

# GENDER AND THE JUDICIARY

Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina



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## **The Geneva Centre for the Democratic Control of Armed Forces**

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is one of the world's leading institutions in security sector reform and security sector governance. DCAF provides in-country advisory support and practical assistance programmes, develops and promotes appropriate democratic norms at the international and national levels, advocates good practices, and conducts policy-related research to ensure effective democratic governance of the security sector. DCAF's gender and security programme supports security sector development by addressing the security needs of women, men, girls, and boys towards achieving the full participation of women and men in security sector institutions and security sector reform processes.<sup>1</sup>

## **Atlantic Initiative**

The Atlantic Initiative (AI) is a non-governmental organization based in Bosnia and Herzegovina (BiH), established in 2009 by a group of university professors, journalists, and analysts. AI researches topics such as: security risks in BiH, Euro-Atlantic integration issues, the safety of women and implementation of UN resolution 1325, gender and the judiciary, and the security of Roma people and returnees in BiH.<sup>2</sup> It also publishes an academic journal entitled *Democracy and Security in Southeastern Europe*, which promotes open and informed debate about BiH's Euro-Atlantic integration processes. AI has a reputation in BiH and the wider Balkan region as a trustworthy source of information that shapes the opinions of BiH government officials as well as other policy makers and professionals working in the international security field.

## **Gender and Justice Reform Project in Bosnia and Herzegovina**

DCAF and AI have partnered to implement The Gender and Justice Reform Project in Bosnia and Herzegovina, funded by the Norwegian Ministry of Foreign Affairs. This multi-year project aims to increase the capacities of judges and prosecutors to more effectively integrate gender awareness into the procedures and practices of the BiH judiciary and thereby strengthen the justice system's ability to deliver non-discriminatory services. It also seeks to strengthen the role of women in the justice sector, particularly at the decision-making level. Some project activities are intended to produce concrete outcomes like resources and research, while others are designed to produce developmental outcomes that create catalysts for change, i.e. by gradually transforming thinking and organizational approaches related to gender in the judiciary. DCAF and AI have relied on the leadership, direction, and knowledge of professionals in BiH's justice sector to design and implement this project. The following organisations and professionals have closely collaborated with DCAF and AI under this project: the Centres for Judicial and Prosecutorial Training in the Federation of BiH (FBiH) and Republika Srpska (RS), the High Judicial Prosecutorial Council (HJPC), the Association of Women Judges of BiH (AWJ), and judges and judicial professionals in F BiH and RS.

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<sup>1</sup> See the DCAF website at: [www.dcaf.ch](http://www.dcaf.ch).

<sup>2</sup> See the Atlantic Initiative website at: [www.atlantskainicijativa.org](http://www.atlantskainicijativa.org).

## Table of Contents

<b>1.</b>	The importance of examining the impact of gender on judicial impartiality.....	1
<b>2.</b>	Exploring the impact of gender on the judiciary of Bosnia and Herzegovina.....	2
<b>3.</b>	Gender and collegial relationships in BiH judicial institutions.....	3
3.1.	Courthouse decorum and the use of titles.....	3
3.2.	Collegial relationships and joke making.....	4
3.3.	Sexual harassment policies, awareness, and preventive practices.....	6
3.4.	Attitudes concerning the representation of women in the BiH judiciary.....	7
<b>4.</b>	Gender and judicial decision making.....	9
4.1.	Gender and child custody.....	9
4.2.	Domestic violence.....	11
4.3.	Sexual assault.....	12
4.4.	Victim/witness credibility.....	13
4.5.	Sentencing.....	13
<b>5.</b>	Gender and material support for victims/witnesses.....	14
<b>6.</b>	Conclusions and Recommendations.....	16
6.1.	Recommendations.....	17
	Bibliography.....	19

## 1. The importance of examining the impact of gender on judicial impartiality

How does gender influence the work of the judiciary? It is sometimes assumed that the law is objective, neutral, and impartial and therefore gender has little or no influence on its implementation. And yet, consideration of the legal practitioner responsible for implementing the law inevitably invites a question that has confronted practitioners and scholars throughout the history of jurisprudence: How can the implementation and practice of law by legal practitioners who are influenced by social norms be delivered impartially?<sup>3</sup>

This report reflects that judges, prosecutors, attorneys, and court associates bring not only their academic training, professional experience, legal diligence, and good intentions to their work; they also bring their values, beliefs, and opinions. Still, democratic judicial institutions are committed to the principles of fairness and impartiality, judicial and legal professionals are trained to apply the law in an objective manner, and legal institutions recognize the importance of continual reform, reflection, and improvement to insure these principles guide all law practitioners.

Yet, research has increasingly revealed the limits to which an individual is able to be impartial and objective regardless of their profession. Most notably, studies examining the influence of subconscious attitudes, assumptions, and stereotypes on decision making have determined that nearly every aspect of behaviour, from how we relate to people who are different from us to how we make choices about the products we buy, are influenced by what is called implicit bias.<sup>4</sup> Implicit bias 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 – to the extent that even if a person develops an explicit (consciously adopted) non-biased world view, “their stereotypes remain largely unchanged and become implicit (or automatic).”<sup>5</sup>

Legal practitioners, mostly from North America and Europe, have been exploring the influence of gender on the implementation of the law for over four decades. For example, a Justice from the US state of New Jersey wrote in 1979 that “We are coming to realize that

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<sup>3</sup> See for example: Lawrence Rosen, *Law as Culture: An Invitation* (Princeton, N.J.; Woodstock: Princeton University Press, 2008); 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 Sharia Court* (Maastricht: Shaker Publishing, 2005); Sally Engle Merry, “Everyday Understandings of the Law in Working-Class America,” *American Ethnologist* 13, no. 2 (May 1986): 253–270.

<sup>4</sup> See: Jerry Kang et al., “Implicit Bias in the Courtroom,” *UCLA Law Review* 59, no. 5 (2012): 1124–1186, especially pages 1135–1152. Also see the Project Implicit website: <https://www.projectimplicit.net/index.html>, and publications of research generated by Project Implicit tools: <https://www.projectimplicit.net/papers.html>

<sup>5</sup> Justin D. Levinson and Danielle Young, “Implicit Gender Bias in the Legal Profession: An Empirical Study,” *Duke Journal of Gender Law & Policy* 18, no. 1 (August 2010): 6. Also see: Timothy D. Wilson, Samuel Lindsey, and Tonya Y. Schooler, “A Model of Dual Attitudes,” *Psychological Review* 107, no. 1 (2000): 101–126, especially page 104.

people are products of cultural conditioning which frequently obscures recognition of social wrongs. [...] discrimination frequently goes uncorrected because it is undetected.”<sup>6</sup>

Similarly, a Judge from the Virginia Court of Appeals noted more recently that the influence of gender is “not limited to conscious, intentional discrimination... more often than not [it is] unconscious or subconscious discrimination that occurs because we look at the individual based on stereotypes that we have accurately or inaccurately assigned to one gender or the other...”<sup>7</sup> These observations underscore the importance of identifying and addressing the influence of gender and gender stereotypes in the implementation of the law.

## 2. Exploring the impact of gender on the judiciary of Bosnia and Herzegovina

This research did not attempt to identify whether the law in Bosnia and Herzegovina (BiH) is objective and impartial. Nor does it contest the legal diligence and expertise of practitioners of the law or members of the judiciary. Rather, this report attempts to shed light on the importance of recognizing both real and perceived influences of gender in the social and professional relationships of court professionals, and on judicial practice and decision making; in other words, its impact on both judicial professionals and court users. This report emphasizes the judiciary’s responsibility to identify and address factors that may call its impartiality into question. Indeed, this report argues that identifying and addressing the influence of gender can improve the administration of justice and increase impartiality.

This report is based in primary research collected from members of the judiciary in BiH, supported by existing international research on the topic. The aim of research undertaken for this report was to identify whether and how gender and gender stereotypes might disadvantage or advantage women or men within the judicial or court setting; whether they are judges, prosecutors, attorneys, victims, witnesses, or defendants. The researchers sought to obtain a snapshot of the gender-related attitudes, beliefs, and judgments that affect the BiH judiciary today, in three areas:

- 1) The physical and policy infrastructure serving female and male court employees and users;
- 2) The codified (written) and customary (unwritten) practices operating within courts; and
- 3) The decision-making outcomes of the judiciary.

The methodology for this research was developed collaboratively by staff from DCAF and the Atlantic Initiative, with assistance from a legal consultant and the Judicial and Prosecutorial Training Centre of the Federation of Bosnia and Herzegovina. In addition, the

<sup>6</sup> Justice Alan B. Handler, *Castellano v. Linden Board of Education*; 79 N.J. 407 (1979) 400 A.2d 1182 (The Supreme Court of New Jersey, 1979), concurring and dissenting opinion by Justice Handler; quoted in: Sandy Karlan, “Towards the Elimination of Gender Bias in the Florida Courts,” *Nova Law Review* 11 (1986): 1574.

<sup>7</sup> Sam W. Coleman, “Gender Bias Task Force: Comments on Courtroom Environment,” *Washington and Lee Law Review* 58, no. 3 (2001): 1101.

## Gender and the Judiciary: **Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina**

High Judicial and Prosecutorial Council (HJPC) provided important support for the collection of data from members of the judiciary.

Research was carried out in the spring and summer of 2013 when data was gathered through 30 semi-structured, in-person interviews and an anonymous online questionnaire that reached 131 respondents. The views and opinions of 161<sup>8</sup> members of the BiH judiciary collected through these means form the basis for this analysis. Interviews were conducted throughout Bosnia and Herzegovina, and in both entities, with judges from first and second instance courts, prosecutors from cantonal and district prosecutors' offices, and private attorneys. Researchers made every effort to select a diverse sample of female and male interviewees of varying ages, from diverse professional backgrounds, and from both the criminal and civil-legal sectors. The online questionnaire was completed by judges, prosecutors, attorneys, court associates, and other judicial personnel. Online questionnaire responses were analysed using a combination of statistical methods and thematic representation, and interview responses were analysed using discourse and thematic analysis.<sup>9</sup>

This research represents the first of its kind in BiH and Southeast Europe, and makes an important contribution to the body of existing international research on gender, gender equality, and the implications of gender in the judiciary. Selected findings are presented here, in three categories:

- Gender and collegial relationships
- Gender and judicial decision making
- Gender and court-user services

### **3. Gender and collegial relationships in BiH judicial institutions**

Gender-related attitudes about a number of issues that impact the atmosphere of the judiciary and collegial relationships among and between members of the judiciary were ascertained in this research by analyzing: courthouse decorum and the use of titles; collegial relationships and joke making; sexual harassment policies, awareness, and preventive practices; and attitudes concerning the representation of women in the BiH judiciary.

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<sup>8</sup>This total reflects 30 interviewees, plus 131 anonymous respondents to the online questionnaire – which was completed by 42 judges, 21 prosecutors, 9 lawyers, 21 court associates, 3 respondents who identified themselves as 'other,' and 35 individuals who did not disclose information about their professional status. Of the 96 questionnaire respondents who disclosed their sex, 52.1 % were men and 47.9% were women. Due to the anonymous nature of the online questionnaire, it is possible that a few of the individuals who participated in an interview may have also completed the online questionnaire.

<sup>9</sup>A detailed explanation of the methodology can be accessed in the complete report: Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: Research on the Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: DCAF/Atlantic Initiative, in press).

### 3.1. Courthouse decorum and the use of titles

Interview and questionnaire respondents expressed the prevailing opinion that communication among and between members of the judiciary is strictly formal and professional, particularly in the courtroom. Nonetheless, the online questionnaire revealed that 24% of respondents (out of 127) had either witnessed or personally experienced a member of the judiciary being called or referred to by a name other than their title or surname (i.e. honey, sweetie, young man, etc.) in the courtroom or courthouse. This data was reinforced by a number of anecdotes shared during interviews. For example, one female attorney recounted being called “girl” in court by a male attorney; behaviour she interpreted as an attempt to discredit her in the courtroom setting. Another female, a judge, recalled a male judge turning to her during a courtroom proceeding and asking, “What did you want to say, beautiful?”

Early research from the US found that terms of endearment or comments on appearance that call attention to an individual as a woman, rather than as a judicial professional, can significantly undercut her credibility and perceived professionalism.<sup>10</sup> Moreover, formal titles denote a super ordinate position while familiar terms, even under the pretext of a compliment, denote a subordinate role.<sup>11</sup> This can give the appearance of favour to one judicial professional over another and thereby call into question the impartiality of proceedings.

Notably, this research also revealed that feminine versions of the words<sup>12</sup> for judge, prosecutor, attorney, and court associate are not well institutionalized despite a mandate for their use in the Law on Gender Equality<sup>13</sup> and the guidelines of a publication entitled, “Methods for Overcoming Language Discrimination in Education, Media and Legal Documents.”<sup>14</sup> During an interview, one female attorney shared her opinion that “the use of female forms is more frequent among younger judges than older judges.” This research did not sufficiently investigate the use, or lack of use, of female forms for professional judicial titles to make conclusions related to the gender implications of this practice in BiH. Still, previous research has illustrated how the use of male pronouns for generic purposes can create barriers to women’s equality and reinforce perceptions that women are less credible.<sup>15</sup>

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<sup>10</sup> William Eich, “Gender Bias in the Courtroom: Some Participants Are More Equal Than Others,” *Judicature* 69 (1986 1985): 340.

<sup>11</sup> Jennifer A. Levine, “Preventing Gender Bias in the Courts: A Question of Judicial Ethics,” *Georgetown Journal of Legal Ethics* 1 (1987): 780.

<sup>12</sup> The Bosnian/Serbian/Croatian language includes many nouns that can be spoken in either the feminine or masculine form. In the legal professions, this is true of the words for judge (sutkinja or sudija) and attorney (advokatica or advokat), for instance, among a number of others.

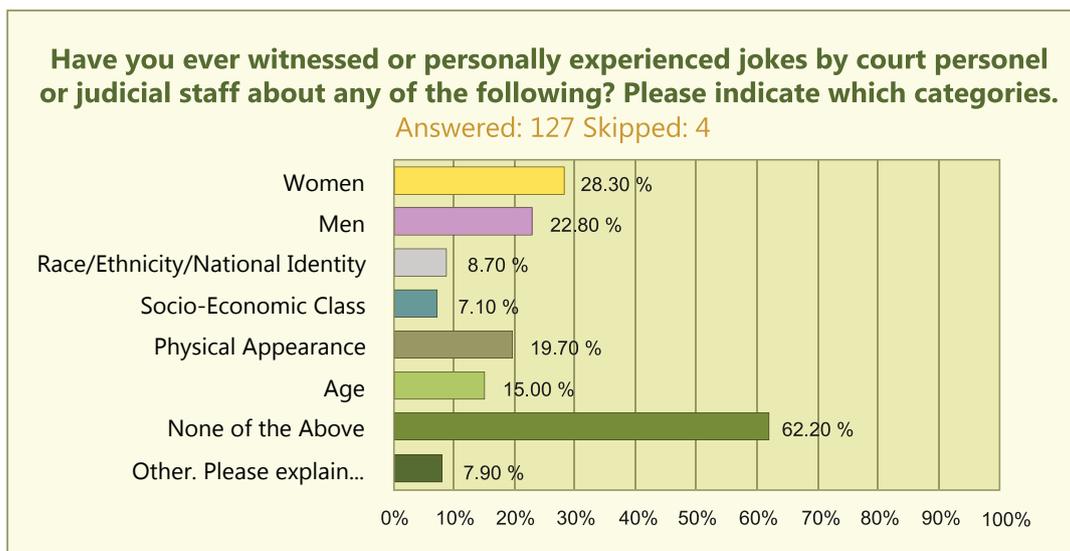
<sup>13</sup> Parliamentary Assembly of Bosnia and Herzegovina, Law on Gender Equality in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina 16/03 and 102/09, 2010, Article 9§2.

<sup>14</sup> Jasmina Čaušević and Sandra Zlotrg, *Načini za prevladavanje diskriminacije u jeziku u obrazovanju, medijima i pravnim dokumentima* (Sarajevo: The Association of Language and Culture Linguists and the Center for Interdisciplinary Post-graduate Studies, University of Sarajevo, 2011). Available in Bosnian only.

<sup>15</sup> For a review of 14 studies on sexist language, see: William R. Todd-Mancillas, “Masculine generics=Sexist Language: A Review of Literature and Implications for Speech Communication Professionals,” *Communication Quarterly* 29, no. 2 (March 1981): 107–115.

### 3.2. Collegial relationships and joke making

Results of the online questionnaire found that 28% of respondents had either witnessed or been the subject of jokes about women, including references to sexual attractiveness or the lack thereof, as well as 'dumb blonde' jokes. Jokes about women made up the single greatest category of jokes witnessed or experienced by judicial professionals (see below).



Respondents, asked to provide examples or topics of jokes, offered the following written responses:

- She is hot
- Fat cow
- [Dumb] blonde
- Stay-at-home husbands
- A woman is a universal machine
- Men only hold one corner of the house while women hold three
- Covered women are hypocritical

Credibility is of paramount importance for legal professionals and international research on gender in the judiciary has revealed that women – whether lawyers, witnesses, litigants, or court employees – are significantly more likely to be perceived as less capable, intelligent, expert, and pleasant than their male counterparts.<sup>16</sup> Moreover, openly negative or sexualized attitudes toward women can directly impact their credibility; their own sense of credibility as well as perceptions of credibility by colleagues, clients, litigants, and witnesses. This can result in a de facto court environment that lacks impartiality and fairness.

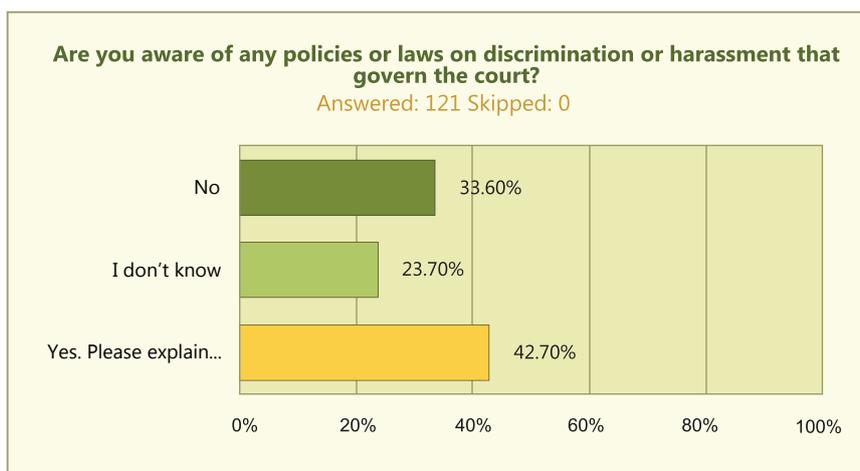
<sup>16</sup>See for example: Lynn Hecht Schafran, "Credibility in the Courts: Why Is There a Gender Gap.," *Judges Journal* 34 (1995): 5; Lynn Hecht Schafran, "The Less Credible Sex," *Judges Journal* 24, no. 16 (Winter 1985): 16; Wendy Murphy, "Gender Bias in the Criminal Justice System," *Harvard Women's Law Journal* 20 (1997): 14–26; Shari Hodgson and Bert Pryor, "Sex Discrimination in the Courtroom: Attorney's Gender and Credibility," *Psychological Reports* 55, no. 2 (October 1984): 483–486; Levine, "Preventing Gender Bias in the Courts: A Question of Judicial Ethics."

## Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

While jokes about women constitute the largest category of jokes made by court personnel, when asked who is treated with the least amount of respect among court professionals, only 6% of questionnaire respondents identified women. None of the respondents answered that men, as a category, are treated with less respect within the BiH judiciary. This seems to suggest that while women may constitute the focus of jokes and comments within the judiciary, there is generally not a feeling among either women or men that these jokes are disrespectful or harmful. Certainly, it is positive that very few respondents believe that women are treated less respectfully, but the fact that over a quarter of survey participants reported experiencing or witnessing joking about women suggests further examination of the issue is warranted.

### 3.3. Sexual harassment policies, awareness, and preventive practices

While 43% of questionnaire respondents indicated that they were aware of policies or laws on discrimination and harassment that govern the court, 34% said they were not aware of any such policies or laws and 24% said they did not know whether any exist (see below).



All 30 interviewees also reported that they were not aware of in-house policies nor had they ever been to an in-house training or seminar on the subject of sexual harassment.<sup>17</sup> One prosecutor elaborated:

*In staff meetings we do not talk about sexual harassment and discrimination and there is no awareness of it. It is very hard to distinguish what is sexual harassment. I think it happens everywhere. For example, we say things jokingly that we actually think [are true].*

This comment seems to suggest a level of openness to the development of a policy on sexual harassment as well as efforts to increase awareness. In contrast, there were also interviewees who trivialized the idea of sexual harassment and the need for a policy. For

<sup>17</sup>Several interviewees noted that they were aware of laws addressing sexual harassment; in particular, the Law on Gender Equality. Among those who were aware of laws on sexual harassment, a number had attended training on the topic through the Association of Women Judges of Bosnia and Herzegovina.

## Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

example, a male judge shared the following anecdote from a training he attended on another topic, where the issue of sexual harassment came up:

***I think this topic is overrated and women think that too. I attended a training in which a court associate asked, "Does this mean that now we have to ask [for] written permission to go out with a woman?"***

Members of the judiciary may not be sure about what constitutes sexual harassment and may feel unsure and/or unsupported in the absence of clear institutional policies that define appropriate and professional conduct. In a rapidly changing socio-cultural context that is increasingly influenced by globalization and communication technology, policies can provide protection for legal institutions, promote more constructive conduct between and among staff, and create a more professional work environment.<sup>18</sup> Interviews revealed additional justification for the development of in-house sexual harassment policies: a number of interviewees suggested that comments which constitute sexual harassment are heard at times among members of the BiH judiciary. For example, one male attorney shared the following anecdote:

***A colleague told the prosecutor in the courtroom that he has a problem when she is there because he has sexual fantasies about her.***

Similarly, another male attorney at a different courthouse suggested that his colleagues will sometimes express interest in sexual relations with women working within the judiciary. He noted that:

***...it can happen that, when an attractive [female] trainee is passing by, one hears comments such as 'oh, I would like to...her!' These comments are said in such a way that the person who is passing by cannot hear them. This behaviour is a matter of upbringing, which a person gets from home.***

Nevertheless, this research does not indicate that comments of this nature are representative of general attitudes. Yet, they do signal that harassment is a practical, if isolated, issue, relevant for address by the BiH judiciary. Indeed, research conducted by US-based judicial task forces during the 1980s and 1990s found that between 15% and 60% of women and men in the court systems observed or experienced inappropriate or sexually suggestive comments or sexual advances.<sup>19</sup> It is reasonable to assume that sexual harassment can and does occur within the BiH judiciary as well.

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<sup>18</sup>See also: Mark I. Schickman, "Sexual Harassment: The Employer's Role in Prevention," *The Complete Lawyer* 13, no. 1 (Winter 1996): 24; Joy A. Livingston, "Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions," *Journal of Social Issues* 38, no. 4 (January 1982): 5–22.

<sup>19</sup>Marina Angel, "Sexual Harassment by Judges," *University of Miami Law Review* 45 (March 1991): 819. For more details on task force findings, also see: Ninth Circuit Task Force on Gender Bias, *The Preliminary Report of the Ninth Circuit Gender Bias Task Force: Discussion Draft* (United States District Court, Western District of Washington, 1992), 8; Maryland Special Joint Committee on Gender Bias in the Courts, *Report of the Special Joint Committee on Gender Bias in the Courts* (Maryland: Administrative Office of the Courts, 1989), 82; Minnesota Supreme Court Task Force, *Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report* (Minnesota: Minnesota Supreme Court, 1989), 107.

### **3.4. Attitudes concerning the representation of women in the BiH judiciary**

Women make up the majority of judges in BiH yet they are not equally represented in leadership positions. More specifically, women make up approximately 60% of all judicial appointments, but only 40% of court presidents and chief prosecutors.<sup>20</sup> Interviews revealed that male and female court professionals generally hold different opinions concerning why women are so well represented within the BiH judiciary. For the most part, women have a positive understanding of the phenomenon and men do not. For example, one female judge framed the gender balance of judges this way:

***There are more women [in judicial positions] because this is a very hard job with a large case load and women are harder working and more responsible than men. Men tend to stay away from the position of judge because this job is no longer very valued and is not properly rewarded.***

In contrast, a number of male interviewees tended to minimize the work and role of a judge. One male judge suggested that the reason there are more women in judicial positions is because the job is in fact less strenuous than others. He remarked:

***The judiciary is now a predominantly female job because it is easier – a sitting job which does not require physical effort.... There are now more male lawyers, but women are slowly occupying that sphere too.***

Perhaps even more interesting, a male prosecutor went so far as to link the gendered nature of power relations between women and men to the representation of women in the BiH judiciary. He postulated:

***Maybe because women are subordinate to men at home, that is the reason why they apply for the positions of judges; because in this position they are dominant at work, which compensates for the situation at home.***

Researchers also explored interviewees' opinions on why women represent nearly two-thirds of judicial appointments but hold less than half of the leadership positions within the judiciary. A large majority of interviewees were surprised by these numbers and admitted that they had never given much thought to the representation of women and men in the BiH judiciary. Still, many interviewees reported that women do not hold leadership positions because of the challenges of balancing work and family responsibilities. For example, one female prosecutor said that she was not interested in seeking the position of chief prosecutor, explaining:

***That position requires a prominent man. I feel that I do not have the skills for that. However, [I have] younger female colleagues who would like to be in a leadership position. But I would not want to be a chief prosecutor because I have children I need to take care of and the job of chief prosecutor would be too much.***

Her assessment was shared by a female judge who, when asked if she would apply for the position of court president, said she would not because her family care responsibilities

<sup>20</sup>High Judicial and Prosecutorial Council of Bosnia and Herzegovina, 2012 Annual Report (Sarajevo, 2012), 62. Available at: <http://www.hjpc.ba/intro/gizvjestaj/pdf/2012%20ANNUAL%20REPORT%20ENG%20-%20Final.pdf>.

## Gender and the Judiciary:

# Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

would not leave her enough time. She felt that men are not burdened by such duties at home.

These opinions illustrate some striking differences in understandings of the judicial profession, and also reveal the stereotypical views women and men have about each other's abilities and assumed responsibilities and motivations outside of their profession. However, to what extent these opinions and perspectives influence which candidates are selected as judges and promoted to leadership positions was not identified through this research. Nonetheless, this report recommends further exploration of this issue with a particular focus on how and why women are not represented at equal levels as court presidents and chief prosecutors.

## 4. Gender and judicial decision making

This research explored the influence of gender on BiH judicial processes and decision making, which could arguably be impacted most significantly by concerns related to the impartiality of the judiciary. Indeed, numerous studies have documented the impact of gender stereotypes on family law case outcomes, the evaluation of criminal cases, and sentencing.<sup>21</sup> This section offers key research findings about the impact of gender in judicial decision making as it relates to cases of child custody, sexual assault, domestic violence, and to victim/witness credibility and sentencing.

### 4.1. Gender and child custody

A number of researchers have documented how gender stereotypes impact family law outcomes.<sup>22</sup> This research did not include an evaluation of resolved custody case records in BiH, but rather investigated the attitudes and opinions of members of the judiciary on the topic of custody decisions. Interviews revealed the strongly held belief among court professionals that children are best placed with their mother, because:

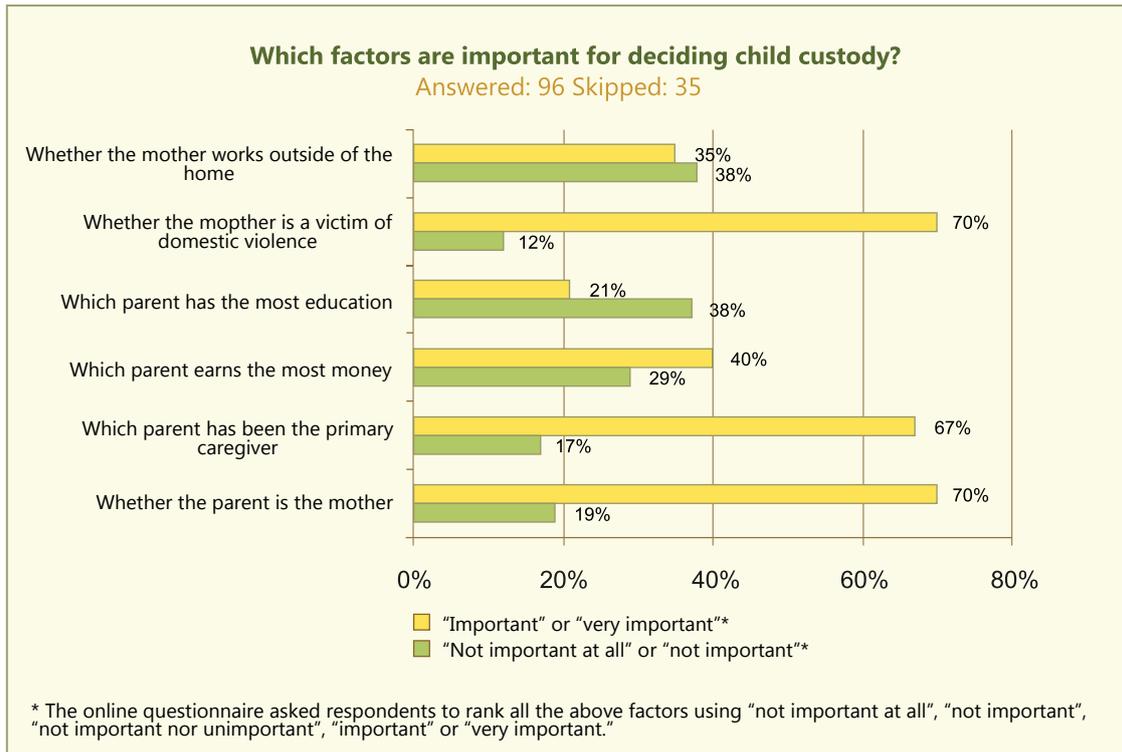
<sup>21</sup> For more on how gender stereotypes impact family law decisions, see: Leslie A. Cadwell, "Gender Bias against Fathers in Custody? The Important Differences between Outcome and Process," *Vermont Law Review* 18, no. 1 (1993): 215–249; Céline Bessière and Muriel Mille, "Le juge est (souvent) une femme. Conceptions du métier et pratiques des magistrates et magistrats aux affaires familiales," *Sociologie du travail* 55, no. 3 (2013): 341–368; Le collectif onze, *Au tribunal des couples enquête sur des affaires familiales* (Paris: Odile Jacob, 2013). For more literature on how gender stereotypes influence judicial decision making in cases of sexual assault, see: Julia Ann Simon-Kerr, "Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment," *Yale Law Journal* 117, no. 1854 (2008): 1854–1898; Murphy, "Gender Bias in the Criminal Justice System"; Ivana Radačić, "Kazneno djelo silovanja: pitanja definicije, (ne)odgovornosti za otklonjivu zabludu o pristanku i postojanje rodnih stereotipa u sudskom postupku na primjeru prakse županijskog suda u Zagrebu," *Hrvatski ljetopis za kazneno pravo i praksu* 19, no. 1 (July 2012): 105–125. For more literature on the influence of gender on sentencing, see: Christina L. Boyd, Lee Epstein, and Andrew D. Martin, "Untangling the Causal Effect of Sex on Judging," *American Journal of Political Science* 54, no. 2 (2010): 389–411; Thomas Dalby and Annik Mossière, "The Influence of Gender and Age in Mock Juror Decision-Making," *Europe's Journal of Psychology* 4, no. 4 (2008); Meda Chesney-Lind, "Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place," *Crime & Delinquency* 23, no. 2 (January 1977): 121–130.

<sup>22</sup> For more research on the impact of gender stereotypes on family law decisions, see: Cadwell, "Gender Bias against Fathers in Custody?"; Bessière and Mille, "Le juge est (souvent) une femme"; Le collectif onze, *Au tribunal des couples enquête sur des affaires familiales*.

## Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

- mothers are natural caregivers
- mothers are more connected to their children
- mothers take better care of their children

This sentiment was further confirmed by online questionnaire responses. Whether the parent is the mother was identified as an important factor in deciding child custody by 70% of respondents (see below).



In addition, a number of interviewees expressed that fathers may decide to not actively petition for custody because they believe it is automatically awarded to mothers. Studies done in the US have also found that fathers sometimes do not seek custody because their attorneys advise them that their chances for success are minimal; and male attorneys are more likely than their female counterparts to give such advice.<sup>23</sup>

This research does suggest that BiH court professionals favour mothers over fathers in child custody cases. The extent to which this impacts fathers' decisions to petition for custody or not was not explored, however this question merits further research. If family law attorneys are aware of the prevailing preference for mothers within the BiH judiciary, they may be inclined to share this information with their clients and, as US research has shown, this could ultimately influence the choice by fathers to petition for custody.

<sup>23</sup> See: New York Task Force on Women in the Courts, "Report of the New York Task Force on Women in the Courts," *Fordham Urban Law Journal* 15, no. 1 (1986): 103; Minnesota Supreme Court Task Force, *Minnesota Supreme Court Task Force Report*, 24; Utah Task Force on Gender and Justice, *Utah Task Force on Gender and Justice: Report to the Utah Judicial Council* (Salt Lake City, Utah: Task Force on Gender and Justice, 1990); Lynn Hecht Schafran, "Gender Bias in Family Courts: Why Prejudice Permeates the Process," *Family Advocate* 17 (1994): 26. Interesting to note, the New York Task Force on Gender Bias actually found that 47% of male attorneys compared to only 21% of female attorneys tended to dissuade fathers from seeking custody, believing that judges wouldn't give their petitions a fair trial.

## 4.2. Domestic violence

Judicial response to domestic violence provides another example of how gender stereotypes have the potential to distort courts' application of law. One judicial task force in the US found that, "...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 unimportant, blame the victim for getting beaten, and badger the victim for not leaving the batterer."<sup>24</sup> Moreover, research on domestic violence sentencing from both BiH and the US has shown that domestic violence offenders are likely to receive suspended sentences, probation, and treatment in lieu of jail time or more severe penalties.<sup>25</sup>

This research explored two topics in relation to domestic violence cases:

- 1) what factors are relevant for sentencing in cases of domestic violence; and
- 2) in which domestic violence cases should jail time be avoided?

During interviews, judges asserted that they apply sentences exclusively on the basis of facts and their relationship to the written law; but online questionnaire results revealed a tendency by respondents to also consider non-legal social factors when determining a sentence. For example, 81% of respondents (out of 96) indicated that whether the defendant is apologetic is relevant to sentencing. In addition, 35% of respondents indicated that whether the victim is argumentative or difficult is relevant. When asked in which types of domestic violence cases jail time should be avoided, 38% of questionnaire respondents selected 'when the defendant is the primary breadwinner.'

A 2011 OSCE report, *Ensuring Accountability for Domestic Violence: An Analysis of Sentencing in Domestic Violence Criminal Proceedings in Bosnia and Herzegovina*, found that BiH sentencing practices in domestic violence cases were at or below the minimum penalty prescribed by BiH law; this included an overuse of suspended sentences.<sup>26</sup> Consistent with this finding, at least one quarter of the interviewees for this research asserted the need for more severe sanctions in domestic violence cases. In addition, a number of leading criminal law scholars and legal practitioners in BiH have called for the use and implementation of a new Benchbook for domestic violence. The *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* was developed by nine judges from across BiH and provides recommendations to improve responses to domestic violence and increase consistency of practice.<sup>27</sup> Recommendations specifically work to eliminate the over-use of mitigating factors to justify below-minimum sentencing.<sup>28</sup>

<sup>24</sup> Maryland Special Joint Committee on Gender Bias in the Courts, Report of the Special Joint Committee on Gender Bias in the Courts, v.

<sup>25</sup> See: Cheryl Hanna, "The Paradox of Hope: The Crime and Punishment of Domestic Violence," *William and Mary Law Review* 39, no. 5 (1998): 1507–1508; 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), 32.

<sup>26</sup> OSCE Mission to Bosnia and Herzegovina, *Ensuring Accountability for Domestic Violence*, 32–33.

<sup>27</sup> Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo: DCAF and Atlantic Initiative, 2014).

<sup>28</sup> *Ibid.*, 17–46 (Recommendations).

### 4.3. Sexual assault

A number of studies have examined the impact of gender in processing and sentencing sexual assault cases.<sup>29</sup> For example, Croatian scholar Ivana Radačić identified the use of questionable mitigating factors in her review of criminal rape cases tried in a Zagreb district court. In one of the cases she analyzed, the court cited the perpetrator's jealousy over his ex-girlfriend's new partner as a mitigating factor.<sup>30</sup> Similarly, gender bias task forces across the US have found that women victims of rape and sexual assault are routinely judged more harshly on their appearance, demeanour, lifestyle, and reputation – while male defendants escape similar scrutiny.<sup>31</sup>

Interviews for this research revealed a number of promising attitudes and opinions related to sexual assault. For example, there was near universal agreement among judges and prosecutors that victims should be afforded protection from defendants (including access to video link testimony), as well as support during proceedings. However, not all interviewees shared the same level of commitment to ensuring access to justice for victims of sexual assault. For example, one judge shared the following story about a prosecutor's response to familial child sexual abuse:

***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 private life of this man was unfairly suffering because of the case.***

Researchers also found that defence counsel tended to reflect a significant degree of scepticism toward victims of sexual assault and assign a level of responsibility to them for the assault. A female defence lawyer recounted a case in which an adult male, who was intoxicated at the time, raped an underage girl. The lawyer argued that the girl was promiscuous and seductive, was known to be sexually liberal and, because her client was intoxicated, he could not have forced the girl to have sex. The lawyer attributed the reduced sentence her client received to these mitigating factors.

In another interview, another defence counsel expressed his surprise that a judge would sentence a man to prison for attempted rape. He shared this anecdote:

***I had a case [in which] a woman reported a cobbler for rape and the man is in prison for attempted rape. She claimed that he locked the door and he touched her breast and kissed her. I don't understand why he was sentenced because he did not unbutton his trousers nor was he violent toward her.***

Further, it is notable that a number of interviewees expressed their belief that men cannot be raped or sexually assaulted. In fact, this question often resulted in laughter and joking.

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<sup>29</sup> For more literature on how gender stereotypes influence judicial decision-making and outcome in cases of sexual assault, see: Simon-Kerr, "Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment"; Murphy, "Gender Bias in the Criminal Justice System"; See also (in Croatian): Radačić, "Kazneno djelo silovanja."

<sup>30</sup> Radačić, "Kazneno djelo silovanja," 115.

<sup>31</sup> Richard C. Kearney and Holly Sellers, "Sex on the Docket: Reports of State Task Forces on Gender Bias," Public Administration Review 56, no. 6 (November 1996): 590.

#### 4.4. Victim/witness credibility

In this research, interviewees generally asserted that victim/witness credibility is entirely determined by the consistency of their statements and how convincing they are during testimony, while variables related to the person are irrelevant. Still, a number of interviewees suggested that some variables, but not gender, may also play a role. One prosecutor said:

*...it all plays a role. If you are a judge, it is all taken into account, including education and background, but it does not matter if someone is male or female.*

A female judge echoed her colleague's sentiments in some ways, but in contrast indicated that the sex of a witness can play an important role in the questions and topics that are explored during proceedings. She 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] 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.*

In addition, 40% of questionnaire respondents answered that whether the witness is emotional during testimony is relevant to their credibility. International research shows that female rape victims who do not appear distraught, tearful, and afraid during testimony are far less likely to be believed.<sup>32</sup> And men may be penalized, shamed, or accused of acting if they cry, exhibit distress, or fail to appear sufficiently masculine. This research suggests that gender plays an important role in how witness credibility is determined – and what kinds of questions witnesses are asked.

#### 4.5. Sentencing

According to interview and questionnaire respondents, sentences are applied objectively and in line with the law. Only 4% of questionnaire respondents (out of 96) said that they had ever witnessed a male defendant receiving a more severe sentence than a female defendant in the same or similar case. Notably, 13.5% of respondents chose the option "I don't want to answer," signalling a level of discomfort with disclosing an opinion or observation on this topic. In fact, judges can and do take into consideration mitigating factors such as family status (whether the defendant is married, has children, and is a breadwinner) to reduce sentences. International research actually shows that men may be

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<sup>32</sup>Lynn Hecht Schafran, "Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist," *Fordham Urban Law Journal* 20, no. 3 (1993): 439–453; Lynn Hecht Schafran, "Writing and Reading about Rape: A Primer," *St. John's Law Review* 66, no. 4 (Winter/Fall 1993): 979–1045. See also: David Lisak, "The Neurobiology of Trauma," in Unpublished Paper (University of Massachusetts, Boston, 2002); parts of which appear in the DVD "Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases," issued by the National Judicial Education Program in 2000. A filmed lecture by Dr. Lisak on the same topic is also available online; see: David Lisak, "The Neurobiology of Trauma," Arkansas Coalition Against Sexual Assault, February 5, 2013, <https://www.youtube.com/watch?v=py0mVt2Z7nc/> (accessed February 20, 2014).

## Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

disadvantaged compared to women when it comes to criminal sentencing.<sup>33</sup> This is because men are generally perceived to have less responsibility for caring for their family and are considered to be a greater threat to the community, while women are seen as more able to reintegrate into society.<sup>34</sup>

This research also attempted to identify the impact of the gender of judges on sentencing. Interviews revealed two examples in which the gender of a judge appeared to play a role in the application of a sentence. One prosecutor remembered a domestic violence case in which a higher instance court reduced the sentence of a male perpetrator from 10 months to 8 months. He said that in thinking about the case, he'd realized that the panel of judges had consisted of three men; he believes that if at least one woman had been on the panel, the sentence would not have been reduced. Another lawyer told the story of a rape case that went to a higher instance court on appeal, where the sentence was ultimately increased. He reflected on the case this way:

***The assessment of the Court was to increase the sentence, but only women judges were on the panel. I am not sure if that influenced the increase of the sentence. My principal used to say that women always have more understanding for men than for other women.***

Questionnaire responses also revealed that 60% of respondents believe men are more violent because they are physically stronger. Additionally, almost 50% indicated their view that men are 'naturally' more violent. This data suggests rather strongly held opinions about the natural inclination or predisposition of men to engage in violence. How these beliefs may influence sentencing is unclear, but attitudes about the inherent nature of women and men are likely to be deeply seated – even implicit.

## 5. Gender and material support for victims/witnesses

BiH courts have made some efforts to institutionalize support to victims and witnesses, most notably in cases of war crimes.<sup>35</sup> Nonetheless, this research revealed that victims in cases of sexual assault, child abuse, and other forms of gender-based violence may have

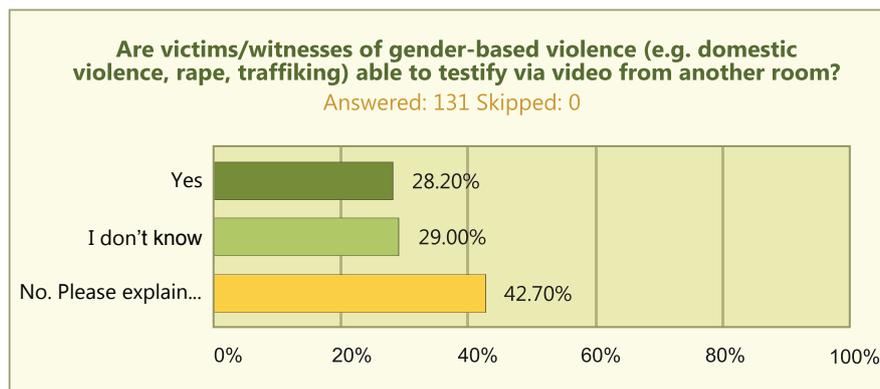
<sup>33</sup> See, for example: Judith Resnik, "Gender Bias: From Classes to Courts," *Stanford Law Review* 45 (1993): 2195–2210. This article did report, however, that the advantage to women in sentencing was rather specific (in the US) to white women and women of certain classes, noting that "the words 'women' and 'men' may at times be inadequate to capture the intersections of gender, race, religion, ethnicity, sexual orientation, and class."

<sup>34</sup> See, for instance: Darrell Steffensmeier, John Kramer, and Cathy Streifel, "Gender and Imprisonment Decisions," *Criminology* 31, no. 3 (1993): 411–446; Kathleen Daly, "Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment," *Social Forces* 66, no. 1 (September 1987): 152–175; Rainer Geißler and Norbert Marißen, "Junge Frauen und Männer vor Gericht: geschlechtsspezifische Kriminalität und Kriminalisierung," *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 40, no. 3 (1988): 505–526.

<sup>35</sup> Maja Šoštarić, *War Victims and Gender-Sensitive Truth, Justice, Reparations and Non-Recurrence in Bosnia and Herzegovina*, Perspectives Series (Impunity Watch, 2012), 46; OSCE Mission to Bosnia and Herzegovina, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a Year after Adoption of the National Strategy for War Crimes Processing, A Report of the Capacity Building and Legacy Implementation Project* (Sarajevo: OSCE, 2010).

## Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

very limited access to material support. For example, approximately 42% of questionnaire respondents indicated that it is not possible for victims or witnesses to testify via video link from outside the courtroom (known as an en camera or video hearing). And altogether, 71% of questionnaire respondents either did not know, or did not believe it was possible to provide video-link testimony to victims.



During interviews, one judge shared the story of a case in which, due to the absence of video link equipment, he found a creative solution to enable a child victim of sex abuse to testify in a safe and non-traumatic environment. He explained that this took time and required delays to scheduled proceedings; moreover, the ad-hoc solution resulted in a motion from the defence calling for the victim to testify a second time. As this example demonstrates, improvised solutions can impact the efficiency of the court and burden judges and other court officials with added complications. But, the participation of victims and witnesses is crucial for the successful administration of justice; so, when a lack of material support restricts that participation, it also limits the potential for justice.

The use of video link testimony to prevent re-traumatising or further traumatising victims and witnesses is well documented. For victims of violence, confronting their perpetrators in court can be harrowing and may result in isolation or retaliation by their community.<sup>36</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) adopted rules of evidence specifically designed for processing cases of gender-based violence due to the high level of sensitivity involved in cases of rape and sexual assault.<sup>37</sup> Yet courts in BiH have

<sup>36</sup>Mandy Burton, Roger Evans, and Andrew Sanders, "Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies," Home Office Online Report 1, no. 6 (2006): 2–3.

<sup>37</sup>Rule 96 of the "Rules of Procedure and Evidence" of the ICTY, on "Evidence in Cases of Sexual Assault" (adopted 11 February 1994) states that:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
  - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
  - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (Amended 3 May 1995)
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (Amended 30 Jan 1995)
- (iv) prior sexual conduct of the victim shall not be admitted in evidence.

See: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Rules of Procedure and Evidence, United Nations IT/32/Rev. 48, last amended on 19 November 2012.

only begun to provide emotional and psychological support to victim and witnesses, and only in cases of war crimes. For example, some courts have instituted support for victims and witnesses of war crimes before and during the investigation, and during trial proceedings.<sup>38</sup> In addition, witness support sections have been established in district courts and prosecutors' offices in Banja Luka and East Sarajevo and in the cantonal court and prosecutors' offices in Sarajevo, the Una-Sana Canton, and the Central Bosnia Canton, to provide support to victims and witnesses of war crimes.<sup>39</sup> A Witness Support Office has also been established in the State Court of BiH.<sup>40</sup>

Establishing policies, programs, and infrastructure that will specifically address the needs of victims and witnesses of sexual assault, domestic violence, human trafficking, and child abuse facilitates their participation in court hearings and thus enhances access to justice. Furthermore, adapting infrastructure and policy to address such needs indicates the extent to which the judiciary is cognizant of the gendered implications of these kinds of criminal offenses.

## 6. Conclusions and recommendations

This report analyzes the influence of gender on the opinions and attitudes of legal practitioners within the BiH judiciary, revealing insights into how it can impact collegial relationships and the atmosphere of the court as well as day-to-day court operations and decision making. The findings of this study are consistent with a significant body of international research that shows that gender does indeed influence the administration of justice, routine courthouse operations, and professional relations.

This research also helps demonstrate the extent to which BiH judges and other legal practitioners are committed to fairness and neutrality in the judiciary. Members of the judiciary are in a complex and difficult position, expected to exercise impartiality, absent from the emotions, beliefs, and values reflected in their socio-cultural environment. Yet, democratic judicial institutions consistently espouse their commitment to the principles of fairness and objectivity; and checks and balances, such as judicial panels, appeal courts, and jury trials, are regular features of judicial systems. With a committed judiciary, a comprehensive legal framework, ongoing opportunities for training and professional development, and a continued willingness to engage in reform and improvement, the BiH judiciary has the capacity to address the impact of gender and increase the impartiality of its administration of justice. To contribute toward this goal, this report makes the following recommendations, which were developed based on findings from this research and were informed by best practices established by the international legal community.

<sup>38</sup>For more information on the UNDP program "Support to Processing of War Crimes Cases in BiH" and its activities in the field of support to victims and witnesses in war crime cases, implemented in cooperation with the HJPC see: Dragan M. Popović et al., A Situation and Needs Assessment of the Cantonal and District Prosecutors' Offices and Courts in BiH to Process War Crime Cases, 2008-2011, Support to Processing of War Crime Cases in BiH (SPWCC) (UNDP in BiH, 2012).

<sup>39</sup>For more on this, see: "Bihac Court to Get Witness Support Section," Balkan Insight, December 12, 2012. Also see the HJPC press release on this topic (in Bosnian): High Judicial and Prosecutorial Council of BiH, "Početak rada Odjela za podršku svjedocima pri Kantonalnom sudu u Novom Travniku i Kantonalnom tužilaštvu Srednjobosanskog kantona," November 9, 2013, <http://www.hjpc.ba/pr/preleases/1/?cid=5746,2,1>.

<sup>40</sup>Šoštarčić, War Victims and Gender-Sensitive Truth, 46.

## 6.1. Recommendations

### **BiH judiciary:**

- » Consider the influence of gender on: 1) day-to-day court operations; 2) procedural practices; and 3) judicial decision making during revision of the Justice Sector Reform Strategy.<sup>41</sup> Use this report as a guide to identify and address specific issues related to the influence of gender in the judiciary.

### **BiH courts and prosecution offices:**

- » Develop in-house policies on sexual harassment and discrimination that contain a broad definition of sexual harassment as well as a detailed description of common offending behaviours. Develop and institutionalize mechanisms for reporting, investigating, and enforcing policy. Provide annual sexual harassment training and awareness-raising activities for all court employees and judicial professionals as a component of policy implementation.

### **BiH law chambers:**

- » Provide members with regular, relevant, and up-to-date domestic and international literature in the fields of gender- and sex-based discrimination, domestic violence, sexual assault, child abuse, and family law (child custody, alimony, child support, and parental rights) related to evidence-based best legal practices.

### **Entity Centres for Judicial and Prosecutorial Training**

- » Develop and implement basic training on the impact of gender on judicial operations, procedures, and decision making. Develop advanced training on the influence of implicit bias specifically, including introducing strategies to increase judicial impartiality.

### **BiH law faculties:**

- » Organize specialized clinics for law students on the influence of gender in legal practice and decision making. Provide law students with opportunities to review cases in which gendered components are especially relevant, including those involving sexual harassment, domestic violence, sexual assault, child abuse, child custody awards, and maternity and paternity leave.

### **High Judicial and Prosecutorial Council of BiH**

- » Lead are view to identify the availability of material support - including psychological services, information and referral, assistance navigating the judicial system, and video-link technology for court proceedings - available to victims/witnesses of sexual assault, trafficking, and child abuse. Identify strategies to comprehensively increase the availability of material support throughout the BiH court system and implement changes within a specified timeframe.

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<sup>41</sup>See: "Bosnia and Herzegovina Justice Sector Reform Strategy 2008-2012" (Sarajevo, June 2008); and Bosnia and Herzegovina Ministerial Conference, "Action Plan for Implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina for the Period 2009-2013 (fourth Revised)" (Ministerial Conference of Bosnia and Herzegovina, Sarajevo, January 2013).

**Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina**

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- » Review and update the Codes of Ethics for Judges and Prosecutors in order to integrate gender considerations, including guidance on sexual harassment as well as strategies for ensuring a fair, transparent, and impartial judiciary as it relates to the issue of gender.

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## Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina

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