with their gender or other demographic characteristics. A woman blocked from becoming a doctor might work in nursing as the next best option, for instance. In some cases, a woman may not be prevented from becoming a doctor as such, but may lack support from her family, which does not see medical school as a woman's realm.


The second issue arises when pay and other workplace benefits begin to reflect not the value of the work, but the value ascribed by society to the people who do the work. For example, caring professions tend to be low paid not because the work is unimportant, but because most of those working in such roles are women. (In many cases, these women are also from marginalised ethnic minorities and hence face a double burden.) In other words, we see a stratification of salaries that reflects not the value of the work, but the relative power and influence of those who typically do the work. The reason most female-dominated professions have relatively low salaries can be attributed in this way to gender inequality.⁴¹⁰

Legislation from BiH and beyond

Provisions mentioned above from BiH laws on gender equality and non-discrimination would theoretically apply here; however, as discussed earlier, it can be difficult to enforce these laws in cases of workplace discrimination because there is no ready comparison between two individuals of differing gender who do the same work but do not earn the same salary. The European Court of Justice has addressed this issue, though, first in the Danfoss case in 1989 and four years later in the Enderby case, which cemented the Court's position.

409 Lilla Farkas and Oragh O'Farrell, *Reversing the burden of proof: Practical dilemmas at the European and national level* (Brussels: European Commission, 2014). Available at: http://ec.europa.eu/justice/discrimination/files/burden_of_proof_en.pdf (accessed 4 March 2017).

410 Daphne Berry and Myrtle P. Bell, "Inequality in organizations: stereotyping, discrimination, and labor law exclusions," *Equality, Diversity and Inclusion* 31, no. 3 (2012): 236-248.



In the Enderby case, Dr. Pamela Enderby, a speech therapist employed by the National Institute of Health in Britain, submitted a complaint of gender discrimination. She claimed that, relative to the length of her work experience, employees in this predominantly female profession had significantly lower salaries than employees at the same professional level in similar yet male dominated professions. (The examples given were clinical psychologists and pharmacists.) The European Court of Justice ruled that although the burden of proof to demonstrate discrimination would fall on the worker as a matter of principle, this cannot undermine the enforcement of equal pay. In this case, statistics indicate the work of speech therapists to be of equal value to that of pharmacists, and hence the employer had the obligation to demonstrate that the pay difference was based on objective grounds and not related to sex.⁴¹¹

Needless to say, the employer was not able to do this, and Enderby won the case. As the president of the UK's Employment Appeal Tribunal highlighted in 2006, the most likely explanation for the difference in salary was the existence of gender stereotypes: "There was historically an expectation that women would go into speech therapy and men (or at least predominantly more men) into the other two professions; and that it was reasonable to assume that this must have left its mark on the relevant pay. The speech therapists would historically have been paid what would have been perceived as the appropriate female rate, and that historical discrimination had not been eradicated."⁴¹²

8.3.4. Parental leave provisions

Parental leave provisions are particularly important for gender equality in society. Where women are concerned, and if the gender pay gap is to be closed, it is vital that their careers are not harmed if they take maternity leave. In BiH, salary compensation during parental leave is used in the large majority of cases by women, with fathers using it mainly in cases when the mother dies or abandons the child or is for some other reason unable to care for the child. Yet, even where legal provisions allow for it, men are often prevented from taking paternity leave. Prejudices and stigmatisation in the working environment tend to reinforce the conventional wisdom that childcare is a mother's responsibility and that she should thus be the only beneficiary of parental leave. Men may even face pressure from their female partners and other family members not to take paternity leave for fear of jeopardising their career prospects and with it, the family's future income.⁴¹³


Other frequently seen forms of discrimination related to pregnancy and parenthood in BiH include refusing to hire a pregnant applicant and firing a pregnant employee while she is still able to work or demoting her upon her return. Furthermore, while the legislation provides for the possibility of a year of absence, many women return to work after 1-2 months of maternity leave for fear of losing their job. A large number of women also return to work before the expiry of maternity leave because the benefits are insufficient, which is part of the cause of the low birth rate in BiH. This is especially true for women working in the private sector or international organizations, which have their own policies and procedures.⁴¹⁴

⁴¹¹ Isabelle Rorive, *Proving Discrimination Cases: the Role of Situation Testing* (Brussels: MPG and the Centre for Equal Rights, 2009), 23-5.

⁴¹² J. Galbraith-Marten, *Shifting the burden of proof and access to evidence*, Seminar on the Burden of Proof, Academy of European Law, June 2007, § 25, quoted in Rorive.

⁴¹³ CEDAW, "...Combined fourth and fifth periodic reports of States parties – Bosnia and Herzegovina," No. CEDAW/C/BIH/4-5.

⁴¹⁴ Ibid.



There are also cases of pregnant women being treated differently than other temporarily disabled employees. For example, supervisors may be unwilling to make reasonable accommodations to account for the fact that pregnant women cannot perform certain physical tasks. In these cases, pregnant women may be forced to resign because they are temporarily unable to perform the duties expected of them. What's more, provisions for medical appointments may not be sufficient to cover prenatal care visits, resulting in unauthorised absences that can lead to disciplinary action or loss of pay. Male workers on the other hand are sometimes afforded extra time off for medical treatment if, for example, they are in an accident; so, this is clearly an example of gender bias. Finally, some women face salary cuts and missed job promotions because they must cut back on overtime hours following pregnancy.⁴¹⁵

Legislation in BiH

In BiH, employers have an obligation to accommodate pregnant workers. During pregnancy and while the mother is breastfeeding, a woman can be redeployed to different tasks based on the advice of a medical professional, without any reduction in salary. If this is not possible, they may be given extra leave instead.⁴¹⁶ Women are entitled to maternity leave for a period of twelve continuous months. This is enshrined in the labour laws of both entities and the Brčko District, and is also reflected in legislation regulating working conditions in the civil service and in BiH institutions, including joint institutions.

In the Federation, Articles 62-70 of the Labour Law regulate the issue of parental leave. Because this is a framework law however, the cantons are responsible for paying salary compensation and have the competence to determine how much to pay. This has resulted in a wide range of compensation levels, from 50% of average wage in some cantons to 90% elsewhere.

Paragraphs 4 and 5 of Article 62 outlines the conditions of paternity leave, for the father of a child:

(4) After 42 days from the delivery, an employee – father of a child may also exercise the right to paternity leave, if the parents so agree.

(5) An employee – father of the child may also exercise the right referred to in paragraph 1 of this Article in case of the mother's death, if the mother has abandoned the baby, or if she is prevented from using maternity leave for other justified reasons.

In the RS, Article 107 of the Labour Law regulates the conditions of maternity leave, while the Law on Child Protection regulates the compensation paid during this time. The cost of these payments is shared between employers and the public fund for child protection. Article 79, paragraph 1 of the Labour Law stipulates that during pregnancy, childbirth, and childcare, a woman has the right to maternity leave for a period of one year without interruption, and for every subsequent child

⁴¹⁵ Workplace Fairness, "Pregnancy Discrimination," <http://www.workplacefairness.org/pregnancy-discrimination> (accessed 4 March 2017).

⁴¹⁶ See: Labour Law of the Brčko District, Official Gazette of the Brčko District 7/00, 08/03, 33/04, 29/05 and 19/06, Article 44; Labour Law of the Federation of BiH, Official Gazette of the FBiH 43/99, 32/00, 29/03, and 26/16, Article 61; and Labour Law of the Republika Srpska, Official Gazette of the RS 1/16, Article 106.

(including if she has twins), a period of 18 months without interruption.⁴¹⁷ Paragraph 3 of this Article stipulates that, 60 days after the birth of a child, parents can decide that the father will take parental leave in place of the mother if they so wish. Additionally, Article 109 states that the full period of maternity leave can be transferred to the father or adoptive parent if the mother dies, or is unable to look after the child due to a prison sentence, serious illness, additional education, specialisation and training, or preparation for employment.

Regional (European) and international legislation

European directive 92/85/EEC was passed in 1992 to protect workers who are pregnant, have recently given birth, and who are breastfeeding.⁴¹⁸ It stipulates that women who are pregnant or have recently given birth cannot be obliged to work night shifts, that they have the right to take time off work to go to ante-natal appointments without losing pay, and that they cannot be dismissed for any reason connected to their condition during their pregnancy or maternity leave. All EU states must offer women a minimum of 14 weeks of maternity leave, paid at least at the rate of sick pay.⁴¹⁹

European directive 2010/18/EEC was passed in 2010 and details minimum standards of parental leave.⁴²⁰ Both male and female workers have the right to an individual entitlement of leave that enables them to care for a child for four months. In order to promote equal opportunities and equal treatment, a minimum of one month leave is “non-transferable” so that each parent takes at least that much time. Workers must not be discriminated against for taking parental leave and have the right to return to the same job (or one of an equivalent level). Employers should also consider requests for changes to working hours for a set period of time, but are allowed to balance their needs with those of their workers.⁴²¹

8.3.5. Sexual and gender-based harassment

Sexual and gender-based harassment (SGBH) can be considered a form of gender bias because those who experience it have their equal opportunities at work undermined. (See Thematic Unit 6 for a fuller discussion.) In other words, people who are not viewed as “belonging” in a given workplace due to their gender can find themselves in a hostile work environment that limits their opportunities for pay raises and promotions, or may pressure them to quit. This also means that those who are not exposed to SGBH – often harassers themselves – have an unfair advantage as there is less competition at work.


⁴¹⁷ The Brčko District law contains identical provisions, in Article 47.

⁴¹⁸ Council of the European Communities, “Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding,” No. 92/85/EEC, 19 October 1992. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A31992L0085> (accessed 4 March 2017).

⁴¹⁹ European Commission, “Professional, private and family life,” 24 November 2016, http://ec.europa.eu/justice/gender-equality/rights/work-life-balance/index_en.htm (accessed 4 March 2017).

⁴²⁰ Council of the European Union, “Directive implementing the revised Framework Agreement on parental leave,” No. 2010/18/EU, 8 March 2010. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:068:0013:0020:en:PDF> (accessed 4 March 2017).

⁴²¹ European Commission, “Professional, private and family life.”



Perpetrators of SGBH in BiH are able to exploit the fact that the people they target risk facing consequences in their private life if they report it. In addition, many victims of SGBH (especially women) simply see it as an unpleasant yet ‘normal’ part of work culture. Consequently, many endure harassment for a very long time and only report it when it begins to seriously impact their health and well-being.

Men also face sexual and gender-based harassment in the workplace. Indeed, it is not a rare phenomenon, especially for men who do not fit traditional stereotypes of masculinity. Research on SGBH in the judiciary have shown that men in legal professions are potential victims of gender-based harassment, often but not always at the hands of other men.

The law in BiH

Extreme forms of SGBH may warrant criminal charges, although only a small proportion of unwanted behaviours that constitute harassment cross this threshold. Generally, unwanted harassment, and the hostile environment it creates, is regulated by anti-discrimination measures (See Thematic Unit 6). In practice, this legislation often goes unenforced, especially when SGBH occurs between employees at private companies. In many cases, workers who are exposed to discrimination and harassment do not report it due to fears of victimisation by a superior or the loss of their job. Even when workers pursue a complaint, and even after a court sentence, many do not want to return to their job because of their previously unpleasant experience and fears about how their superiors and colleagues will treat them.⁴²² So far, in 11 cases of sexual harassment in the courts in BiH, only one prison sentence (of one year in length) was imposed, on a director who harassed his female subordinate.

8.3.6. Gender bias in representation on governing boards and employee councils

Despite legal safeguards, in practice, women in BiH are severely underrepresented on the governing boards of public and private business entities, and on employee councils. Since the data on gender representation on these boards are not available, it is useful to look at the representation of women on the boards of the National Assembly of the RS. The BiH CEDAW Report from 2011 documented that, out of 22 committees and commissions in the Assembly, women were a majority on only four – the Committee on Education, Science, Culture and Information; the Equal Opportunities Committee; the Committee on the Environment; and the Committee on Agriculture and Forestry. Men dominate all others.⁴²³

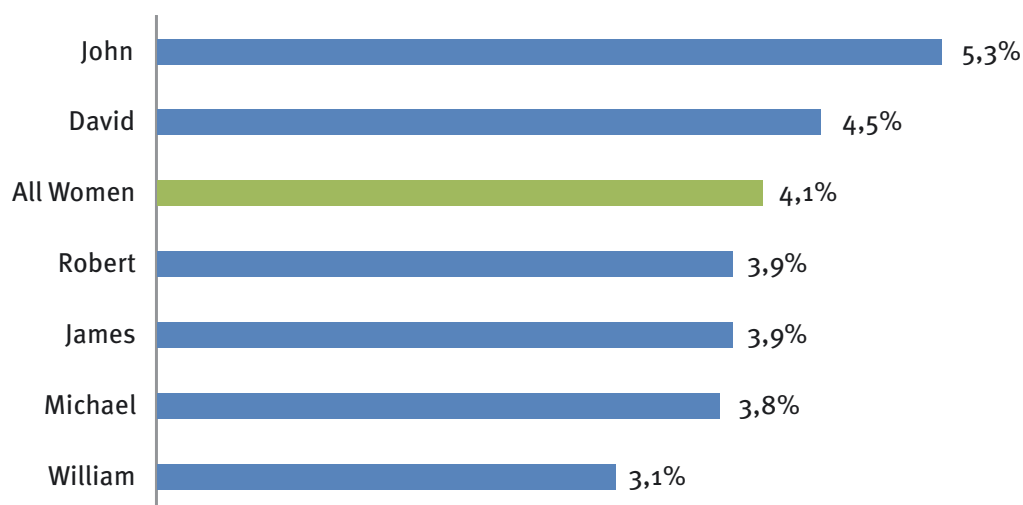
The lack of women on company boards is a problem across the world. For example, a study of 1500 companies that trade on the US Stock Exchange found more Chief Executive Officers (CEOs) named John and David than all women combined (See below).⁴²⁴

⁴²² Berry and Bell.

⁴²³ CEDAW, “...Combined fourth and fifth periodic reports of States parties – Bosnia and Herzegovina,” No. CEDAW/C/BiH/4-5.

⁴²⁴ Justin Wolfers, “Fewer Women Run Big Companies Than Men Named John,” *The New York Times*, 2 March 2015.

CEOs in S&P 1500 Companies



Adapted from: Justin Wolfers, "Fewer Women Run Big Companies Than Men Named John," *The New York Times*, 2 March 2015.

The situation is not much better in the UK. Of the 100 largest companies on the London Stock Exchange (FTSE 100), 7 CEOs are women, 14 are men named David, and 17 are men named John.⁴²⁵ In 2015, the country in the EU with the highest representation of women on corporate boards was France (32.8%). Malta had the lowest rate, at 2.5%. The average was 21.2%.⁴²⁶

A 2013 study conducted by the International Finance Corporation on the representation of women on governing boards in BiH, Serbia, and Macedonia indicated issues of gender bias. Men and women who participated in the research claimed that decision making and dynamics on boards changes if women are present. But, they noted that real change would take place only when more than one woman is present, because women have a stronger voice together and it is easier to avoid group pressure.⁴²⁷


Legislation in BiH

Article 3 of the Labour Law of the FBiH foresaw equal representation of the sexes, stating that "the establishment of councils of employees, peaceful settlement councils, socio-economic councils and other bodies under this law, and collective agreements, shall reflect gender equality." In accordance with this, women and men should be equally represented in the various councils and bodies of commercial and public entities.

⁴²⁵ Jennifer Rankin, "Fewer women leading FTSE firms than men called John," *The Guardian*, 6 March 2015.

⁴²⁶ European Commission, "Gender balance on corporate boards: Europe is cracking the glass ceiling," October 2015. Available at: http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet_women_on_boards_web_2015-10_en.pdf (accessed 4 March 2017).

⁴²⁷ International Finance Corporation, *Women on Corporate Boards in Bosnia and Herzegovina, FYR Macedonia and Serbia* (World Bank Group, 2013).



The BiH Law on Gender Equality lists the obligations of state authorities in ensuring equal representation of both sexes in Article 20, paragraph 1. It stipulates that: *“State authorities at all levels of government and local authorities, including legislative, executive and judicial authorities, political parties, legal persons with public authorities, legal entities that are owned or controlled by the state, entity, cantonal, city or municipality or whose work is in control by a public authority, shall ensure and promote equal gender representation in management, decision making and representation. This obligation exists for all authorized proponents during the election of representatives and delegations to international organizations and bodies.”*

And in the RS, Article 224, paragraph 4 of the Labour Law obliges government-appointed committees to establish the representativeness of trade unions and employee associations, which are to reflect gender equality. This is in accordance with the Gender Equality Law and implies that trade unions and employee associations that do not reflect the gendered composition of the workforce are not representative.

Regional (European) and international legislation

While standard non-discrimination policies apply, the EU has also proposed legislation that would set the objective to have at least 40% men and women among non-executive directors of all companies listed on stock exchanges by 2020. This was passed by the European Parliament in 2013 and is awaiting approval by the Council of the EU.⁴²⁸

8.4. Contemporary debates in gender and labour law


This final section seeks to explore some contemporary debates in this field, as an opportunity for students and scholars to apply their knowledge and informed opinions. While many people can agree that gender equality is both the right thing to do and a reflection of international legal norms, there are some cases when exceptions to this norm have been argued for. This is true, for example, in cases of affirmative action – whereby it is acceptable to discriminate against dominant groups to expedite the process of reaching equality. Exceptions to gender equality norms are also often asserted in the context of national security. Many roles in security institutions rely heavily on biological characteristics such as physical strength; and some argue, therefore, that anti-discrimination legislation should not apply in these professions.

Affirmative action (positive discrimination)

Affirmative action, also known as positive or reverse discrimination, special measures, or preferential treatment, is a practice meant to enhance the position of people in groups that have been historically underrepresented or discriminated against. In some cases, affirmative action can involve setting quotas for recruitment or for electoral lists, for example. In others, employers overtly favour candidates on the basis of their gender or ethnicity, in order to rectify an imbalance within their existing workforce.⁴²⁹

⁴²⁸ European Commission, “Gender balance on corporate boards.”

⁴²⁹ EU Agency for Fundamental Rights, *Handbook on European non-discrimination law* (Luxembourg: EU FAR and the ECtHR, 2010), 38.



The Convention on the Elimination of All Forms of Discrimination against Women states in Article 4 that, “temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination” but that “these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”⁴³⁰ The UN Committee on the Elimination of Discrimination Against Women, which monitors the implementation of CEDAW, later clarified that ‘temporary special measures’ can include “preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.”⁴³¹

Article 3 of the Law on Gender Equality in Bosnia and Herzegovina recognises that such actions are legitimate as long as they are proportionate and can be objectively justified by aiming “to promote gender equality and to eliminate the existing inequality.” Similarly, Article 2(4) of the European Equal Treatment Directive states that the prohibition of gender-based discrimination in the workplace shall be “without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.”⁴³²

Affirmative action can sometimes be unpopular, especially with people who feel they have been overlooked for a job or role solely because they belong to a group that is already overrepresented in an organisation. In these situations, affirmative action is usually justified by the fact that candidates that are helped would otherwise receive less favourable treatment due to factors such as gender bias in the recruitment process. In addition, they are likely to have experienced gender bias in applying for jobs in the past. In other words, proponents of affirmative action see it as a means of removing the unfair *advantage* that members of overrepresented groups in a given profession have historically enjoyed.⁴³³

⁴³⁰ UN, *Convention on the Elimination of All Forms of Discrimination against Women*, No. 34/180.

⁴³¹ UN General Assembly, *Report of the Committee on the Elimination of Discrimination against Women*, No. A/59/38, 2004. See: Annex I, “General Recommendation No. 25, on article 4, paragraph 1, of the Convention...” Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No4/462/77/PDF/No446277.pdf> (accessed 4 March 2017).

⁴³² Council of the European Communities, “Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,” No. 76/207/EEC, 9 February 1976. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31976Lo207> (accessed 20 February 2017).

⁴³³ EU Agency for Fundamental Rights, *Handbook on European non-discrimination law*, 38.

Cases from the European Court of Justice (ECJ)

ECJ rulings on affirmative action cases have been rare, but have nonetheless helped to define the limits of what can be considered to be proportionate.

In *Kalanke v. Freie Hansestadt Bremen*, Eckhard Kalanke (a man) was initially recommended for a promotion at the Parks Department of the City of Bremen. The Personnel Committee instead applied a rule giving automatic priority to the other candidate on the shortlist, Heike Glissmann, on the grounds that she was a woman with equal qualifications, and that women were underrepresented in the sector. The ECJ was asked to advise on whether the rule giving that automatic priority to a woman was in line with article 2(4) of the European Equal Treatment Directive. The ECJ declared that the rule overstepped the limits of article 2(4) by giving women priority in an absolute and unconditional way. It ruled that providing women with equal opportunities would have been a legitimate aim, but that the goal of numerical equality was not legitimate.⁴³⁴

In *Marschall v. Land Nordrhein Westfalen*, Hellmut Marschall complained about an almost identical law in the State of North Rhine-Westphalia that meant a female candidate was given preference over him for a promotion. In this case, however, the law stated that exceptions to the automatic promotion of women could be made in specific cases where male candidates face social hardships that put them at an even greater disadvantage. In this case, the ECJ advised that because the man's situation was also considered in each case (albeit with no defined criteria), the law was within the limits of article 2(4).⁴³⁵

Abrahamsson and Leif Anderson v. Elisabet Fogelqvist was a similar case involving academic appointments at Swedish universities. In this case, candidates from the underrepresented sex would be given priority unless "the difference between the candidates' qualifications is so great that such applications would give rise to a breach of the requirement of objectivity in the making of appointments." In this case, the ECJ ruled that this was still effectively an automatic priority for women and hence unlawful under article 2(4).⁴³⁶

434 Sean Pager, "Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice," *Boston College International & Comparative Law Review* 26, no. 1 (2003): 35-76; and EU Agency for Fundamental Rights, *Handbook on European non-discrimination law*, 40.

435 Ibid.

436 Ibid.

Discussion

- *What are the advantages of affirmative action in addressing gender bias?*
- *What are the disadvantages of affirmative action in addressing gender bias?*
- *What criteria would you put in place to ensure that affirmative action addresses gender bias in a way that is proportionate and in accordance with the law?*

Affirmative action can be a useful means of swiftly correcting gender bias and other persistent forms of discrimination, which are often difficult to prove; especially when gender-based workplace segregation makes it hard to assess whether men and women in very different professions have been discriminated against on an individual basis. Affirmative action can be a practical tool in these cases. On the other hand, gender bias interacts with other forms of bias related to class, disability, ethnicity, and age. If affirmative action is not carefully applied, it can act to further disadvantage certain groups already facing discrimination, such as Roma men in BiH, for example. It also fails to address some of the root causes of gender inequality, such as a lack of equal opportunities in education and training. It may therefore promote people into positions where they are doomed to fail because they lack the necessary skills. For this reason, affirmative action should be applied with caution and in combination with other initiatives to promote gender equality.

Rulings of the ECJ indicate that the criteria for using affirmative action must ensure that it is used proportionately and that case-by-case decisions are still made. This ensures that discrimination based on factors other than gender is also considered and that laws, rules, and policies are tailored toward addressing specific, identifiable cases of inequality.

8.5. An example for discussion: Exemptions from gender equality legislation in the name of national security

Article 14(2) of the European Gender Equality Directive allows for exemptions to workplace anti-discrimination legislation if a “particular characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.”⁴³⁷ Similarly, Article 3 of the BiH Law on Gender Equality allows for provisions, criteria, and practices that can be “objectively justified by achieving a legitimate aim, which is proportionate to undertake necessary and justified measures.”

Security institutions have frequently applied for exemptions to workplace anti-discrimination laws, arguing that the biological differences between women and men dictate that they favour men in some roles in the name of national security. As our understanding of gender (as distinct from sex)

⁴³⁷ Council of the European Union, “Directive on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast),” No. 2006/54/EC, 5 July 2006. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0054&qid=1487986928701&from=EN> (accessed 22 February 2017).

has developed, however, people have begun to question whether these arguments are in fact based on robust scientific evidence, or rather gender stereotypes. These discussions have played out in several high-profile court cases at the European Court of Justice.

Cases from the European Court of Justice (ECJ)

In *Commission v. France (1988)*, the European Commission challenged the assertion of the French prison service that it was lawful to reserve positions in men's prisons primarily for male employees, and those in women's prisons primarily for female employees. One of the key arguments was that prison guards may need to use force to restrain violent inmates, and that there were many other duties that could only be undertaken by men in male prisons; thus, it was important, the French prison service claimed, that most prison staff were men. While the ECJ accepted these as legitimate arguments in principle, the prison service was unable to elaborate on which tasks required male staff, and why. Rather, the case seemed to be based on sex generalisations and not any demonstrable proof.⁴³⁸

Johnston v. Chief Constable of the Royal Ulster Constabulary involved a female police officer, Marguerite Johnston, whose contract was not renewed when the security situation in Northern Ireland deteriorated, requiring police to carry firearms. Female police were not trained to carry firearms and the Chief Constable did not offer them training, believing this would increase their chances of being assassinated. The court accepted the defence's claim that proportionate derogations from the right to equal treatment in employment could be made on the grounds of national security and public safety. In such cases, however, the onus was on the employer to demonstrate that sex is a determining factor that creates a higher risk for women. Protective measures for women found in the legislation should aim to protect their right to equal treatment. Measures that provide greater protection for women against workplace risks at the expense of equal treatment would thus undermine the specific aim of the law. Thus, the court dismissed the argument that public opinion demands higher protection for women as legitimate grounds for excluding women from a certain type of employment.⁴³⁹

In *Sirdar v. The Army Board and Secretary of State for Defence (1999)*, Angela Sirdar was dismissed from her position as a chef for an army commando unit. Reductions in spending had prompted a rule of 'interoperability' which stipulated that all individuals in the commando unit had to be capable to perform a combat role. Women were not allowed to serve in combat roles in the British Army and Ms Sirdar was thus dismissed in order to guarantee combat effectiveness. The ECJ supported the reasoning of the armed forces on this occasion.⁴⁴⁰ However, in 2016, the UK government lifted the ban on women in combat roles, in part due to a lack of scientific evidence that employing women alongside men reduces combat effectiveness.⁴⁴¹

438 EU Agency for Fundamental Rights, *Handbook on European non-discrimination law*, 47.

439 *Ibid.*

440 *Ibid.*, 48-49.

441 UK Ministry of Defence, "Ban on women in ground close combat roles lifted," 8 July 2016. <https://www.gov.uk/government/news/ban-on-women-in-ground-close-combat-roles-lifted> (accessed 4 March 2017).

In *Kreil v. Bundesrepublik Deutschland*, Tanja Kreil was barred from applying to work as an electrical engineer in the German military. At the time, women were only allowed to serve as musicians or in the medical corps. The government argued that this was because women could not serve in posts that required weapons use, and that circumstances in which an electrician may have to take up arms were not unforeseeable. The ECJ rejected this argument as too broad and disproportionate in achieving the aim of protecting staff. Besides, female medics and musicians were given basic weapons training. Armed units were subsequently open to women.⁴⁴²

Discussion

- *What was the role of gender bias in these cases?*
- *Do you believe some cases still exist for which the exclusion of women or men from certain security roles could satisfy the requirements of the Law on Gender Equality?*

The European Court of Justice has consistently ruled that national security objectives are legitimate reasons for security institutions to select staff on the grounds of their gender, but these institutions have also had problems proving the link between the need to discriminate and their defined objectives. We see now that many historical prohibitions against women serving in the security sector were influenced by gender bias. As the burden has shifted onto employers to demonstrate the need to favour women or men for particular tasks, and as our understanding of gender as distinct from sex has evolved, employers have increasingly struggled to ground such arguments in a provable occupational need.

It is likely that positions which do require higher amounts of physical strength will continue to be dominated by men. It seems, however, that blanket bans on women in security roles will become a thing of the past. Indeed, preventing an employer from choosing the best candidate because of their gender – even in professions where women are a small minority of the eligible candidates – could be viewed as a threat to national security in and of itself.

8.6. Conclusion

We have seen how gender bias can have a significant impact on the application of labour law, whether in relation to recruitment, salaries, benefits, or other forms of workplace discrimination such as sexual and gender-based harassment. This is perhaps unsurprising, given that paid work was a traditionally male-dominated field and that many of the greatest changes we have experienced in gender roles since the industrial revolution have been in the workplace. In addition, gender bias can be more evident in the labour sector than in others, because it results in economic inequalities that are quantifiable. Still, for the best part of fifty years, the spirit of gender equality has been enshrined in many provisions of labour law and numerous roles previously closed to women have been opened thanks to legal challenges to discrimination. For this reason, labour law remains an important tool for addressing gender bias and an area where many debates on the role of men and women in society continue to take place.

⁴⁴² EU Agency for Fundamental Rights, *Handbook on European non-discrimination law*, 49.



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Thematic Unit 9:

Gender Bias and the Law on Pensions

Learning outcomes – by the end of this unit, you will:

1. Understand how pension systems are gender biased.
2. Understand and discuss how gender bias hinders fair judgements in pension cases.
3. Understand how inheritance law can replicate and reinforce gender bias in society.

Background Reading:

Frances Raday, “Gender Pension Gap,” Background Paper for Report to the UN Human Rights Council, Working Group on Discrimination against Women in Law and Practice, 2013. **web:** <http://www.ohchr.org/en/issues/women/wgwomen/pages/esl.aspx>

Summary: Thematic Unit 9 focuses on gender bias in pension law. The introductory section details the regulation of the pension system in BiH, outlining historical differences in legislation as it has applied to women and to men. This is followed by a brief overview of general principles related to pensions in European and international documents. The next section explores current realities faced by pensioners in BiH, and how these differ between women and men. For example, gender inequality in the labour market and differences in working arrangements significantly affect the earnings of women during their working life, as well as their contributions to pension funds. This translates into new forms of gender inequality when people retire. Several cases from across Europe are examined to highlight the role the legal system can play in addressing both direct and indirect discrimination in this area. These cases are designed to encourage discussion on the future of pension systems and the duty courts and jurists have in promoting principles of gender equality and addressing gender bias in both the labour market and the pension system.

9.1. Introduction

Retirees in BiH are one of the poorest groups in society. This is because average pensions are low compared to the cost of living and social welfare is insufficient and often delayed. On top of this, public services have faced many challenges over the past two decades and are generally unable to meet the needs of retirees when it comes to care and assistance. These combined factors leave many elderly people vulnerable.

As a result, intergenerational solidarity, wherein retirees depend on relatives to help them meet their basic needs, has been observed in many families in BiH.⁴⁴³ Conversely, the socio-economic situation in the country (particularly high unemployment and low wages) means that, in other families, the pension of retirees constitutes the sole source of income and may amount to very little.⁴⁴⁴

Only 46% of people aged 65 years and over receive pensions in BiH, and 13% receive veterans' benefits, but the rest receive nothing at all. The majority of those who are not covered by the pension system live in rural areas and most are women.⁴⁴⁵

As is true across Europe and in most other countries, legislation in BiH regarding pension schemes is gender neutral. Yet, because the labour market is still predominantly structured around a traditional family model, the pension systems in BiH are gender-biased in their application. This perpetuates discrimination that negatively affects women, as well as those men who do not conform to traditional models.

9.2. Legal framework

The legal framework for the pension system in BiH

Until 1992, BiH had a single pension fund.⁴⁴⁶ Male workers could retire at the age of 60 after at least 20 years of service, and female workers could retire at 55 after 15 years of service.⁴⁴⁷ Since the end of the war, and per Annex 4 of the Dayton Peace Accord, the system of pension and disability insurance has been under the authority of the two entities – the Federation of Bosnia and Herzegovina and the Republika Srpska.⁴⁴⁸ However, the state-level Ministry of Civil Affairs maintains a coordinating role over the funds of both entities and has some jurisdiction over settling transnational pension-related disputes. Despite significant differences, the systems in both entities face many of the same problems; for example, high rates of unemployment and low pensions that are insufficient for the cost of living.

443 Sanela Šadić and Nusreta Salić, "Social and economic causes of elderly violence in Bosnian society," in *Violence against the elderly Challenges – Research – Action*, eds., Joanna Małgorzata Łukasik, Norbert Gerard Pikuła and Katarzyna Jagielska (Toronto: European Association of Schools of Social Work, 2015): 143-154. Available at: http://www.kgs.up.krakow.pl/files/2114/6072/3131/violence_book2.pdf (accessed 5 March 2017).

444 Šadić and Salić.

445 World Bank, *Bosnia and Herzegovina Poverty Assessment*, No. 25343-BIH, vol. I, 21 November 2003. Available at: <http://documents.worldbank.org/curated/en/511721468769462746/pdf/25343.pdf> (accessed 5 March 2017).

446 Martin Hutsebaut, "Pensions reforms in the Countries of the Western Balkans from a European Perspective," research document, ITUC Pan-European Regional council, 14 November 2011. Available at: http://perc.ituc-csi.org/IMG/pdf/pensions_in_the_balkans_-_complete_report_cle4e15c7.pdf (accessed 5 March 2017).

447 Glenn E. Curtis, ed., *Yugoslavia: a country study* (Washington, DC: Library of Congress Federal Research Division, 1990), 150. Available at: https://cdn.loc.gov/master/frd/frdcstdy/yy/yugoslaviacountroocurt_o/yugoslaviacountroocurt_o.pdf (accessed 5 March 2017).

448 International Monetary Fund, *Bosnia and Herzegovina: Poverty Reduction Strategy Paper – Mid-Term Development Strategy*, Country Report No. 04/114, April 2004. See: Chapter V.1, "Sector Priorities: Social and Pension Policy." Available at: <http://www.imf.org/external/pubs/ft/scr/2004/cro4114.pdf> (accessed 5 March 2017).

Federation of Bosnia and Herzegovina

In the Federation, the Law on Pension and Disability Insurance was adopted in 1998 and enshrines the “principles of reciprocity, solidarity between generations and obligatory pension and disability insurance.”⁴⁴⁹ The insured person contributes 17% of his or her wages, and the employer contributes a further 7% to make a total of 24 percent of net wages.⁴⁵⁰

Conditions

Men and women can both claim their old-age pension from the age of 65 after at least 20 years of contributions; or, they can retire earlier if they have contributed for at least 40 years.⁴⁵¹ Those who have not made contributions to the pension scheme will not receive any entitlements, although they may obtain private insurance.

Until 2003, these conditions varied according to a person’s gender, with men allowed to claim a pension at age 60 and women at age 55.⁴⁵² And, through the end of 2015, early retirement was allowed for men at 60 years old if they had contributed for 35 years, while women could retire at 55 years old if they had contributed for 30 years.⁴⁵³

Benefits

In 2015, the minimum pension amounted to 326 KM (€160) and the maximum amounted to 2,174 KM (€1,100).⁴⁵⁴ In 2009, 51% of pensioners received the minimum, while just 0.04% received the maximum.⁴⁵⁵

Republika Srpska

In the RS, the Law on Pension and Disability Insurance was adopted in 2000 and has been amended several times.⁴⁵⁶ It “establishes mandatory pension and disability insurance and determines the rights and responsibilities based on that insurance, as well as the options for persons who are not covered by mandatory insurance to get voluntary insurance.”⁴⁵⁷ The average salary of insured individuals determines their pension base. This law eliminated some compensation rights, including for the assistance and care of another person.⁴⁵⁸

449 Ibid., 145. Also see: Parliament of the Federation of BiH, Law on Pension and Disability Insurance, Official Gazette of the FBiH 29/98, 49/00, 73/05, 59/06, 4/09.

450 Ibid.

451 FBiH Law on Pension and Disability Insurance, Article 30.

452 International Labour Office, *Report on the Pension Reform in Bosnia and Herzegovina: First assessment* (Budapest: International Labour Organization, 2009), 3. Available at: http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_168788.pdf (accessed 5 March 2017).

453 Hutsebaut, 30.

454 Šadić and Salić, 147.

455 Ibid. Note: These calculations include only people over 65 years old who receive a pension.

456 National Assembly of the Republika Srpska, Law on Pension and Disability Insurance, Official Gazette of Republika Srpska 134/11, 82/13, 103/15.

457 International Monetary Fund, *Bosnia and Herzegovina: Poverty Reduction Strategy Paper*, 145.

458 Ibid.



Conditions

Pension conditions in RS are currently in a transition phase with the retirement age gradually increasing each year. Once the transition is complete (by 2023 for men and 2032 for women), men and women will be able to claim their old age pension from the age of 65 given that they have contributed for at least 15 years. Early retirement will be possible at 60, with 40 years of contributions.⁴⁵⁹

Before these recent changes to the RS law, retirement criteria were different based on a person's gender. Men aged 60 and women aged 55 could retire after 20 years of contributions, while men aged 65 and women aged 60 could retire after 15 years of contributions. The option of early retirement was available to men who had reached 55 years and women who had reached 50 if they had contributed for at least 35 years.⁴⁶⁰

Benefits

In 2015, the minimum pension amounted to 174 KM (€85) and the maximum to 1,687 KM (€860).⁴⁶¹ In 2010, 10% of all pensioners received the minimum pension.⁴⁶²

Derived pension rights

In both entities, a widow is entitled to her spouse's pension at a younger age than a widower is to his wife's. In the FBiH, a woman can collect these benefits if she is at least 45 years old, and in the RS, if she is at least 50; while a widower must be at least 60 years old in either entity. Widows and widowers are entitled to derived pension rights as long as they do not re-marry. There is no minimum age for widows and widowers to claim these rights if they care for children entitled to survivor's pension, or if they are disabled.⁴⁶³ Derived pension rights are calculated as a percentage of the pension the deceased would have received, also taking into account the number of eligible survivors.⁴⁶⁴

European legal framework on pensions

Pension entitlements are considered economic interests and thus fall within the scope of the right to property, enshrined in Article 1 of Protocol 1 to the European Convention on Human Rights.⁴⁶⁵ This Article does not specifically cite the right to a pension, but the right to property is usually broad-

459 Hutsebaut, 35. Also see: RS Law on Pension and Disability Insurance.

460 Sead Dedić, *Socijalno pravo*, IV novelirano i prošireno izdanje (Sarajevo: Magistrat, 2010), 184.

461 Šadić and Salić, 147.

462 Ibid. Note: These calculations include only people over 65 years old who receive a pension.

463 Senada Smajic and Sergio Ermacora, "Poverty amongst Female-headed Households in Bosnia and Herzegovina: an empirical analysis," *South East European Journal of Economics and Business* 2, no. 1 (2007): 69-88. Available at: <https://www.degruyter.com/downloadpdf/j/jeb.2007.2.issue-1/v10033-007-0017-x/v10033-007-0017-x.pdf> (accessed 6 March 2017).

464 Ibid.

465 Monica Carss-Frisk, "The right to property: A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights," Human rights handbook series, No. 4, Council of Europe, 2001. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4a> (accessed 6 March 2017).

ly interpreted and as such includes pension entitlements.⁴⁶⁶ The ECHR thus assumes that the making of compulsory and/or voluntary contributions to pensions funds constitutes a possession, and in this way creates a property right.⁴⁶⁷ While states are generally given what is known as “a wide margin of appreciation” in the granting of social benefits, because it is assumed state authorities are best placed to assess the needs of their own citizens, the reduction or discontinuation of pension entitlements also falls within the scope of the right to property, because it may hinder the right to peaceful enjoyment of possessions.⁴⁶⁸

In addition, it is important to consider the European Social Charter, the so-called “Social Constitution of Europe.” This Charter supplements the EHRC, guaranteeing all fundamental rights with social and economic dimensions. By ratifying the Charter, countries are bound to ensure rights to housing, health, education, employment, legal and social protection, and freedom of movement, and to guarantee that those rights are upheld and enjoyed according to the principle of non-discrimination.⁴⁶⁹

International framework related to gender inequalities and pensions

General Recommendation 27 (2010) of the CEDAW Committee addresses the rights of older women. It acknowledges that gender inequalities and discrimination in employment accumulate throughout women’s lives, so that older women have disproportionately less access to pensions; and when they do receive pensions, they are smaller on average than those received by men.⁴⁷⁰ In this recommendation, the Committee also recognized that many older women continue to do unpaid care work for dependent family members and encouraged states to ensure that their pension systems do not discriminate against women.⁴⁷¹

9.3. The impact of gender bias on pensioners

Gender bias shapes the experience of women pensioners not just because of how it relates to pensions per se, but because of the add-on effect of gender bias over time. As CEDAW Committee member Frances Raday wrote:

466 Aida Grgić, et al., “The right to property under the European Convention on Human Rights: A guide to implementation of the European Convention on Human Rights and its protocols,” Human rights handbook series, No. 10, Council of Europe, 2007, 7. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff55> (accessed 6 March 2017).

467 Ibid.; and Carss-Frisk.

468 Ibid., 14.

469 “Bosnia and Herzegovina and the European Social Charter,” factsheet, Council of Europe, November 2015. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680492808&format=pdf> (accessed 6 March 2017).

470 CEDAW, “General recommendation No. 27 on older women and protection of their human rights,” No. CEDAW/C/2010/47/GC.1, 19 October 2010. Available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC1.pdf>

471 Francesca Bettio, Platon Tinios and Gianni Betti, *The Gender Gap in Pensions in the EU* (European Commission, 2013). Available at: http://ec.europa.eu/justice/gender-equality/files/documents/130530_pensions_en.pdf (accessed 6 March 2017).

*Women's income and quality of life in retirement derives from the culmination of all these earlier phases and bears the imprint of them: stereotyping in education and girlhood; precarious jobs; informal labour; the costs of caring; interrupted career patterns; the motherhood penalty in wages; earlier effective retirement, in almost all states, and earlier normative retirement in some states.*⁴⁷²

9.3.1. Traditional causes of gender bias in the implementation of pension laws

When discrimination “has been incorporated into the structures, processes and procedures of organisations, either because of prejudice or because of failure to take into account the particular needs of different social identities,” we refer to it as *institutional discrimination*.⁴⁷³ And in most social security frameworks, institutional gender-based discrimination prevails. In Europe, for instance, these structures were designed around a traditional family model, with a male breadwinner and a female caretaker. Yet, this model, based on a traditional division of labour, reinforces gender stereotypes. The male head of household works full time, in the formal economy, and for a precise number of years. The female caretaker is economically dependent because she tends to tasks in the household or in the informal sector. Because many social security frameworks have been slow to evolve, they remain gender biased.

A number of social security structures and schemes are also impacted by gender bias in the labour market. (For a full discussion, see Thematic Unit 8.) By focusing on a stereotypically male model of the work experience, the different factors that are present in a woman's professional and personal life are not accounted for.⁴⁷⁴

Data from 2010 and 2011, and from across Europe, shows that:

- Fewer women than men entered the labour market. For example, in BiH, only 25% of working-age women were employed in 2010 and just 10% of women 15-24 years old were employed.⁴⁷⁵
- Women's careers are more likely to be interrupted (usually due to maternity leave or because they must care for dependents).
- Women are more likely to work part-time. Figures from BiH indicate that, in 2010, 13% of all employed women worked part-time (8% of all employed men worked part-time).⁴⁷⁶

472 Frances Raday, “Gender Pension Gap,” Background Paper for Report to the UN Human Rights Council, Working Group on Discrimination against Women in Law and Practice, 2013.

473 NHS Health Education England, Multiprofessional Faculty Development, “Institutional discrimination,” <http://www.faculty.londondeanery.ac.uk/e-learning/diversity-equal-opportunities-and-human-rights/institutional-discrimination> (accessed 6 March 2017).

474 European Commission EGGSI Coordinating Team, *The socio-economic impact of pension systems on the respective situations of women and men and the effects of recent trends in pension reforms*, synthesis report, November 2011. Available at: http://ec.europa.eu/justice/gender-equality/files/equal_economic_independence/pensions_report_en.pdf (accessed 8 March 2017).

475 Shagun Khare, Per Ronnas and Leyla Shamchiyeva, *Employment and Labour Market Dynamics in Bosnia and Herzegovina* (Geneva: International Labour Office, 2010). Available at: http://www.ilo.org/employment/Whatwedo/Publications/WCMS_144423/lang-en/index.htm (accessed 8 March 2017).

476 Lejla Somun-Krupalija, “Gender and Employment in Bosnia and Herzegovina - A Country Study,” Working Paper 4/2011 (Geneva: International Labour Office, 2011).

- Women are more likely to work in jobs with lower pay and/or in sectors where pension provision is less common. For instance, as is the case in many European countries, women in BiH are more likely to work in “feminised” fields such as education, healthcare, and the informal economy. Most of these women have temporary contracts or are self-employed, which exacerbates their insecurity.⁴⁷⁷
- Women are more likely to have jobs in the informal sector, working in undeclared and untaxed petty trade, small-scale agriculture, and services like cleaning and maintenance.⁴⁷⁸ This sector is very large in BiH, and a 2005 study found that women accounted for an estimated 80% of informal sector workers.⁴⁷⁹ Women in this sector generally do not make pension contributions, or at least not to formal social security systems.
- Women in rural areas often perform unpaid agricultural activities. While this earns income for their family in the short term, it will not result in a pension for them in the long term.
- Traditional gender stereotypes mean that caring for the family is often considered a woman’s primary responsibility. Thus, almost one third of working age women in BiH are not registered with employment offices and describe themselves as housewives or inactive.⁴⁸⁰
- Historically, women were more likely to be forced to take early retirement. In 2001, before stricter regulations were in force, 57.6% of those claiming pensions before the age of 65 were women.⁴⁸¹

To summarise, gender differences and structural inequalities in employment translate into limited access to employment-related social protections for women (pension benefits among them).⁴⁸² If you examine the issue through the lens of the three dimensions of a career – pay, job status, and years of service – women are disadvantaged through:

- 1) pay per hour (differences due to education, skills, segregation of professions, discrimination);
- 2) hours worked (differences due to part-time work, types of contracts, self-employment); and
- 3) years worked (differences due to work interruptions, unemployment, early retirement, and caretaking roles).⁴⁸³

These three career dimensions are the basis for most pensions systems, and given the gender disparity of these dimensions, it is clear these systems are likely to be gender-biased. The disadvantages that women face in their work life will persist and/or worsen once they retire; and while men may benefit from this system overall, it also puts pressure on them to pursue traditional models of

477 CEDAW, “Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina,” No. CEDAW/C/BIH/CO/4-5, 30 July 2013.

478 Anastasia Fetsi, Henrik Huitfeldt and Ulrike Damyanovic, *Labour Market Review of Bosnia and Herzegovina* (European Training Foundation, 2007). Available at: http://www.etf.europa.eu/web.nsf/pages/Labour_Market_Review_of_Bosnia_and_Herzegovina (accessed 8 March 2017).


479 United Nations Human Settlement Programme, *Housing and Property Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro* (Nairobi: United Nations, 2005); Mirjana Radović-Marković and Snežana Lekić, “Development and Features of Female Self-employment in Bosnia-Herzegovina,” in *Challenges of Economic Sciences in the 21st Century*, eds., Jean-Paul Guichard, et al. (Belgrade: Institute of Economic Sciences, 2008). Available at: http://ebooks.ien.bg.ac.rs/210/1/mrm_2008_02.pdf (accessed 8 March 2017).

480 Ibid.

481 International Labour Office, *Report on the Pension Reform in Bosnia and Herzegovina*, 3.

482 International Labour Office, *Women at Work: Trends 2016* (Geneva: International Labour Organization, 2016). Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_457317.pdf (accessed 8 March 2017).

483 Platon Tinios, Francesca Bettio and Gianni Betti, *Men, Women and Pensions* (European Commission, 2015).



employment. Compared to a traditional family with a male breadwinner, a couple who prioritises the wife's career and is comfortable with the husband taking extended periods of leave to care for the family, would probably be much worse off during their retirement.

9.3.2. Contemporary causes of gender bias in the implementation of pension laws

While we can expect that the pension system in BiH is likely to change significantly over the next generation, current high levels of youth unemployment are likely to have an impact nonetheless, once this cohort reaches retirement. This will mean it is harder for many young people to contribute for enough years to qualify for a pension (especially as many will not be working full time). And couples who adopt traditional family models may find that neither spouse has made enough lifetime contributions to claim a pension upon retirement.

The youth unemployment situation has also had a disproportionate impact on younger women. While many young people have had to broaden the range of jobs for which they apply, beyond their areas of expertise, women have fewer options because many occupations are still considered unsuitable for them. This is partly because women are taught fewer skills (through formal education or informally by family members) that can lead to job opportunities in the formal sector.⁴⁸⁴ For example, girls and women have not traditionally been encouraged to obtain mechanical skills.

However, what is more troubling is that while levels of unemployment in young men decrease in proportion to their level of education, this is not the case for young women.⁴⁸⁵ In other words, even when women have the requisite skills for a job, they are still overlooked because of their gender. This will ultimately have an impact on both their life savings and pension contributions.


Further, employers show a preference for unmarried women with no children, so that women who are unemployed at the early stages of adulthood will miss out on an opportunity to contribute toward their pension before facing this form of discrimination.⁴⁸⁶ Finally, the extreme competition for all open positions that results from high levels of unemployment can magnify prevailing discrimination in recruitment. With so many candidates to choose from, there is less pressure on employers to consider female candidates for jobs traditionally done by men, or vice versa. These challenges are likely to create a difficult transition period in BiH.

Differences in retirement age clearly reflect gender bias; it makes no sense that women should work less than men, especially because they have a higher life expectancy. The historical disparity in retirement age was probably based on the notion that women are weaker and should thus be protected from working at an older age. Some also argue that because husbands were generally a few years older than their wives, the difference allowed couples to retire at the same time, so that hus-

⁴⁸⁴ Davorin Pavelić, *Study on Youth Employment in Bosnia and Herzegovina* (Sarajevo: CISP, 2006), 50. Available at: <http://developmentofpeoples.org/uploads/analysis/analysis1-CISP-ricerche-europe.pdf> (accessed 8 March 2017).

⁴⁸⁵ International Fund for Agricultural Development Governing Council, "Bosnia and Herzegovina: A country factsheet on youth employment," 2011. Available at: <https://www.ifad.org/documents/10180/53fb4a05-d97a-45b7-986c-00aa0774c85c> (accessed 8 March 2017).

⁴⁸⁶ Pavelić, 118.



bands would not be at home without their wives to care for them. Still, moving to a gender-neutral retirement age and requiring the same years of contributions to qualify for a pension will only bring about gender equality if gender bias in the labour market is eliminated. And much work remains to be done before this can be achieved in most countries, including BiH.

Gender bias in the pension systems of BiH

Studies conducted in various countries demonstrate that most women receive lower pensions than men.⁴⁸⁷ Although women represent two thirds of retirement-age individuals, in some EU member states, more than one third of women do not receive a pension. This situation is compounded by the fact that fewer women receive supplementary pensions (such as those from private pension schemes).

This “gender pension gap” does not depend simply on the characteristics of a specific pension system, but on the combined effect of lifetime gender inequalities and gender bias in the labour market, as mentioned above. The pension gap in EU countries is significant: a report from 2015 indicates that women’s pensions are, on average, 40% lower than men’s.⁴⁸⁸ Consequently, many women rely on rights derived from their husbands’ pensions (survivor benefits, spousal benefits, divorcees’ benefits) as their sole source of income.

For most women, retirement thus marks a reduction in economic independence. Elderly women have lower income levels than the rest of the population, and in fact, single (including divorced or widowed) women aged 75 and older are considered the population group most at risk of poverty in BiH. In addition, as of 2016, women’s life expectancy in BiH is 79.7 years, compared to 75 for men, and hence women make up 60% of the population aged 65 or older.⁴⁸⁹ The combination of these factors means that impoverished older women significantly outnumber impoverished older men.

Another issue is that, because most pension payments are insufficient to pay for professional care services, the implicit assumption is that other family members will take on caregiving roles once a woman (or occasionally a man) is no longer able to perform them. As wives tend to outlive their husbands, this tends to disproportionately disadvantage widows, especially if they do not have any relatives willing or able to care for them.


The gender bias that women are subjected to also has some side effects for men. Studies indicate that elderly single or widowed men are particularly vulnerable because they have often never developed basic life skills, such as cooking and cleaning, required to live independently.⁴⁹⁰ As husbands are traditionally seen as heads of their households, policymakers often overlook how dependant they are on the care work done by their wives. Consequently, few provisions if any are made to account for the loss of support to elderly men through care work that occurs when husbands outlive their wives.

487 Tinios, Bettio, and Betti, *Men, Women and Pensions*.

488 European Commission, “First steps taken towards reducing the gender pension gap,” 23 June 2015, http://ec.europa.eu/justice/newsroom/gender-equality/news/150618_en.htm (accessed 8 March 2017).

489 See: World Health Organization, *World Health Statistics 2016: Monitoring Health for the SDGs* (Geneva: WHO, 2016), 104; and US Central Intelligence Agency, “The World Factbook: Bosnia and Herzegovina,” 12 January 2017, <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html> (accessed 8 March 2017).

490 Martha Walsh, “Aftermath: The Impact of Conflict on Women in Bosnia and Herzegovina,” working paper no. 302, USAID, 2000, 8.



Despite several attempts to reform various pension systems, the negative effects of gender bias on retirees are still pervasive. For example, “the shift from statutory and publicly funded pension systems to privately funded occupational and third-pillar pension schemes has a disproportionate impact on women who often have a more disrupted career than men.”⁴⁹¹ This is mainly due to the persistence of traditional family models and gender stereotypes in most societies that place a disproportionate expectation on women as responsible for caretaking.

9.4. Gender bias in judicial cases related to pensions

Indirect discrimination

As we have seen, the high risk of poverty that women are confronted with when they enter retirement is exacerbated by the fact that some pension systems create new forms of direct or indirect gender-based discrimination. Judges are encouraged to consider the negative consequences of pension systems in terms of how some arrangements and provisions constitute discrimination on the grounds of gender. The following judgement by the European Court of Justice demonstrates how even gender-neutral national legislation can generate indirect gender discrimination.

In 2012, the Court of Justice of the European Union ruled that Spanish legislation on contributory retirement pensions for part-time workers was discriminatory:

In Spain, in order to qualify for a contributory retirement pension, an applicant must be aged at least 65 years and have completed a minimum contribution period of 15 years. In order to determine the contribution periods required, the Spanish legislation takes into account only the hours actually worked, by calculating the equivalent number of theoretical days of contribution....

...Ms Elbal Moreno worked exclusively as a cleaner for a Residents’ Association part-time for four hours a week (10% of the 40-hour statutory working week in Spain) for 18 years. Aged 66 years, she applied to the National Institute of Social Security (NISS) for a retirement pension. Her application was refused on the ground that she had not completed the minimum 15-year contribution period required for entitlement to a retirement pension.

...[t]he Social Court of Barcelona before which the case was brought, asked the Court of Justice whether the directive on equal treatment for men and women in matters of social security precludes the Spanish legislation.

⁴⁹¹ AGE Platform Europe, “EU Council calls for action on the gender pension gap,” 19 June 2015, <http://www.age-platform.eu/policy-work/news/eu-council-calls-action-gender-pension-gap> (accessed 8 March 2017).

In that regard, the Spanish court notes that so long as Spanish legislation takes into account only the hours worked and not the contribution period (the days worked), this ultimately results in the double application – albeit corrected – of the *pro rata temporis* principle. Thus, a longer qualifying period is required from the part-time worker in inverse proportion to the reduction in his working hours in order to obtain a pension the amount of which is already directly and proportionately lower owing to the part-time nature of the work. In the case of Ms Elbal Moreno... [she] would have to work for 100 years to complete the minimum necessary qualifying period of 15 years which would give her access to a pension of €112.93 a month.

Source: Court of Justice of the European Union, “Spanish legislation on contributory retirement pensions for part-time workers is discriminatory,” press release no. 152/12, 22 November 2012.

In this case, the Court found that Spanish legislation on matters of social security is not exempt from the directive on equal treatment for men and women; and emphasised that any national measure that disproportionately impacts men or women in a significant way is considered indirect discrimination. The court noted that part-time workers not only had to make contributions over a proportionally greater amount of time but that their pensions would be lower due to their job status. As 80% of part-time workers in Spain are women, the legislation was thus found to be disadvantageous for women.

The Spanish government contended that it was necessary to maintain the existing threshold (15 years of full-time work) in order to protect the contributory social security system. While the court agreed that such legislation can be justified by objective factors, it found no evidence in this case that it was necessary to exclude part-time workers. The Court thus concluded that such legislation constituted indirect discrimination.⁴⁹²

Different provisions for men and women in pension systems

When pension systems were originally established, many provisions were included to compensate for women’s caring responsibilities, which were presumed due to traditional family models. Some argue that these provisions no longer reflect parenting and caretaking trends in current societies. For example, the minority of men who do take on primary caretaker roles do not benefit from the same provisions as women (such as the chance to collect a pension at an earlier age).

⁴⁹² Court of Justice of the European Union, “Spanish legislation on contributory retirement pensions for part-time workers is discriminatory,” press release no. 152/12, 22 November 2012. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-11/cp120152en.pdf>

9.5. Case scenarios

Case 1

The European Court of Justice: *Pensionsversicherungsanstalt v. Christine Kleist*

Ms Kleist was employed as a chief physician by the pension insurance institution in Austria, which decided to terminate the employment of all employees who satisfied the conditions for retiring. Austrian legislation set the retirement age for women at 60, and for men at 65. Ms Kleist informed her employer that she wanted to work until the age of 65, but she was forced to retire at 60. She contested this decision before a local court, which ruled against her.

The plaintiff challenged this ruling at the European Court of Justice, arguing that her employer's decision constituted discrimination on the grounds of sex. She referred to EU Council Directives 76/207 and 2000/78/EC.⁴⁹³ Her employer stated that the difference in treatment between men and women was indirectly based on sex and was justified because the employer intended to promote employment of younger staff. The employer also mentioned that they intended to avoid a situation wherein working women could receive their statutory pension in addition to their salary, which was not allowed for men.⁴⁹⁴

In the Kleist case, the Court held that national legislation which set different retirement ages for women and men constituted discrimination on the grounds of sex. Indeed, the fact that the plaintiff had been dismissed only because she was a woman who had reached the (younger) minimum retirement age denoted a difference in treatment directly based on sex.

⁴⁹³ See: Council of the European Communities, "Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions," No. 76/207/EEC, 9 February 1976; and Council of the European Union, "Directive establishing a framework for equal treatment in employment and occupation," No. 2000/78/EC, 27 November 2000.

⁴⁹⁴ Court of Justice of the European Union, Judgement, *Pensionsversicherungsanstalt v Christine Kleist*, No. C-356/09, 18 November 2010. Available at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX %3A62009CJ0356](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62009CJ0356) (accessed 8 March 2017).

Case 2

European Court of Human Rights: *Andrle v. the Czech Republic*

Mr. Andrle, a Czech national, cared for his two minor children himself after he was divorced. His application for the statutory old age pension was dismissed by the Czech Social Security Administration, as he had not attained the pensionable age required by national legislation on statutory pensions. Mr. Andrle challenged the administrative decision, arguing that given the fact that he had cared for two children, he was entitled to retire at the age of 57 (the pensionable age set for women if they cared for two children) and thus had reached the pensionable age. In the meantime, the constitutionality of the provision on pensionable age had been questioned. The Czech Constitutional Court, in judgment no. Pl. ÚS 53/2004,¹³ dismissed the Supreme Administrative Court's petition to repeal the provision at stake, finding that it was not discriminatory. The Constitutional Court... acknowledged that, in the former Czechoslovakia, the more favourable treatment of women who raised children was originally designed to compensate for the factual inequality and hardship arising out of the combination of the traditional mothering role of women and the social expectation of their involvement in work on a full-time basis.

...The [Court] said, in its judgment, that it could not “overlook the fact that the measure at stake is rooted in specific historical circumstances. The means employed in 1964 reflected the realities of the then socialist Czechoslovakia, where women were responsible for childcare and the related care of the household while being under pressure to work full time.”


...[It] concluded that “the original aim... was to compensate for the factual inequality between men and women,” [and said it] preferred a special treatment for women until the social and economic changes would remove the need for it.

Source: *European Gender Equality Law Review*, No. 2/2011 (European Commission, 2011).

In the *Andrle* case, the Court held that differences in the treatment of men and women in legislation was indeed discriminatory; however, after examining all the factors of the case, including historical realities in Czechoslovakia, it ruled that the legislation in question reflected the reality when it was adopted. At that time, it was meant to compensate for inequalities between men and women caused by the fact that many women were charged with both childcare and paid work outside the home.

While the Court asserted that the legislation lags behind current social trends, whereby caring roles and responsibilities may not be as distinct as they were at the time when the legislation was passed, it also stated that “the demographic shifts and changes in perceptions of the roles of the sexes are by their nature gradual and, after forty-five years of the existence of the measure at stake, it is necessary to time the amendment accordingly. Therefore, the State cannot be criticised for progressively modifying its pension system to reflect these gradual changes and for not having pushed for complete equalisation at a faster pace.”⁴⁹⁵ And in light of how slowly these changes take place,

⁴⁹⁵ European Court of Human Rights, Judgment, *Andrle v. the Czech Republic*, No. 6268/08, 17 February 2011. Available at: <http://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-103548%22%7D> (accessed 8 March 2017).



the Court concluded that the legislation continued to be “reasonably and objectively justified... until social and economic changes remove the need for special treatment for women.”⁴⁹⁶

The Anderle case is thus an interesting example for two reasons: First, it highlights how legislation that takes into account general trends can be discriminatory toward individuals who do not adhere to typical gender roles. Second, despite recognizing this, the judges endorsed approaches to pension reform that reflect the gradual pace of changes in social attitudes rather than calling for swift changes in legislation.

9.6. Conclusion

Courts and justice professionals have a duty to promote the principle of equality and to prevent gender biased behaviour and legislation by weighing all relevant factors when they consider cases related to pensions, including the long-term consequences. In other areas of law, changes in attitudes toward the roles of women and men have resulted in immediate changes to how the law is applied. Legislation on pensions, though, is more complicated; because it must account for historical gender inequality that has had a disproportionate impact on older generations, while simultaneously supporting newer social dynamics in which gender roles are less rigid. For example, women have historically been allowed to retire earlier and make fewer years of contributions before they qualify to receive a pension. This recognizes the caretaking roles women play and the time they may have spent on maternity leave. Yet, this has the effect of incentivizing modern family arrangements in which men work full time and women work as housewives because it is the more rational financial choice, thus reinforcing discriminatory gender norms.

A balance therefore must be struck between accounting for general trends and preventing discrimination against families who do not fit these trends. In some cases, this is the choice of families; for example, if women decide not to marry or husbands decide to be the primary caregiver. In others, life circumstances can force these dynamics; for example, in the case of many single fathers or situations in which husbands perform caring roles for partners who cannot work (e.g. due to illness or disability). In some instances, a grandmother cares for the children while the mother works, and there is no male figure in the family. In these cases, mothers are at a disadvantage if they must retire early.


Families headed by same-sex female couples also face double-discrimination if both women work, in addition to discrimination on the basis of their sexual orientation.⁴⁹⁷ Finally, groups such as Roma people, who tend to work largely in the informal sector, face additional barriers to receiving pensions. For these reasons, initiatives that provide options to women who have faced discrimination in the labour market must be balanced with other forms of non-discrimination legislation (such as that related to age). Legislation on pensions plays a key role in mitigating many of the common disadvantages that women and men face in society due to gender inequality. At the same time, it faces the perpetual challenge of trying to mitigate any (unintended) negative impacts it may have on men and women who do not adhere to traditional gender roles.

⁴⁹⁶ *European Gender Equality Law Review*, No. 2/2011 (European Commission, 2011). Available at http://ec.europa.eu/justice/gender-equality/files/egelr_2011-2_en.pdf (accessed 8 March 2017).

⁴⁹⁷ Nathanael Miles, *The double-glazed glass ceiling: Lesbians in the workplace* (London: Stonewall, 2008). Available at: https://www.stonewall.org.uk/sites/default/files/Double-Glazed_Glass_Ceiling.pdf (accessed 8 March 2017).

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Thematic Unit 10: Gender Bias in Inheritance and Land Rights

Learning outcomes – by the end of this unit, you will:

1. Recognize that gender neutral inheritance law is applied with gender bias.
2. Understand how gender bias in inheritance reproduces gender inequality in society.
3. Understand the role of legal professionals in mitigating gender bias in cases of inheritance.

Background Reading:

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long: 11:29, posted 23 September 2014, <https://www.youtube.com/watch?v=52B1oELGtCo>

short: 1:49, posted 22 September 2014, <https://www.youtube.com/watch?v=Q3qGkLOJH14>

Summary: Thematic Unit 10 is focused on gender bias as it relates to inheritance and land ownership rights. The Unit first outlines the legal framework in BiH, as well as that of Europe and the world. Through the prism of gender bias, the practical application of hereditary rights is then examined. Although the BiH Constitution prohibits direct and indirect discrimination on the grounds of sex, in practice, many women are disadvantaged by the social pressure to waive their right to inheritance in favour of their male relatives. This Unit also addresses the issue of gender bias in the case of ownership of agricultural land. Gender-based prejudices and traditional principles of property rights exist not only in BiH and in the region, but in Western Europe as well. The Unit concludes by exploring some potential solutions and guidelines for dealing with gender prejudices regarding inheritance in BiH and beyond.

10.1. Introduction

Opening Discussion:

Why are inheritance and property rights important for gender equality?

(The following points can be highlighted if they have not already been raised by students after 10 minutes of discussion.)


- Older women who do not inherit their spouse's property are unfairly discriminated against. While the property may have been in their husband's name, they contributed to its value through both paid and unpaid roles played over the course of the marriage.
- Inheritance often gives an economic advantage to men over women in subsequent generations. In effect, gender inequality in one generation is passed onto the next.
- Property ownership underpins an individual's independence; otherwise, they are usually dependent on property-owning family members.
- Property provides collateral against which to secure loans. This is significant in being able to create wealth and elevate one's social status.
- Property and asset ownership significantly impacts the power, influence, and respect a person has in society. In this way, it is a status symbol.

In most countries in the world, inheritance assures both men and women the option to own land, housing, or other resources.⁴⁹⁸ Inheritance rights are important in the context of gender bias because when property is passed from one generation to another, so too are social norms, including those related to gender equality. If land, housing, and assets are passed exclusively to male members of a family, this gives them an advantage when it comes to providing for their family and securing credit. It also affords them a certain amount of respect from the community and greater freedom to decide their own future.

In such cases, women can access land and property only through marriage, making it harder for them to lead an unmarried life if that is their preference. And still, though women are usually legally entitled to joint ownership of the marital estate, property is symbolically associated with husbands nonetheless. This gives husbands the upper hand in making financial decisions such as whether to sell property or use it in other ways. Some studies even suggest that this imbalance of power makes women who do not own property more likely to be victims of domestic violence.⁴⁹⁹ It is also worth mentioning that this issue is particularly pertinent for women in rural areas because,

⁴⁹⁸ World Bank Group, *Women, Business and the Law: Getting to Equal* (Washington, DC, 2016), 12. Available at: <http://wbl.worldbank.org/~media/WBG/WBL/Documents/Reports/2016/Women-Business-and-the-Law-2016.pdf> (accessed 8 March 2017).

⁴⁹⁹ For example, see: Nandita Bhatla, et al., *Property Ownership & Inheritance Rights of Women for Social Protection – The South Asia Experience: Synthesis Report of Three Studies* (International Center for Research on Women, 2006). Available at: <https://www.icrw.org/wp-content/uploads/2016/10/Property-Ownership-and-Inheritance-Rights-of-Women-for-Social-Protection-The-South-Asia-Experience.pdf> (accessed 8 March 2017).



for farmers, property represents both home and income. Compared to women in urban areas, these women have fewer alternative sources of income.

While many of the choices in cases of inheritance lie with those writing wills and last testaments, legal professionals can play a significant role in ensuring that the law is applied according to contemporary notions of gender equality, as detailed in the BiH Law on Gender Equality. They can advise those writing testaments of the potential effects that gender-biased discrimination can have on their descendants. And, they can ensure that all those entitled to an inheritance receive adequate information before making decisions on whether or not to waive their inheritance rights. Judicial professionals can also engage in initiatives that educate the public on inheritance rights and provide *pro bono* legal assistance with the aim of promoting the law as the prime authority, over discriminatory traditions.

10.2. Legal framework

The legal frameworks on inheritance and property in BiH are gender neutral, as is the case in most countries. However, around the world, their application reflects gender norms found in society. Legal decisions may be influenced, for instance, by traditions that dictate men should inherit more than women. The reasons given to support this often centre around the fact that most wives move into their husband's home and hence gain access or ownership rights to his estate. Yet, even where legal systems operate in a way that supports gender equity, men usually have proportionately greater access to the resources (and sometimes the education) necessary to assert their rights. Women may also face social stigma for asserting their right to an asset, especially if it is a property with strong links to the family's identity or heritage.

The legal framework in BiH

The Constitution of BiH guarantees the right to property, in Article II, paragraph 3(k); and paragraph 4 notes that this right is to be enjoyed by all without discrimination. Provisions of the Inheritance Law, adopted in 1980 in the former Socialistic Republic of Bosnia and Herzegovina, were integrated into legislation on inheritance in both the Federation and the RS.⁵⁰⁰

According to the entity-level inheritance laws, women and men have equal rights with regard to inheritance and property. Women and men can make their own will without external consent, and sons and daughters have equal inheritance rights, as do female and male surviving spouses.⁵⁰¹ Two types of inheritance are allowed and recognized:

- Inheritance based on testament
- Inheritance based on law: four inheritance degrees apply when a deceased person has not left any testament, or in case the deceased's testament does not include their entire estate.
 - i. The first degree applies when the deceased's descendants and surviving spouse inherit in equal parts.

⁵⁰⁰ United Nations Human Settlement Programme, *Housing and Property Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro* (Nairobi: United Nations, 2005); also see: Official Gazetter of the Socialist Republic of BiH 7/80 and 15/80.

⁵⁰¹ World Bank Group, *Women, Business and the Law*.

- ii. The second degree applies in cases when the deceased has no descendants; inheritance is then divided between the parents and the surviving spouse (parents together and equally inherit half of the estate, while the spouse inherits the other half). If an intestate (person without a will) dies without a surviving spouse, the parents inherit the entire estate in equal parts. In case the parents of the deceased have already died, the siblings (or their descendants if the latter have died) shall inherit the estate.
- iii. The third degree applies when the deceased person has no descendants, spouse, parents, or siblings. In such cases, the grandparents inherit.
- iv. When no successor can be found at the third degree, the fourth degree applies, so that great-grandparents of the decedent, or their descendants, can inherit.⁵⁰²

Descendants with a right to inheritance who do not have sufficient means to survive can file requests to inherit larger shares of an estate than the standard legal entitlement. This right specifically applies to the deceased's spouse and parents. Such requests are decided by the courts once all the circumstances of a case have been considered.

In addition to the law and testaments as the basis of inheritance rights, the Federation of BiH also allows legal contracts to be established between spouses or unmarried cohabiting partners. In the latter case, the two parties can name each other as their successor. In addition, in both entities of BiH, legal contracts can be established to divide a property between surviving individuals or to provide permanent sustenance to a specific person.

The BiH Law on Gender Equality forbids gender discrimination, including in cases of inheritance. In addition, changes to the Family Code in both entities are designed to encourage married women to register themselves as co-owners of marital property in order to prevent gender-based discrimination further down the line.⁵⁰³

European Legal Framework

In inheritance proceedings, the following articles from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) apply:

- Article 6 (the right to a fair trial)
- Article 8 (the right to respect for private and family life)
- Article 1 of Protocol 1, which states that:
“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general

502 UN Human Settlement Programme, *Housing and Property Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro*; and Harun Karčić, “Applying Islamic norms in Europe: is Bosnia a good example?” Akademie der Diözese Rottenburg-Stuttgart, November 2013. Available at: downloads.akademie-rs.de/interreligioeser-dialog/131115_karcic_islamic-norms.pdf (accessed 8 March 2017).

503 Victoria Stanley and Samantha Di Martino, “Assessing Land Administration Project’s Gender Impacts in the Western Balkans – Country Case Studies: Albania, Bosnia-Herzegovina and Montenegro,” World Bank, 2012, 7. Available at: <http://siteresources.worldbank.org/INTECA/Resources/landgenderassessment.pdf> (accessed 8 March 2017).

interest or to secure the payment of taxes or other contributions or penalties."⁵⁰⁴

Article II(2) of the Constitution of BiH sets forth that the Convention and its Protocols "shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."⁵⁰⁵

International Legal Framework

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Two CEDAW articles mention property rights and prohibit discrimination:

- Article 15(2) declares that:
"States parties shall accord to women in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."
- Article 16 (1)(h) reads:
*"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."*⁵⁰⁶

In BiH, national legal provisions are in accordance with Article 15, but work remains to be done to fulfil the obligations of Article 16.

Beijing Declaration and Platform for Action

The Beijing Declaration was adopted at the Fourth World Conference on Women in 1995 and contains several references to inheritance.⁵⁰⁷ While not a legally binding document, it was formally endorsed by BiH and has been used as a source of international norms and standards related to gender equality in the Gender Action Plans produced by the Gender Equality Agency of BiH.⁵⁰⁸

504 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended, 1 June 2010. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 8 March 2017).

505 Constitution of Bosnia and Herzegovina, 14 December 1995, Article II, para. 2.

506 United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, No. 34/180, 18 December 1979. Available at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (accessed 20 February 2017).

507 United Nations, "Beijing Declaration and Platform for Action," adopted at the Fourth World Conference of Women, Beijing, 4-15 September 1995, No. A/CONF.177/20/Rev.1. Available at: <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> (accessed 8 March 2017).

508 For example, see: Gender Equality Agency of BiH, "Gender Action Plan of Bosnia and Herzegovina 2013-2017," Official Gazette of Bosnia and Herzegovina 98/13, 3. Available at: http://arsbih.gov.ba/wp-content/uploads/2014/02/GAP_BIH_ENGLISH.pdf (accessed 8 March 2017).

In paragraph 51 of the Declaration, the link between poverty and barriers to inheritance and land ownership are highlighted: “Women’s poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit, land ownership and inheritance, lack of access to education and support services and their minimal participation in the decision-making process.”⁵⁰⁹

In paragraph 165, member states are instructed to: “Undertake legislation and administrative reforms to give women equal rights with men to economic resources, including access to ownership and control over land and other forms of property, credit, inheritance, natural resources and appropriate new technology; [and] conduct reviews of national income and inheritance tax and social security systems to eliminate any existing bias against women.”⁵¹⁰

And in paragraph 274, governments are called on to: “Eliminate the injustice and obstacles in relation to inheritance faced by the girl child so that all children may enjoy their rights without discrimination, by, *inter alia*, enacting, as appropriate, and enforcing legislation that guarantees equal right to succession and ensures equal right to inherit, regardless of the sex of the child.”⁵¹¹

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

The Voluntary Guidelines on Tenure were developed by the Food and Agriculture Organization of the United Nations and endorsed by its Committee on World Food Security in 2012.⁵¹² While these guidelines are not binding, they set out internationally accepted standards related to the governance of tenure; and in this regard, they are considered a form of “soft law.”⁵¹³ The guidelines specifically reference questions of inheritance, and gender has been mainstreamed across these provisions.

Section 4, on the rights and responsibilities to tenure, discusses inheritance in Sections 4.6 and 4.7. Section 4.6 advises states to “remove and prohibit all forms of discrimination related to tenure rights, including those resulting from change of marital status, lack of legal capacity, and lack of access to economic resources. In particular, States should ensure equal tenure rights for women and men, including the right to inherit and bequeath these rights.” And Section 4.7 recommends that states “consider providing non-discriminatory and gender-sensitive assistance where people are unable through their own actions to acquire tenure rights to sustain themselves, to gain access to the services of implementing agencies and judicial authorities, or to participate in processes that could affect their tenure rights.”⁵¹⁴

509 “Beijing Declaration,” para. 51.


510 *Ibid.*, para. 165.

511 *Ibid.*, para. 274.

512 Food and Agriculture Organisation of the United Nations, *Voluntary Guidelines on the Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (Rome, 2012). Available at: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (accessed 8 March 2017).

513 Food and Agriculture Organisation of the United Nations, “Voluntary Guidelines on the Governance of Tenure at a glance,” Rome, 2012, 8. Available at: <http://www.fao.org/docrep/016/i3016e/i3016e.pdf> (accessed 8 March 2017).

514 *Voluntary Guidelines on the Governance of Tenure*, 6-7.



The Voluntary Guidelines reflect the approach of CEDAW, in that they call for legal equality but also for action to address existing inequalities faced by both women and men in asserting their rights and accessing justice.

10.3. Gender bias in inheritance practices

Studies demonstrate that when men and women do not have equal rights with regard to inheritance, women are less likely to have rights to land or housing. Since the ownership of assets has been clearly linked to poverty reduction, discrimination in inheritance rights (and their application) can compound existing gender inequalities that result in women being at a greater risk of poverty.⁵¹⁵ Inheritance rights are particularly important for widows and for rural women, many of whom depend on inherited assets for their economic independence and sometimes for their survival. In addition, where property is passed from one generation to the next, gender discrimination in the application of inheritance rights has the potential to perpetuate gender inequalities within a new generation; for instance, by preventing women from starting business ventures, for which it is difficult to secure bank loans without holding property under their name.⁵¹⁶ The effects of this are especially severe amongst poorer people in rural areas, where self-employment or small-scale entrepreneurship may be the only feasible path to social mobility.⁵¹⁷

Inheritance *de jure* vs Inheritance *de facto* in BiH

While the Constitution of BiH prohibits any discrimination on the grounds of sex, traditional notions of gender roles in society and the division of responsibilities within the family still prevail in practice. And these norms influence decision making when it comes to inheritance. Indeed, in many cases, women pass on their portion of inherited property to their male relatives.⁵¹⁸ (While this may appear to be a free choice, they may face negative consequences from their families and communities if they retain their share.) Nonetheless, because younger generations appear generally to oppose more traditional visions of family and society, a shift toward more balanced role-sharing seems to have emerged in recent years.⁵¹⁹

One process that has reinforced gender inequalities related to access to property is the privatisation that took place in BiH after the war. Studies indicate that economic transitions have reinforced gender inequalities across Central and Eastern Europe, including in BiH, notably because of


515 Ruth Meinzen-Dick, “Property Rights for Poverty Reduction?” working paper no. 91, UN Department of Economic and Social Affairs, December 2009. Available at http://www.un.org/esa/desa/papers/2009/wp91_2009.pdf (accessed 9 March 2017); and World Bank Group, *Women, Business and the Law*.

516 Jozefina Cutura, *Voices of Women Entrepreneurs in Bosnia and Herzegovina* (MI-BOSPO and the International Finance Corporation, 2008), 20. Available at: <http://documents.worldbank.org/curated/en/331561468225623123/pdf/441840WPOBOX3210icesoWomeno1PUBLIC1.pdf> (accessed 9 March 2017).

517 Nayda Almodóvar-Reteguis, Khrystyna Kushnir and Thibault Meilland, “Mapping the Legal Gender Gap in Using Property and Building Credit,” WBL topic note, World Bank Group, January 1, 2013, 2. Available at: http://wbl.worldbank.org/~/_media/WBG/WBL/Documents/Notes/Legal-Gender-Gap-in-Using-Property-and-Building-Credit.pdf (accessed 9 March 2017).

518 CEDAW, “Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined second and third periodic reports of States parties – Bosnia and Herzegovina,” No. CEDAW/C/BIH/1-3, 18 April 2005, 79. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No5/315/63/PDF/No531563.pdf> (accessed 9 March 2017).

519 OECD Development Centre, *Atlas of Gender and Development: How Social Norms Affect Gender Equality in Non-OECD Countries* (Paris: OECD, 2010).



the withdrawal of women from the formal economy and cutbacks in social welfare.⁵²⁰ For example, the Law on the Sale of Apartments allows for the reduction of a purchase price based on the number of years a buyer has worked. Couples can combine their years of work, but a surviving spouse must choose between counting the number of years they have worked *or* the years the deceased worked (i.e., they cannot combine them). Provisions such as this can disadvantage women, who “both by virtue of longer life spans and the wartime death toll among men, constitute the majority of surviving spouses.”⁵²¹ And young widows are disproportionately affected because they will have worked only a few years if at all.

There are also significant discrepancies between rural and urban areas as far as women’s ownership of property. In 2013, of all properties owned by at least one majority owner (with a share of 50% or more), one third were owned by women. In Cazin, however, just 17% of such properties were owned by women (and 83% by men).⁵²² A similar phenomenon exists in the RS, where women own over 30% of such properties in East Sarajevo, Gradiska, and Banja Luka, but hold much lower rates of ownership in the rural, eastern parts of the entity. Interestingly, Bijeljina has the lowest level of female ownership, but the second highest percentage of women who are the *sole* owners of their property.⁵²³

Studies that examine why the equal access to property enshrined in national legislation has not translated into practice suggest that this is true for several reasons. These include the impact of gender bias, not only in ownership rights, but also inheritance practices. For instance, a CEDAW report from 2005 mentions that even women tend to choose male relatives as legal heirs.⁵²⁴ It is also common for sisters to surrender their right of inheritance to their brothers.⁵²⁵

While it may not make financial sense to divide properties such as apartments, shops, or farms based on the percentages stipulated in law, social attitudes are likely the main reason female descendants do not or cannot assert a claim to a property. There is often an implicit assumption that a male family member will inherit the family house and that a man will take over the running of any family enterprise. Many view this as fair because most women will ‘inherit’ through their husbands; although their names may not appear on the title deeds of property. Women generally have less access to the resources necessary to buy out their relatives, in part due to their lower levels of income but also because their spouses are likely to oppose using the family resources in this way.

This goes some way to explain why, in the case of testaments, practice follows tradition in favouring male inheritance of property, as a 2005 study indicated.⁵²⁶ This is compounded by the fact that laws and property rights have been slow to evolve so that joint-ownership by a couple is the

520 Martha Walsh, “Aftermath: The Impact of Conflict on Women in Bosnia and Herzegovina,” working paper no. 302, USAID, 2000.

521 Ibid.


522 Romyana Tonchovska, Kathrine Kelm and Renee Giovarelli, “ICT in Support of Evidence Based Policy Making: Land and Gender in the Western Balkans” (presented at the Annual World Bank Conference on Land and Property, *Integrating Land Governance into the Post-2015 Agenda*, Washington DC, 24-27 March 2014), 11. Available at: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/TONCHOVSKA_389-Final.pdf (accessed 9 March 2017).

523 Ibid., 11-12.

524 CEDAW, “Consideration of Combined second and third periodic reports of Bosnia and Herzegovina,” No. CEDAW/C/BIH/1-3, 2005.

525 Stanley and Di Martino.

526 Ibid.



norm.⁵²⁷ In cases of divorce, there have been situations where men, who already own the majority of property, have transferred property titles into the names of other family members in order to keep it within their family (and likely under male ownership).⁵²⁸

Gender bias in inheritance practices related to farmland and farms

The Gender Action Plan of BiH notes that rural women face unique challenges when it comes to achieving gender equality. A lack of access to education, including lifelong learning, is noted as a particular obstacle to these women accessing justice and economic opportunities.⁵²⁹ Studies of European agricultural practices suggest that gender bias in inheritance is the root cause of many of the difficulties faced by rural women.

While a married couple may theoretically own a farm jointly, in nearly all cases, inheritance is patrilineal – meaning that the husband is seen as the “farmer” and his wife as his “assistant.” The consequence of this is that the husband is still viewed as the primary breadwinner and the work of the wife is less valued.⁵³⁰ Husbands thus tend to have a greater influence on decisions about how the farm is run. In fact, research by Shortall found that the “family farm” is the default arrangement in all but 4.4% of European farms, but also that there is a coinciding default assumption that farms have a single head of the household when it comes to providing training, subsidies, and community discussions in the sector. For this reason, women often miss out on opportunities for lifelong learning and involvement in farming unions.⁵³¹

The irony in this situation is that female members of farm families are not seen as producers, and yet farms would not be financially viable without their unpaid labour or without the part-time jobs they do off the farm to help balance the books when their family income is low. Even when women from these families are higher earners, wives still see their own income as “supplementary” to the primary income of the farm.⁵³² This can have very negative consequences later on, as wives are excluded from farmers’ pension schemes because they are not seen as “genuine farmers.”⁵³³ It can also cause problems in cases of divorce, wherein women have a tendency to downplay their contribution to shared assets and, in some cases, receive no share of the farm despite having contributed significantly to its value over the course of the marriage due to a prenuptial agreement.⁵³⁴

Patrilineal inheritance in the context of the 21st century is by some measures a “poisoned chalice.” In inheriting a farm, a son also inherits social expectations and responsibilities to continue the family farming tradition, even when it no longer confers a high level of social status and financial

527 Tsjeard Bouta, Georg Frerks, and Ian Bannon, *Gender, Conflict and Development* (Washington, DC: World Bank, 2005).

528 Walsh.

529 Gender Equality Agency of Bosnia and Herzegovina, *Gender Action Plan of Bosnia and Herzegovina 2013-2017*, Official Gazette of Bosnia and Herzegovina 98/13, 17.

530 Sally Shortall, “Farming, identity and well-being: managing changing gender roles within Western European farm families,” *Anthropological Notebooks* 20, no. 3 (2014), 70-1 and 78.

531 Sally Shortall, “Gender mainstreaming and the Common Agricultural Policy,” *Gender, Place and Culture* 22, no. 5 (2015), 721-722.

532 *Ibid.*, 721.

533 *Ibid.*, 724.

534 Shortall, “Farming, identity and well-being,” 74; and Judith G. McMullen, “Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce,” *Duke Journal of Gender Law and Policy* 19, no. 1 (2011), 73. Available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1194&context=djglp> (accessed 9 March 2017).

gain.⁵³⁵ Siblings who do not inherit the farm may receive fewer inherited assets, but they are also free to pursue more lucrative and respected professions.

The social stigma against dividing up farmland among siblings, which is seen as a threat to productivity, is probably the main reason women and younger male siblings tend not to assert their rights of inheritance of farmland. Researchers have been surprised by the support demonstrated by non-inheriting siblings toward those who do inherit farmland. This may be a sign that these siblings are relieved to have the freedom to explore other professions.⁵³⁶

About 25% of rural households in Bosnia and Herzegovina are headed by women, which is very near the European average of 24%. However, the farms that women do own tend to be less profitable and used primarily for subsistence, undermining their hopes of economic upward mobility. In fact, women-headed farms are about half as productive as those run by men. This is due to their small size, which not only limits production on its own but also prevents women from using their farms as collateral for the credit needed to invest in modern farming methods (e.g. machinery, the purchase of high-yield seeds, etc.).⁵³⁷

10.4. Responding to gender bias in the application of inheritance law, in BiH and beyond

Class Discussion:

What role can legal professionals play to combat gender discrimination in inheritance in BiH?

Give students a few minutes to discuss this question in pairs or small groups, then ask them to report back to the larger group. Wrap up with the following conclusions, placing an emphasis on any of these points that were not raised by students:

There is no *explicit* discrimination based on gender in the law when it comes to inheritance. For this reason, legislative changes are probably unnecessary. Instead, a lack of legal education and a lack of access to justice must be addressed.

All judges and lawyers may exhibit some degree of gender bias; but most commonly, this involves legal professionals assuming that traditions (such as the exclusion of women from inheritance) are norms. Thus, it is imperative that legal professionals ensure that family members have not waived their rights to inherit under duress, or because they were not informed of their entitlement.

535 Shortall, "Farming, identity and well-being," 68.

536 Shortall, "Gender mainstreaming," 722.

537 Cheryl Doss, et al., "The Role of Women in Agriculture," ESA working paper no. 11-02, Food and Agriculture Organization of the United Nations, March 2011, 12-13. Available at: <http://www.fao.org/docrep/013/am307e/am307e00.pdf> (accessed 9 March 2017); and Shortall, "Gender mainstreaming," 721.

Furthermore, when writing their wills, it is important that people realise the consequences of leaving property only to male heirs, even if they rationalise that their female children will gain the inherited properties of their husbands. Family lawyers should play a role in informing their clients of the potential legal consequences of their testaments. Public education campaigns regarding inheritance rights can also be helpful, especially if high-profile male allies publicly declare their intention to divide their property equally between their sons and daughters.

Women and men are also sometimes discriminated against because they face financial barriers to accessing legal advice or services. Legal aid, freely available written information, or low-cost services for those most in need of help can foster greater gender equality in the application of the law. NGOs and volunteer paralegals, lawyers, and legal institutions can all play a part.

Access to Information

Even “neutral” laws cannot be applied in an unbiased way when there is an asymmetry of information. In other words, if someone is entitled to inheritance but doesn’t know their rights, and someone else is also entitled but *does* know their rights, the application of law will favour those who know the most about their legal entitlements. In Zenica, the Center of Legal Assistance for Women (Centar za Pravnu Pomoć Ženama) has sought to address this by providing online legal aid, whereby people can fill out a web-based form and receive answers via e-mail.⁵³⁸ This model can be less expensive than providing face-to-face service and allows experts to respond to simple, frequently asked questions relatively quickly, including those that relate to inheritance.

Advocacy

While it is important to provide information to those who have been traditionally excluded from exercising their right to inheritance, it is also important to educate those in decision-making positions through public legal education initiatives. This will help women and men understand the effect that decisions made now about inheritance can have on their sons and daughters in the future. For instance, by informing them of the power they have to prevent gender inequalities in their generation from being compounded in the next. One example of this is the OSCE’s campaign to tackle gender inequality related to property and inheritance rights in Kosovo.⁵³⁹ As part of this campaign, the organisation compiled an “Information Guide on Women and Men’s Access to property and housing rights” and also created an advocacy video (See below).⁵⁴⁰

538 See: Centar za Pravnu Pomoć Ženama, “Postavite pitanje,” <http://www.cenppz.org.ba/index.php/online-pravna-pomoc> (accessed 9 March 2017).

539 The term here is used to refer to a geographical area. This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo declaration of independence.

540 OSCE Mission in Kosovo, “Information Guide on Women and Men’s Access to Property and Housing Rights in Kosovo,” 4 November 2015. Available at: <http://www.osce.org/kosovo/197371> (accessed 9 March 2017).

📺 **Video: OSCE Mission in Kosovo, “Nije bitno da li je ćerka ili sin; oboje su naslednici” [“No matter a daughter or a son; they are both heirs”] (2015)**

YouTube: <https://www.youtube.com/watch?v=bG1oR5rHnaY> (in B/C/S)
or <https://www.youtube.com/watch?v=SLBKenf3KMU> (in Albanian)

Running Time: 44 seconds

Question for discussion: Who should be targeted by campaigns of this kind?

It is also important that legal professionals who work on inheritance-related matters are made aware of the leadership they can show in this regard.⁵⁴¹ Simple acts like taking the time to speak to each family member who is entitled to inherit, before they decide whether to waive their claim, can ensure that decisions are based on a negotiated agreement and not simply on biased traditions. In addition, presenting model testaments in which all children inherit equally means that parents must consciously “opt out” of passing property on to their daughters. Alongside public education campaigns, this should help change social norms so that sons do not automatically inherit family property.

Some high profile political figures in the region have demonstrated support for addressing low levels of female land ownership. In Shtime, Kosovo, the municipal Gender Officer and his wife even publicly registered their property jointly in the presence of journalists to encourage their fellow citizens to do the same. This, together with a temporary suspension of the registration fee usually required to add a second person to a property deed, led to a 21% increase in the number of women registered as landowners in Shtime.⁵⁴²

Legal Support

Poorer members of families – usually women – who wish to assert their right to inherit can find themselves in a Catch 22: they lack the resources to hire a lawyer when they are wrongly denied an inheritance, and have no access to credit, and yet the only way to claim their inheritance is to hire a lawyer. Several organisations, including the Center for Legal Assistance for Women in Zenica, provide free or low-cost legal support to individuals involved in inheritance disputes. Cases like these can be expensive; so lawyers work *pro bono* or external funding is used to cover their costs. With this in mind, projects around the world aimed at addressing this form of gender discrimination have experimented with training paralegals, who can help clients to complete paperwork and provide basic support and information. This frees up fully trained lawyers to work on the more complex aspects of a case. What’s more, this approach can have the secondary effect of empowering local people who

541 Anna Knox, Aslihan Kes and Noni Milici, “Mending the Gap Between Law and Practice: Organization Approaches for Women’s Property Rights,” International Center for Research on Women, 2007, 4. Available at: <http://www.icrw.org/wp-content/uploads/2016/10/Mending-the-Gap-Between-Law-and-Practice-Organizational-Approaches-for-Womens-Property-Rights.pdf> (accessed 9 March 2017).

542 Food and Agriculture Organization of the United Nations, “Land ownership still lagging for women in Western Balkans,” 15 May 2014, <http://www.fao.org/news/story/en/item/231863/icode/> (accessed 9 March 2017).



may not have been able to complete their university education, for example.⁵⁴³

10.5. Conclusion

On paper, laws that deal with inheritance and property rights don't discriminate on the basis of gender. In practice, however, the law is clearly subject to gender bias, sometimes significantly. The consequences of this are considerable, because it perpetuates dynamics in which men own the majority of property, and the means to produce wealth – by profiting off the land through agriculture, by leasing it as industrial or commercial property, by selling the property, or by using the property as collateral in securing loans. To achieve gender equality at the political, social, and economic levels, women and men must have equal access to property, especially when it is passed from the previous generation. Legal professionals play an important role in this, by both challenging gender bias where they see it and also by educating different groups of women and men to ensure that they all understand and can access their rights.

Case Study: Challenges to women's inheritance among the Kosovar population

Property law regimes currently in force in both Central Serbia and Kosovo promote gender equal approaches to inheritance and property ownership. Yet, in practice, very different outcomes have resulted in these two places. In Central Serbia, female ownership of land and property averages 37% (even reaching 50% in some areas), whereas among Kosovar women, this rate is only 8%. The explanation for this cannot be found in the law itself but rather in disparities in the way it is applied.

In Albanian-speaking communities, property is traditionally inherited by males and is passed to male children rather than the wife upon the death of a husband. Historically, large families lived together, with each brother and his family apportioned a floor or part of the house. While changes in the law have given women an equal right to property by legal standards, social norms are such that many families view it as shameful and embarrassing if women assert those rights. Traditional gender roles in these communities dictate that men inherit, and then support their sisters. If a woman inherits, she is seen to be taking what rightfully belongs to her brothers; and if she brings property into a marriage, the implication is that her husband's family cannot adequately provide for her needs.

Research has indicated that many women in Kosovo do not know that the law provides equal inheritance rights to them, and families sometimes coerce female relatives into waiving their rights. Local courts accept this, although it is often obvious that coercion has taken place. There are also cases where legal procedures are not applied in the correct order; i.e., women renounce their claims by prior agreement. The law stipulates that women and men alike can only renounce their share of an inheritance *after* the registration of inherited property. Gender bias in the court, coupled with a lack of public legal education and poor leadership by legal professionals as far as correctly applying the law, has reinforced gender inequality within this community.⁵⁴⁴

543 Nadia Steinzor, *Women's Property and Inheritance Rights: Improving Lives in a Changing Time – Final Synthesis and Conference Proceedings Paper* (Development Alternatives, Inc, 2003), 24-26 and 31-32. Available at: http://pdf.usaid.gov/pdf_docs/Pnada958.pdf (accessed 9 March 2017). This report is derived from the proceedings of the Small Grant Program's Conference on Women's Property and Inheritance Rights, held in Nairobi in June 2002.

544 Adapted from: Sandra F. Joireman, "Resigning Their Rights? Impediments to Women's Property Ownership in Kosovo," *Political Science Faculty Publications* 44 (2015). Available at: <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1056&context=polisci-faculty-publications> (accessed 9 March 2017).

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