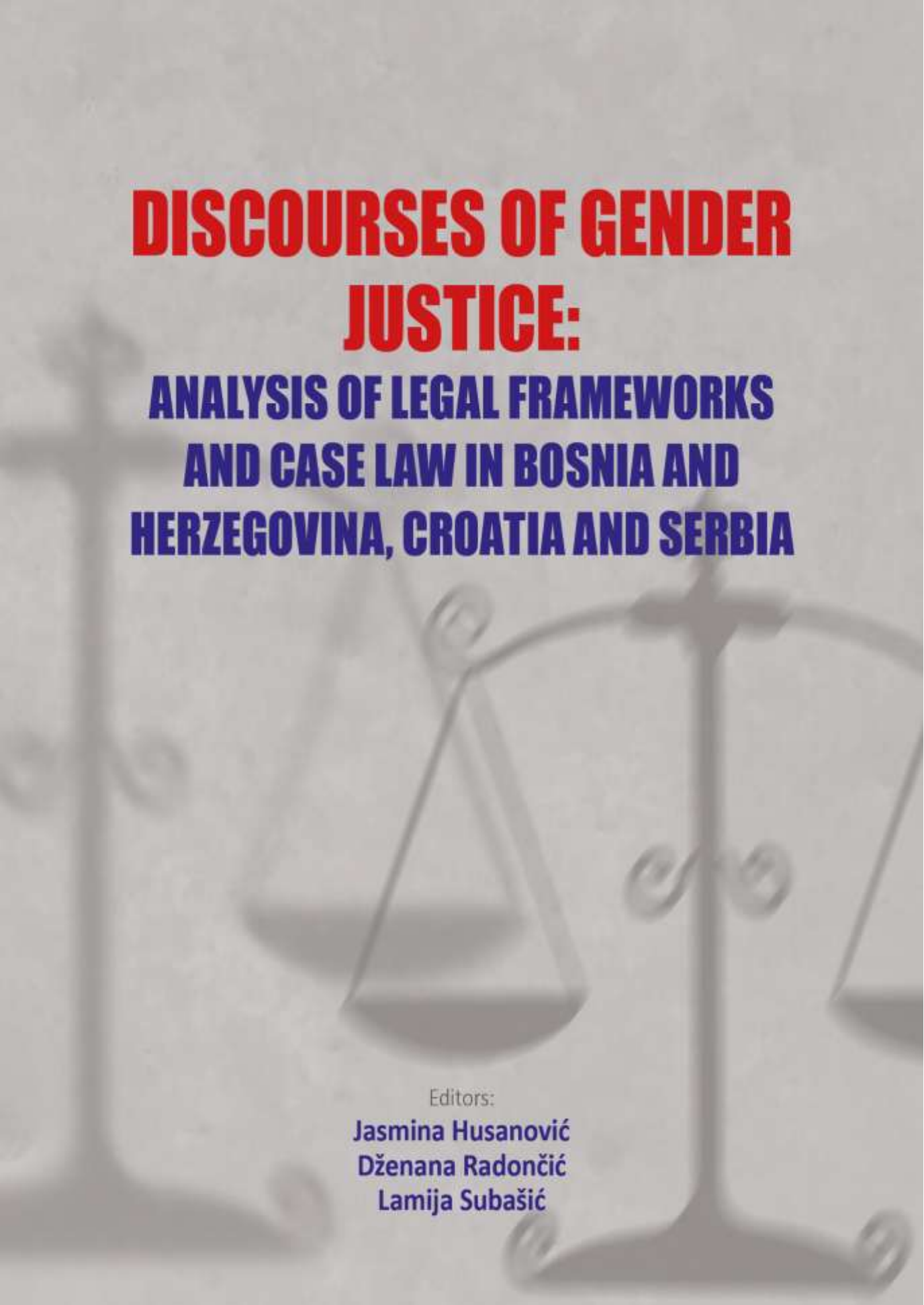
DISCOURSES OF GENDER JUSTICE:

ANALYSIS OF LEGAL FRAMEWORKS AND CASE LAW IN BOSNIA AND HERZEGOVINA, CROATIA AND SERBIA



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Publisher:

TPO Foundation, Sarajevo

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Layout/Cover Page:

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Print:

Amos Graf d.o.o.

Sarajevo, 2024.

This publication is financed by the Government of the United Kingdom under the University and Gender Mainstreaming – UNIGEM Project. Views expressed in this publication do not necessarily reflect the views of the UK Government.

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Introduction – Editors' Note

Discourses of Gender Justice: Analysis of Legal Frameworks and Case Law in Bosnia and Herzegovina, Croatia, and Serbia emerged as a result of a two-year research endeavour under the University and Gender Mainstreaming (UNIGEM) Project, implemented by the TPO Foundation from Sarajevo in collaboration with nineteen partner universities in Bosnia and Herzegovina, Croatia, and Serbia. The research began with an invitation to all members of the academia – including professors, doctoral students, and scholars in the fields of humanities, social sciences, and especially law – as well as activists engaged in combating gender-based violence, to critically analyse criminal judgments in cases of gender-based violence, with a focus on sexual violence, domestic violence, and femicide. The research that led to this collection was initiated to better understand and address deeply rooted gender stereotypes that often shape judicial decisions. Authors from diverse academic and professional backgrounds contributed with papers analysing the criminal prosecution of gender-based violence cases, offering critical insights and recommendations for improving public policies, legal and institutional frameworks, and case law.

The research objectives were focused on examining the complex issue of a gender-sensitive approach to justice, in accordance with the highest international standards. These standards primarily include the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention – the first legally binding and most comprehensive international treaty for combating violence against women and domestic violence. All three countries included in the analysis have signed and ratified the Istanbul Convention. The aim was to explore and understand the challenges in implementing relevant principles, norms, and protocols for the prevention, protection, and prosecution of gender-based violence. To ensure a common empirical corpus for the research, the TPO Foundation requested first-instance criminal court judgments and decisions on legal remedies from the High Judicial and Prosecutorial Council of Bosnia and Herzegovina for the period 2017–2022. The focus was on cases in which women were victims of criminal offences that could be classified as femicide, i.e., murder, sexual violence, and domestic violence, according to the relevant articles of the Criminal Codes of the Federation of Bosnia and Herzegovina, Republika Srpska, and Brčko District. Additionally, trial transcripts for rape cases prosecuted between 2017 and 2022 were requested. In total, 37 courts in Bosnia and Herzegovina provided 292 judgments and transcripts, forming the research corpus for researchers from Bosnia and

Herzegovina, while researchers from Serbia and Croatia independently compiled their own corpus.

The result of this research work is a collection of ten individual and group author contributions by researchers who analyse the criminal prosecution of gender-based violence cases, focusing on three key categories:

1. Femicide – gender-based murder of women perpetrated by men, the murder of a woman because she is a woman, motivated by hatred towards women, as well as a sense of ownership and superiority. Given that the roots of femicide lie in societies and cultures with patriarchal structures where discrimination against women and unequal relations and distribution of power between men and women are prevalent, this collection makes a significant contribution to the much-needed scientifically grounded monitoring and analysis of femicide in the region.

2. Sexual violence – any sexual act, attempt to engage in a sexual act, unwanted sexual comment, or proposal directed against a person and their sexuality, which may be committed by another person regardless of their relationship with the victim or the situation in which they find themselves, characterised by the use of force, threats, or blackmail to endanger the well-being and/or life of the victim or those close to them.

3. Domestic violence / family violence / intimate partner violence – a criminal offence and a widespread social issue – refers to any act of physical, sexual, psychological, or economic violence occurring within a family or household, or between former or current partners, regardless of whether they have shared a household. This category also includes intimate partner violence, which, although not classified as domestic violence in all countries of the region, shares many characteristics with this form of gender-based violence.

The legal aspect of the research focused on analysing various factors that influence the prosecution of gender-based violence cases. The research examined the characteristics of the committed criminal offences, with particular attention given to the relationship between the victim and the perpetrator, the perpetrator's motives, and intent. Additionally, both substantive legal aspects, such as criminal legislation and strategic documents, and procedural legal aspects, such as the classification of the offence, the conduct of professionals, the course and dynamics of the proceedings, the analysis of judgments, penal policy, and aggravating and mitigating circumstances, were also explored. The research also covered the support and

protection of injured parties in criminal proceedings, as well as awareness-raising measures, improving women's awareness, gender sensitisation, and achieving a gender-sensitive approach to justice for victims of gender-based violence.

The section dedicated to exposing gender stereotypes in criminal court proceedings related to sexual violence includes four papers that provide an in-depth analysis of how these stereotypes influence judicial decisions and the prosecution of sexual violence cases, particularly rape, as the most severe form of sexual violence that directly attacks the victim's physical, psychological, and sexual integrity and autonomy. It is important to note that the legal definition of rape is not harmonised across the countries included in the analysis. Currently, only Croatia and the Brčko District of Bosnia and Herzegovina have a definition of rape based on the concept of consent, which is considered an international standard in accordance with the provisions of the Istanbul Convention.

The first paper *Deconstructing Gender Stereotypes Related to Rape Crime in the Jurisprudence of the High Criminal Court of the Republic of Croatia*, by Darija Mrljak, analyses 20 decisions of the High Criminal Court in Zagreb, focusing on how gender stereotypes influence court judgments. The author thoroughly examines judicial discourse, the assessment of victims' character and credibility, and the evaluation of mitigating and aggravating circumstances in judgments. The paper provides an in-depth analysis of case law and highlights necessary reforms to achieve gender justice in criminal proceedings concerning rape, highlighting the importance of continuous education for judicial professionals as a key factor in eliminating deeply rooted patriarchal patterns that continue to affect the adoption and reasoning of judicial decisions in these cases.

In the paper *Interpretation of the Crime of Rape in the Case Law of the Higher Court in Novi Sad – Myths and Gender Stereotypes*, Dragana Pejović analyses how myths and gender stereotypes influence the decisions of the Higher Court in Novi Sad in rape cases. The analysis reveals that rape myths and gender stereotypes are present in the interpretation of the legal definition of rape, often emphasising the victim's resistance as a crucial element of the offence. The paper also highlights various forms of coercion and violence used by defendants, such as the use of physical force, threats, and the use of weapons, which further hinder victims' ability to resist. This demonstrates that current legal practice continues to downplay the severity of rape, indicating an urgent need to amend the legal definition of rape in accordance with the Istanbul Convention.

The next paper, *The Offense of Rape in the Practice of Bosnian-Herzegovinian Courts*, by Martina Primorac, examines case law in Bosnia and Herzegovina, with a particular focus on the influence of gender stereotypes on judicial decisions. The author analyses available court judgments to map the current state of case law, explore how the judicial system responds to gender stereotypes, and determine the extent to which case law aligns with theoretical perspectives. The research findings indicate that courts in BiH often impose minimum statutory sentences for rape offences, raising concerns about the effectiveness of penal policy. Through a critical analysis of existing legal definitions, the paper highlights the need for legislative intervention to achieve full harmonisation with international standards.

The paper by Anita Dremel and Barbara Herceg Pakšić, *Gender Stereotypes and Rape Crime*, analyses the case law in rape cases at the County Court in Osijek (2018–2022) to investigate the influence of gender stereotypes on perception and adjudication. This research, which examines local legal practices, draws on broader transnational perspectives on gender stereotypes. Grounded in a theoretical review of the development of legislation and legal practice related to criminal offences against sexual freedom, the empirical analysis of ten judgments focuses on the gender structure of perpetrators and victims, the characteristics and circumstances of the offence, and the presence of gender stereotypes. The authors' findings reveal that case law often results in lenient sentencing where stricter penalties are warranted and that rape trials reflect social perceptions of gender relations and sexual violence, emphasising the need for a holistic approach that integrates legal analysis with sociological insights.

Three papers included in the second section analyse the influence of gender stereotypes on penal policy through the process of issuing and reasoning judicial decisions in criminal cases of gender-based violence.

The paper *Judicial Decisions on Victims of Violence in the Shadow of Gender Stereotypes*, by Nevzet Veladžić and Anita Mujkić, examines the influence of gender stereotypes on judicial decision-making and the additional stigmatisation of victims. The paper demonstrates that while Bosnia and Herzegovina's legal framework contains relevant provisions for combating domestic violence, the enforcement of these laws is inadequate. In practice, ambiguities and inconsistencies in certain legal provisions result in legal uncertainty. The authors recommend the use of gender-sensitive language and the avoidance of assumptions about behaviour based on gender. They also emphasise the need for inter-institutional cooperation and raising public awareness about domestic violence and available support mechanisms for victims.

A group of authors – Adem Olovčić, Davor Trlin, Anes Makul, and Hrustan Šišić – focuses on legal interpretations and discourses in cases of gender-based violence judgments in Bosnia and Herzegovina in their paper *Discursive (In)Justice: An Analysis of Mitigating and Aggravating Circumstances in Court Rulings on Gender-Based Violence in Bosnia and Herzegovina*. Through an analysis of 232 conviction judgments, the paper examines contradictions in the judicial process, particularly differences in the interpretation of relevant circumstances between first-instance and second-instance courts. The findings highlight the complexity of judicial discourse in Bosnia and Herzegovina and the need for a more consistent implementation of judicial principles in practice.

The co-authored paper by Neira Raković and Nermin Šehović examines two court decisions of the Cantonal Court in Bihać for rape cases. Drawing from their daily direct contact with victims of various forms of violence, especially gender-based violence, the authors identify potential improvements in court proceedings to ensure a gender-responsive approach to justice. Otherwise, as illustrated by the cases in this paper, problematic practices will persist. Specifically, the authors highlight the troubling tendency of courts to consider factors such as the victim being a minor, the trust relationship between the victim and the perpetrator, the victim being a virgin, and the victim's psychological state not as aggravating for the perpetrator of rape but – as in the two analysed cases – as mitigating circumstances.

The third section of the collection focuses on judicial responses to cases of femicide as the most severe manifestation of gender injustice and the most extreme form of gender-based violence. It includes two papers.

In the paper *Possibilities to Prosecute femicide Cases in Bosnia and Herzegovina*, author Zlatan Hrnčić examines the possibilities for prosecuting femicide in Bosnia and Herzegovina through an analysis of the country's criminal codes and a qualitative analysis of 246 judgments related to femicide, issued between 2017 and 2022 by 38 courts. The author analyses how judicial authorities apply existing legal solutions, highlighting that while femicide is not explicitly defined as a separate criminal offence, the current criminal codes criminalise murder, including cases of femicide. Moreover, they allow for stricter sentencing in cases where the murder was motivated by hatred toward women and facilitate the prosecution and monitoring of femicide cases.

The paper *Gender-Based Violence in the Context of Femicide – Current State in the Legislative and Legal Framework in Bosnia and Herzegovina* by author Nermin Šehović emphasises that only clear legal regulation can provide an adequate response to gender-based violence and femicide as its most brutal

form. The author argues for a revision of existing laws and by-laws to ensure the full implementation of the Istanbul Convention in Bosnia and Herzegovina, in line with the recommendations of the GREVIO report. On the one hand, the domestic criminal legislation has not provided the expected level of protection for victims. On the other, gender-based violence is inadequately addressed and regulated through certain decisions of cantonal and other governments or through other fragmented and inconsistently applied measures. Instead, the author advocates for a unified state-level response to the issue of gender-based violence.

The final thematic chapter is dedicated to the perspective of survivors and a gender-responsive approach to justice. In their paper *Justice in the Mirror of Domestic Violence Survivors*, authors Sabiha Husić and Zilka Spahić Šiljak provide critical insights into the discourse surrounding the reporting and prosecution of domestic violence through a qualitative analysis of interviews with women who have survived various forms of domestic violence, as well as an analysis of available documentation from competent institutions found in the personal files of women who have survived violence and have been accommodated in safe houses. Grounded in feminist theoretical insights on gender justice, the paper reveals how women survivors of domestic violence perceive and experience the processes from reporting the violence to the conclusion of the case or the final court judgment. It also highlights the impact of sociocultural pressures and the normalisation of violence, which often lead to the internalisation of guilt and shame.

This collection, through its comprehensive review and analysis of legal frameworks and court judgments in Bosnia and Herzegovina, Croatia, and Serbia, represents a significant scholarly contribution to understanding gender justice discourse within the judiciary. It contributes to a better understanding and elimination of gender stereotypes in judicial systems, and to ensuring a more just and inclusive approach to (gender) justice for victims of gender-based violence. The collection will also contribute to the quality of public discourse and action on pressing issues such as femicide, sexual violence, and domestic violence – phenomena that are alarmingly on the rise both in the countries analysed and globally. It serves not only as a call for further research on gender-based violence but also as a demand for concrete, gender-responsive action by relevant authorities, all experts and professionals involved in ensuring gender-sensitive justice. By emphasising the necessity of demonstrating zero tolerance for violence against women and domestic violence, this collection reinforces the importance of developing a more just and inclusive judicial system grounded in the principles of gender justice.

An important challenge for future research lies in understanding the linguistic, cultural, and political perspectives of case law, with a particular focus on the characteristics of courtroom discourse. This involves analysing how a specific conversational event unfolds spatially in the public sphere (in the courtroom), where multiple participants engage with distinct social and discursive roles. Further analysis should be directed toward examining discursive strategies used during judicial communication, particularly in interactions between judges and other participants in court proceedings during the court hearing with a special emphasis on the dynamics of interactions between judges, defendants, and victims/injured parties. This would enable a more effective approach to analysing judicial discourse by identifying the social power dynamics among participants in court proceedings and examining how such interactions reflect the practical implementation of legislative provisions on discrimination, equality, and related issues. It would also provide insight into how social power is interpreted within the courtroom. We hope that the papers presented in this collection serve as a valuable foundation and guide for future scholarly research in this area.

I. EXPOSING GENDER STEREOTYPES IN CRIMINAL COURT PROCEEDINGS RELATING TO OFFENSES OF SEXUAL VIOLENCE

Darija Mrljak

Deconstructing Gender Stereotypes Related to Rape Crime in the Jurisprudence of the High Criminal Court of the Republic of Croatia

Abstract

The article analyses 20 decisions of the High Criminal Court in Zagreb in rape crime cases under Article 153 and the aggravated form of this criminal offence under Article 154 of the Criminal Code of the Republic of Croatia in the period from the establishment of this second-instance court on 1 January 2021 to 31 December 2023. The purpose of the analysis is to identify positive aspects, as well as shortcomings, in terms of procedural protection provided to victims of these forms of sexual violence. The analysis of judicial discourse also shows how the victim's character and credibility are assessed, and how mitigating and aggravating factors are valued in criminal proceedings. This research sought to verify the extent to which gender-sensitive language was used in court arguments and whether gender stereotypes exist in the arguments of the parties (especially the defence) and in the analysed court judgements, and whether the second-instance court explicitly deconstructs them in the operative part of a judgement. The analysis is supplemented by the conclusions of the first evaluation report of the Expert Group on Action against Violence against Women and Domestic Violence for Croatia from September 2023, and relevant literature.

Keywords: High Criminal Court in Zagreb, analysis of judicial discourse, rape, crimes against sexual freedom, gender stereotypes

1. Introduction

"Inequality between women and men, negative attitudes towards women, discrimination, sexism and misogyny are in the roots of sexual violence (Mamula, 2020). This is a key reason why sexual violence is surrounded by so much bias and stereotypes, most of which are aimed at shifting responsibility from the perpetrator to the victim, as well as minimising the significance and consequences of experienced violence."

The quoted section is taken from the legally non-binding Protocol of conduct in cases of sexual violence (hereinafter: Protocol, 2023, 3), which entered into force in the Republic of Croatia (hereinafter: RC) on 7 September 2023. However, a critical analysis of the Protocol discourse, which was

amended to ensure "immediate, compassionate, gender- and culturally sensitive and comprehensive assistance and support to the victim from all competent institutions" (2023, 8), reveals that it minimally addresses the issue of gender stereotypes and bias in these highly gendered criminal offences. The Protocol only mentions once that police officers should avoid biases about rape when collecting information from victims of sexual violence (2023, 14), but this obligation does not explicitly extend to other competent criminal justice actors, such as public prosecutors and judges. This poses a challenge, as previous research into national practice (more on this in Chapter 2 of the paper) has shown that deep-rooted gender stereotypes persist not only within the police force but also among judicial officials. It is of particular concern that the preamble of the previous version of the Protocol elaborated in detail specific gender stereotypes and myths surrounding rape and explicitly deconstructed them (Željko, 2019, 65-66).

As early as the 1990s, there was a growing awareness that rape and other crimes against sexual freedom and autonomy as the protected object (Valentiner, 2021, 706) represented a bastion of "(…) sexism in criminal law. In rape, a male standard defines the criminal offence committed against women, and male standards (…) are used to evaluate the behaviour of female victims. Moreover, since the rape crime involves sexual intercourse, laws governing rape inevitably tread the explosive terrain of gender roles, male aggression and female passivity, and our understanding of sexuality." (Estrich, 1993, 159). The victim's behaviour is questioned whenever there is a concern that a woman's behaviour transgresses social and/or gender norms in any way. There is a series of infamous rape judgments (for example, the *Karen Vertido*[1] case) and all of them are based on some false or degrading myths about rape and/or a wrong assessment of the victim's contribution to the rape, i.e. to their own victimisation. Defence tactics for sexual offences during criminal proceedings often focus on the victim's "behaviour prior to the incident, her physical attractiveness, the level and fact of her intoxication, or the existence of any prior flirtation or intimacy with the defendant." (Ellison and Munro, 2009, 202-203).

The Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: the Istanbul

[1] This is a landmark Philippine case from 2010 in which the United Nations Committee on the Elimination of All Forms of Discrimination against Women explicitly recognised for the first time and condemned seven harmful sexist gender stereotypes that had led to an acquittal in a rape case. Following the applicant's legal reasoning, the Committee imposed on the State Parties a duty to combat gender stereotypes, which is followed by another obligation to prevent judgements from being based on gender stereotypes. (Željko, 2019, 11-12).

Convention) aims to ensure that "the interpretation of rape laws and the prosecution of rape cases are not influenced by gender stereotypes and myths about men and women's sexuality" (Council of Europe, 2011, para. 192). At the same time, the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) gradually and increasingly points to the harmfulness of gender stereotypes, and in the context of sexual violence, the judgement of J. L. v. Italy from 2021 (application no. 5671/16) is of critical importance, in which the ECtHR pointed out that "it is essential that judicial authorities avoid reproducing sexist stereotypes in court decisions" (para. 141) and found that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) had been violated. In this specific case, under the undisguised influence of a series of rape myths along with moralising remarks about the "provocative and vulgar attitude (...) and lascivious dance" (para. 42) of the alcoholised and bisexual twenty-two-year-old victim, the second-instance court acquitted the defendants accused of a gang rape. The ECtHR is aware of the deterrent effect of such a sexist decision on the victim, because it undoubtedly "exposes the victim to secondary discrimination", and a broader effect because it "discourages the victims' trust in the justice system" (para. 141). Although the ECtHR can be criticised for not finding a violation of Article 14 of the ECHR, which prohibits discrimination (Željko, 2022, 345-346), the judgement is important because it "shows that harmful attitudes and bias about women's roles, sexuality and behaviour continue to haunt the legal discourse and their direct and indirect impacts on women's access to justice." (Renzulli, 2023, 173).

Owing to years of tireless efforts of legal feminists, such as Catherine McKinnon, many seemingly intractable inconsistencies in the criminal legislation governing rape around the world have been exposed (Greer, 2018, 32), and the necessary changes to the legal framework have arisen especially after the emergence of the #MeToo movement and its regional variants such as #Spasi me and/or #Nisam tražila in the Western Balkans (Željko, 2019, 63).

In the last decade, the Republic of Croatia has certainly been characterised by normative optimism in the criminal justice sphere related to the reconceptualization of crimes against sexual freedom with an emphasis on consent, [2]which has placed Croatia among the most progressive countries in

[2] The amendment to the Criminal Code from 2019 ("Official Gazette", No. 126/19) criminalises sexual intercourse or an equivalent non-consensual sexual act as the basic form of rape in Article 153 (1). Therefore, Croatia belongs to an increasing circle of member states of the Council of Europe that introduced the lack of victim's consent as a constituent element of the rape crime definition. The aggravated form of this crime is characterised by the use of force or threat, which is regulated by paragraph 2 of the same Article.

that area (Maršavelski, Moslavac, 2023, 319). This is also commended in the first evaluation report of the Expert Group on Action against Violence against Women and Domestic Violence (hereinafter: GREVIO) from September 2023, tasked with monitoring and assessing progress in the implementation of the Istanbul Convention. However, GREVIO notes that sexual crimes are underreported and prosecuted in Croatia, which stems from the "lack of knowledge and understanding of the dynamics of these criminal offences and the impact of trauma on victims." (2023, 55). GREVIO further notes that when a sexual violence case is brought before the courts, mitigating circumstances are often applied in favour of the perpetrator, where the victim's behaviour is stereotypically interpreted as contributing to the crime. In this respect, GREVIO notes "with concern" that the defendant's marital status and parenthood are also often taken as a mitigating circumstance, as is their participation in the Homeland War (2023, 55). Referring to research from the Ombudsperson for Gender Equality, GREVIO expresses concern because "lengthy criminal proceedings expose the victims to re-traumatisation and the sentences imposed on perpetrators fall short of being dissuasive." (56). GREVIO for Croatia concludes, inter alia, that prejudices and patriarchal attitudes still seem to prevail among many in the criminal justice system, resulting in a series of adverse consequences for victims (Petričušić, 2023a, 3).[3]

Encouraged by the specific conclusions of the GREVIO evaluation report and persistent demands of the non-governmental sector, the Government of the Republic of Croatia proposed a comprehensive amendment to the legal framework governing gender-based violence issues. An interdisciplinary Working Group worked on amendments to the set of relevant laws from September 2023, which included female representatives of civil society for the first time with extensive practical experience working with victims of these crimes. At the time of writing this paper, extensive amendments to a series of laws are yet to enter into force,[4] and will therefore

[3] The European Court of Human Rights warns about the above, referring to the conclusions of the GREVIO report in para. 65 of a recent judgement in Vučković v. Croatia (application No. 15798/20, 12 December 2023). In this case, the appellate court commuted a prison sentence to community service for lewd conduct crimes against a victim at the workplace "without providing appropriate reasons or taking into account the victim's interests" (para. 64). The ECtHR further notes that such an approach by national courts may be an indicator of leniency in punishing violence against women instead of conveying a strong message that violence against women will not be tolerated, which may discourage victims from reporting such crimes (para. 65) and finds that Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms were violated.

[4] A complete amendment to the legal framework governing gender-based violence in the Republic of Croatia entered into force on 2 April 2024 (for example, relevant provisions of

not be subject to further consideration. However, it should be noted that, in the domain of sexual violence, the legislator proposed tightening of the criminal framework in the sphere of sexual offences (Maršavelski, Moslavac, 2023, 319).

2. Existing Research

The most comprehensive legal feminist research on rape jurisprudence in the Republic of Croatia to date was conducted by Radačić, who argued that a major problem was related to "gender stereotypes and myths about rape that are present when assessing force, consent, and evidence, and in the sentencing phase when valuing mitigating and aggravating circumstances" (2012, 119). Maričević et al. analysed different victimological factors of rape seeking to refute existing classic myths and stereotypes about rape and rape victims and perpetrators (2018).

In an empirical study conducted by *Ženska soba* (Women's Room) research team in 2021 and 2022, the views of judicial officials and police officers who work with victims of gender-based violence on a daily basis were explored. All interviewed groups emphasised similar problematic aspects of victim treatment. A police officer pointed out that "police officers are still not sufficiently sensitised to protect the victim's dignity, and they often interfere with something that has nothing to do with the criminal offence, and the victim is still often blamed that she contributed to the criminal offence herself" (53). Some public prosecutors also state that victims are asked inappropriate questions during questioning and generally emphasise inappropriate behaviour towards victims when responding (comments, mocking, etc.), noting that defendants and defence attorneys behave in this manner. Ivičević Karas and Burić note that public prosecutors "see potential solution in additional training of judges who should be the first to protect the victim from unnecessary questions of defence attorneys and defendants and ensuring that individual cases are assigned to those judges who have the affinity and capacity to deal with the nature of certain criminal offences." (53). Respondents also highlighted the problem of multiple interrogations of victims – by the police, at the public prosecutor's office and in court, "possibly more than once" (53).[5] For this reason, they believe that the training for judges

the Criminal Code and the Criminal Procedure Code were amended, "Official Gazette", no. 36/24).

[5] In June 2023, the media published a story of an alleged rape victim, who said that she testified as many as 7 times during the criminal proceedings (which, by the way, have not been finalised yet). According to media reports, the public prosecutor appealed against an acquittal in this case, and it is about to be decided on by the High Criminal Court. More information in Vlašić article (2023, 34-35).

should emphasise that "re-examination further traumatises the victim and that easily granting such requests of the defence goes against the victim's rights..." (53).

Following the results of previous research in the context of sexual offences, the Ombudsperson for Gender Equality repeatedly emphasises in her annual reports "the insensitive approach to victims of this criminal offence, lack of trust in victims' allegations, poorly and/or inadequately conducted investigations, and rape myths and stereotypes that continue to plague certain parts of our judiciary." She proceeds to clarify this by noting that "(…) on several occasions in previous years, she received complaints from women about insensitive police investigations that ended in favour of rape suspects, sometimes also because the investigations were limited to examining the victims' sexual habits and behaviour in previous relationships. The Ombudsperson also received complaints regarding the DORH's (State Attorney's Office of the Republic of Croatia) dismissal of criminal reports of rape and/or due to lenient sentences for perpetrators, acquittals and ultimately reductions in sentences for perpetrators imposed by higher courts." (2023, 104).

It seems that the legislator has become aware of some of these problems existing in practice for years, and the amendments to the Law on Courts stipulate that, on an annual schedule, domestic violence cases will be assigned to judges who have a "sense and inclination to work such cases, who shall regularly attend professional training in this field."[6]

3. Results of Research into the Jurisprudence of the High Criminal Court

3. 1. Statistical Framework of the Analysis

The research sample of this research comprises 20 decisions of the High Criminal Court rendered from 1 January 2021 to 31 December 2023 for the criminal offence (hereinafter: CO) of rape under Article 153 and the criminal offence of aggravated rape under Article 154 of the Criminal Code,[7] more

[6]Government of the Republic of Croatia, Article 10a of the Proposal for the Law amending the Law on Courts, 16 November 2023 This amendment entered into force on 2 April 2024 as part of the legislative package mentioned in the introductory chapter herein ("Official Gazette", No. 36/24).

[7] The research corps was obtained using the random sampling method by searching the jurisprudence of the High Criminal Court available on the website of this two-instance court: https://sudovi.hr/hr/vksrh/sudska-praksa/sudska-praksa (accessed on January 5, 2024) and through the IUS-INFO jurisprudence web browser: https://www.iusinfo.hr/. The following judgements were analysed: Kžzd-1/2021, Kžzd-6/2021, Kžzd-8/2021, Kžzd-34/2021, Kž-

precisely a total of 17 final judgements and 3 decisions.

A critical analysis of the discourse was used to see whether the defence relied on so-called rape myths, and at the same time, conclusions of the first-instance court regarding perpetrators' guilt, as well as arguments of the High Criminal Court were reviewed through a feminist lens. The research also aimed to review whether judgements examine victims' "contribution" to own victimisation in situations when they did not behave in the way expected from an "ideal" rape victim, which is specific for the analysed criminal offences. It has already been mentioned that in previous research into jurisprudence concerning the rape crime and other crimes against sexual freedom, it was established that the victim herself is often questioned in trials, which contributes to her revictimization and ultimately to the victims' (and general community's) mistrust in the judicial system. Among other things, it will be assessed whether the jurisprudence of the court in question includes a "superficial and contextually insensitive valuing of mitigating and aggravating circumstances in the individualisation of the sentence" (Profaca, 2023, 4).

Out of 17 analysed judgements, one was an acquittal, and others were convictions. In total, three decisions were made by the juvenile chamber, including the aforementioned acquittal.

This research also confirms the results of previous research that rape is a gender-based crime, given that all perpetrators in the analysed sample were men. In 19 cases, victims were female, while in one case, a homosexual man was raped. In all judgements that reached a final epilogue at the second instance, prison sentences ranging from 1 to 10 years were imposed and/or upheld (10 years for a concurrence of criminal offences), while in case Kž 129/2021, the High Criminal Court altered the first-instance alternative sanction of community service into a one-year prison sentence. This analysis also confirmed that "most of the violence against women is actually perpetrated by their loved ones", i.e., spouses, common law partners, current or former partners (Ljubičić, 2023, 230), family members (husband's brother), or acquaintances. Rape is often preceded by a spiral of other forms of gender-based violence (Kž-203/2022, Kž 400/2021) or defendants are special recidivists (Kž-161/2022, Kž-381/2022). In none of the analysed cases does the factual situation correspond to the imaginary "real" rape, or as the preamble to the 2018 Protocol reads, it is the rarest form of rape in practice, characterised by "(…) an unknown perpetrator, violence that occurred outside

72/2021, Kž-129/2021, Kž-230/2021, Kž-277/2021, Kž-283/2021, Kž-285/2021, Kž-370/2021, Kž-375/2021, Kž-400/2021, Kž-161/2022, Kž-203/2022, Kž-283/2022, Kž-341/2022, Kž-381/2022, and Kž-393/2022.

the victim's or perpetrator's home (for example, a street, park, porch), involving the use of force and/or weapons, and serious physical injuries to the victim."

It should be added that a judgement explicitly mentions that two victims are particularly vulnerable. In the first case, citing the findings and opinion of an expert witness, the trial chamber finds that a victim is vulnerable because she is a "mildly mentally retarded person, with visible psychological and physical deficiencies" (Kž-400/2021), but in the second case, upon the prosecutor's allegation that the victim is a person with low cognitive abilities, the trial chamber points out that vulnerability is inherent to the offence referred to in Article 154 of the Criminal Code. (Kž-393/2022). In Kž-381/2022 case, the court also rejected the prosecutor's allegations regarding the vulnerability of a raped homosexual person who was found to be living in a conservative environment. In the Kž-230/2021 case, the question is whether, by imposing a sentence of 4 years in prison, three women judges in the chamber adequately valued the intersectional elements on the part of the rape victim as a person of same-sex orientation and a seeker of international protection who was staying in a shelter in tempore criminis; it should also be noted that the defendant is an asylum seeker. The subject of a separate analysis could be whether the victim's multiple vulnerability is adequately valued in such cases with regard to the standards developed in the ECtHR's jurisprudence.

3.2. (De)construction of Rape Myths as a Counterbalance to Stereotypical Defence Arguments

In Kž-203/2022 case, the common-law partner insisted in the criminal proceedings that the victim had falsely accused him, emphasising her promiscuity and immorality. The defendant said that the victim's statement was not credible, and victim blaming was evident from his description of her as a person of "questionable moral values". He also criticised her for the alleged "fact that during the incriminated period she was in a romantic relationship with J. B., but also with other men." According to the trial chamber of the High Criminal Court, the allegation that the victim had previously reported him for other criminal offences, but not for criminal offences against sexual freedom is not a circumstance indicating that her statement is untrue. The court decision reveals that the victim grew up in an extremely dysfunctional family, which is evident because during the proceedings she stated that her father raped her sister, which the defendant vaguely used as another argument for his claims about false accusation. In this judgement, the Court decisively deconstructs a number of rape myths, noting that "some recent events related to criminal offences against sexual freedom, rape crime in particular, indicate that due to the defamatory nature of this

criminal offence and all potential inconveniences that could arise from it, as well as the question of whether they will be believed at all, women as victims of this offence are very reluctant when it comes to reporting the perpetrators of these offences, as the victim herself stated. Therefore, the lapse of time from the offence perpetration to the time of filing a criminal report for that offence is not a circumstance that should automatically - a priori - be interpreted to the detriment of the victim and the credibility of their testimony, because perpetrators often commit these crimes counting on the fact that the victim will not file a criminal report due to all aforementioned circumstances (11.11.). The High Criminal Court agrees with the first-instance court's assessment that the amount of time that elapsed between the crime commission and filing of the criminal report can be attributed to the following "objective factors, namely the victim's reduced intellectual capacities and low education (she dropped out of school in the seventh grade of elementary school), as well as the worldviews of her environment and limitations arising from the patriarchal patterns of that environment regarding the position and role of women in marriage." In another appeal, the defendant, the victim's husband, referred to the fact that the victim did not file the report on the same day but on the next day (Kž-277/2021), and believes that the victim falsely reported him under the influence of a person with whom she was in a romantic relationship during the incriminated period, who allegedly manipulated her. The High Criminal Court remanded case Kž-370/2021 for retrial because the time of reporting was also challenged at first instance, and because of the "unrealistic and unacceptable position of the first instance court that the initial consent to sexual intercourse cannot be revoked, which directly contradicts the defined protective object of this group of offences." The deprivation of the victim's right to change her decision during the sexual intercourse was rebuked by the appellate court, which emphasised that it was dismayed from the perspective of "life and law" by the unacceptable reasoning of the first-instance court.

False accusation is a recurring motif in case Kž-285/2021, in which the defendant accused of attempted rape rationalised that "the revenge of abandoned women who are still in love is the worst." Also, in case Kž-375/2021, the defence tactic was to portray the victim as a "skilled manipulator." In this case, the victim was raped by her husband's brother, and the judgement empathetically recognises in many ways that this is an extremely patriarchal and conservative environment, in which "the family pact prevails, where even incidents such as this one are to be kept "within the home", regardless of their seriousness and severe consequences suffered by female members of the family (primarily the victim, of course, but also the defendant's wife, who is expected to forgive and continue living with the defendant)."

In Kž-129/2021 case, the defence argues that the report was false because there were no injuries. However, in a case involving a sexual act equivalent to rape which was perpetrated in a club, the HCC does not find it relevant that "according to medical documentation (...) no marks were found on the injured party's genitals because the expert witness, whose findings and opinion were accepted by the parties without objections, decisively stated that marks could not have remained on the injured party's vagina given her age (36) and the fact that she is a mother of one, and that marks could only exist if it was a girl." Also, this expert witness said that female genitalia can be penetrated by another person's hand while two people are standing, both from the front and from the back." It was in this case that community service was ultimately converted into a one-year prison sentence, and the HCC recognised that the victim had already been stigmatised in her environment for reporting the crime.

In most cases, the defence actively questioned the credibility and truthfulness of the victim's testimony. In response to the defence's claim that the victim did not tell the details of the rape crime to her friend and mother, and that she told the doctor that she had fallen, the HCC in para. 9.2. of judgement Kž-285/2021 explains that "it is normal and common for rape victims to feel discomfort and shame and avoid talking about it, even when necessary, so it is quite understandable that she did not mention this to the doctor whom she visited in order to have her head, i.e., injuries examined."

In Kž-283/2021 case, the only first-instance acquittal for a rape crime was upheld. The appellate court agreed with the first-instance court that the unreliability of the victim, who is deaf, stems from certain inconsistencies in her two statements regarding, for example, whether she was wearing shorts along with her underwear and whether the defendant moved or removed her panties. Both courts question the victim's behaviour, who sent photos of herself trying on clothes in a store to a friend the day after the aggravated crime, while the public prosecutor correctly points out in the appeal that "it is not uncommon for victims to continue with their daily activities and routine, trying to suppress the trauma they experienced." There is also some moralising in relation to the fact that the victim lived with the defendant in the same apartment after the alleged incriminating incident. The conclusion of both courts that the above circumstances justify an acquittal is extremely questionable, especially in view of numerous studies confirming that highly traumatic events such as rape significantly impair the victim's ability to recall and talk about details of the criminal offence they wish to suppress (Smith and Skinner, 2017, 459).

In case Kž-393/2022, a particularly vulnerable person was raped, and the defence attorney questions the fact that the victim came to the scene voluntarily, insinuating that she consented to sexual intercourse. This is the only case with eyewitnesses, but the defence downplays their concurring testimony, noting that "due to their age and inexperience, they incorrectly perceived the nature of the sexual intercourse, because they are unfamiliar with the concept of "rough sex" and they confuse it with violent sex." It is commendable that the HCC finds these defence allegations irrelevant and unacceptable.

The defence teams in at least three cases (Kžzd-8/2021, Kž-129/2021, Kž-393/2022) evidently still express suspicions if the victims' active resistance was absent, but the youth chamber in Kžzd-8/2021 explicitly rejects this argument, noting that "for a rape crime to exist, neither the legal description of the offence nor the jurisprudence require the victim's resistance, but it is sufficient that she clearly expressed her non-consent to sexual intercourse, and her resistance was absent either due to a threat or the use of force." The HCC is more specific in para. 9.16. of judgement Kž 129/2021, explaining in detail how "the victim's physical resistance to a perpetrator of the rape crime, depending on the situation, physical strength of the perpetrator, as well as the psychological and physical predispositions of the victim herself, can be manifested in very different ways, from the victim slipping away or pushing the perpetrator away, or trying to free herself from his physical grip, as the injured party did in this case, to stronger physical resistance to the force used by the perpetrator. In this context, this court does not accept the position of the appellant, who points out in the appeal that he did not use force against the victim, given that the victim did not physically resist him by e.g. bitting his shoulder, hitting him with a bottle she was holding or kicking him in the groin." Nevertheless, it would be enough if the HCC repeated the arguments from the previously analysed judgement, because in a case of the criminal offence of rape, the emphasis should be on the absence of consent, and not on the (non)existence of victim's of active resistance.

Several cases point to the victim's alcohol intoxication in tempore criminis (Kžzd-34/2021, Kž-129/2021, Kž-381/2022 and Kž-393/2022). The court in Kžzd-34/2021 notes that "the defendant is also wrong when he points out in his appeal that the sentence is too high and that the defendant's problem with alcohol was not taken into account, as well as the victims' propensity for alcohol abuse that would 'contribute to bad endings with their lifestyle'." The HCC unequivocally rejects a similar attempt to overemphasise the impact of alcohol on the victim in case Kž-393/2022, noting that "this second instance court also does not accept the appellant's thesis trying to link the injured

party's described reaction, obviously aware that it is not in his favour, with her alcohol intoxication, and neither the unsubstantiated claim that she was under the influence of opiates, because the alcohol concentration of 1.38 g/kg found in the injured party's blood immediately after the incident is undoubtedly not a state of severe alcohol intoxication which would impair the injured party's ability to control her behaviour."

3.3. Valuing of Mitigating and Aggravating Circumstances

It is generally recognised, especially in feminist legal discourse, that mitigating and aggravating circumstances in judgements are a good example of the need to reflect on underlying cultural prejudices and social narratives that reflect certain power relations (Profaca, 2023, 9).

A specific feature of the Croatian judicial system is that participation in the Homeland War is often, even stereotypically, valued as a mitigating circumstance (Mrčela, 2023, 71), which was also established in the aforementioned GREVIO report. This research noted an inconsistency of the HCC when valuing this circumstance. Namely, while in case Kž-161/2022-8 the court explained that, given the manner and consequences of the crime perpetration, "(…) the data that the defendant participated in the Homeland War in the context of the nature of the criminal offence and the defendant's previous behaviour and his convictions for serious criminal offences cannot be valued as a mitigating circumstance", while in case KŽ-72-2021 the court valued the defendant's participation in the Homeland War and the fact that he was decorated as mitigating circumstances, even though he was a multiple recidivist.

Case Kž-119/2021 in which the defendant's sentence for a rape crime was reduced from two years to one year and 6 months in prison was negatively received by the public. Explaining the sentence reduction, the judgement reads that the first-instance court "unreasonably valued the defendant's lack of criticism in relation to his illegal behavior as an aggravating circumstance, because the presumption of criticism towards a perpetrated crime means prior confession of the crime", in view of the fact that the defendant has the right to defend himself in a way that suits him best and ensures him the most favourable procedural position in the proceedings. The explanation further reads that "that the first-instance court failed to value the perpetrator's participation in the Homeland War and his multiple military decorations as a mitigating circumstance", which caused consternation among the general and professional public." It should be noted that in this particular case, the defendant was clearly a powerful person, given that he held office of a municipal mayor and had previously spoken negatively in the media about the

alleged rape victim during the criminal proceedings, portraying her as a lying prostitute (Željko, 2019, 99). In view of the presented circumstances of the case, it is evident that through stereotypical valuing of the defendant's status of a decorated war veteran as a mitigating circumstance, the HCC completely ignored the issues of power and control that underlie gender-based violence, which GREVIO also points to as a negative practice of the Croatian judiciary (Petričušić, 2023a, 3). Therefore, one should agree with Proface's conclusion that in such judgements, "the perpetrator's status of a – father, husband, war veteran – is used as a nominal value that puts one in a more favourable position in terms of the law, although, in the context of the offence itself, its meaning could be interpreted differently, as an aggravating circumstance. Another problem is that the lack of convincing argumentation when using these categories as mitigating circumstances creates the impression of arbitrariness, especially when it comes to gender-based violence." (2023, 9).

In the aforementioned case KŽ-72/2021, the HCC valued fatherhood of three children as a mitigating factor, although it noted that the children are adult. The said judgement also reads that "the circumstances of perpetration indicate that the defendant's actions during the rape exceeded the degree of humiliation that is inherent in every rape crime." The defendant is a multiple recidivist whose extensive criminal record also includes the criminal offences of child neglect and abuse, domestic violence, and threats, which at the very least makes it questionable to value paternity as a mitigating circumstance for this particular defendant.

The fact that he is a father and breadwinner of six children was also valued as a mitigating factor for a recidivist who "committed criminal offences he was convicted of in the contested judgement during the probation period imposed in a previously revoked final judgement." The next part of the reasoning of judgement Kž-400/2021 seems problematic, as the court claims that the first instance sentence was of a strongly retributive nature and because "the injured party, shortly after the traumatic event, in October 2020, married her long-term partner, which means, as it follows from the expert witness report, that she was positively looking into the future, which improved her mood and focused her attention on future events." The judgement does not specify the defendant's contribution to the fact that the victim "moved on" with her life, and therefore it is not appropriate to value this fact as mitigating. In Kž-285/2021 case involving attempted rape and unlawful deprivation of liberty, the trial chamber valued proper conduct of both male and female defendants before the court, their family circumstances and the fact that they have one minor child each, as well as their previous lack of convictions as mitigating circumstances, and the fact that their offences pose a great social

threat was valued as aggravating.

In the aforementioned case Kž-161/2022, in which the court refused to value war veteran status and the defendant's impaired health as mitigating factors, it did so under the decisive influence of consequences of the crime suffered by the victim, who is also "an elderly person with impaired health, who has suffered from PTSD consequences, the persistence of the defendant who again directed his aggression against the injured party, whom he had tried to kill, as well as members of her immediate family 23 years ago, when he succeeded in killing the injured party's husband." Also, in case Kž-230/2021, the first-instance court's conclusion on the evident effect of the criminal offence on victim's physical and mental state was accepted: "At the same time, it correctly qualified as an aggravating factor the fact that the injured party was handicapped due to an injury to her shoulder and upper arm, that she had told him about her different sexual orientation, and that the criminal offence contributed to further deterioration of the injured party's already poor mental health." The mention of the victim's sexual orientation is justified because the analysis of the judgement pointed to a conclusion that it was a so-called "corrective" rape, with which the defendant further violated the victim's sexual autonomy.

Finally, in judgement Kž-375/2021, the HCC upheld the first-instance judgement imposing a one-year prison sentence, noting that "this sentence sufficiently reflects the defendant's previous lack of convictions and the lapse of time since the commission of the offence, as well as the lack of interest of the victim and her husband in prosecuting the defendant, although it undoubtedly stems from a patriarchal and conservative view of such crimes." Also, it should be emphasised that this is the minimum prison sentence that can be imposed by applying the provisions on mitigating the sanction for that crime. The defendant's suggestion for another type of punishment is unacceptable, especially considering that he perpetrated the crime against a person related to him by blood, undoubtedly counting on the victim's silence."

3.4. Selected Criminal Procedural Issues

In two cases, the first-instance decision was overturned and the cases were remanded for retrial before a different chamber (Kž-370/2021 and Kž-283/2022), while in one case, the youth chamber composed of three judges overturned the first-instance acquittal (Kžzd-1/2021), but without imposing the obligation for the first-instance hearing to be held before a new chamber. The latter decision of the HCC can be reviewed given that in the explanation of that decision, the court described the positions of the first-instance court as "unacceptable" on two occasions, noting that it was related to a "personal

worldview". In this case, it is learned that the victim, who was a 15-year-old child at the time of the alleged crime, was directly questioned by the investigating judge, "and then at a hearing in the presence of the defendant, without an appointed attorney and without special protective measures, such as questioning by an expert in a separate room, without the defendant's presence, with audio and video recording." In addition, the instruction to the first-instance court reveals a series of serious procedural omissions, including the failure to implement measures to protect the vulnerable victim: "One should keep in mind that a criminal report is not evidence in criminal proceedings, so its content cannot be used to assess the credibility of the victim's statement (…) The first-instance court is reminded of its duty to conduct an individual assessment of the victim before questioning, pursuant to Article 43a of the Criminal Procedure Code/08, especially in view of the victim's right to be questioned in accordance with Article 292 (4) of the Criminal Procedure Code/08, as well as the right to an attorney or advisor financed from public budget, if the need for special protection measures was established, also bearing in mind the victim's statement that she would not like the defendant to be in front of the room when she gets out."

The thesis that seven statements of a rape victim (see supra Chapter 2) do not represent a problematic excess in judicial practice is supported by judgement Kž-283/2022, in which the victim testified five times "with some minor differences". "Minor differences", i.e., inconsistencies in the victim's statement, can certainly be explained by the fact that the lapse of time contributes (even in ideal circumstances) to the imperfection of human recollection. An additional problem is that the mental suffering of the victim, who is forced to repeatedly describe the traumatic event in detail, is ignored, which clearly contributes to her retraumatisation.[8] The victim testified twice (at the evidentiary hearing and other hearing) in case Kž-283/2021, which is the only analysed case which resulted in an acquittal. On the other hand, in Kž-129/2021, the victim refused to confront the defendant at the hearing, and, contrary to the defence's allegations, the HCC does not diminish her credibility and is empathetic to the fact that "this action would lead to unnecessary and additional traumatisation of the injured party as a victim of a criminal offence against sexual freedom." The chamber of judges in case Kž-375/2021 attributed the later acceptance of benefits from non-testifying of the victim and her husband to the undoubted influence of "an extremely patriarchal and conservative environment that imposes rules that such events should be hidden and not made public."

[8] More information about multiple testimonies of rape victims in the analysis of jurisprudence previously carried out by Željko (2019, pp. 76-77).

In two cases (Kž-341/2022, Kž-285/2021), it is stated that the victim was instructed to file a claim in a civil lawsuit, with judgement Kž-285/2021 emphasising that "information about the victim's interest in criminal prosecution and in filing a claim in this specific case cannot be considered either mitigating or aggravating, in accordance with the provisions of Article 47 of the Criminal Code/11, because they are not the result of the perpetrator's treatment of the victim and his behaviour after the commission of the criminal offence." Furthermore, the reasoning of the analysed judgements points to a conclusion that security measures were imposed in two cases only, namely the mandatory treatment of alcohol addiction (Kžzd-34/2021) and a restraining order against approaching, harassing or stalking the injured party for a period of 5 years.

In conclusion, this research has shown that judges referred to the Strasbourg jurisprudence in only two analysed judgements. In judgement Kž-285/2021, they did so in the context of considering whether the defendant was treated fairly in the criminal proceedings, more specifically explaining why there was no violation of the principle of equality of arms or principle of hearing both parties, referring to judgements Topić v. Croatia and Horvatić v. Croatia. In Kžzd-1/2021, paragraph 27 of the case Kovač v. Croatia (application no. 503/05) was quoted, in which the ECtHR expressed an opinion that a court may take special protective measures for victims of sexual crimes, especially if the victims are minors. At the same time, with the exception of the ECHR, judgements do not mention the relevant international or regional framework such as the Istanbul Convention, while only one case (Kž-370/2021) mentions that the treatment of a rape victim followed the standardised guidelines of the Protocol. Nevertheless, it is clear that, with the exception of the aforementioned case of Kovač v. Croatia (in which, à propos, the ECtHR found that the defendant's right to a fair trial was violated due to a breach of the principle of equality of arms referred to in Article 6 (3) d) of the ECHR), the HCC failed to refer to a series of landmark judgements of this highest regional court of human rights concerning the ineffective investigation of the criminal offence of rape and/or to those in which it was found that the gender insensitive conduct of criminal proceedings retraumatised victims in multiple ways, starting from M.C. v. Bulgaria to J.L. v. Italy mentioned in the introduction, and to other cases against the Republic of Croatia such as D.J. v. Croatia and J.I. v. Croatia. This definitely confirms the need for training of judges (in) the ever-growing jurisprudence of the ECtHR relating to gender-based violence, which the Republic of Croatia promised in the process of enforcing the judgement in *D. J. v. Croatia*.

4. Conclusion

In relation to previously conducted research into the rape crime jurisprudence, it is commendable that the judicial discourse is not unfamiliar with explicitly raising awareness and deconstructing the patriarchal patterns underlying experienced sexual abuse, which is particularly evident in the meticulous argumentation of the two analysed cases (Kž-375/2021 and Kž-203/2022). However, the acquittal in case Kž-283/2019 for the criminal offence of rape of a particularly vulnerable (deaf and minor) person due to minor inconsistencies in the victim's statement, which was rendered by a three-member chamber composed of three female judges, has an extremely sobering effect and prevents a final conclusion about a (significantly) more gender-sensitive composition of male and female judges at the newly established second instance of criminal justice in the Republic of Croatia.

Considering the constant increase in the number of rape reports and convictions, the author is aware of the modest size of the analysed sample, hoping that the aforementioned data still provide a useful overview of jurisprudence and will therefore serve as a basis for further research.

Finally, it should be noted that the Judicial Academy has, for the first time, introduced topics dealing with the gender perspective in criminal justice into the lifelong education programme for judges for 2024, taking into account the GREVIO recommendations.[9] It is worth hoping that the aforementioned much-needed and thematically diverse training, along with the mentioned specification of the characteristics of judges who should continuously specialise in gender-based violence cases (Petričušić, 2023b), will lead to more gender-sensitive judicial decisions. It is also expected that the specialisation and sensitisation of judicial officials will contribute to better and more effective criminal proceedings in the long run that will empower, and not additionally traumatise victims of sexual and other forms of gender-based violence.

[9] The workshops are as follows: Gender perspective in criminal justice; stereotypes and prejudices with an emphasis on GREVIO recommendations; Psychological violence as a manifestation of domestic violence with an emphasis on the distinction in criminal and minor offence legislation; and The criminal offence of rape with an emphasis on the definition of consent referred to in Article 153 (5) of the Criminal Code (including situations lacking victim's resistance and circumstances that prevent valid consent). More: The 2024 Programme of lifelong professional development of the Judicial Academy, p. 12., available at: https://www.pak.hr/wp-content/uploads/2023/11/ODABRANI_Program-2024.-cjelozivotno.pdf (accessed on 2.12.2023).

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Dragana Pejović

Interpretation of the Crime of Rape in the Case Law of the Higher Court in Novi Sad – Myths and Gender Stereotypes

Abstract

Rape is the most serious form of sexual violence against women. In addition to suffering mental and physical injuries, victims of this crime also face social stigmatisation. While rape is a serious criminal offence against sexual freedom with devastating and long-term adverse effect on women's health, various myths and gender stereotypes associated with sexual violence, particularly rape, may challenge the efficacy of the legislation in practice. This encouraged the author to explore the influence the myths on rape and gender stereotypes have had on the interpretation of the crime of rape. To get an understanding of how courts today interpret the crime of rape, the research will focus on the case-law of the Higher Court in Novi Sad. The objective of the study is to ascertain if and to what extent the myths on rape and gender stereotypes affect the interpretation of the rape crime in the case-law of the Higher Court in Novi Sad, and if so, to which extent.

Keywords: myths on rape, gender stereotypes, crime of rape, women

1. Introduction

Sexual violence against women is a form of gender-based violence defined as violence directed against a woman because she is a woman, or violence that affects women disproportionately (Paragraph 6, General Recommendations 19). Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men (Paragraph 1, General Recommendations 19).

Sexual violence is any sexual act, attempt to obtain a sexual act, unwanted sexual comment or proposal directed against a person and person's sexuality, by any person regardless of their relationship to the victim, in any setting (World Health Organization 2021[10]).

There are several intersectional individual, family and social factors that contribute to sexual violence occurring. The most important ones include:

[10] Hereinafter: WHO

poor education, experience of sexual violence, alcohol abuse, psychological disbalance and law self-respect, exposure to violence in childhood, impeded access to employment for women, regulations that privilege men or ascribe a higher status to men than to women, acceptance of aggression as a trait of "masculinity", norms of "honour" and "fidelity" applied to solely women, understanding violence as a way to control a woman's body and sexuality, low level of gender equality (discriminatory legislation), lenient sanctions for sexual violence (WHO; Ignjatović 2017).

Sexual violence results in a range of enduring physical, mental and social consequences.

The physical consequences manifest in bodily injuries, including genital injuries, unwanted pregnancy, sexually transmitted diseases, including HIV, pelvic pain, urinary tract infections, and many others. The mental consequences include acute stress reaction, posttraumatic stress disorder, depression, anxiety, trouble sleeping, loss of self-esteem, substances abuse, self-harm, and suicidal behaviour. The social consequences manifest in survivors' stigmatisation, and their rejection not only in the community, but also in the family (WHO 2020).

Insufficient attention has been paid to devastating consequences rape survivors experience because the myths on rape and gender stereotypes "have been used to deny, trivialise or justify this form of sexual violence and have commonly contributed to intolerant and hostile treatment of rape survivors" (Genc at. El. 2018: 155).

Use of feminist methodology in the analysis of the legislation and research of the case-law on rape, focusing on victims, revealed that neither the laws nor the case-law have remained immune to the myths on rape. Previous studies conducted in the country, region and worldwide (Memedović 1988; Mlađenović 2020; Radačić 2014; Grozdanić and Sršen 2011; Brownmiller 1975; Burth 1980) that focused on both the legislation and case-law on rape, showed that the myths and gender stereotypes prevail in this domain. Given the above stated, the author sought to examine to which extent the myths and gender stereotypes have affected the recent case-law. We selected several cases of the Higher Court in Novi Sad for this study.[11] The objective of the

[11] The Higher Court in Novi Sad was founded to cover cases from the jurisdiction of the Basic Court in Novi Sad (for the territory of the Municipalities Bački Petrovac, Beočin, Žabalj, Sremski Karlovci, Temerin, and Titel, and the City of Novi Sad) and Basic Court in Bačka Palanka (for the territory of the Municipalities Bač and Bačka Palanka) (the Law on Organisation of Courts, "Official Gazette of RS", 10/2023 and the Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutor's Offices, "Official Gazette", 101/2013).

study is to ascertain if and to which extent the myths on rape and gender stereotypes affect the interpretation of the rape crime in the case-law of the Higher Court in Novi Sad.

The author believes that a deconstruction of the myths on rape and gender stereotypes as such opens the door for understanding and different treatment of the rape, perpetrator and victim. The feminist legal theory plays an essential role in this process, because it provides new critical approaches and new arguments for new legal provisions, with the ultimate goal to change the legal and social context and practice (Mršević 2019: 263). According to Mršević, the feminist methodology, used by feminist legal theorists allows an insight and analysis of "what women are experiencing in the world shaped by the law, more specifically legal institutions speaking the language of the law, which have been dominated by men for millennia" (Mršević 2019: 256). The role of the feminist legal theory, among other things, is also to "draw the attention to ineffective remedies against gender-based violence" (Mršević 2019: 256) and to put forward proposals for improvement of the current legislation and practice.

2. Myths on rape and gender stereotypes

Professionals need to have both theoretical and practical knowledge in a particular field. However, legal professionals commonly believe that it is only the law that has the ability to recognise the truth, while they easily "dismiss the knowledge and experience which cannot be articulated in in legal terms" (Radačić 2014: 20). This attitude of the professional community, on the other hand, opens up the possibility that they may succumb to myths and gender stereotypes without recognising the truth.

One of prevailing myths on rape is that all women want to be raped. It has been supported and promoted by the assertion that "it is impossible to rape any woman against her will" (Brownmiller 1975; Burth 1980). A widely spread belief that a woman can defend herself if she does not want to be raped, is based on the assumption that "a woman, even when she desires to engage in a sexual intercourse, shows shyness and restrain and offers a certain level of so-called usual resistance" (Memedović 1988: 136). The assumption that women show shyness even when they desire to engage in a sexual intercourse has been found in Stojanović's discussions who notes that "verbal resistance does not necessarily imply the absence of consent" (Stojanović 2016: 6). This view cannot be accepted, because, as Radačić states, it transforms the victim again from the subject of knowledge into an object in accordance with the prevailing model of possessive (hetero)sexuality (Radačić 2014: 22). The above opinion also points to different traits ascribed to men and women, with men being autonomous rational subjects who do not lose their autonomy in a

sexual intercourse, while the subjectivity of women disappears during a sexual intercourse (Radačić 2014: 22).[12]

The myth that it is impossible to rape a woman against her will also shape the legal definition of the crime of rape. This is obvious because the coercion is the main element in the determination of the rape crime (Brownmiller 1975; Radačić 2014; Memedović 1988). If rape is not a consequence of coercion, it is assumed that the sexual intercourse was consensual.

The myths on rape rely on the stereotype on a genuine rape. "A genuine rape" is defined as a violent attack by a stranger in a public place, an attack to which a victim offers resistance with all her strength. (Estrich 1986; Radačić 2014).

Results of the research on rape show that the reality is different. Women have been raped by men they know and whom they trust (Radačić 2014), and therefore, women experience rape as a devious attack (Mlađenović 2020). Rapes rarely occur in a public place. On the contrary, they often occur in victims' homes. Resistance commonly means physical resistance[13], however, this form of resistance often does not happen, but not because the victim consented to a sexual act. Victims rarely offer resistance, because they are petrified by a sudden attack. The force used in rape, which manifests in strangulation, hitting, ripping of clothes, causes terrifying fear in victims, which renders them uncapable of offering resistance, or makes them believe that any resistance is in vain (Brownmiller 1975). Traumatic feelings in form of a shock, numbness, helplessness, insecurity, confusion, humiliation, worthlessness, hopelessness, dissociation, et cetera, indeed enable the woman to emotionally survive the rape, but these feelings remain engrained in their personal history and make their life difficult in a later stage (Mlađenović 2020; Pavkov-Mišić et al. 1995).[14]

[12] The interpretation "no means yes" is an obliteration of the autonomy of the woman, while understanding that "no means no" means respect and appreciation of the autonomy of the woman.

[13] Estrich's view is that the crime of rape, because it includes a sexual intercourse, has been viewed through the lenses of gender roles. He states that this is obvious, among other things, having in mind the level of resistance the victim is required to offer in order to qualify the act as a rape crime. The resistance has been considered through "men's rules" applied in "men's fights", and the victim, most commonly a woman, is required to "fight back", in other words to physically resist the attacker. This view, however, does not take into account that young boys and girls are not socialised in the same way, and that young girls are not raised to "fight back" (Estrich 1986: 1091–1092).

[14] More details on neurobiological brain activities during a rape available in Mlađenović, Lepa . (2020). *Emocije menjaju rad mozga – feministički pristup neurobiologij i trauma silovanja.*

3. **Rape Crime in the Criminal Code of the Republic of Serbia**

In the Criminal Code of the Republic of Serbia rape crime[15] is classified as one of the sexual offences. The legal definition of the perpetrator of this criminal offence reads "Whoever forces another person to have sexual intercourse or a comparable sexual act by use of force or threat of an imminent attack against the life or body of an individual or of another person close to them". This offence carries a prison sentence of 5 to 12 years (Art. 178(1) of CC).

Rape is a compound criminal offence. The act of commission comprises two different acts, coercion and sexual intercourse or a comparable sexual act. There must be a causal link between the coercion and sexual intercourse, or a comparable sexual act, more specifically, the coercion should be employed with a view of obtaining in a sexual intercourse or a comparable sexual act.

In terms of the criminal law, the sexual intercourse entails the sexual penetration of a male penis into a female vagina. The act is considered completed upon even a partial penetration of the female genitalia, without the sexual intercourse being completed in physiological terms. Nevertheless, a mere contact of sexual organs is not sufficient to establish that a sexual intercourse has occurred. It should be noted that the act may be completed also in a case that no defloration of the women occurred, because the extent of the penetration of the male penis does not affect the completeness of the act. The definition of rape is gender neutral, because both male or female may be a perpetrator and a passive subject. The marriage status is irrelevant. The act of commission may also entail another comparable sexual act. The interpretation of this concept can be broad or narrow. A narrow interpretation would imply the penetration of a male penis in anal or oral opening of the passive subject. A broader interpretation would, in addition to these acts, include other forms of penetration, such as thrusting fingers, fist or an object into the victim's vagina or anal opening, according to Stojanović. He believes that the wording "comparable sexual act" should be restricted to two acts which are most similar to the sexual intercourse, and these are the anal and oral coitus (Stojanović and Delić 2020).[16]

As above stated, coercion is required to establish that a rape occurred. RS CC defines coercion as use of force or threat of an imminent attack on the life or body of the passive subject or a person close to them. A sexual

[15] Hereinafter: CC

[16] He believes that otherwise this act could not be distinguished from unlawful sexual acts and it is therefore necessary to limit the definition to anal and vaginal coitus which are most similar to the forced sexual intercourse.

intercourse or a comparable sexual act must be committed using force or a qualified threat. Coercion appears as the means the offender uses to achieve the goal –sexual intercourse or a comparable sexual act (Memedović 1988). "Force is the means of action used to influence the will of other individuals in order to make them act against their will, and do things they would never do without the use of force" (Radačić 2014: 38). The force may be absolute and compulsive. Absolute force is "such that a strong external force makes a person behave in a certain way preventing them from exerting their will" (Radačić 2014: 38). It "eliminates any possibility of the person against whom it has been applied to make or implement a decision" (Stojanović 2008: 35). Compulsive force "does not entirely disable victims to make a choice, but they must choose the behaviour imposed on them unless they want something bad to happen to them" (Radačić 2014: 38). Force also includes application of hypnosis and intoxicating substances for the purpose of making the victim unconscious and unable to offer resistance. Intoxicating substances include alcohol, narcotic drugs, etc. (Stojanović and Delić 2020). As for the nature of the threat, it must be a qualified threat of an imminent attack on the life or body of the victim or a person close to them.

Resistance is not an element of the crime of rape, although the view represented in the earlier theory and case-law is still present[17] that rape is in question only where victims put up a serious, firm and persistent resistance, showing by their behaviour a strong determination that they do not want to engage in a sexual intercourse (Grozdanić and Sršen 2011; Memedović 1988). Resistance has been used in the case-law to measure the intensity of coercion. "The absence of resistance implies the victim's consent, and as the victim's consent excludes unlawfulness of the act, the absence of resistance leads to the conclusion that there was no rape." (Grozdanić and Sršen 2011: 326)

Brownmiller made an interesting parallel on the issue of resistance between the criminal offence of rape and criminal offence of robbery. She notes that resistance is an imperative in the criminal offence of rape, while there is no requirement to prove resistance in the criminal offence of robbery. Brownmiller states that, in cases involving a robbery, the police even advises citizens that they should not offer resistance (Brownmiller 1975). Similar

[17] Tahović has held that resistance must be serious and persistent (Tahović 1961). This view of the criminal law theorists has not significantly changed to date. Jovašević and Miladinović Stefanović support the view that, unless the passive subject offered resistance, there is no rape crime (Jovašević and Miladinović-Stefanović 2023). Škulić believes that the issue of resistance should be addressed with more flexibility and more realistically, and it should be assumed that force is not excluded if, given specific circumstances, there are justified and understandable reasons which made the victim not to offer a physical resistance or to offer a fairly weak resistance (Škulić 2017).

interpretation of resistance was present in our criminal law theory. It manifested in an inconsistent interpretation of force in the crime of rape and robbery. Stojanović for instance, discussing the rape crime in terms of intensity of force held that it "must be of such intensity, adequate to break the resistance of the victim" (Stojanović 2008: 247), while in regard to the criminal offence of robbery he was of the view that "resistance of the passive subject was not required to establish that the force used to commit the crime was sufficient (Stojanović 2008: 274).[18] In the meantime, he abandoned such inconsistent interpretation of force because, as he found himself, this resulted in an "unjustified narrowing of the criminal zone in rape crime" (Stojanović and Delić 2020: 79).

Memedović notes that the requirement for resistance obscures the fact that "offering a substantial and persistent resistance is often impossible and even risky for a woman".[19] Also, a woman may not resist as a result of fear or an impression that any attempt to resist is futile in a given situation (Memedović 1988: 140). Memedović therefore concludes that "the severity of the resistance of the rape victim cannot be linked with a specific form in which it manifests, or its intensity or persistence (endurance, determination, etc.)" (Memedović 1988: 140).

Insistence on victim's physical resistance is in breach of the standards of the European Court on Human Rights which were integrated in the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). Under the Council of Europe Convention on preventing and combating violence against women and domestic violence[20] the key criterion is consent which must be given voluntarily as a result of the person's free will assessed in the context of surrounding circumstances (Art. 36 of the Istanbul Convention).[21] The absence of consent qualifies the act as a sexual violence or rape. Given that Serbia ratified the Istanbul Convention in 2013, the country is obliged to amend the current and essentially outdated definition of rape in accordance with the Istanbul Convention so as to make the absence of consent an element

[18] The quote is from the Manual for the bar exam which, among others, has been used by prospective judges, prosecutors and attorneys in their preparation for the bar exam.

[19] In this regard, Ristanović states that some women tend to remain still, hoping that they will be less hurt, which proved right in many cases (Ristanović: 95).

[20] Hereinafter: Istanbul Convention

[21] It must be unambiguous and clear, and the assessment as to whether resistance was present or not, must not rely on assumptions on "typical" behaviour in such situation, which mainly encompass gender stereotypes and myths on male and female sexuality. This assessment must take into account that individual victims may respond entirely differently to sexual violence and rape (Autonomous Women's Centre 2018).

of the criminal offence.

A rape crime cannot be perpetrated without intent. The offender must be aware that a sexual intercourse and comparable sexual acts have been committed against the will of the passive subject, in other words, the offender must be aware that the passive subject has not consented to the sexual intercourse or comparable sexual acts, and that these occur against the will of the passive subject (Škulić 2017).

CC stipulates a lighter form of rape which occurs if the principal form of the act was committed under the threat of disclosure of information which my harm the image and reputation of the passive subject and/or a person close to them or under threat of other harm. This criminal offence is punishable with imprisonment of 2 to 10 years. The lighter form of the rape crime differs from the basic criminal offence only in the form of coercion applied to commit the sexual intercourse or a comparable sexual act.

Aggravated rape is a rape in circumstances when the passive subject sustains grave bodily injuries or if the act is committed by several persons in a particularly cruel or particularly humiliating way or against a minor, or if the act results in pregnancy. Aggravated rape is punishable with imprisonment of 5 to 15 years (Art. 178(3) of CC).

The most serious form of rape is a rape which results in a death of the passive subject or if committed against a child. The most serious crime of rape is punishable with imprisonment of minimum 10 years to life (Art. 178(4) of CC).

According to CC, the sentence imposed for a rape crime must not be reduced (Art. 57(2) of CC).

4. Case-law of Higher Court in Novi Sad

The main part of the paper focuses on the analysis of the case-law of the Higher Court in Novi Sad examining the presence of myths on rape and gender stereotypes in the interpretation of the legal definition of rape.

In the period from January 1, 2018 to May 1, 2023[22] the Higher Court in Novi Sad rendered final decisions in twenty three (23) rape cases.[23] The analysis took into account only cases involving adults, because it was felt that the myths on rape and gender stereotypes in the interpretation of the legal

[22] This period was selected because of the fact that the court started classifying cases in the database by criminal offences from 2018, and the case-law research started on May 5, 2023.
[23] Rape cases include cases pf criminal offences of rape and attempted rape.

definition of rape were most apparent in these cases.[24] For this reason, the research used a sample of ten (10) finally resolved rape crime cases. The research used the feminist legal analysis, normative-dogmatic method, and content analysis method.

All ten (10) cases ended with a conviction.[25] Nine (9) cases involve female victims, while the victim in one (1) case is a male person. All offenders[26] are men. In nine (9) cases the victim and offender had known each other, and in only one (1) case the victim had not known the offender at all, and the attack occurred in a public space. In five (5) cases the victims and offenders were acquaintances, and in one (1) case they were relatives (in-laws), in one (1) case they were former intimate partners (love relationship had ended), one (1) case involved current intimate partners, while in one (1) case the offender and victim had had casual sex. In In four (4) cases the offence was committed in the offender's home, in three (3) cases in the home of the victim, two (2) cases in a car, and in one (1) case in a public place.

Generally, facts obtained from the case-law of the Higher Court in Novi Sad confirm what we already know, that rape is a gender-based violence and that offenders are commonly persons whom victims know and who are close to them, which challenges the common belief that women are commonly been raped by men they do not know.

As for the interpretation of the legal definition of rape, operative parts of judgments in seven (7) cases show that resistance has been weighted as an essential element of rape. In four (4) judgments, the operative part explicitly states that the victim offered resistance, also noting the persistence of the victims' resistance using wordings such as: "offering physical resistance", "resisting all the time", and/or "when her strength resist has gone out". Operative section of the judgment in which the court elaborates on the reason why the victim was not able to offer resistance stating : "taking the advantage of the fact that the victim was under the influence of alcohol with a blood alcohol level of 2.81 mg/ml, which weakened her ability to offer adequate resistance" also shows that resistance is considered to be an essential element of the criminal offence of rape. In one (1) judgment, the operative part states

[24] This certainly does not imply that the myths on rape and gender stereotypes do not affect rape crime cases involving minors and children. It was decided to limit the research only to cases involving adult victims because of the time available for the research, which was not sufficient to include other cases involving minors and children as victims.

[25] Five (5) cases concern a rape crime, while five (5) cases involve attempted rape.

[26] This paper uses the term defendant, which in accordance with the Criminal Procedure Code is a generic term for a suspect, offender, defendant, convicted person (Art. 2 of the Criminal Procedure Code).

that the victim refused to make love with the defendant, listing all the actions the victim took in an attempt to fight off the defendant, in other words to offer resistance to the defendant, among other things that she "struggled, requesting him to leave her alone, screaming", which we view as a direct indication that the victim did offer resistance. Two (2) other the judgments also directly refer to resistance stating that the victim "tried to prevent" the defendant from unzipping her pants, and/or that the (male) victim "pushed the defendant from himself" "resisted and called neighbours for help".

In only two (2) cases, the court did not rely on the existence of physical resistance, in other words, the court interpreted a nonvoluntary sexual intercourse as rape. To this end, the operative sections of these judgments state that the victim told the defendant that "she did not want to have a sexual intercourse with him", and/or the victim "engaged in a sexual intercourse against her will". In these cases, the court accepted verbal disagreement as the absence of consent, more specifically the force was interpreted as an action taken against the will of the victim (Radačić 2014).

As above discussed, resistance, is not an element of the criminal offence of rape, yet, as the analysis of the case-law of the Higher Court in Novi Sad showed, the issue has been repeatedly raised.

According to Memedović, the question whether it is objective or fallacious to persist on the requirement on victims that they had offered resistance has been explored in the light of the degree of force and threat the defendants used when committing the rape crime (Memedović 1988). Force and threats in the analysed cases included: gun pointing, knife pointing, cutting of the victim's clothes with a knife, ripping of the victim's clothes, removing the clothes, threat of murder, threat of an imminent attack on the life of the victim, threat of an imminent attack on the life of the victim's children, pressing the body against the victim, punching the victim on the head and body, throwing the victim on a bed, forceful undressing, hair pulling, holding the victim by hair, preventing the victim to leave the car, throwing her on the ground, kicking the victim's body, hitting the victim with plastic pipes, a wood plunk, a paddle on the head and body, pushing, pulling, slapping and pushing her lags apart.

Many different ways of using force, such as kicking the victim's the body, hitting the victim with plastic pipes, a wood plunk, a paddle on the head and body, cutting the victim's clothes with a knife, gun pointing per se indicate that it is absurd to expect the victim to offer any resistance, because the force employed objectively blocks any resistance. Force employed in some cases such forcible undressing, pulling, ripping of the clothes, slapping, may at the

first glance, or as Brownmiller (1975) states "on the paper", lead to the conclusion that the victim was able to defend herself if she genuinely did not want to be raped. This is why the pertinent forms of force and threats should be viewed in the light of the fact that rape is a gender-based violence, and it constitutes a sudden attack, an attack even that is committed by a man the victim knows and whom she trusted in a place where she felt safe. In Judgment K 23/2017 the Court gives particular significance to the abuse of trust in the rape crime stating that "the victim, immediately before the commission of the crime, had been in an emotional relationship with the defendant, and relied on this fact when she decided to go to his house, and trusted him, and it did not even occur to her that their intimacy could end in this way."

This insight changes the view on the potential ability of the victim to offer resistance, and it explains why many rape victims remain "paralyzed" when exposed to a "an insignificant level of force". Testimonies of the victims describe the shock and disbelief they felt because of the attack, and the absence of resistance.

In the case K 63/19, the defendant and victim were acquainted. The attack occurred in the home of the victim. Asked about resistance, the victim testified: "I was terrified, I believe I made some noises, but I do not know how loud they were."

In the case 75/2020 the defendant and victim were in an emotional relationship. The attack occurred in the defendant's apartment. In response to the question about resistance, the victim testified: "I did try to resist, but I failed, because he weighs 130 kg. I was unable to do anything, I was just shouting: don't do this, don't, let me go, but I did not shout in a loud voice, because he put a gun on a cabinet in the room where we were".

In the case K 123/20 the defendant and victim were strangers. The attack occurred in a public place. Addressing the absence of resistance, the victim testified: "I did not shout or call for help because I was numbed by a shock, and as if I were absentminded, but, as I described, I did try to break away from his grip."

The analysis of the case-law of the Higher Court in Novi Sad showed that there is no consistent interpretation of the rape crime. The prevailing view is that evidence of physical resistance by the victim is required to prove that a crime of rape was committed. This view is also prevailing in the legal theory. The issue of consent had been considered in connection with the question whether the victim put up resistance, more specifically whether her will was indeed broken by the use of force or threat of an imminent attack on her life

and body and/or the life and body of a person close to her. We believe that such interpretation of the rape crime in judicial practice emerged under the influence of a widely spread view in the criminal law theory that the assessment whether a sexual intercourse was involuntary, should be made in the context of the victim engaging in vigorous physical resistance against her attacker. Also, the results of this research confirmed that the interpretation of the rape crime in the criminal law theory and practice does not reflect the reality, and that it is based on a "false hypothesis" that it is indeed possible to resist a sexual assault (Mlađenović 2020).

5. Conclusion

The analysis of the case-law of the Higher Court in Novi Sad showed that the myths on rape and gender stereotypes have shaped professional opinions. Insisting that victims should have offered resistance in the interpretation of the rape crime in judicial cases reveals that there are still those who believe that a woman can defend herself if she indeed does not want to be raped. Above all, the current definition of the crime rape, which has still not been harmonised with the Istanbul Convention, contributes to such understanding. Therefore, redefining of the rape crime should be the first step in changing the way how the professionals treat rape. Given that it is still entirely uncertain as to when this will happen, and having in mind that currently resistance is not an element of the crime of rape but rather a result of the myths on rape and gender stereotypes, proof of resistance should not be required in order to establish that a person was raped. Rape, as this research also showed, is a heinous assault by a man who knows the victim or is close to her. Insisting on resistance by the victim in the interpretation of the crime of rape by professionals revictimises women who did not consent to a sexual intercourse and furthers the myths on rape and gender stereotypes, which ultimately downplay the most drastic forms of sexual violence, and the professional community should certainly oppose this.[27]

[27] I am grateful to my colleague Ivana Radačić from Zagreb whose book *Seksualno nasilje – Mitovi, stereotipi i pravni sustav* gave me an incentive and reference for this research. I am especially grateful to the acting President of the Higher Court in Novi Sad Tijana Jakovljević, a Judge of the Higher Court in Novi Sad, and Miroslav Alimpić, a Judge of the Appellate Court in Novi Sad, who was the President of the Higher Court in Novi Sad in the period 2019-2023, who ensured I had unimpeded access to casefiles. A huge thanks goes to Sanja Ćetojević, the spokesperson of the Higher Court in Novi Sad, and Jelena Ostojin, senior associate in the Department for Assistance and Support to Witnesses and Victims in the Higher Court in Novi Sad, who provided me with a space where I could work without disruption, and made themselves available throughout the period of the research, while performing their day to day duties.

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Martina Primorac

The Offense of Rape in the Practice of Bosnian-Herzegovinian Courts

Abstract

Rape is the most typical criminal offense against sexual freedom and morality, invading the most intimate aspects of the victim's life. The law defines the basic form of this offense as committed by anyone who, through the use of force or threats to directly harm the victim's life or body, or the life or body of someone close to her, coerces her into sexual intercourse or an equivalent sexual act. The qualified forms of the crime refer to the method of its commission, the consequences of the act, and the victim's characteristics.

This paper explores the key characteristics of the crime of rape through the available case law of courts in Bosnia and Herzegovina. Its goal is to map the current state of these practices, assess how closely they align with theoretical perspectives, and evaluate whether the judicial system effectively addresses the impact of gender stereotypes. The paper also examines whether judges demonstrate a consistent understanding of the essential elements of the crime of rape, whether the criminal sanctions imposed fulfil the purpose of punishment, and whether victims receive equal protection, free from discrimination, regardless of which court in Bosnia and Herzegovina is handling the case

This paper critically analyses existing legal definitions and raises questions about the need for legislative intervention to fully align with international standards by advocating for the definition and expansion of the regulation of sexual violence without consent, drawing inspiration from the criminal laws of European countries.

Keywords: coercion, lack of consent, purpose of punishment, leniency

1. Introduction

Until 2003, Bosnia and Herzegovina applied the criminal legislation of the former Socialist Federal Republic of Yugoslavia (Criminal Code of SFRY, Official Gazette SFRY 44/76, SL SFRJ 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90). In 2003, following a decision by the High Representative, the Criminal Code of Bosnia and Herzegovina was imposed

and came into force on March 1. Based on this, entity-level criminal codes and the Criminal Code of the Brčko District of Bosnia and Herzegovina were adopted in July and August of the same year.

By the Legislative Decree dated April 11, 1991, adopting the Criminal Code of the Socialist Federal Republic of Yugoslavia as the law of the Republic (Legislative Decree adopting the Criminal Code of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Republic of Bosnia and Herzegovina 2/92), rape was classified under the first paragraph of Article 142 as a war crime against civilians, with a penalty of at least five years of imprisonment or the death penalty for the perpetrator.

In the post-war period, following the signing of the Dayton Peace Agreement, the death penalty was abolished, and the European Convention on Human Rights and Fundamental Freedoms, as outlined in Article II of the Constitution of Bosnia and Herzegovina, became directly applicable, taking precedence over all other laws. No additional legislative or administrative measures are required to implement the Convention's provisions in Bosnia and Herzegovina. Where national legislation is not aligned with the rights and freedoms defined by the European Convention, its provisions will be directly applied to the specific case.

The autonomous criminal legislation of Bosnia and Herzegovina, as it exists today, consists of four criminal codes: the Criminal Code of Bosnia and Herzegovina, two entity-level criminal codes, and the Criminal Code of the Brčko District of Bosnia and Herzegovina. Since the Criminal Code of Bosnia and Herzegovina does not define crimes against sexual integrity, these offenses are addressed by the entity-level codes. In light of this, this paper focuses on analysing the crime of rape as defined by the entity-level codes, which are directly applied in practice by municipal and cantonal courts, as well as basic and district courts.

This paper aims to conduct a comparative legal analysis of entity-level criminal codes to identify any discrepancies in legal provisions—and, consequently, in their practical application—based on available case law regarding the crime of rape. It also seeks to determine whether harmonising legal provisions could offer guidance to courts in handling specific cases, thereby contributing to a reduction in the dark figure of crime.

The research aimed to address questions about the punishability of the offense, highlight potential shortcomings in the process of individualising sentences for offenders, and examine whether the penal policy established by lawmakers is significantly stricter than the judicial approach to sentencing.

The research in this paper is limited to the crimes of rape and sexual assault and analyses judicial rulings provided by 38 courts for the study. The decisions reviewed were made and published between January 1, 2017, and December 31, 2022. Due to the volume of material and the time required to anonymise the judicial decisions, it was not possible to extend the research to a longer period. A total of 38 courts participated in the study, including 17 municipal courts, 7 basic courts, 9 cantonal courts, three district courts, and two Supreme Courts, with 26 rulings analysed in total. While this is a gender-neutral offense, classified among *delicta communia* (crimes that can be committed by anyone capable of committing a crime), all 26 rulings involved female victims and male perpetrators.

The data collected from the analysis of judicial rulings and legal provisions were organised into standardised tables to facilitate tracking and presentation.

2. The Legal Definition of the Crime of Rape

In the Federation Criminal Code, the crime of rape falls under Title XIX – Crimes Against Sexual Freedom and Morality, while in the Republic Criminal Code, it is classified under Title XIV – Criminal Offenses Against Sexual Integrity.

The basic form of the crime of rape is defined in the first paragraph of Article 203 of the Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the FBiH 36/03 (SN FBiH 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16 and 75/17)), which states: "Anyone who, by using force or threats of a direct attack on the life or body of the victim or a close person, forces another person into sexual intercourse or an equivalent sexual act shall be punished with imprisonment from one to ten years." Similarly, Article 165, Paragraph 1 of the Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska 64/2017, (SG RS 104/2018 – decision of the Constitutional Court and 15/2021 and 89/2021)) reads: "Anyone who forces another person into sexual intercourse or an equivalent sexual act by using force or threats of a direct attack on the life or body of the victim or a close person shall be punished with imprisonment from three to ten years."

The basic formulation of the offense in the entity-level criminal codes suggests that the penal policy in the Federation is generally more lenient, as the statutory minimum sentence for the basic form of the offense is one year in prison, while the minimum in the Republika Srpska's criminal code is three years. The statutory maximum sentence, however, is the same in both entities—ten years in prison. Punishment for the qualified forms of the offense

is also stricter in the Republika Srpska's Criminal Code compared to the Federation's. The qualified forms of rape refer to the manner of committing the crime, its consequences, and the characteristics of the victim, and are defined in paragraphs (2) to (7) of Article 203 of the Federation's Criminal Code and in paragraphs (2) and (3) of Article 165 of the Republika Srpska's Criminal Code. However, both in the punishment for the basic offense and for the qualified forms, legislators make distinctions depending on the entity. For example, under the Federation's Code, a perpetrator who commits the crime in a particularly cruel or degrading manner, or when multiple sexual acts or equivalent acts are committed against the same victim by multiple perpetrators, or if the crime is motivated by hatred toward the victim, or if the victim is a minor, will face a prison sentence of three to fifteen years. In contrast, the Republika Srpska's Code prescribes a sentence of five to fifteen years for these circumstances. If the crime results in the death of the raped person, the Federation's Code stipulates a minimum sentence of three years, whereas in the Republika Srpska, the perpetrator will be sentenced to at least ten years.

Rape is undoubtedly an extremely sensitive criminal offense and is categorised as a commission offense, meaning it can only be perpetrated through action. The legal definition of the basic form of the offense clearly indicates that the act of committing the crime involves coercion and sexual intercourse, or an equivalent sexual act, which can be carried out through the use of force or threats against another person. It is, therefore, a pseudo-complex offense in which the acts of coercion or threat are punishable *ipso iure* while the acts of sexual intercourse or equivalent acts are not punishable unless certain circumstances justify their criminalisation. The offense is considered complex because it protects both sexual freedom and personal autonomy, and it is pseudo—since sexual intercourse itself is not a criminal act— and it is a multi-act, involving at least two actions (Cvitanović et al., 2018), and is considered complete when sexual intercourse is carried out through the use of coercion or threats.

The term *force* should be understood not only as the use of physical, mechanical, or other power directed at an individual (irresistible force – *vis absoluta*), but also as any action that incapacitates the person from resisting due to the psychological state they are in (irresistible force – *vis compulsiva*). With absolute force, the victim cannot resist or overcome it due to their personal characteristics—physical (in)abilities—while in the case of psychological force, the victim may be physically capable of resisting but chooses not to because of the psychological state they are in. These standards have been established by the case law of the European Court of Human Rights,

which holds that the obligations of member states under Articles 3 and 8 of the Convention must be seen as a requirement to effectively prosecute and punish any sexual act committed without the victim's consent, including cases where the victim did not physically resist. Force, in this context, is not limited to direct violence but also includes situations where the victim sees no alternative but to submit, even against their will (M.C. v. Bulgaria, 4 December 2003, Application no. 39272/98). Recommendation (2002)5 of the Committee of Ministers of the Council of Europe on the Protection of Women against Violence, in its Appendix 35, stipulates that the criminal codes of each member state should, among other things, "penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance."

A threat as a means of committing a crime is defined as creating the appearance of harm to provoke justified fear or distress in another person.

While a threat merely suggests potential harm, psychological coercion involves actual harm being inflicted upon the person to force them into compliance, which is the key difference between the two (Radačić, 2014). The force or threat used must be of such intensity that it can break the victim's resistance (Bačić and Pavlović, 2004).

It is important to note that in November 2013, Bosnia and Herzegovina, as the sixth member state of the Council of Europe, ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Official Gazette of BiH 15/13), commonly known as the Istanbul Convention. By ratifying it, the country committed to adopting all necessary legislative and other measures to establish an institutional, legal, and organisational framework for preventing violence against women and domestic violence. and under Article 36 of the Istanbul Convention, it committed to criminalising all forms of unconsented sexual acts when committed intentionally, including rape. The central aspect of the Convention's definition is the lack of consent given voluntarily as a result of the person's free will (GREVIO 2022). However, Bosnia and Herzegovina has not yet aligned its penal policy to ensure that the legal definition of rape fully incorporates the concept of the lack of voluntary consent, as outlined in Article 36 of the Istanbul Convention. This issue was highlighted in the 2022 report by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), which is responsible for monitoring the implementation of the convention in member states.

3. Sentencing for the Crime of Rape

"Rape is a highly sensitive crime that is significantly influenced by cultural and sociological factors, reflecting the varying levels of societal

awareness surrounding it compared to other types of delinquency (Vuletić and Šprem 2019: 131). The issue of sentencing individuals convicted of rape involves a complex process. This complexity is manifested in the destructive behaviour exhibited by the perpetrator. Meanwhile, the penal policy of the courts is required to address such behaviour appropriately. Article 7 of the Federation's Criminal Code outlines the objectives of criminal sanctions, which include safeguarding society from criminal behaviour through preventive measures, deterring the offender from reoffending, promoting rehabilitation, and ensuring protection and redress for the victim. The Republika Srpska's code, however, lacks provisions regarding the protection and redress of the victim (Article 41, Paragraph 3, and Article 43 of the Criminal Code of the Republika Srpska). The primary aim of punishment is to convey society's condemnation of criminal behaviour, promote the rehabilitation of offenders, and enhance public awareness regarding the dangers associated with criminal activities and the justness of penalising wrongdoers.

Once the court has established the offender's guilt for the crime of rape, it will proceed to sentencing within the parameters set by the legislator (Article 49 of the Criminal Code of the Federation of BiH and Article 52 of the Criminal Code of Republika Srpska). The court will consider the purpose of punishment and evaluate all circumstances that may influence whether the sentence should be more lenient or severe, particularly: the degree of culpability, the motives behind the offense, the extent of harm inflicted on the protected interest, the context in which the crime occurred, the offender's prior history, personal circumstances, and their behaviour following the crime. Additionally, other aspects related to the offender's character will be taken into account. In cases of recidivism, particular attention will be given to whether the previous offense was of the same nature as the current one, whether both offenses were committed for the same reasons, and how much time has passed since the previous conviction or the completion of a previous sentence, whether served or pardoned if both offenses were motivated by similar reasons, and the duration since the prior conviction or the completion of any previous sentence, whether it was served or pardoned.

The provisions explicitly state that the legislator presents mitigating and aggravating circumstances as mere examples, granting the court the discretion to assess the legally relevant facts and their impact on the sentence. However, this does not imply that the court can act arbitrarily. In fact, the court is required to specify in the judgment's reasoning the facts taken into account when determining the sentence, along with the evidence and rationale supporting their conclusions.

"The law mandates that judges provide a written explanation for both the verdict of guilt and the sentencing decision. The rationale behind the sentencing explanation includes: a) demonstrating to the involved parties that the decision is lawful and justified, b) ensuring transparency in a democratic legal system by making decisions and their reasoning accessible to the public, c) allowing authorised individuals to contest the decision through legal avenues, and d) facilitating the review of the judgment by a higher court". (Đurđević 2004: 764)

The court's authority to evaluate the presence or absence of facts is neither bound nor restricted by specific formal evidentiary rules. The court tailors the sentence based on its discretion while following professional standards and principles of logic, but all within the legal framework. If the court is not convinced of the existence of decisive facts, as outlined in Article 3 of the entity-level criminal procedure codes, any uncertainty must be resolved in favour of the accused, in accordance with the procedural principle of *in dubio pro reo*. This principle dictates that any lack of full certainty must benefit the accused.

The court has the authority to impose a sentence that is below the statutory minimum or to apply a lesser penalty in cases where the law explicitly allows for a reduced sentence, or when the court finds that there are particularly mitigating circumstances suggesting that the objectives of punishment can still be fulfilled with a lighter sentence (Article 50 of the FBiH Criminal Code). However, in reducing the sentence, the court is not free to act arbitrarily, as the legislator has established clear boundaries. In contrast, the Republika Srpska Criminal Code adopts a more stringent approach regarding sentence reductions for rape, explicitly prohibiting such reductions as stated in Article 54, Paragraph 3. Consequently, even plea agreements cannot result in a lesser sentence in these cases.

The limited number of prosecuted rape cases highlights the presence of the so-called "dark figure", which suggests that there may be many more victims who either do not report or will never report their assaults. This raises the question: contribute to this phenomenon?

This research examined a total of 38 courts, focusing on 26 court rulings specifically related to the criminal offenses of rape and/or incest. Over the observed six-year period in the Republika Srpska entity, eleven courts participating in the study did not issue any rulings for the offense of rape. Consequently, it remains unclear whether judges in both entities demonstrate the same level of understanding of the fundamental characteristics of the crime of rape. In other words, all 26 analysed court rulings were issued by courts

with jurisdiction in the Federation of Bosnia and Herzegovina.

In five prosecuted cases, the court rendered acquittals, unable to establish beyond a reasonable doubt that the crime had occurred. This was due to the prosecution's failure to provide clear and conclusive evidence proving, with absolute certainty, that the victims had been subjected to unconsented sexual intercourse.

Four cases resulted in conditional sentences for incomplete rape offenses (classified as indecent acts), with the accused admitting guilt in two of those instances.

In only three of the analysed cases, the victim did not know the perpetrator. In the remaining cases, however, the perpetrators were individuals with whom the victims had established trusting relationships, such as family members, (former) intimate partners, or coworkers. The crimes predominantly occurred – almost without exception - in familiar environments for the victims, such as family homes, parents' apartments, the residences of intimate partners, backyards, or workplaces. Typically, these offenses took place in the afternoon or evening; however, there were exceptions for prolonged abuses that lasted for days or even years, occurring at any time of day or night.

Table 1. Overview of Legally Prescribed vs. Imposed Penalties in the Analysed Court Cases

Article of the Criminal Code **that defines the offense**	**The prescribed prison sentence (from – to)**	**Court-imposed sentence**
§213, Para. 2 §222 Para. 4 in relation to Paras. 2 and 1 §55 (prolonged offense)	1 to 5 years 1 to 5 years	Imprisonment for 1 year and 8 months
§208, Para. 1 §203, Para. 1	3 months to 3 years 1 to 10 years	Suspended sentence (8 months in prison)
§203, Para. 1	1 to 10 years	One year and 10 months in prison
§203, Para. 1	1 to 10 years	3 years in prison
§208, Para. 1 §203, Para. 1	3 months to 3 years 1 to 10 years	Suspended sentence (4 months in prison)
§208, Para. 1 §203, Para. 1	3 months to 3 years 1 to 10 years	Suspended sentence (5 months in prison)
§203, Para 5 in relation to Para. 1	Minimum 5 years in prison or long-term	9 years in prison

§213, Para. 2 §54 (concurrence) §55 (prolonged offence)	imprisonment 1 to 5 years	
§203, Para. 2 in relation to Para. 1	3 to 15 years	2 years in prison
§203, Para. 2 in relation to Para. 1	3 to 15 years	4 years in prison
§207, Para. 2 §203, Para. 1 §55 (prolonged offence)	Minimum 3 years 1 to 10 years	2 years in prison
§207, Para. 2 §203, Para. 1	Minimum 3 years 1 to 10 years	5 years and 6 months in prison
§207, Para. 2 §55 (prolonged offence) §213, Para. 3	Minimum 3 years 2 to 10 years	6 years in prison
§213, Paras. 2 and 1	3-15 years	1 year in prison
§203, Paras. 5 and 1 §213, Paras. 2 and 1 §55 (prolonged offence)	Minimum 3 years 3 to 15 years	14 years in prison
§179, Paras. 2 and 1 §203, Paras. 3, 1 and 2 §54 (concurrence)	2-8 years Minimum 3 years	1 year and 6 months in prison
§207, Para. 2 §203, Para. 1 §213, Paras. 3 and 1 §54 (concurrence)	Minimum 3 years 1 to 10 years 2 to 10 years	4 years and 7 months in prison
§203, Paras. 2 and 1	3 to 15 years	Two convicted persons, 1 year in prison each
§203, Paras. 5 and 1 §213, Paras. 2 and 1 §54 (concurrence) §55 (prolonged offence)	Minimum 3 years 3 to 15 years	3 years and 6 months in prison
§210, Para. 1 §203, Para. 1	6 months to 5 years 1 to 10 years	Two convicted persons: -3 years and 6 months in prison - 2 years in prison

When analysing the research results, it becomes evident that courts frequently impose the legal minimum when sentencing perpetrators of rape and/or incest. In some cases, they may even apply rules that allow reductions below this minimum. This raises a critical question: Are less severe

punishments truly effective in deterring crime? The issue is further complicated by the requirement that, in cases involving prolonged criminal offenses with identical legal characteristics, the court must impose the type and level of punishment specifically designated for that crime. However, when dealing with similar offenses, the court is obligated to impose the type and level of punishment associated with the most serious offense among them.

In the process of tailoring sentences and assessing the mitigating and aggravating factors for offenders, it becomes evident that courts frequently present these factors in a stereotypical way when determining sentences, often without providing explanations for their credibility.

In cases of rape, the aggravating factors identified in the reviewed court rulings – ranked by frequency, from most to least common – are:

- previous convictions, which clearly failed to serve the purpose of punishment,
- audacity, brutality, persistence, and recklessness,
- the commission of the crime over an extended period,
- abuse of the victim's trust, and
- lack of remorse for the crime committed.
- In cases of incest, the factors are as follows:
- audacity, brutality, persistence, and recklessness in committing the act,
- abuse of trust,
- the severity of the harm to the protected interest, and
- the consequences for the victim's future life (withdrawal, isolation, loss of trust, PTSD disorders).

As mitigating circumstances, based on the frequency of recurrence in the reviewed court rulings, we find:

- lack of prior convictions,
- admission of guilt,
- material and family circumstances (unemployed, in poor financial condition, married, father),
- the offender's age (younger individual),
- diminished capacity responsibility,
- appropriate behaviour during the legal process, and
- remorse for the committed act.

The analysis of verdicts shows that courts often overestimate mitigating circumstances, or misinterpret certain factors as mitigating. For instance, it is unclear why the defendant's age is considered a mitigating factor when any

adult should be mature enough to understand the consequences of their actions. Why should a defendant's significantly diminished capacity, resulting from their own drug use, warrant a more lenient sentence? Unemployment and financial hardships should not be viewed as justifications or mitigating factors in cases involving sexual offenses or crimes against sexual freedom and morality. Moreover, proper conduct in court—something every participant is obligated to uphold—should not serve as a reason for a court to impose a sentence below the legal minimum.

An important aspect that should not be overlooked in this research process is the evolution of judicial thinking. Courts have generally moved away from outdated, stereotypical views, rejecting the once-prevailing belief that a victim must physically resist for an act to be classified as rape. In the reasoning of only one ruling by the Municipal Court in Travnik, a mitigating circumstance was found for the defendant because the victim did not visibly resist, instead simulating sexual intercourse. However, the Cantonal Court in Travnik correctly ruled in its appeal decision that the concept of force extends beyond mere physical, mechanical, or other forms of strength; it also encompasses actions that inhibit the victim's ability to resist due to their psychological state. In this context, simulating sexual intercourse reflects the victim's fear and an instinctive attempt to protect their life and body in a vulnerable situation with an unknown individual. The force exerted effectively eliminated any further resistance from the victim, and passive endurance after resistance is broken does not equate to voluntary consent to sexual intercourse. The absence of the victim's consent is a crucial factor in establishing the crime of rape, and it is evident that there has been progress in judicial practice regarding this standard, even if the legislator has not explicitly defined it.

4. Concluding considerations

The crime of rape is a severe crime that violates the most intimate aspects of a person's being and sexual integrity, which makes the protection of victims through judicial practice especially important.

The legislator has established a range of penalties for perpetrators of rape; however, notable discrepancies exist between the two entities. In the Republika Srpska, courts are not allowed to reduce sentences below the legal minimum, a right that is – as the research has shown - often exercised in regions governed by the Federation Criminal Code. The legal minimum sentence for the basic form of rape in the Federation is one year, while in the Republika Srpska, it is set at three years. Unifying the legal minimum for the basic offense and harmonising sentencing policies for aggravated forms of the crime in both entities—where significant discrepancies currently exist—

would promote legal equality and certainty, or at least move us closer to these principles.

While the legislator defines the abstract severity of each criminal offense by prescribing a range of penalties, it is the court's responsibility to assess the specific gravity of the offense in line with the criminal code and to evaluate the presence of any mitigating or aggravating circumstances that impact the tailored the sentence in each case. This is not an easy task, as the court must evaluate the degree of harm caused by the crime in each case and, through its judgment, express society's condemnation of the offense, deter the offender from committing future crimes, and raise public awareness of the seriousness of the crime and the fairness of the punishment.

Although the research did not cover all courts in Bosnia and Herzegovina and therefore lacks a larger sample for analysis, some important conclusions can still be drawn. Over the seven-year period studied, 38 courts in Bosnia and Herzegovina issued a total of 26 rulings related to crimes of rape and/or incest, meaning that, on average, courts issue four such rulings per year. This supports the hypothesis that the relatively low number of criminal cases may be why judges across the country have little incentive to further their education by studying international case law. While the collected data does not show alarming figures or an increase in the prosecution of rape cases—in fact, it suggests there is no reason to tighten repressive measures—the research highlights a significant disparity between legislative and judicial policies regarding the sentencing of offenders. Judges must recognise that their rulings send important messages to the public, and it is through judicial practice that the need for legal amendments or better alignment of legal provisions should be identified.

The length of a prison sentence is not the sole indicator of punishment severity; all pertinent factors must be evaluated when deciding if a sentence should be increased or reduced. Nevertheless, when courts repeatedly issue sentences that fall short of the legal minimum, it raises a critical question: what message does this send to perpetrators of the most serious crimes? Sentencing significantly influences victims' decisions to report crimes such as rape. When penalties are perceived as too lenient, victims may feel that the emotional and legal burdens of pursuing legal action outweigh the potential benefits—particularly given that court proceedings often last longer than the sentences imposed. An examination of court rulings uncovers a concerning pattern: sentences for rape often hover around or fall below the statutory minimum. In the Federation of Bosnia and Herzegovina, 57% of rape convictions leading to prison sentences were below the legal minimum—a practice that is prohibited in Republika Srpska, where judges are legally barred from

imposing sentences beneath the established threshold. This inconsistency in sentencing laws inevitably raises an important question: does this legal disparity and the exercise of judicial discretion contribute to higher crime rates in one entity compared to the other?

The research further indicates that, as a rule, sentencing decisions in court rulings often lack adequate justification. Mitigating and aggravating circumstances are frequently evaluated superficially, merely listed as specified in the code instead of being thoughtfully weighed. This, however, does not necessarily suggest judicial arbitrariness. Court rulings seldom specify the sources of legally relevant facts or clarify why certain evidence was regarded as credible. This points to inconsistencies in judicial reasoning, with judges exhibiting varying levels of understanding when evaluating key aspects of crimes, particularly concerning mitigating and aggravating factors.

A key positive finding from the analysis of court decisions is that judges have generally moved away from gender stereotypes. In legal proceedings, there is no longer a necessity for corroborating evidence to validate the victim's testimony, instead, judges acknowledge that lawful, authentic, and credible evidence can be adequate to establish the defendant's guilt, even when it relies solely on the single witness account - victim's account.

Standardising judicial practice is a normative ideal in any society, including Bosnia and Herzegovina. The objective is not to compromise judicial autonomy and independence but to ensure that courts apply consistent criteria when determining sentences, in accordance with international standards and case law. To achieve this, lawmakers must first establish uniform legal principles and criteria, as discrepancies in legislation inevitably result in inconsistencies in judicial practice. Harmonising legal provisions is a crucial initial step toward meaningful reform, providing courts with clear guidelines for case handling. This approach would ultimately reduce the number of unreported crimes, ensure equal protection for victims, and impose uniform criminal sanctions on offenders, irrespective of their prosecution location within Bosnia and Herzegovina. While efforts to align entity-level criminal codes with the Istanbul Convention are evident—particularly through amendments that prohibit referencing a victim's sexual history in cases of sexual violence and rape—further legislative adjustments are necessary. This includes revising the legal definition of rape to fully incorporate the concept of lack of voluntary consent, as outlined in Article 36 of the Istanbul Convention. Legal reforms must ensure that all non-consensual sexual acts, including those where physical resistance is absent, are classified as rape.

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Anita Dremel and Barbara Herceg Pakšić

Gender Stereotypes and Rape Crime

Abstract

Criminal offences against sexual freedom constitute an area extremely susceptible to change under the influence of prevailing attitudes in a society. The legislative evolution of these crimes in the Republic of Croatia is presented below, showing, inter alia, the way to gender and sex neutrality and modern legal standards.

A theoretical overview of some relevant research is provided with regard to the codes selected for analysis, including discussions about gender myths, characteristics of rape perpetrators, power relations, the relationship between the perpetrator and the victim, the victim's contribution, the impact of alcohol abuse, evaluation of mitigating circumstances, and types and duration of imposed sentences. The paper analyses empirical material made up of final judgements in rape cases at the County Court in Osijek in 2018-2022.

The paper seeks to raise awareness of secondary victimisation, gender stereotypes and deeper structural socio-cultural norms and values, present in various discourses, from family to legal ones. It points to the need for education in a broader social context, insisting on an approach that eliminates moralism and raises awareness of some of the fundamental social functions of adequate criminal law responses to sexual violence.

Keywords: gender stereotypes, myths, legal discourse, criminal law, criminal offences, sexual freedom, rape, gender equality

1. Theoretical Background and Overview of Some Relevant Research

Criminal law is a key instrument for preserving social order, justice and security as the foundations required to maintain and strengthen wider social cohesion. Specifically, the legal response to offences against sexual freedom has significant social relevance, not only in terms of victim protection, deterrence and public security, but also as a mechanism for public education and awareness raising of severity and harmfulness of these crimes.

The societies we live in are characterised by gender inequality at deeper levels that also structure a part of the system of norms and values. In this respect, gender is a social practice, we make and perform gender as a

differentiation system where different values are hierarchised and associated with male and female in a family, media and schools, as well as the legal system.

Stringent sanctioning of offences against sexual freedom can contribute to the fight against gender inequality, emphasising the unacceptability of violence against women and girls who are most frequently the victims of these crimes. Sanctions for offences against sexual freedom therefore play a key role in the protection of individuals, preserving social peace and promoting justice and equality in society. Therefore, the approach of the judicial system to the processing and punishment of crimes against sexual freedom can tell us a lot about the deeper structures that form gender relations in a society. In that regard, it is always about social power relations.

Data with numbers can be found in reports of the Ministry of Internal Affairs (MIA, 2023) and the Central Bureau of Statistics (CBS, 2023), where we learn that there was a total of 230 reports of rape crimes in 2023 in the Republic of Croatia (for comparison purposes, there were 194 reports in 2021, and 216 reports in 2022). However, the real situation is far gloomier; for example, the Women's Room report (2017) showed that for every reported rape, there were 15 to 20 unreported ones and that a total of 757 counselling sessions were held at their Centre for Victims of Sexual Violence. The most common problems that made violence victims turn to the Women's Room were rape/attempted rape/incest (59.3%) and sexual harassment (10.3%).

Only a small percentage of rapes were reported, and even fewer ever reach trial. However, those that do play an important symbolic role. Criminal proceedings are symbolic in the sense that their main actors, e.g. the defendant and the victim represent social roles; the court process itself embodies ideas of a 'good' society (and a 'just' and 'reliable' criminal justice system) and delivery of justice in individual cases (Bumiller 1991). This is the case because of the pervasive social belief that law always promotes justice. However, law is also a powerful creator and propagator of different types of discrimination, such as gender-based discrimination.

A rape trial discourse may actually work to disempower women, rather than strengthen women's rights. One of the most perverse effects of a rape discourse is that it can strongly influence the way women see themselves, their attackers, and the violence they were subjected to. Many women decide not to report sexual assaults because they have problems admitting that they were raped, which is coupled with feelings of shame and guilt, and a well-founded fear of actions of the criminal justice system.

A multidisciplinary approach is welcome in dealing with this topic, and here it is approached from the social science perspective of law and sociology. Such an approach enables a holistic view of the problem, combining legal analysis with the social context. Sociology can provide insight into the social norms, attitudes, and prejudices that influence rape cases, whereas law provides a structural framework for interpretation and implementation of the law. Gender stereotypes and prejudices can influence the behaviour of judges and legal professionals, and legal perspective can offer ways to mitigate these influences through legal reforms and education, which can lead to fairer and more objective trials in sexual violence cases.

The aims of this paper are to provide a theoretical overview of the development of legislation and legal practice in criminal offences against sexual freedom and to analyse court judgements in rape cases at the County Court in Osijek in the period from 2018 to 2022. The analysis aims to examine the gender structure, characteristics and relationship between perpetrator and victim, the concept of "victim's contribution" and possible discursive gender stereotypes and myths in the evaluation of mitigating and aggravating circumstances and the choice of type and severity of sanctions.

Given the complexity of the subject and the number of legislative changes on the one hand, and the significant limitation of the scope of the work on the other, we provide only the basic characteristics and data from the selected materials in the theoretical background. The research reviewed here does not provide a direct analysis of the Osijek court but offers insights into broader patterns that may be present in such contexts. Therefore, the specific regional context of the research examining local legal decisions and practices over the past five years is informed by broader transnational legal perspectives on gender stereotypes (Cook and Cusack 2010; Alderden and Ullman 2012). In the domestic context, it is essential to refer to the study on myths in rape cases by Ivana Radačić (2014), along with other references that appear in the following chapter providing an overview of the legal framework.

Rape myths can be defined as prejudices, stereotypical or false beliefs about rape, rape victims and rapists (Burt 1980) or, alternatively, as attitudes and false beliefs that are widely and persistently held, and that serve to deny and justify male sexual aggression against women. (Lonsway and Fitzgerald 1994). Despite research and publications in professional and popular journals about rape, such myths persist in mainstream secular thinking. One myth that research has shown to have little basis in reality is that rape is a crime of pure passion, that it is primarily sexually motivated. (Johnson, Kuck and Schander 1997). Such myths have their basis in gender-role attitudes referred to the beliefs about the appropriate role activities for men and women (McHugh and

Frieze 1997). For example, taking care of the family in most cultures is considered a responsibility belonging to women's gender role. Men are expected to be dominant, powerful and sexually aggressive, while women are expected to be fragile, passive and obedient, but also responsible for controlling the extent of their sexual activity (Simonson and Subich 1999). According to this theory, socialisation into gender roles promotes the formation of false and supportive beliefs about rape and supports the view that individuals who firmly believe in traditional gender roles will perceive rape by acquaintances as an extreme and appropriate version of traditional male-female sexual interaction (Bridges 1991; Ewoldt et al. 2000).

These rape stereotypes, called rape myths, see sexual aggression as expected male behaviour that women encourage or enjoy (Payne, Lonsway and Fitzgerald 1999). Conversely, people who believe rape myths are more likely to blame the victim and less likely to blame the perpetrator, especially when the victim is of lower status than the perpetrator (Yamawaki, Darby and Queiroz 2007). Unfortunately, some people demonise a rape victim who reports the perpetrator to the police (Benedict 1992).

This pattern of sexual violence, the abundance of stereotypes, and the denial of justice fit into sociological and social-psychological theories of hierarchy and group dominance. According to Jackman (2001), members of a dominant group often threaten violence in order to control members of a subordinate group. In order to protect the status quo and manage unpleasant emotions, people create ideologies that legitimise the superiority of a dominant group, the inferiority of a subordinate group, and reasons for systemic violence. (Jost and Hunyady 2002; Jost, Pelham, Sheldon and Ni Sullivan 2003).

Research suggests that underreporting of rape is partly explained by the fact that rape myths can be present and strong among the police. (Rose and Randall 1982) and judges (LaFree, 1980). This is also contributed to by the belief that there are false rape allegations (Jordan 2004). Such expressions of distrust by groups that are socially and legally responsible for the welfare of rape victims can result in secondary victimisation, an experience that can negatively impact recovery. It is possible that the low conviction rate of rape offenders compared to other violent crime offenders may be related to bias against rape victims – whether conscious or not – in the criminal justice system. Empirical findings show that individuals' attitudes about general dominance among groups and gender-based oppression are significant predictors of their attitudes toward rape and rape victims (Hockett, Saucier, Hoffman, Smith, and Craig 2009). They corroborate the feminist perspective that rape and rape myths are structural components of male domination.

One can notice a kind of naturalisation or trivialisation of violence, including (or especially) sexual violence, which is commented on a daily basis in discourses of the media, religion, science and law, which can lead to women themselves interpreting the violence that happened to them as unimportant or even as their own fault, and deciding not to panic about it, especially if there was no great physical force or the rapist is an acquaintance or partner (Figueiredo 1998; Hall 1985). The survivor's perspective is thus informed by imagining what others would think of the incident and who is to blame.

Unfortunately, as pointed out by some studies (Radford 1987), certain behaviours of a woman, such as going out late at night, accepting offered transportation by car, or the way she dresses, may be recognised as reckless, which is then interpreted as willingly participating in a sexual intercourse or provoking it, which again may even lead to a sentence reduction. This view of the circumstances of sexual violence is called victim blaming or victim contribution.

A great emphasis is placed on sexuality, in the sense that the female body is seen as an object of regulation, control and punishment, and that the legal discourse constructs the female body as hysterical or immoral. (Smart 1989). Susan Edwards (1981), for example, argues that the discourse of rape trials is replete with ideas about female passivity, women as victims, and female guilt. Edwards says that for legal culture, sexuality is the main characteristic of a woman, the one that constructs, defines, and shapes female identity. This is achieved by constructing a specific feature of a woman's behaviour (e.g. her sexual history) as dominant. Other characteristics either adapt to this dominant one or, if they conflict, they are downplayed. The rape trial discourse constantly invokes images of motherhood, chastity, promiscuity, the 'bad girl', the 'unfaithful wife', the virgin, the 'lost' woman, etc., creating a shallow and ambiguous portrait of women. In view of the broader cultural and social context, we will mention here the French philosopher Michel Foucault's work. In his influential History of Sexuality (2013), he argued that by introducing prohibitions and regulations on sexuality within legal and medical discursive practices, among others, control over women's sexual behaviour is achieved. In addition, stereotypical representations of gender roles and gender relations found in, for example, family, media and school discourses, are not refuted in the criminal justice system discourse; on the contrary, they receive support and strength in judgements. Even when the rapist has been convicted, the criminal justice system discourse does not genuinely challenge gender and sexual inequalities, which should be interpreted on the basis of the understanding that a crime is not a series of relatively unproblematic facts but a wide range of activities that

should be understood within the context of gender relations (Newburn and Stanko 1994). Moreover, legal attitudes can seem rather outdated and conservative because social values and attitudes change faster than official discourses, especially legal ones. Edwards thus argues (1981) that although social attitudes towards female sexual freedom may have changed so that the girl next door can sleep with her boyfriend without much criticism, if she is raped, however, the social construction of promiscuity is triggered. She concludes that the discourse of court judgements is replete with one-dimensional assumptions about female passivity, women as victims, and women's contribution to guilt.

There are studies that, in an attempt to understand sexual violence, offer a relevant analysis of the difference between perpetrators who admit and those who deny their guilt (Scully 1990). Although they believe that the act of rape is unacceptable, those who do not admit guilt argue that in their particular cases there were justifications that made their behaviour appropriate, if not even right. These justifications were rhetorically constructed, and Scully (1990) concludes that the use of discursive explanations and manipulations to make rape and other sexual offences seem normal appears to be present not only in the discourse of rapists, but also in the criminal justice system discourse. Both rapists and legal experts (like judges) build their explanations for rape on a knowledge acquired from society, the knowledge that expresses what our culture deems acceptable. This process of social and cultural acceptance of sexual violence is sometimes even acknowledged in official discourses and is a product of prevailing stereotypes about women as sexual objects. The most common stereotypes that Scully (1990: 102) detects in the situational justifications of denying perpetrators are: (1) women are seductresses, (2) "no" means "yes", (3) women "relax and enjoy" eventually, and (4) nice girls don't end up being raped. It is also about victim blaming. A sociological explanation for the apparent insensitivity of rapists towards their victims can be offered from the perspective of a lack of empathy, which is closely related to the power distribution between sexes. Powerful people (e.g. men and judges) have little reason to put themselves in the shoes of the less powerful. For less powerful individuals, on the other hand, it is vital to learn to understand and predict the behaviour of others. Therefore, understanding the female role is not crucial for men, while for women it is a survival strategy (Scully 1990: 115–116).

Rape trials are a good example of how society sees gender relations, gender roles and the social phenomenon of sexual violence against women. The discourse of most rape trials rests on the assumption that the causes of rape are individual rather than social and should be sought primarily in the

rape victim's behaviour. However, the rape problem lies not only in the assaulted woman (her clothes, her sexual behaviour, her occupation, her appearance, where she is, etc.), but mainly in the messages that her assailant received from social discourses: we talk about women and men who have been brought up in a society that allows powerful groups to exhibit all kinds of abusive behaviour towards the less powerful. This way of thinking can lead us to see rape not just as a type of sexual crime, but as a form of power abuse, an exercise of male control over female behaviour. This link between sexual violence and forms of social and legal control is poorly researched. Ruth Hall therefore argues that, in theory, rape is seen as a very serious crime, but there is a widespread view that rape is simply a sexual act which took place at the wrong time and in the wrong place (Hall 1985).

Numerous studies indicate that the relationship between the perpetrator and the victim is important in judgments in rape cases, for example with regard to value orientations, where "Traditionals" minimised the severity of all rapes more than "Egalitarians" did. As the acquaintance level increased, there was a greater tendency to minimise the severity of the rape, (Ben-David and Schneider 2005). Despite advances in women's rights and status in many parts of the world, there is a persisting belief that a woman's sexual consent automatically arises from an intimate heterosexual relationship. Marriage is often considered an indication of irrevocable consent to sexual intercourse (Ewoldt, Monson and Langhinrichsen-Rohling 2000). Unfortunately, even if the close relationship does not result in full acquittal, it is often used as a mitigating circumstance to justify a reduced sentence. The degree of acquaintance between the victim and the perpetrator affects rape perceptions in terms of defining the situation, assessing the psychological traumatic experience, and attributing guilt. Acquaintance rapes as opposed to stranger rapes are less likely to be considered rape, even by victims themselves (Koss et al. 1988). Many studies have shown that individuals consider acquaintance rape to be a lesser crime than stranger rape (Bell, Kuriloff, and Lottes 1994; Bridges 1991), and marital rape is considered less serious than non-partner rape, and is perceived to have fewer psychological consequences for the victim (Monson, Langhinrichsen-Rohling and Biderup 2000; Sanchez 1997; Simonson and Subich 1999). These studies show a reversed linear relation between victim–perpetrator acquaintance level and attributions of blame to the perpetrator. As the intimacy of the relationship increases, the tendency to consider his behaviour as totally unacceptable decreases (Freetly and Kane 1995). Shorter sentences are recommended for partner rapists and date rapists than for acquaintance and stranger rapists (Cowan, 2000), and longer sentences are recommended for stranger rapists than for acquaintance rapists (Viki, Abrams, and Masser 2004). Support for this position was found in

Bridges study (1991), where gender role expectations are applied more strongly to date rape than to stranger rape.

Research shows that a high percentage of rape offenders have alcohol issues (Grubin and Gunn 1990) and that victims of sexual assault are more likely to drink excessively than non-victims. (Corbin et al. 2001). Considering the widespread use of alcohol in contemporary social interactions and the fact that sexual assaults involving intimate partners or acquaintances are much more common than those involving strangers, the existence of this association is perhaps not surprising. Also, alcohol consumption has been studied as a risk factor for sexual victimisation because it reduces awareness of risky situations and hinders the ability to resist an attack (Abbey 1991; Berkowitz 1992). Therefore, it is perhaps no surprise to find evidence that presence of intoxication in consensual sex scenarios often affects the way observers assign responsibility to the parties involved. Where a sober defendant takes advantage of an intoxicated plaintiff, despite her intoxication, the plaintiff appears less likely to be held responsible (Wall and Schuller 2000) and observers are more likely to conclude that rape occurred (Norris and Cubbins 1992), because the defendant's sobriety excludes any mitigation options. Alcohol is considered a seduction tool, a measure of masculinity, a provider of sexual prowess and a means of breaking down social constraints (Crowe and George 1989).

2. The Evolution of Criminal Offences Against Sexual Freedom in the Republic of Croatia with Special Emphasis on Rape Crime

Nowadays, gender-based violence is common subject of scientific discourse conditioned by social reality. The need to suppress it has long been recognised internationally. As a rule, it is determined by the sexual/gender basis and the resulting consequences.[28] Sexual violence (or "*spolno nasilje*",

[28] In this sense, for example, the United Nations define "violence against women" as "all acts of sex/gender based violence that result in, or are likely to result in physical, sexual, psychological or economic harm or suffering to women, including threats, coercion or arbitrary deprivation of liberty, whether occurring in public or private spaces." The UN Declaration on the Elimination of Violence against Women was adopted by the United Nations General Assembly on 20 December 1993, 48/104, Art. 1. The Council of Europe considers violence against women to be a human rights violation and a form of discrimination against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life", while "gender-based violence against women" is violence directed at a woman because she is a woman or that disproportionately affects women. Council of Europe Convention on preventing and combating violence against women and domestic violence. Art. 3., points a) and d), Official Gazette - International Agreements, No. 3/18. See also Recommendation

a frequently used term in Croatian literature) can qualify as different forms of minor offences or crimes. Criminal law is (or should be) the last public resort that acts as a protective mechanism when all more lenient social tools have failed. Its modernisation and acceptance of the fact that women are crime victims because of patriarchal social patterns, gender stereotypes, discrimination and prejudice, abuse of power and underrepresentation in decision-making processes (Đurđević 2022), led to the fact that the gender prism is a recognised perspective of (criminal) matters.

Each criminal offence serves to protect a selected legal good, and some of them have a distinct gender perspective. There is no doubt that the latter include crimes against sexual freedom, which, as the name indicates, protect sexual freedom in the sense of "one's freedom to choose the place, time, way and person with whom to have sexual intercourse", as well as sexual integrity and self-determination, providing protection against involuntary sexual acts (Turković in: Derenčinović (ur.) 2013: 157). This area belongs to the more dynamic parts of criminal law because it is often changed and harmonised under the influence of societal progress, changes in social attitudes and the implementation of modern legal standards, but also the desire to better protect victims (thus the most recent amendment to the Criminal Code affected the provisions referred to in this part). These crimes are known to be poorly reported, among other things, due to secondary victimisation, procedural traumatisation, lack of confidence in the system, fear and social stigmatisation (Herceg Pakšić 2024), which makes their prosecution elusive.

Historically, the chapter title in the Criminal Code was often changed, showing the connection with morality and ethics. Until 1998, the title of the chapter was "Criminal offences against one's dignity and morals" (Chapter X of the then Criminal Code of the Republic of Croatia from 1977), and then it was replaced with "Criminal offences against sexual freedom and sexual ethics" (1997 Criminal Code). This chapter (XVI) of the Criminal Code includes five criminal offences: Rape, Aggravated Crimes Against Sexual Freedom, Lewd Acts, Sexual Harassment, and Prostitution. Below, we particularly focus on elements of a rape crime.

In the following text, we focus specifically on the elements of the criminal offense of rape.

In 1998, the entry into force of the 1997 Criminal Code was a turning point for three important rape crime changes - gender neutrality was

REC(2002) 5 of the Committee of Ministers of the Council of Europe to member states on the protection of women from violence, and General Recommendation No. 19 of the CEDAW Committee on Violence against Women (1992).

introduced, and the role of perpetrator or victim became possible for both sexes, the existence of marriage ceased to be a precondition for the existence of this crime, and rape became an option even if people were married, and behaviours equated with sexual intercourse became a rape modality, which expanded the punishable area (Kurtović Mišić, Garačić 2010). In 2011, the adoption of the new Criminal Code was a new turning point, when the concept of sexual ethics was omitted from the chapter title, indicating that the association with morality and honour meant additional stigmatisation, shame and secondary victimisation, and downplaying of injuries (Turković, Maršavelski 2010; Turković in: Derenčinović 2013), any non-consensual sexual intercourse became punishable, and the concept of consent was introduced in the text of the Code. Originally, non-consensual sexual intercourse was defined as the basic offence under sexual offences, based on the English concept, but in 2019, the Croatian legislator decided to classify this provision under Rape.

Pursuant to Article 153 of the Criminal Code, an offender who engages in a non-consensual sexual intercourse or a sexual behaviour equated with it or induces the victim to perform non-consensual sexual intercourse or equated sexual act with a third person, or on herself, shall be punished with imprisonment of three to eight years. If an offence was committed by the use of force or threat of a direct attack on the life or body of a raped victim or other person, it is punishable with five to twelve years in prison. Punishment of up to three years for rectifiable misconception about the existence of consent has also been introduced. Consent exists if a person voluntarily decided to engage in sexual intercourse or a sexual act equivalent to it and was capable of making and expressing such a decision, and it is considered not to exist if sexual intercourse or an equivalent act was carried out using threats, fraud, abuse of position towards a dependent person, by taking advantage of one's condition which rendered them unable to express their refusal, or against a person who was unlawfully deprived of liberty.

Statistically, rape does not account for a large share of the annual number of criminal offences committed in the Republic of Croatia. Reportedly, it accounts for approximately 0.20% of the total number of convicted criminals (Vuletić and Šprem 2019: 131), which only confirms the high figure in bold above. When it comes to criminological characteristics, it is a serious crime that, as a rule, leaves victims with many different health consequences; victims are often young, and perpetrators are known or close to them, and there is no significant numerical discrepancy between the defendants and convicts in the Republic of Croatia (most of those accused were also convicted) (Vuletić and Šprem 2019).

Almost a decade and a half ago, the authors pointed out that the issue of rape victim's resistance has long been a "stumbling block" for Croatian jurisprudence: although this issue was not mentioned at the legislative level, jurisprudence tried to nullify the thesis about voluntary sexual intercourse precisely through the characteristics of resistance (Kurtović Mišić and Garačić 2010). It is noted that Croatian jurisprudence, especially in the early 2000s, accepted that there was no need to prove resistance, with occasional exceptions (Vuletić and Šprem 2019). Considering resistance in the context of proving rape is against the standards of the European Court of Human Rights. In 2011, with the adoption of the current Criminal Code, the focus was shifted to the (non)existence of consent. This actually introduced a rebuttable presumption of non-existence of consent (Turković, Maršavelski 2010). Thus, as determined within criminal rape, consent also applies to serious criminal offences against sexual freedom and to lewd acts. Jurisprudence provides an insight into how defendants, who defend themselves as not being aware of the lack of consent, usually refer to the absence of resistance or the victim's voluntary arrival to the place where the crime was committed (Vuletić and Šprem 2019).

3. Methodology and Analysis of Results

The purpose of this chapter is to describe the methodological procedures in the analysis of first-instance judgements concerning sample selection, time frame, geographical area and selected cases according to the type of criminal offence, as well as data access conditions and topics by which the material was coded.

Time and geographic criteria were applied in sample selection. As both authors work at the University in Osijek, and each deals with gender-based violence from own perspective, they chose a deliberate sample of judgments from the County Court in Osijek. The time frame of the selected sample is from 2018 to 2022. They analysed rape convictions.

Data access was agreed by a formal request to the County Court management, explaining that we needed access for research purposes and explained our goals, purpose and basic methodological procedures, as well as ethical considerations and data anonymisation procedures.

Unfortunately, the courts are not transparent yet, and all judgements are not available online. As previously agreed, employees of the County Court in Osijek prepared court files from the archive for us, and we were only able to review and analyse the material in the court premises. We extend our gratitude to them.

The data collection method was organised on the basis of previously developed matrices, which included a large number of collected data. For the analysis purposes, we deliberately decided to examine the gender structure, characteristics and relationship between perpetrator and victim, the concept of "victim's contribution" and possible discursive gender stereotypes and myths in the evaluation of mitigating and aggravating circumstances and the choice of type and severity of sanctions. The analytical tool is a description of the perpetrator and the relationship with the victim, as well as a coded analysis of the text of judgements. We previously selected the described codes as themes. Over the past five years, the criterion of such sample selection has facilitated insight into the current situation, and apart from this sample selection criterion, we have reduced the influence of various sociocultural, sociopolitical and sociolegal circumstances, because we deal with judgements from the same context and region.

Ethical aspects we considered include vulnerability concerns and anonymisation, in order to ensure anonymity and confidentiality of data.

Methodology limitations include a small sample, but the large size of the material and the aforementioned sociocultural context justify this approach. It is not possible to generally apply these insights to the population, but the research aims to provide a denser description in view of the rape phenomenology and a specific region.

In total, in the above five-year period, there were eleven judgements in rape cases at the County Court in Osijek, but we could only access ten because one case was at the Supreme Court at the time of our analysis in November and December 2023.

The material we analysed is very extensive, and for the purposes of this paper we chose to describe the main characteristics of the perpetrator, victim-perpetrator relationship, the role of alcohol intoxication, guilty plea, some mitigating and aggravating circumstances, and the choice of types and extent of imposed sanctions.

All rape crime perpetrators from 2018 to 2022 tried at the County Court in Osijek were men (10), and all victims were women. The perpetrators' age ranges from the oldest born in 1960 to the youngest born in 1997. One perpetrator has a university degree, one completed elementary school, two are unqualified, while the others obtained a secondary school degree. One perpetrator is divorced, four are single, one is married, one has just broken off the engagement, and three are in common law marriages. Four perpetrators have children. Five perpetrators are employed, one is retired, and the rest are

unemployed and without income. Table 1 shows some basic sociodemographic characteristics of all ten perpetrators from the analysed judgements. Table 2 shows the duration of prison sentences imposed, guilty pleas and prior convictions.

As for victim-perpetrator relationship, two cases involve people who did not know each other before, in one case the perpetrator is a foster parent as a surrogate father of the victim, in three cases it is about intimate partners in common law marriages that the victims ended or wanted to end, two cases involved friends, in one of which the perpetrator claimed that he had previously been in an intimate relationship with the victim, and in one case they were neighbours and friends. Two rapes were committed against elderly persons.

As for alcohol consumption, seven cases involved severe intoxication of perpetrators, and in two of those cases victims were also intoxicated.

Table 1 Characteristics of perpetrators

Gender	Year of birth	Education	Employment	Marital status	Children
M	1973	Secondary school	Retired	Divorced	1
M	1960	Secondary school	No	Married	2
M	1990	Unqualified	Yes	Broken engagement	0
M	1988	Unqualified	No	Single	0
M	1994	Secondary school	Yes	Common law marriage (broken)	1
M	1991	3-year secondary school	Yes	Common law marriage	0
M	1990	Unqualified	Yes	Single	0
M	1997	Secondary school	Yes	Single	0
M	1994	Higher education	Yes	Single	0
M	1966	Elementary school	No, social welfare	Common law marriage (broken)	3

Table 2. Plea, sentence and prior convictions of perpetrator

Perpetrator	Imprisonment	I feel guilty	Prior convictions
1	Murder 25 years Rape 13 years Unified 37 years	No	Yes
2	6 years	No	No
3	4 years	No	No
4	2 years	No	Yes
5	2 years and 10 months, suspended 1.5 years if they do not repeat the crime in 3 years	No	Yes
6	2 years and 11 months, unified 1.5 to be enforced, then release with 5 years of probation	Yes	Yes
7	6 years	Yes	Yes
8	1 year	Yes	No
9	1 year and 5 months, reduced to 9 months	Yes	No
10	5 years and 6 months, attempted murder and rape	No	No

The first perpetrator (born in 1973) broke into the apartment of an elderly person (born in 1941) and brutally physically attacked, raped and robbed her. He had several prior convictions and plead not guilty despite clear evidence (video footage, DNA findings) and witness statements. There were no mitigating circumstances.

The second perpetrator also denied guilt even though he raped a minor whom he and his wife adopted when she was 4 years old and he was her surrogate father. The victim told her new foster mother about the crime later, when she was 6 months pregnant, and she showed strong signs of traumatisation. Under mitigating circumstances, the judgment reads that this is an isolated incident, that the perpetrator has no prior convictions, that he is 62, and even that it is normal and logical for a person who has never been convicted to be under great stress due to arrest and trial. A motion to extend the 6-year prison sentence was not accepted.

The third perpetrator attacked an unknown woman in the park, who resisted and wailed as heard by women passing by, which made him run away without having full intercourse. He was severely under the influence, and he was sentenced to 4 years in prison. His ex-fiancée testified that he was prone to violence and had bad relations with his family. Photographs of the victim testify to severe physical injuries and extreme aggressiveness, but he pleaded not guilty.

The fourth case was committed by a man with prior convictions, born in 1988, who was a friend of the victim and they partied together with alcohol in a club. He called her to the car where he insulted her, abused her and threatened her life. He said that he was in a relationship with the victim, which she denied. Text messages confirm her statement. She wanted to drop charges because she later had a child and felt burdened and just wanted to forget everything. Although the perpetrator was convicted, the court reduced the sentence to 2 years in prison because he had low salary and no possessions. The perpetrator plead not guilty.

The fifth case involved rape of a common law wife, the mother of perpetrator's child, after she broke up with him. The perpetrator threatened and insulted her and used economic, psychological and physical violence. His alcoholism was valued as a mitigating circumstance along with his guilty plea. He was sentenced to 2 years and 10 months in prison; he was to serve 1.5 years provided that he did not repeat the offence within three years.

The sixth case was also committed by a former common law husband with prior criminal record. He choked and chased the victim when she tried to escape, she fainted at one point, he threatened her life, pleaded guilty and received a unified sentence of 2 years and 11 months in prison. The court finds that it is understandable that he loves his children and values his guilty plea, alcoholism, the fact that he is the sole breadwinner and young as mitigating circumstances. The sentence is reduced because the court believes that the perpetrator will not commit crimes in the future.

The seventh case of rape was committed by an intoxicated offender with prior criminal record against his elderly neighbour and godmother (victim 30 years older than him), who lives alone. He seriously injured the victim (chest haematoma, injuries on mouth, genitals and thighs) because he believed that the victim was gossiping about him, he threatened to set fire and kill the victim and her son. The expert witness claims that the perpetrator has low IQ, and his guilty plea and intoxication were valued as mitigating. He was sentenced to 6.5 years in prison.

The eighth perpetrator had no prior criminal record, he worked in Germany. He was friends with the victim on Instagram. He raped her in a car, blackmailing her that he would share her intimate pictures and videos. He received a 1-year suspended prison sentence, which will not be enforced if he does not repeat the crime in 4 years.

The ninth perpetrator is the only one with a higher education, no prior convictions, who raped his friend. They went out together, and she invited him and his friend to spend the night at her apartment so that they wouldn't have to drive home to another city while intoxicated. He raped the victim while she was asleep. The mitigating circumstances include his young age, no criminal record, and his heavy intoxication. He received a prison sentence of 1 year and 5 months, which was commuted to 9 months.

The tenth case of rape was committed by a father of three against his former common law wife after she ended their 26-year relationship. He threatened to kill her, he wanted to stab her in the stomach, but she dodged and he cut her lower leg. He raped her multiple times in one night, heavily intoxicated, holding a knife under the pillow, claiming that it was consensual and pleading not guilty. He was sentenced to a combined prison term of 5 years and 6 months for attempted murder and rape.

4. Discussion and Conclusion

The aim of this paper was to provide an overview of the legislative framework for rape trials in Croatia, map existing relevant research and analyse court judgements. In this paper, we provided an overview of some important research related to the codes that were selected for the analysis of court judgements in rape cases at the county court in Osijek from 2018 to 2022. The selected codes included some sociodemographic characteristics of the perpetrator, victim-perpetrator relationship, potential gender myths when valuing mitigating circumstances, and the influence of alcohol intoxication.

In the theoretical overview at the beginning of this paper, we established that criminal law functions include the overall preservation of a minimum of

morality and social order and cohesion, and the prosecution of crimes against sexual freedom is a practice that not only reflects gender relations, but also helps to construct them. Our societies are characterised by deep gender inequality, which is unfortunately also shown in the results of this analysis, clearly arising from the fact that all perpetrators are men and the victims are women, and at deeper levels from certain assumptions that can be seen in the discourse of judgments, for example in sentencing and mitigating circumstances. The fact that this analysis covers only ten cases in five years is consistent with data on underreporting, despite the high incidence of rape.

Stringent sanctions for rape crimes can contribute to the fight against gender inequality, emphasising the unacceptability of violence against women and girls who are most frequently the victims of these crimes. Sanctions for these offences play a key role in the protection of individuals, preserving social peace and promoting justice and equality in society. The way in which the justice system approaches the prosecution and punishment of these crimes can reveal a lot about the deep structures shaping gender relations in a society. Our results show that the court often imposed sentences below the legal minimum and reduced sentences, allowing suspended sentences. Only in cases of aggravated murder or pronounced and persistent aggressiveness with life threats, a sentence of more than three years was imposed, and all other cases were punished much more leniently, as shown in the previous chapter.

For example, in the case of a raped foster daughter, the rape was reported later, during her stay with a new foster family, when the victim told her foster mother about the incident, who reported the case. We can say that the victim's perspective here was filled with fear and/or shame and that the victim wondered about the ways of interrogation and guilt proving. This supports the thesis about the ubiquity and normalisation of violence, as well as contemplation about one's own guilt and avoiding panic, especially when the rapist is someone close, like in this case and in most of the analysed cases.

Victim blaming that we discussed theoretically in the first chapter can also be seen in cases involving friendly relations and going out together, especially in the evening with alcohol. Such behaviour by a female victim was interpreted as unreasonable, and in court proceedings, they searched for additional evidence of the circumstances and explored potential contribution of the victim to the crime committed against her. Such situations in the described cases confirm the thesis about objectified female body and female sexuality as primary signifiers of female identity in court cases of rape.

Furthermore, the rhetorical constructions and excuses of perpetrators who plead not guilty in the analysed cases (thus also suggesting at least partial

guilt of the victim) include many stereotypes that we discussed in the theoretical chapter at the beginning of the paper - for example, that the women wanted it (although there was clearly resistance and no consent, and the women suffered serious injuries and death threats), that they are seductresses, and that they are not "nice" (especially considering the crude and vulgar insults uttered during the act of rape, especially to (former) intimate partners). These findings suggest that rape is an act of power where the dominant have no empathy and no sensitivity for the less powerful who are expected to be submissive. Therefore, our results support the theses from the literature referred to in the first chapter pertaining to the resilience of gender myths that justify male aggression, including sexual aggression, and confirm that the thesis about rape as a crime of pure passion is also a myth, and that reality testifies to practicing of power relations that exist in the wider social fabric.

To some extent, our findings can confirm the thesis that due to close victim-perpetrator relationships, the crime is viewed as less serious, which is evident in lenient and sentences below the minimum of three years that were imposed in more than a half of the cases. Shorter sentences are recommended for partner rapists and date rapists than for stranger rapists.

Diminished mental capacity due to alcohol abuse was valued as a mitigating circumstance in most of the analysed cases. Our findings confirmed those from the presented research showing that a high percentage of rape perpetrators have problems with alcohol. Considering the widespread use of alcohol in contemporary social interactions and the fact that sexual assaults between intimate partners or acquaintances are much more common than those involving strangers, the existence of this association is no surprise. As mentioned above, alcohol is often considered a means of seduction, a masculinity indicator, a source of sexual prowess and a way to overcome social restrictions. Our results also suggest that, even when the level of alcohol consumed has no significant impact on behaviour or cognitive processes, alcohol often provides an incentive to engage in otherwise unacceptable behaviour and is regularly valued as a mitigating circumstance in the analysed cases.

Rape trials are a good example of how society sees gender relations, gender roles and the social phenomenon of sexual violence against women. The discourse of most rape trials rests on the assumption that the causes of rape are individual rather than social and should be sought primarily in the rape victim's behaviour. However, the rape problem lies not only in the assaulted woman, but mainly in the messages that her assailant received from social discourses: we talk about women and men who have been brought up in a society that allows and encourages powerful groups to exhibit all kinds of

abusive behaviour towards the less powerful. This way of thinking can lead us to see rape not only as a type of sexual crime, but as a form of power abuse, an exercise of male control over female behaviour, which is reproduced in law practices and discourse. This link between sexual violence and forms of social and legal control is poorly researched. Therefore, we should embark on new research, education and awareness raising of this deeply rooted societal problem.

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II. IMPACT OF GENDER STEREOTYPES ON THE SANCTIONING POLICY

Nevzet Veladžić and Anita Mujkić

Judicial Decisions on Victims of Violence in the Shadow of Gender Stereotypes

Abstract

This research started from the assumption that judicial treatment of domestic violence victims have commonly been affected by deeply rooted gender stereotypes, and resulted in unfair decisions and further stigmatisation of the victims. Given the above hypothesis, this research seeks to determine how generally traditional gender stereotypes impact the treatment of domestic violence survivors in judicial proceedings. In choosing appropriate methodology we were guided by our opinion that an analysis of the literature on gender stereotypes, domestic violence and judiciary, and an analysis of the case law should be valuable. Also, in order to obtain quality data, we interviewed several lawyers and judges. Their opinions and views will be used to make conclusions on the impact of gender stereotypes on how the domestic violence survivors have been treated. The result of this research could be highly valuable for the improvement of the judicial treatment of domestic violence victims, and for raising the awareness on gender stereotypes in the community and their adverse effect on women. In conclusion, the research will provide specific recommendations for the prevention and combating of domestic violence, and promotion of the rights of victims and their protection.

Keywords: gender stereotypes, judiciary, victims of violence, family

1. Introduction

Violence against women is a global problem which affects all the aspects of victims' life, and the legal system plays a crucial role in the protection of the victims, and prevention of this form of abuse. Unfortunately, judicial decisions in cases of violence against women have repeatedly been affected by gender stereotypes. This can result in unfair decisions and further stigmatisation of the victims. The theses statement of this paper is that judicial decisions on victims of violence must be free from gender stereotypes. The objective is to determine the impact of gender stereotypes on how the judicial institutions treat the domestic violence victims. The legal system plays an essential role in protection of victims and prevention of this form of abuse. Nevertheless, many judicial decisions in cases concerning violence against

women have notably been affected by deeply rooted gender stereotypes. Gender stereotypes are gender-biased opinions on traits and patterns of behaviour of individuals. These stereotypes can have an impact on the evaluation of evidence, credibility of a victim, the application of relevant legal provisions. For example, gender stereotypes can create a perception that a women who was exposed to a sexual assault "provoked" the attacker by her outfit and behaviour, which again may result in a more lenient sentence for the defendant or even dismissal of the indictment. The idea behind our research is to highlight the importance of fair decisions on victims of violence free from influence of gender stereotypes. The treatment of victims of violence in their families is often affected by gender stereotypes, and our intention is to determine the extent of such impact.

2. Gender Stereotypes and Domestic Violence

Domestic violence is a complex social and legal issue which unfortunately knows no boundaries regardless of the socio-economic setting or level of education. Research shows that gender stereotypes largely affect both the perception and experience of domestic violence, as well as the patterns of this violence. This chapter analyses the conceptual link between gender stereotypes and domestic violence, and how they contribute to its occurrence, concealment, and response to this violence.

Gender stereotypes are predefined sets of gender-biased expectations on behaviour and emotions, and abilities (Jones 2003). Traditional gender stereotypes often present men as dominant, powerful, and aggressive figures, while women are seen as submissive, emotional and passive (Carrigan and Connell 2007). These generalisations can also have an impact on how we define and recognise domestic violence. For instance, it is easier to recognise physical violence if committed by a man against a woman, while mental and emotional violence, which can be extremely harmful, can easily be overlooked, because men are not perceived as perpetrators of this form of violence.

A gender stereotype is a generalised view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by, or performed by, women and men. Harmful stereotypes on men portray them as aggressive, dominant and controlling, while harmful stereotypes portray women as passive, submissive and responsible for taking care of home and children.

Furthermore, the role of gender-based stereotypes, when it comes to domestic violence, may also be viewed through the lenses of the perpetrator,

warranting men's violence and providing justification for their behaviour. For instance, a man who believes that his role is to be dominant and control the family, may seek to justify his violent behaviour by the need to "discipline" or "protect" the family (Carmichael 2020). If the role of gender-based stereotypes is viewed through the lenses of the victim, gender stereotypes may make victims feel that they are expected to remain passive, which can make it more difficult for them to defend themselves or ask for help, because they may fear that thy will be judged because they "had not tried hard enough". Gender-based stereotypes may also challenge impartiality of judicial institutions in processing these cases. For instance, police may not understand seriously a domestic violence case if they believe that the victim may have "provoked" her partner (Hester).

2.1 Impact of Gender-Based Stereotypes on the Efficacy of the Legal and Social Response to Domestic Violence

Legal and social response to domestic violence may also be affected by gendered stereotypes. It is also necessary to ensure that the applicable legal framework is gender sensitive and safeguard procedures are in place that provide an adequate level of protection regardless of victims' sex. Domestic violence is a global problem that transcends socioeconomic and cultural boundaries. While progress has been made in victims' identification and protection, harmful stereotypes still impede the efficacy of the legal and social response. This chapter analyses how stereotypes affect reported domestic violence cases, trials and support provided to domestic violence victims, and proposes measures to combat domestic violence. One of the most harmful stereotypes portrays a woman as the only victim, and man as the perpetrator of domestic violence. There are other stereotypes such as the one that "victims brought it upon themselves" by their behaviour or provocation, while the fear of stigmatisation and blame makes it difficult for them to report violence.

The fight against stereotypes in domestic violence cases requires a multidisciplinary approach, and engagement of the judicial system, social services, and civil society. Some of key strategies include:

a. **Training of legal officers and social workers**: educating police, prosecutors, judges, and social workers on stereotypes and their impact on domestic violence cases.
b. **Public campaigns**: Launching campaigns to raise awareness on different forms of domestic violence and to break stereotypes on victims and perpetrators.

c. **Support to victims**: Providing safe space and services to victims of domestic violence in order for them to feel sufficiently empowered to come forward and ask for help.

The above indicates that multiple approaches must be used in order to reduce the impact of gender-based stereotypes on domestic violence. The following steps can be taken at the legislative level:

a. **Gender-neutral legislation**: Draft and implement a gender-neutral legislation on domestic violence with clearly defined forms of violence regardless of the victim's or perpetrator's sex.
b. **Safeguards**: Ensure that legislation provides adequate protective measures for all victims of domestic violence, including men and children.
c. **Training for professionals**: Legislate mandatory training for judges, prosecutor's offices, police and other professionals handling domestic violence cases on how gender-based stereotypes can affect their work.

3. Legal Framework on Protection from Domestic Violence in Bosnia and Herzegovina

3.1 International Legal Framework

In the past decades, domestic violence became the focus of international legal and political engagement, including both governmental and nongovernmental organisations. As a result, we now have a robust legal framework comprising international conventions, political agreements, guidelines, and recommendations. It is fair to say that the relevant legislation on domestic violence at the international level is rather comprehensive.

Specific international documents addressing the status and rights of women in this context include:

- **Beijing Declaration (1955):** Adopted at the Fourth Conference on Women, this Declaration reaffirms equal rights and inherent human dignity of women and men. It calls for elimination of all forms of discrimination against women and children particularly of domestic violence.
- **Convention on Elimination of all Forms of Discrimination against Women (CEDAW):** This legally binding document requires signatories to take specific measures to protect women from violence.

- **Convention on the Political Rights of Women:** this Convention promotes and protects political rights of women, including their right to live free from fear of violence.
- **Convention on Nationality of Married Women:** This important document from 1957, although it has not been widely ratified, is an early attempt to protect women in marriage, including from violence.
- **Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others:** This document may be applied to cases of trafficking in women and young girls for sexual exploitation, which is often connected with domestic violence.

There are other international legal documents addressing domestic violence other than the above listed documents. Analysing these documents, we can identify the obligations of the state in the fight against domestic violence, and international standards pertaining to the protection of women and children from this criminal offence (Šarić 2012).

The Convention on Elimination of all Forms of Discrimination against Women (CEDAW) took effect on September 3, 1981, having been adopted by the Resolution of the General Assembly of UN of December 18, 1979. The member states committed to:

- **Definition of "discrimination against women":** shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
- **Elimination of discrimination:** States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
    - **Amend the legislation**: Improve the national legislation and gender mainstreaming.
    - **Legal protection:** Ensure availability of legal remedies for women who have been exposed to discrimination.
    - **Effective policies:** Develop and implement efficient policies that promote gender equality.
    - **Social protection:** Provide health and social protection for women.

The Committee on the Elimination of Discrimination against Women

(CEDAW): CEDAW is a body established in UN to monitor the implementation of the Convention in the states parties.

Other international documents in form of recommendations which are also relevant in combating violence against women include:

- Universal Declaration on Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social, and Cultural Rights (1966)
- Convention on the Elimination of all Forms of Discrimination against Women (1979) and General Recommendations of the UN Committee on the Elimination of All Forms of Discrimination against Women (no. 12 from 1989 and no. 19 from 1922)
- Convention on the Rights of the Child (1989)
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Convention on the Elimination of all Forms of Racial Discrimination (1965)
- Convention on the Political Rights of Women
- Convention on the Nationality of Married Women
- UN Declaration on the Elimination of Violence Against Women (1999)
- European Convention on the Protection of Human Rights and Fundamental Freedoms (1950)
- European Social Charter (1961) and Revised European Social Charter (1966)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989)
- Recommendation no. R(85) on domestic violence
- Recommendation no. R (2002) on the protection of women against violence
- Recommendation no. R (2000) on violence against women in Europe
- Recommendation no. R (1582) on domestic violence against women
- Recommendation no. R (2004) on the campaign to combat domestic violence against women

- Recommendation no. R (90) on social measures concerning violence in the family
- Recommendation no. R (2001) on the protection of children against sexual exploitation (Šarić 2012)

3.2. The Legal Framework of Bosnia and Herzegovina

Article III of the Constitution of BiH stipulates that all government functions and all powers which have not been allocated to the institutions of Bosnia and Herzegovina in this Constitution, shall be the responsibility of its entities. Therefore, the family relations in Bosnia and Herzegovina are regulated at the level of the entities. It is fair to say that important initial steps have been made to establish specific institutional mechanisms, which are essential for the improvement of gender equality in BiH (Šarić 2012).

Prevailing beliefs and values of individual communities also encourage domestic violence, such as assumptions that abuse of women, and increasingly men, in a marriage is normal, or that such abuse is a strictly private family matter, and that the community should not interfere. Such beliefs vary in different social and cultural settings. There are those who believe that a husband is not a real husband and is not a "man" unless he is abusive to his wife from time to time, and those who do not condone violence, but persist on non-interference in family matters, as well as those who embrace increasingly present views of the western societies on the need to intervene in any major family conflict, and to protect the victims and provide them with an access to medical treatment, and more recently also those who believe that perpetrators of violence should also be allowed access to treatment. Aside these values, social policies that determined how the community treats the perpetrators and victims of violence, legislation on domestic violence and presence of violence in media also play and an important role (Čudina-Obradović and Obradović 2006).

Bosnia and Herzegovina has an international obligation to prevent domestic violence. This obligation stems from various international documents on human rights which prohibit violence both in public and private life. BiH signed many documents, which directly or indirectly address domestic violence. This means that BiH committed to protect the right of individuals to a life free from violence, both in public and family settings.

The national legal framework includes:

- Constitution of BiH
- Constitution of the Federation of Bosnia and Herzegovina

- Constitution of Republika Srpska
- Statute of the Brčko District
- Gender Equality Law of Bosnia and Herzegovina
- Criminal Code of BiH
- Resolution on the fight against violence against women in family
- Gender Action Plan of BiH
- Law on the Protection from Domestic Violence (FBiH and RS)
- Family Law (FBiH and RS)
- Strategic Plan on the Prevention of Domestic Violence 2009-2010

3.2.1. Legislation on Domestic Violence in Bosnia and Herzegovina

The laws that address domestic violence in Bosnia and Herzegovina include:

- Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, 36/03, 21/04, and 18/05)
- Criminal Code of Republika Srpska (Official Gazette of RS, 49/03)
- Criminal Code of the Brčko District (Official Gazette of BD 47/11)
- Family Law of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH 35/05)
- Family Law (Official Gazette of Republika Srpska 54/02) – Family Law of the Brčko District of BiH (Official Gazette 23/07)
- Law on the Protection from Domestic Violence of the Federation of Bosnia and Herzegovina 20/04)
- Misdemeanour Law (Official Gazette of BiH, Misdemeanour Law of the Federation of Bosnia and Herzegovina 20/04).

The applicable legislation concerning domestic violence is vague and inconsistent. It is necessary to analyse individual laws in order to establish which law should be applied in every specific case. The main problem is that the definition of domestic violence is inconsistent in different laws. A stronger media promotion of these laws is also required in order to better inform the public on individual rights of every person.

In addition to these laws, there are other important documents that partly address the issues of domestic violence such as: the Gender Equality Law in

Bosnia and Herzegovina (Official Gazette of BiH, 16/03), Gender Action Plan of Bosnia and Herzegovina, adopted by the Council of Ministers in September 2006), Resolution on the prevention of violence against women in family (Official Gazette of BiH, 15/08), Resolution on the prevention of juvenile delinquency and dealing with violence in children and young persons (Official Gazette of the Federation of BiH, 10/08), National Strategy on Combating Violence against Children 2007-2010 (Official Gazette of BiH, 64/07), Strategy on Juvenile Delinquency in Bosnia and Herzegovina (2006-2010), (Official Gazette of BiH, 14/08).

3.2.2. Analysis of Relevant Provisions of the Criminal Code of the Federation of Bosnia and Herzegovina in Combating Domestic Violence

The Criminal Code of the Federation of Bosnia and Herzegovina (FBiH CC), which entered into force on August 1, 2003, introduced a new set of criminal offences in relation to marriage, family and minors. These criminal offences had not been defined previously, and had not constitute unlawful conduct in family relations for the purposes of criminal liability.

These new criminal offences include:

- Double marriage (Article 214)
- Facilitating a prohibited marriage (Article 215)
- Common-law marriage with a minor (Article 217)
- Change of child's family status (218)
- Neglect or abuse of a child or a minor (Article 219)
- Child abandonment (Article 220)
- Violation of family obligations (221)
- Domestic violence (Article 222)
- Evading the payment of alimony (223)
- Prevention and failure to enforce measures for the protection of a minor (Article 224) (Šarić 2012).

All the above criminal offences carry a sentence ranging from three months to a long term imprisonment, depending of their severity. Special attention has been paid to domestic violence (Article 222) which can be physical, mental, emotional, spiritual and economic. This violence endangers both the victim's bodily integrity and mental state. In addition to a prison sentence, a perpetrator of domestic violence can be imposed a fine.

It should also be noted that domestic violence is associated with other criminal offences such as severe bodily injuries (Article 172(2)) and minor

bodily injury, if committed against a spouse, common-law partner or a child's parent. Finally, in Articles 225 to 240, FBiH CC also defines criminal offences against health which can be an indirect form of domestic violence. These are primarily transmission of infectious disease (Article 225) and transmission of sexual disease (Article 227). Criminal offences against life and limb in Articles 166 through to 176 of the Criminal Code of the Federation BiH (FBiH CC) can also occur as a result of domestic violence. Reckless and violent behaviour may occur in a family and can result in a murder. Also, in addition to abuse that can result in a murder, a victim may be brought in a state of extreme exasperation and commit a crime without the fault of her/his own.

The criminal offence of involvement in other person's suicide referred to in Article 170 of FBiH CC can also qualify as domestic violence, because paragraph 4 of this Article states that a person who treats another person, who is subordinated to or dependent on him/her, with cruelty or inhumanely and, by doing so, unintentionally drives the other person to a suicide, has committed a criminal offence carrying a sentence of imprisonment ranging from six months to five years.

The criminal offence of double marriage defined in Article 214 of FBiH CC means entering into a marriage with another person while the previous marriage is still effective, which gives rise to mental and economic violence against a women. Such cases, according to a research conducted by non-governmental organisations, have been recorded in some communities in Bosnia and Herzegovina where religious marriages outnumber civil marriages. The research shows that in such situations, women are entirely exposed and only a few of them decide to resort to a legal action to protect their rights due to economic dependence, lack of information and lack of understanding of the setting where they live.

The criminal offence of endangering security defined in Article 183 of FBiH CC can also be associated with domestic violence, because the act of commission (pilferage, frequent stalking or harassment of a spouse or a common-law partner, parent of his/her child or another close person) cause suffering and the feeling of insecurity. This criminal offence is also linked with the Law on Protection from Violence in Cases Involving Protective Measures. It is also linked with the Public Law and Order Act, which is a cantonal law.

The criminal offence of incest defined in Article 213 of FBiH CC has been increasingly recorded in the case-law. It is linked with domestic violence. There are three categories of this offence which carry different sentences:

(1) Whoever engages in a sexual intercourse or an equivalent sexual act with a blood relative in a direct line or a sibling, shall be fined or sentenced to a prison term of six months to two years.
(2) Whoever commits the criminal offence referred to in paragraph 1 against a minor, shall be sentenced to a prison term of two to ten years.
(3) Whoever commits the criminal offence referred to in paragraph 1 against a child shall be sentenced to a prison term of two to ten years.

Fathers, brothers, grandfathers and step fathers of the victims have been the most common perpetrators of these crimes. However, processing of these crimes tends to be problematic, because mothers often defend the accused before the court and influence witnesses to change their testimonies. While this problem had been present in Bosnia and Herzegovina since long ago, it has been rarely discussed, because the perpetrators are often persons who were obliged to take care of their victims. In the past, these crimes mainly went unreported due to different kinds of pressure, but the situation has slightly improved.

The criminal offence of rape, defined in Article 203 of the Criminal Code of the Federation of Bosnia and Herzegovina, has been amended so as to cover a marital rape. However, like in cases involving some other crimes, it is extremely difficult to prove a marital rape before the court, unless it involves bodily injuries. Reports on marital rape have been very rare.

As for the sentencing policy for criminal offences of domestic violence, it should be noted that sentences depend on the severity of the criminal offence. The criminal offence of domestic violence, as defined in Article 222 of the Criminal Code of the Federation of Bosnia and Herzegovina, has six different qualifications, with two qualifications that are most common in the Federation.

Due to a poor financial status of perpetrators of these crimes, fines have been rarely imposed, while suspended sentence has been the most common punishment. This gives rise to the questions whether such sentencing policy serves its purpose, and is it capable of providing an adequate satisfaction to the victims. To answer these questions, it is necessary to conduct a special study in Bosnia and Herzegovina.

4. Analysis of Judgments of the Cantonal Court in Bihać through the Lens of Gender Stereotypes

This section of the paper analyses eight judgments made available by

the Cantonal Court in Bihać; three of these eight judgments concern domestic violence cases.

Analysis of the judgments in domestic violence cases. In the case where the perpetrator was accused of the criminal offence of murder referred to in Article 166(1) of the Criminal Code of the Federation of Bosnia and Herzegovina in concurrence with the criminal offence of illicit possession of arms or explosive substances as defined in Article 371(1) of the Criminal Code of the Federation of Bosnia and Herzegovina, the research found that the text of the judgment does not explicitly acknowledge the presence of gender stereotypes, however the analysis considered the following:

> ***Focus on romantic relationship:*** The judgment gives substantial weight to the romance between the victim and defendant. One could ask, how much attention would be paid to this relationship if they had been two unrelated parties.
>
> ***Description of the victim:*** The judgment does not detail on the character of the victim, except that she was in a *romantic relationship* with the defendant. The reasoning of the judgment should not focus on the romantic relationship between the victim and defendant because this could lead the reader to assume that the victim might have provoked the defendant.
>
> ***Description of the defendant:*** The judgment mentions that the defendant showed "a genuine remorse" and "willingness to apologise to the family of the victim".

The language of the judgment is formal and legalistic. The judgment steers clear of emotional wordings and focuses on the factual description and legal reasoning of the judgment.

In a case in which the defended committed extended criminal offence – sexual intercourse with a child" defined in Article 207(2) in conjunction with Article 55 of the Criminal Code of FBiH, in concurrence with extended criminal offence – incest defined in Article 213(3) in conjunction with Article 55 of this law, the analysis of the judgment revealed the following:

- The language of the judgment remains mainly neutral, careful not to favour one sex or the other. Instead of the wording "accused (male) murderer" the judgment uses a neutral term "defendant", which can refer to both men and women. However, some parts of the judgment do address the issue of gender

stereotypes, the analysis of these parts is important for understanding of a potential impact on the judgment.

- Role in the family: the judgment lingers on description of the defendant as a "father" and "spouse", without mentioning other relevant traits which could be more relevant for the case. The focus on the role in the family may imply that the role of the father is automatically relevant for the judgment, which is not necessarily the case.

Phrases with emotional weight: Instead of a neutral term "father" the judgment uses the word "dad", a term which in the Bosnian language has an emotional flavour (dear father). This can inadvertently create an image of the defendant as a protector, with a potential to diminish the seriousness of the allegations.

Gender stereotypes in description of the victim: sexual orientation; the judgment explicitly refers to the female victim using the term "daughter". This can fortify the perception on the vulnerability of the victim based on traditional gendered roles, instead of relying on the facts.

Relation with the defendant: Using the word "daughter" highlights the close relationship between the victim and defendant. This can inadvertently cast doubts on the testimony of the victim, or even encourage sympathies for the defendant because of a "betrayal" of the role of the father.

Potential impact of gender-based stereotypes: One can hardly maintain with certainty that these stereotypes directly affected the judgment, because there is no explicit reference to this matter.

Potential effects: It is however possible that these stereotypes did have an effect at the subconscious level on how the court perceived the defendant and victim. For instance, the defendant may have been perceived as less dangerous, because he is a "dad", or the victim's narrative on the abuse may have been taken less seriously because of the emotional appeal of the term "daughter". Also, the stereotypes can affect the way in which the investigation is conducted and questions asked. It is important that the courts are sensitive to gender stereotypes in order to ensure a just and fair application of the law. Use of a gender sensitive language and avoiding gendered assumptions on behaviour are essential for a fair trial. Based on the above discussion, it is fair to say that the judicial judgments on victims of violence are still shadowed by gender stereotypes, as can be clearly seen in the judgments analysed, particularly in the wordings used in the judgments.

In the judgment where a man murdered his mother, although the judgment does not comprise explicit gender stereotypes, it is possible to consider potential implications and legal elements of the case. The judgment does not use the language which seeks to put the victim or defendant in an inferior position. However, one could look for a potential presence of an implicit assumption that men are more prone to violence than women.

Mental health: The judgment established that the defendant was temporarily insane as a result of schizophrenia when he committed the crime. The judgment does not refer to protective measures, but one can assume that the police investigated the case, and that appropriate protective measures were imposed. The judgment uses a gender-neutral language when describing the defendant and victim. While the judgment does not comprise any obvious gender stereotypes, the case raises the issue of implicit assumptions on men and inherent violent behaviour. The legal elements of the judgment focus on the mental health of the defendant, sanction and public health protection.

Furthermore, the analysis included a judgment concerning a defendant convicted of the criminal offence of sexual intercourse with a child. The Court applied the provisions of the Criminal Code of the Federation of Bosnia and Herzegovina (FBiH CC) on the sexual intercourse with a child and imposed a prison sentence prescribed for this crime. Provisions of the Criminal Procedure Code on admission of guilt, compensation claims and reimbursement of legal fee were also considered in the judgment. The judgment uses a gender-neutral language for the defendant and victim, avoiding gender stereotypes.

The analysis also included a judgment rendered in a case of attempted murder as defined in Article 166(1) in conjunction with Article 28 of the FBiH CC, in concurrence with the criminal offence unlawful possession of arms and explosive substance as defined in Article 371(1) of FBiH CC. Thus, he was charged with an attempted murder of the former girlfriend and unlawful possession of arms. The judgment is free from obvious gender stereotypes, such as that women are emotional and men are aggressive. However, the judgment does use wordings such as, the accused was “infuriated” because the former girlfriend was going to leave him. This lexeme may imply that he reacted *typically as a man: anger over split*.

A conclusion made based on the analysis of the final judgments of the Cantonal Court in Bihać was that while they used a gender-neutral language when referring to the defendant (name and family name, without specifics on the sex), the reasonings of the judgments still contain elements of gender stereotypes. These elements can be viewed as remnants of the traditional,

potential discriminatory approach to wordings used in the judicial decisions.

5. Conclusion

The current legal framework in Bosnia and Herzegovina contains relevant provisions that can be used to address domestic violence. Nevertheless, several weaknesses have been identified in the implementation of the law, while some provisions may comprise uncertainties and inconsistencies. Furthermore, these uncertainties and inconsistencies may impair the implementation of the law and create legal uncertainty.

In addition, the courts need to be more sensitive to gender stereotypes in order to ensure just and fair application of the law. Use of a gender-sensitive language and avoidance of gendered assumptions about persons' behaviour are essential for a fair trial.

Finally, continued efforts to improve coordination among the different stakeholders involved in handling domestic violence cases, and to raise public awareness about this problem, as well as to expand the assistance available to survivors are necessary.

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Discursive (In)Justice: An Analysis of Mitigating and Aggravating Circumstances in Court Rulings on Gender-Based Violence in Bosnia and Herzegovina

Abstract

The paper titled *Discursive (In)Justice: Analysing Mitigating and Aggravating Factors in Gender-Based Violence Verdicts in Bosnia and Herzegovina* examines the nuances of legal interpretation and the influence of judicial discourse in gender-based violence cases. The authors reviewed 232 convictions from Bosnia and Herzegovina rendered between 2017 and 2022, focusing on how courts assess and weigh mitigating and aggravating circumstances.[29] The study explores the contradictions in the judicial process, especially the inconsistencies observed between first-instance and appellate courts regarding the relevance of certain circumstances. Case examples demonstrate that some courts tend to overemphasise mitigating factors while neglecting aggravating ones, whereas others apply sentencing criteria with greater consistency. The analysis also uncovers discrepancies in how circumstances unrelated to the crime, such as unemployment or courtroom demeanour, are interpreted. This paper sheds light on the complexity of legal discourse in Bosnia and Herzegovina and its impact on the perception and treatment of gender-based violence and its influence on the perception and handling of gender-based violence, highlighting the necessity for a more uniform application of legal principles to guarantee equitable treatment for both victims and defendants.

Keywords: judicial discourse, gender-based violence (GBV), mitigating and aggravating circumstances, court rulings in Bosnia and Herzegovina, legal interpretation

1. Introduction

According to the definition by the European Institute for Gender

[29] The courts provided the verdicts in accordance with the recommendation of the High Judicial and Prosecutorial Council for a project carried out by the University Gender Resource Centre at the University of Sarajevo and the TPO Foundation.

Equality (EIGE), gender-based violence (GBV) is any type of discrimination against women that infringes upon their fundamental rights and freedoms. Furthermore, EIGE defines it as: "…all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life."[30] While there are other definitions of gender-based violence, this paper adopts EIGE's due to its comprehensive scope.

Under the existing legal framework in Bosnia and Herzegovina, gender-based violence encompasses criminal offenses that are subject to fines or imprisonment. This study investigates the consideration of mitigating and aggravating circumstances in sentencing decisions for gender-based violence cases within the country's courts. It aims to clarify how these factors are defined and applied in judicial rulings. The analysis is based on a dataset comprising 244 court rulings on gender-based violence across three judicial levels: local, regional, and supreme entity courts. Out of these, twelve cases resulted in acquittals and were excluded from the analysis, as the focus is on the factors influencing sentencing in convictions. The study includes both final and non-final verdicts.

This paper highlights the importance of mitigating and aggravating circumstances as key determinants in sentencing practices and examines their application in court rulings on gender-based violence in Bosnia and Herzegovina.

This paper focuses on mitigating and aggravating circumstances in sentencing decisions, as these factors determine the severity of the sentence in convictions, while being irrelevant in acquittals where no sentence is applied. Furthermore, these circumstances contribute to a broader narrative that enhances public understanding of court rulings and sentencing decisions, thereby shaping public opinion. Gender-based crimes, particularly femicide—as the most severe offense—garner considerable public attention in Bosnia and Herzegovina, creating pressure on policymakers and the judiciary due to insufficient preventive measures. To strengthen prevention, it is essential to either implement stricter legal provisions or impose harsher sentences within the current legal framework, based on the understanding that repeat offenders were not adequately punished the first time.

This paper is organised into four distinct sections. The first section

[30] Gender-Based Violence Against Women (European Institute for Gender Equality, n.d.). Available at: https://eige.europa.eu/publications-resources/thesaurus/terms/1312?language_content_entity=hr

delves into the conceptual definitions of discourse and discursive justice, highlighting the importance of these concepts due to the influential nature of spoken and written words in shaping dominant narratives and justifying individual cases. The second section addresses the legal dimensions of identifying mitigating and aggravating circumstances within criminal codes, underscoring the interpretive authority that courts have in assessing these factors. The third section is devoted to analysing court decisions based on the available judgments. Given the extensive database of 232 convictions and space constraints, not all circumstances presented in the rulings are included. Nevertheless, the objective of this paper is to emphasise certain consistencies in the evaluation of circumstances while critically examining the relevance of specific factors to the criminal offense, without contesting any individual verdicts. Ultimately, our aim is to scrutinise judicial practices. In the conclusion, we will encapsulate the key findings.

2. Theoretical Framework – Discourse, Power, Justice

The notion that "to say something" invariably means "to proclaim or define something" has long been a foundational premise in philosophy. In contrast, the twentieth century, marked by the "linguistic turn"[31] (Ibrulj, 1999), redefined language as a functional tool, implying that utterance is intrinsically linked to an act of doing. French philosopher Jacques Derrida (1930–2004), a pivotal figure in poststructuralist philosophy and semiotics, completely transformed the classical phonocentric paradigm, which regarded spoken language as a clearly defined system of meaning[32]. Derrida underscored the importance of the written word and, more importantly, highlighted the relativity of meaning within the linguistic framework, emphasising the potential and necessity for deconstruction.

In the wake of modern linguistics and psychoanalysis, deconstruction as

[31] In the twentieth century, language regained its significance and central role in philosophy as well as the social sciences and humanities. Twentieth-century philosophy posited that every human interaction with the world and others is inevitably mediated by language, making it a transcendental condition for conceptual thinking, objective knowledge, and meaningful action. In this context, language became a key focus in modern philosophy, sociology, and other social sciences, viewed not only as a tool for communication but also as a framework for understanding the world across its many dimensions.

[32] Ferdinand de Saussure (1857–1913) was a Swiss linguist, semiotician, and philosopher, often referred to as the "father of modern linguistics." He argued that language is a system of clearly defined meanings and can be analysed as a formal structure of differential elements, separate from the complex processes of actual production and comprehension in real-time. A key aspect of his theory was the concept of the linguistic sign, which consists of the signifier (the word's form) and the signified (the concept it represents) (see: Macey, D. 2009. *The Penguin Dictionary of Critical Theory*, Crane Library at the University of British Columbia).

a method helps us understand the unconscious—what shapes our knowledge, actions, and identities. This unconscious, as Louis Althusser (1965) emphasises, is nothing more than ideology, a "set of concepts created in specific socio-historical conditions" (Althusser 1965: 35). This is, however, achieved through language. Modern philosophy has posited that every human stance towards the world and others is necessarily mediated by language, which, in Derrida's terms, appears as a transcendental precondition not only for thinking or knowing but also for acting. Language, therefore, emerges as a practical activity through which the unity of the subjective and the objective, the unity of the "I" and the "Other", takes place. In this sense, Jürgen Habermas[33] asserts that "ideology refers to communication and the symbolic mediation of action" (1975: 44). In recent decades, this activity has been marked by the term "discourse". The term has come to be used across a broad spectrum of social and particularly humanistic disciplines, such as sociology, linguistics, and psychology (Mills 2004). However, the term "discourse", like many others used in the social and human sciences, is not unambiguously defined; it inherently implies concepts such as text, sentence, or ideology, each of which, depending on the context in which they appear, forms a specific meaning.

Different dictionaries provide varying definitions of the term "discourse". For example, Merriam-Webster defines it as "a verbal interchange of ideas; formal and orderly and usually extended expression of thought on a subject; connected speech or writing; a linguistic unit (such as a conversation or story) larger than a sentence; a mode of organising knowledge, ideas, or experience that is rooted in language and its concrete contexts (such as history or institutions)" (Merriam-Webster). On the other hand, Geoffrey Leech and Michael Short describe discourse as "linguistic communication viewed as a transaction between speaker and listener, an interpersonal activity whose form is determined by its social purpose" (Leech & Short 1992: 189). Among the many definitions, the term discourse emerges as controversial, encompassing a range of meanings or contexts in which it can be found. However, for this paper, the most significant aspect is the relationship between discourse and justice, or the judicial system, where discourse is understood in the terms defined by poststructuralist philosopher Judith Butler, as "a historically developed set of interconnected and mutually supportive statements, used to define and describe objects" (Butler 2006: 44). Essentially, according to this view, discourse is the language used by specific disciplines in the form of "discursive practices" that serve specific societal purposes and

[33] Jürgen Habermas (1929) is a German philosopher and sociologist, renowned for his theory of communicative action. This theory is based on the idea that every form of social relation, behaviour, and action is always mediated by language.

fulfil corresponding social roles.

Understanding language as a tool that shapes our reality and identity is essential in the judicial system and for interpreting court rulings. In the context of justice, discourse encompasses not only linguistic structures but also legal practices embedded in language, particularly within judicial decisions. Through Derridean deconstruction, we can explore how the language used in court rulings shapes and reflects legal norms, ideologies, and power dynamics within society. The judiciary uses language not only to interpret laws but also to apply them in specific situations, creating "legal truths" that directly affect people's lives. Terms like "justice" or "guilt", for instance, are not merely abstract concepts—they hold real, transformative power in people's lives through the judicial process. In this sense, the judiciary functions as a discursive practice that produces reality, identities, and power, much as Derrida and Foucault understand language in a social context. Deconstruction allows us to examine how meanings within judicial discourse are constructed, questioned, and potentially manipulated or interpreted in various ways. In the judicial realm, deconstruction uncovers hidden assumptions, unspoken norms, and ideologies that shape legal texts and rulings. This approach helps us better understand the connection between language, power, and justice, as well as how judicial discourse contributes to the construction of social identities and power dynamics.

The most influential analysis of the relationship between discourse and power was provided by the French historian of ideas, Michel Foucault, in his works on the history of legal practices, criminal law, and medicine. Building on Derrida's thesis that Western civilisation is founded on binary oppositions, Foucault emphasises that powerful discourses often serve the clear purpose of excluding and controlling certain individuals, such as those deemed criminals, insane, or ill. Foucault discusses these exclusions in his work *Discipline and Punish: The Birth of the Prison* (Foucault 1997).

In an attempt to define discourse, Foucault highlights the difficulty of providing a clear definition, given the complex history of human societies and the intricate archaeology of knowledge that modern times have inherited. In this regard, he notes: "Instead of gradually reducing the rather fluctuating meaning of the word 'discourse', I believe I have in fact added to its meanings: treating it sometimes as the general domain of all statements, sometimes as an individualizable group of statements, and sometimes as a regulated practice that accounts for a number of statements." (Foucault 1997: 80)

A regulated practice, as defined above, is essentially a legacy of prior knowledge, experiences, and values. In this sense, the human being, as a social

entity, becomes a resident of historical narratives, with their identity shaped by the archaeology of knowledge. Returning to the previously discussed concept of power, it is essential to recognise, in line with Foucault's perspective, that power and knowledge continuously interact with one another. Foucault deconstructs this interaction through dichotomies that create social inequalities. For example, individuals with education are often contrasted with those without, while sexists tend to oppose the opposite gender, and racists direct their prejudice toward different racial groups. Each of these groups, in turn, seeks to have their discourse prevail, asserting its superiority over others. In this way, social inequalities manifest as superior or subordinate identities within society. As Foucault suggests, the nature of discourse is such that it is always "in dialogue or conflict" (Mills 2004: 12) with other discourses. Thus, there is little doubt that a person, belonging to one group or another, becomes a participant in discourse; in Wittgenstein's[34] terms, they are part of a language game that they maintain and reproduce. In short, discourse shapes identities (both individual and collective) and, by extension, constructs social reality.

For Foucault, discourse is not merely a group of signs or a stretch of text, but as "practices that systematically form the objects of which they speak". (Foucault, 1972: 49). Through discourse, we not only create individuals but also shape their identities, a process that is especially prominent in the political arena. The philosopher emphasises that all social bodies and political institutions are permeated by power, and all subjects (state bodies) entering into relations with each other are, in fact, engaging in power dynamics. Defining power as "the ability to structure the field of action of others, to intervene in the field of their possible actions—power is a way of acting upon active subjects, free subjects, as free as they may be" (Foucault 1994: 53-54), Foucault argues that power relations produce positions that subjects (whether state bodies or citizens) occupy within these dynamics.

The judicial discourse, therefore, not only shapes legal reality through the interpretation and application of laws but also reflects broader societal discourses and power struggles, including issues of gender inequality and

[34] Ludwig Wittgenstein (1889–1951), an Austrian-British philosopher, argued that traditional views of language constrain its potential. According to the classical model, language is understood as a cohesive structure based on the "word-object" relationship. In this view, words in a language serve to name objects, with each word having a specific meaning that refers to a particular object. Wittgenstein, however, rejects this perspective. He contends that language doesn't always function to refer to objects, that its primary purpose isn't to name things, and that a word is not simply a name. While a word can be a name, Wittgenstein emphasises that it is never only that; it performs many other functions depending on the context in which it is used. For Wittgenstein, the entire use of language occurs as part of a "language game"—a complex interplay of words and the activities they are intertwined with.

gender-based violence. By examining the language of court rulings through the lens of critical theory—particularly Derrida's ideas on deconstruction and Foucault's concepts of discourse and power—we can reveal how the judiciary not only interprets laws but actively participates in constructing legal and social realities. Language, in this context, becomes a key site of struggle for meaning, power, and justice, with judicial discourse playing a crucial role in shaping legal and social relationships. This is especially evident in cases involving gender inequality and gender-based violence, where the language used by the judiciary can either reinforce existing gender biases and injustices or contribute to challenging them and advancing gender equality. In this way, judicial discourse not only reflects prevailing social norms and power dynamics but also has the capacity to shape societal perceptions of and responses to gender-based violence and gender inequality.

A deeper understanding of how judicial discourse addresses and handles issues of gender inequality and gender-based violence can uncover deeply ingrained power structures that perpetuate discrimination and violence. Court rulings, legal norms, and language practices within the judiciary often reflect broader societal attitudes toward gender equality. Judicial discourse, therefore, becomes a field where the struggle is not only for justice in individual cases but also for social change in how women and marginalised groups are perceived and treated. Introducing a critical perspective to the analysis of judicial discourse enables the identification and challenge of implicit assumptions and biases that may perpetuate gender inequality. Thus, judicial discourse has the potential not only to reflect but also to actively contribute to shaping a more inclusive and just society, where gender equality and the fight against gender-based violence are central values. In this way, judicial discourse influences not only legal outcomes but also broader societal awareness and shifts in attitudes toward gender inequality and violence, thereby contributing to the creation of a fairer society.

3. Mitigating and Aggravating Factors in the Criminal Legislation of the Entities – Research Findings

3.1.1. Definition and Types of Mitigating and Aggravating Factors

Article 49 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 52 of the Criminal Code of Republika Srpska set out the fundamental principles of sentencing. Under these provisions, the court determines the sentence for a criminal offense within the legally prescribed limits, considering the purpose of punishment and taking into account all relevant factors that may justify a more lenient or harsher sentence (mitigating and aggravating factors). These include, in particular: the degree of

culpability, the motives behind the offense, the severity of harm or threat to the protected legal interest, the circumstances under which the offense was committed, the perpetrator's prior conduct, personal circumstances, and behaviour following the offense, as well as other factors relevant to the individual concerned. Additionally, in cases of reoffending, the court must consider whether the prior offense was of the same nature as the new one, whether both offenses were committed with the same motives, and the time elapsed since the previous conviction or the completion of any previous sentence, whether it was served or pardoned. When imposing a fine, the court also takes into account the perpetrator's financial standing (their salary, other income, assets, and family obligations).

Our legal framework does not provide an exhaustive list of aggravating[35] and mitigating[36] factors; rather, it highlights certain factors without explicitly classifying them as one or the other. Each factor may be considered either mitigating or aggravating, depending on the specifics of the case and the sentencing process. For example, when assessing the motives behind a crime—which can be viewed as positive or negative from a moral and social perspective—a perpetrator who misappropriates money to pay for a sick child's medical treatment may have a mitigating circumstance, whereas using

[35] In the court rulings we reviewed, certain aggravating circumstances were identified, including: the defendant's ruthlessness and persistence in committing the criminal offense (Supreme Court of FBiH ruling no. 03 0 K 018715 20 Kžk, dated June 15, 2020); Multiple repeat offenses (Supreme Court of FBiH ruling no. 03 0 K 019064 20 Kž 10, dated October 8, 2020); A declared refusal to compensate the victim (referenced in a ruling); A murder committed in the presence of the victim's children and husband (Supreme Court of FBiH ruling no. 04 0 K 010814 20 Kž, dated June 4, 2020); A crime committed against an elderly person, who was also the perpetrator's neighbour and had a close relationship with the perpetrator's parents (Supreme Court of FBiH ruling no. 07 0 K 013045 18 Kžk, dated November 13, 2018); A lack of remorse (Supreme Court of FBiH ruling no. 09 0 K 026265 17 Kž 8, dated December 12, 2017).

[36] In the court rulings we reviewed, the following mitigating circumstances were considered: Diminished capacity (Supreme Court of FBiH ruling no. 09 0 K 026265 17 Kž 8, dated December 12, 2017); Financial hardship (District Court of Doboj ruling no. 13 0 K 005596 19 Kž, dated April 1, 2021); Disability (Supreme Court of RS ruling no. 11 0 K 031857 22 Kž 4, dated April 19, 2023); The defendant's relatively young age (Supreme Court of FBiH ruling no. 09 0 K 026265 17 Kž 8, dated December 12, 2017); The defendant's advanced age (Supreme Court of FBiH ruling no. 03 0 K 017819 19 Kž 2, dated October 21, 2019); The defendant's status as a family person (Supreme Court of FBiH ruling no. 10 0 K 004608 21 Kžk, dated July 13, 2022); The absence of other ongoing criminal proceedings against the defendant (District Court of Banja Luka ruling no. 11 0 K 021607 19 K, dated November 6, 2019); The defendant's willingness to undergo mandatory treatment and psychosocial therapy and comply with a restraining order upon release (District Court of Banja Luka ruling no. 11 0 K 028118 21 K, dated May 26, 2021); The fact that the victim did not file a property claim (Cantonal Court of Zenica ruling no. 36 0 K 059245 22 Kž, dated December 8, 2022).

the money for gambling or entertainment would be considered an aggravating one. Similarly, a perpetrator's prior conduct may serve as a mitigating factor if they have no history of legal violations and have generally demonstrated good behaviour. However, if the individual has a criminal record or a pattern of disregarding legal norms, this would be treated as an aggravating circumstance. Ultimately, all circumstances are evaluated in their entirety, taking into account both the specific offense and the individual concerned.

Depending on whether they pertain to the criminal offense or the perpetrator, all circumstances are classified as either objective or subjective. Objective circumstances include the extent of harm or threat to the protected legal interest, while subjective circumstances encompass the degree of culpability, the motives behind the offense, the perpetrator's prior conduct, personal circumstances, and behaviour following the crime. The circumstances under which the offense was committed can be both objective and subjective in nature.

3.1.2. Specific mitigating and aggravating factors

1. The degree of culpability is influenced by the presence of conscious and voluntary elements related to accountability, intent, and negligence. The court evaluates whether the individual is fully or partially sane. If fully accountable, it further examines whether the act was executed with direct or indirect intent, or through negligence, taking into account the specific type of negligence involved. Additionally, various subjective factors concerning the perpetrator may be evaluated, including age, education, upbringing, mental stability, moral character, motivations such as fear, and any indications of audacity or recklessness during the commission of the crime.

2. Motives serve as the internal drivers behind a perpetrator's actions during the commission of a criminal offense, often driving the commission of the crime itself. This aspect is taken into account during sentencing only when it does not constitute an essential element of the offense. (Petrović et al. 2016: 126) While no motive can justify a crime, understanding the internal reasons for the act remains pertinent in determining the appropriate sentence. Motives can be categorised as humane—such as compassion, love, a sense of duty, or honour—which are viewed as mitigating factors, or as base—such as greed, hatred, malice, or avarice—which are regarded as aggravating factors. For instance, using misappropriated money for gambling is considered an aggravating factor due to its association with a low, immoral motive. In murder cases, if the act was committed to alleviate the victim's suffering, this may be recognised as a mitigating factor during sentencing. However, if a motive qualifies the offense, it cannot simultaneously be treated as an

aggravating factor. Some legal theories propose that motives should not be assessed as isolated factors but rather in relation to the degree of culpability, arguing that a more negative motive correlates with a higher degree of culpability (Bačić, 1986: 470).

3. The severity of harm or threat to a protected interest is contingent upon the extent and intensity of the consequences resulting from the perpetrator's actions. The seriousness of these consequences directly influences the severity of the offense. Whether the action caused actual harm to the protected interest or merely posed a threat will also affect the severity of the sentence, i.e., it will be higher or lower. For instance, when the consequence involves endangering a person's life, several factors are considered, including the number of lives at risk, the proximity of the threat, and the actions or means employed to create the danger. In instances where the crime results in harm to the protected interest, the degree of harm can be more readily evaluated. A serious bodily injury is defined as the destruction or significant impairment of a vital body part or organ. More severe injuries occur when multiple vital parts or organs are affected, and this must be taken into account when determining the appropriate sentence.

4. The circumstances surrounding the commission of a criminal act can vary significantly in both nature and impact. These circumstances may be classified as objective—such as location, time, means (if they are not elements of the criminal act), method, and environmental conditions like poor visibility, earthquakes, floods, or fires—or subjective, encompassing mental states, interpersonal relationships, the influence of delusion, and the duration of the crime's preparation, whether it was meticulously planned or spontaneous. Particular emphasis is placed on the identity of the victim, the number of individuals involved in the crime, and the extent to which the victim contributed to the crime. These circumstances can manifest either prior to or during the commission of the offense. The influence of these factors on the severity of the sentence must be evaluated in each individual case, alongside other pertinent considerations.

5. An individual's early life reflects their psychological profile and life orientation. This assessment takes into account the offender's personality prior to the crime, considering various circumstances from their past. Essentially, the court must ascertain whether the crime represents a random incident in the offender's life or stems from a generally antisocial lifestyle. If the offender has no prior convictions, is a devoted father, a diligent worker, honest, respected within their community, and exhibits moderation and tolerance, it suggests that the crime is not a product of moral decay or social deviation. In such instances, a more lenient sentence may serve the purpose of punishment.

Conversely, if the offender has a history of deviant behaviour and is a repeat offender, a harsher sentence becomes necessary to achieve the purpose of punishment. Among these factors, recidivism consistently serves as an aggravating element, while other factors may function as either mitigating or aggravating.

6. An offender's personal circumstances include the conditions of their living and working environments. Judicial practice acknowledges several key factors: the offender's health and that of their immediate family, age, housing situation, economic and financial status, employment, the number of family members—especially children, along with their age and health—disability, family relationships, and other elements of personal and family life. While these circumstances often lack a direct causal link to the crime committed, legal theory posits that they should not influence sentencing decisions. Nevertheless, the law mandates that the court consider these factors when determining the appropriate punishment.

7. An offender's behaviour following a crime offers valuable insights into their psychological profile, particularly regarding their character traits, which can aid in predicting future conduct. This behaviour also reveals their attitude toward the crime itself. Actions such as assisting the victim or displaying indifference and vengefulness, admitting guilt or falsely accusing others, making efforts to compensate for damages or evading responsibility, and either apologising to the victim or insulting them—all these factors must be taken into account when determining a sentence. However, a refusal to confess and attempts to conceal evidence should not be viewed as aggravating circumstances, as they are part of the right to defence (the accused is not required to incriminate themselves or assist in revealing their own crime). Genuine and sincere remorse is considered a mitigating factor. These circumstances can be divided into two categories: 1. circumstances related to mitigating or rectifying the consequences of the crime (e.g., apologising to the victim, providing assistance, compensating for damages, demonstrating genuine remorse, returning stolen property); and 2. circumstances related to the accused's conduct during criminal proceedings (e.g., denying guilt, expressing remorse, changing testimony, lying, influencing witnesses, falsely accusing innocent individuals). Proper conduct during the proceedings should not be regarded as a mitigating factor, as it is the expected duty of every participant in a criminal trial.[37]

[37] Among the judgments we analysed, this position is reflected in the ruling of the Supreme Court of the Federation of Bosnia and Herzegovina No. 03 0 K 016509 18 Kž 8, dated

8. The financial status of an offender is taken into account solely when assessing a monetary fine. This requires the court to consider the individual's income, additional sources of revenue, assets, and family responsibilities. Although financial status is not explicitly classified as a mitigating or aggravating factor, it functions as a corrective measure to ensure that fines are equitably impactful across various economic situations. Conversely, when evaluating a prison sentence, financial status may be regarded as a personal circumstance of the offender.

9. Other circumstances pertaining to the offender's personality, which do not fit into the previously mentioned categories, are challenging to define beforehand but are always unique to the individual. These subjective factors may encompass age, menopause, senility, specialised skills, educational background, sensitivity (or its absence), and overall demeanour.

The court is responsible for examining various factors and assessing their impact on the sentence that will be determined and imposed. In each case, the court considers multiple factors, some mitigating and others aggravating. The court's approach to evaluating these factors may be either analytical or synthetic, depending on its discretion. In the analytical approach, the court scrutinises each factor individually, first identifying whether it is mitigating or aggravating—essentially determining if it favours the offender or works against them—and then assesses its impact on increasing or reducing the sentence. Conversely, the synthetic method involves a collective evaluation of all mitigating and aggravating circumstances, leading to a holistic assessment of both the crime and the offender. The sentence imposed should reflect the court's judgment regarding the offender's social risk and the severity of the crime, taking into account all pertinent circumstances (Srzentić et al., 1981: 381). Given that criminal law mandates the court to consider the purpose of sentencing, the most effective strategy is likely a blend of both methods. The court should initially establish a baseline sentence based on a comprehensive assessment, then refine it by individually weighing each mitigating and aggravating factor.

The court is obligated to evaluate all relevant circumstances of each specific case and accurately determine their influence on the nature and severity of the sentence, while considering the legally mandated penalties for the particular criminal offense (within the established minimum and maximum limits). Although the court's assessment is discretionary, it must be grounded in reality and adequately represent the overall effect of the circumstances. In

November 8, 2018. In contrast, the opposite stance is evident in the judgment of the District Court in Banja Luka No. 11 0 K 021607 19 K, dated November 6, 2019.

its judgment reasoning, the court is required to clearly identify which circumstances were deemed mitigating, and which were considered aggravating, and provide justifications for these conclusions.

Circumstances recognised by law as mitigating or aggravating factors in sentencing may also qualify as elements of a privileged or qualified criminal offense. In these instances, such circumstances cannot be re-evaluated as mitigating or aggravating factors in sentencing, meaning that the same circumstance cannot be penalised twice against the offender. However, an exception arises when a specific circumstance can function as both a qualifying and an aggravating factor in sentencing, as long as it can present itself in varying degrees of severity (Petrović et al., 2016: 129).

3.1.3. Analysis of Court Judgments

The role of courts is vital to any society, as they establish the foundation of the rule of law. Gender-based violence cases are particularly delicate due to the nature of the offenses, which often leave victims with lasting trauma and (or) physical consequences—unless the crime involves murder. Additionally, there is frequently a lack of societal understanding regarding the classification of certain acts as punishable under criminal law. Accurate fact-finding and a clear assessment of the circumstances surrounding the offense are essential, yet they are often open to various interpretations. These processes are crucial in shaping public understanding and ensuring that legal proceedings serve their preventive purpose—not only concerning the perpetrator but also for the wider community. Consequently, the discourse, or the way something is said or written, is highly significant in shaping the perception and understanding of gender-based violence.

This chapter aims to emphasise the variability in courts' interpretative discretion when assessing circumstances during proceedings, even in cases that appear identical, between first-instance and appellate levels. Additionally, the analysis intends to uncover potential patterns within specific courts by examining which circumstances are prioritised in judgments, which factors receive less consideration, and whether certain circumstances tend to "reappear" in particular courts. Through case law examples, this chapter will analyse the application of both aggravating and mitigating circumstances.

Based on the available judgments, it is evident that mitigating circumstances are cited more frequently than aggravating ones. A notable mitigating factor highlighted by judges during sentencing is "appropriate behaviour during the proceedings", which is referenced in over 20 judgments. However, in some instances, judges contend that such behaviour should not

be regarded as a mitigating circumstance, as it is an expected standard during the legal process. Another mitigating circumstance mentioned in the judgments is prior non-conviction. Conversely, in a case heard by the District Court in Banja Luka, where a brother killed his sister due to dissatisfaction over inheritance division, the court dismissed prior non-conviction as a mitigating factor, asserting that "prior non-conviction should be taken for granted, as it is normal for citizens not to commit crimes; thus, no one, including the defendant, should be rewarded for it."[38]

For instance, the Cantonal Court in Mostar dismissed the mitigating circumstances in a first-instance verdict following the prosecution's appeal in a case involving an adult who engaged in sexual relations with a girl under the age of 13 with whom he was in a relationship. The judgment explicitly addressed this issue. As stated in the verdict:

Considering the prosecution's appeal, the court acknowledges the argument that the victim's perception of the defendant as her boyfriend does not constitute a mitigating circumstance. This is particularly relevant given that both individuals are young, with the victim being a child under thirteen years old and the defendant being twenty-two, nearly a decade her senior. The appeal correctly emphasises that their meeting in the city, the defendant's kind treatment of her, and the use of a condom during intercourse do not serve as mitigating factors.[39]

This case not only highlights the varying evaluations of facts but also illustrates the importance of an individualised approach to the situation.

The analysis reveals discernible patterns in specific courts, particularly where judges tend to omit explicit references to aggravating circumstances and, to a lesser degree, mitigating circumstances. For instance, the Basic Court in Bijeljina has acknowledged mitigating circumstances in only one case, while failing to mention any aggravating circumstances. This observation suggests a degree of consistency in the court's judgment practices. Furthermore, this consistency implies a level of predictability regarding the mention of circumstances during verdict delivery.

On the other hand, the Municipal Court in Srebrenik identified the defendant's "lack of prior convictions" as a significant mitigating factor in two

[38] The judgment of the District Court in Banja Luka, case no. 11 0 K 021607 19 K, dated November 6, 2019, Criminal Code of the Republika Srpska (KZ RS).
[39] Judgment of the Cantonal Court in Mostar No. 56 0 K 059662 18. Sexual intercourse with a child under Art. 207, Paragraph 1, Criminal Code of the Federation of Bosnia and Herzegovina, dated 02. 10. 2018.

judgments. This absence of previous offenses is noted in 29 cases, highlighting the relevance of the defendant's past and suggesting a discontinuity in the commission of criminal acts.

Furthermore, in some judgments, the connection between mitigating circumstances, such as the defendant's unemployment, is unclear, as acts of gender-based violence are not committed for self-interest. Unemployment is mentioned as a mitigating factor in 18 analysed judgments, which often gives this fact the weight of a mitigating circumstance.

The examination of specific judicial rulings at the regional level reveals a tendency among courts to dismiss mitigating circumstances or regard them as exaggerated, while aggravating factors are often undervalued, particularly in first-instance judgments. This trend is largely attributed to the severity of the crimes committed, which frequently results in the revision of initial rulings. For instance, a judgment from the Cantonal Court in Široki Brijeg concerning ongoing sexual offenses perpetrated by an older individual against a younger child found that mitigating factors such as a lack of prior convictions, good behaviour in court, and financial hardship were considered overstated. In contrast, the aggravating circumstances were undervalued by the first-instance court, leading to an increased sentence for the defendant.[40] Additionally, another ruling from the same court highlighted the defendant's persistent commission of serious domestic violence against his wife, who is 100% disabled. The appellate court deemed the mitigating circumstances to be exaggerated, which ultimately contributed to a harsher sentence for the defendant.[41] Similarly, in a ruling by the Cantonal Court in Novi Travnik regarding a rape case, the court rejected all cited mitigating factors—including youth, absence of prior convictions, and the defendant's claim of not possessing a weapon during the offense—and revised the initial judgment concerning the defendant's sentence. These instances of judicial practice in appellate rulings underscore a pattern of dismissing mitigating circumstances

[40] The judgment of the Cantonal Court in Široki Brijeg, No. 64 0 K 047924 19 Kž 2, for the criminal offense of "Introducing a Child to Pornography" under Article 212, Paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina (KZ FBiH) and the criminal offense of "Sexual Acts" under Article 208, Paragraph 2 of the Criminal Code of the Federation of Bosnia and Herzegovina (KZ FBiH), all in relation to Article 54 of the Criminal Code of the Federation of Bosnia and Herzegovina (KZ FBiH).

[41] The judgment of the Cantonal Court in Široki Brijeg, No. 64 0 K 051731 20 Kž, for the criminal offense of "Sexual intercourse by abuse of position" under Article 205, Paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina (KZ FBiH), in conjunction with the criminal offense of "Sexual Acts" under Article 208, Paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina (KZ FBiH), all in relation to Article 54 of the Criminal Code of the Federation of Bosnia and Herzegovina (KZ FBiH).

or diminishing their importance when determining sentence severity.

The practices of certain municipal courts in Bosnia and Herzegovina reveal a concerning trend of prioritising mitigating circumstances over aggravating ones, even in cases of severe crimes. For example, the Municipal Court in Foča demonstrated this by focusing on the youth and unemployment of a mother who suffocated her out-of-wedlock child after birth, heavily weighing her confession while neglecting to identify any aggravating factors.[42] Similarly, the Municipal Court in Živinice granted mitigating circumstances to a defendant involved in serious sexual offenses against his own child, citing good behaviour in court and a lack of prior convictions. In another case before the same court, a teacher accused of sexual misconduct against a student was also afforded mitigating consideration due to his previous non-conviction. These instances suggest that some municipal courts may frequently disregard aggravating circumstances in their judgments, even in the context of serious criminal offenses. However, it is crucial to recognise that this approach does not reflect the practices of all municipal courts in the country. For instance, the Municipal Court in Orašje takes a different stance, emphasising the persistence of criminal behaviour and prior convictions that failed to serve their punitive purpose as aggravating factors in its rulings.

4. Conclusion

The objective of this paper was to examine court rulings regarding gender-based violence, focusing on 232 convictions issued by municipal, district, cantonal, and supreme courts from 2017 to the end of 2022. Given the distinct nature of each case, a quantitative analysis was deemed impractical. Furthermore, due to space constraints, an in-depth exploration of each individual case was not feasible. The primary aim was to investigate how the courts interpret mitigating and aggravating circumstances in the context of delivering convictions.

The employed method was discursive analysis, which is crucial for comprehending judicial discourse. This type of discourse not only influences legal realities through the interpretation and application of laws but also mirrors wider societal discourses and power struggles, particularly concerning gender inequality and gender-based violence. As a result, discourse plays a significant role in shaping our understanding of court-established facts.

One key finding reveals that courts explicitly utilise the law to explicitly

[42] The judgment issued by the Basic Court in Foča, case number 94 0 K 026869 17 K, pertaining to the crime of child murder during childbirth, as defined in Article 151 of the Criminal Code of the Republic of Srpska.

outline both mitigating and aggravating circumstances when determining sentences. However, the assessment and interpretation of these circumstances often exhibit contradictions. In particular, appellate courts frequently diverge in their interpretation of facts as circumstances or evaluate them differently in first-instance and second-instance rulings. For instance, two cases illustrate this inconsistency: one from the Cantonal Court in Mostar involving sexual relations with a minor girl in a relationship with the defendant, and another from the Supreme Court of the Republika Srpska. These cases highlight the varying interpretations of what constitutes mitigating circumstances, underscoring a significant lack of consistency in fact determination.

Furthermore, when determining certain circumstances, there remains ambiguity regarding their connection to the commission of the criminal act. This primarily refers to factors such as good behaviour during the trial, or the defendant's unemployment at the time the crime was committed.

Additionally, the analysis reveals a consistent practice across the same courts when determining circumstances, meaning that the same factors are emphasised during the reasoning of the judgments.

The objective of this paper was to assess the mitigating and aggravating factors in judgments involving guilty defendants, with a particular focus on identifying elements that significantly influence penal policy in cases of gender-based violence. The authors argue that it is unacceptable for circumstances to be deemed mitigating when they lack a direct connection to the criminal act (financial standing or family status). For future judicial proceedings, it is recommended that each factor be articulated with precision rather than in broad terms (for instance, detailing specific family situations instead of merely stating "family circumstances"). Additionally, certain factors should consistently be classified as aggravating—some are inherently aggravating, such as recidivism and hatred—while others, like the perpetrator's position of power, should also fall into this category. Conversely, some factors should always be regarded as mitigating, such as diminished capacity (provided it is substantiated through expert evaluation). Moreover, the perpetrator's age is frequently overvalued as a mitigating factor and should be assessed in relation to its effect on the victim. Family circumstances should not be automatically classified as mitigating. Finally, remorse and confession should be thoroughly verified, as they may be considered aggravating if deemed appropriate.

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Nermin Šehović and Neira Raković

Impact of Aggravating and Mitigating Circumstances in Rape Cases as a Serious Form of Gender-Based Violence – Cases of the Cantonal Court in Bihać

Abstract

In discussing gender-based and extremely brutal violence against women, this paper will analyse the decisions of the Cantonal Court in Bihać. The focus will be on different approaches courts use to evaluate aggravating and mitigating circumstances for defendants' cases in reasonings of judgements in rape cases, and how identical circumstances may have a different impact on the severity of the sentence. The authors will analyse two cases of rape offences, in which victims are a fairly old women and an underage girl respectively to examine which circumstances the court considered as aggravating and which were considered as mitigating factors in the context of gender stereotypes.

The objective of the paper is to highlight flaws in the courts' decisions, more specifically to show through a detailed analysis of the present cases, how judges tend to consider some circumstances, which are in fact aggravating for the defendant, as mitigating factors for the defendant. For instance, the fact that the victim is a minor, the fact that the victim trusted the defendant, virginity of the victim, her mental state, etc. are indeed circumstances the court used to significantly reduce the sentence for the criminal offence. To improve the protection of victims of gender-based violence, the authors recommend a focused and enhanced approach to consideration of mitigating and aggravating circumstances in rape trials, when deciding on the severity of the punishment.

Keywords: trial, rape, aggravating and mitigating circumstances, punishment

1. Introduction

Sentences for criminal offences are decisions that courts hand down on the basis of evidence and in consideration of aggravating and mitigating circumstances for the defendant, which ultimately determine the severity of the punishment or may lead to an acquittal. To pass a judgment a single judge or a panel of judges need to engage in a careful analytical thinking, after they had gained a good understanding of all elements of the criminal offence in question and elements of criminal liability.

Within the research, the authors explore circumstances the law identifies as aggravating and mitigating factors. The paper focuses on the analysis of two judgments of the Cantonal Court in Bihać. It takes these judgments as good examples

that show a gender insensitive approach to administration of justice.

The aim is to examine how the judicial officials actually determine sentences for the crime of rape and how they weigh mitigating and aggravating circumstances for defendants. The research also explores the question whether they use a hybrid or rigid approach in their evaluation, without taking into account the gender aspect, and if the sentences in such situation can be seen as manifesting a gender insensitive approach of the judiciary in the fight against gender-based violence.

The qualitative analysis of the judgments in rape cases of the Cantonal Court in Bihać passed in the period 2017-2022 that the authors conducted seeks to provide a scientific proof on the existence of a gender insensitive approach in evaluation of circumstances of the defendant. The analysis ultimately revealed its existence using a descriptive methodology. Relying on the results of the analysis, in their final considerations, the authors seek to propose measures *de lege ferenda* to change this pattern in the case law, in order to improve the protection of gender-based violence victims.

2. Aggravating and Mitigating Circumstances in the Context of Rape Crime

Aggravating and mitigating circumstances are a set of different circumstances which have an impact on the severity of the sentence, regulated by the law for each specific offence. The circumstances that ultimately justify a more lenient punishment, within the range of sentences prescribed by the law, are mitigating circumstances, while those which result in a harsher punishment, within the range of sentences prescribed by the law, are aggravating circumstances. Whether a fact has an aggravating or mitigating effect depends on a variety of factors, because circumstances surrounding the commission of a criminal offence may be related to the offence and/or perpetrator. Depending on the specific criminal offence, circumstances can be both an aggravating factor in one case and a mitigating in another.

Article 49[43] of the Criminal Code of the Federation of BiH stipulates that, in determining the sentence, the court shall take into account all the circumstances which may reduce or increase the sentence, defining these as aggravating and mitigating circumstances. These include: the degree of culpability, motive/s, earlier life of the defendant, his personal circumstances and behaviour after the fact, and other circumstances pertaining to his personality traits.

Such legal definition shows that the law distinguishes between circumstances in relation to defendants such as their earlier life, personal circumstances, behaviour, and circumstances surrounding the commission of the offence, in other words acts, and/or causal link and consequences of the offence.

[43] Official Gazette of the Federation of FBiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, and 75/17.

The criminal offence "Rape" is stipulated in Article 203(1) of the Criminal Code of FBiH.

> *Whoever forces another person to a sexual intercourse or a comparable sexual act using force or a threat of an imminent attack on their life or body or the life or body of a person close to them, shall be sentenced to a prison term from one to ten years*.

This is the basic form of rape, while paragraphs 2 through to 7 regulate aggravated forms of rape.

As a rule, if specific circumstances that qualify a criminal offence as an aggravated offence are regulated in the law, such elements cannot be considered an aggravating factor in sentencing. However, according to some authors:

> "there are exceptions from this rule, when a single fact can be both an element of an aggravated form of a criminal offence and an aggravating factor in sentencing, because it is of such nature that it can appear in a more or less serious form of the offence" (Petrović and Jovašević 2005a: 318).

Different circumstances can constitute aggravating or mitigating factors in relation to the basic form of the "rape". For example, if a person has previous convictions for rape or another form of the offence which involves sexual violence; the degree of criminal liability – intent; personal circumstances – a person is a family man or grew up in a family with the father who committed domestic violence, behaviour after the fact – honest remorse of the defendant or lack of remorse; motivation for rape – which may be a desire to satisfy his sexual arousal or for instance taking the victim's virginity by force in order to inflict mental and physical harm and prevent her from starting a family in traditional and religious communities; the extent of jeopardy and severity of injuries in the context of rape, such as bodily injuries inflicted on the victim, damages on sexual reproductive organs, pregnancy, etc; Consequently, we discuss a variety of potential circumstances, which may differently apply in each individual case, and the court evaluates all circumstances using either analytical or synthetic methodology.

Evaluation of both aggravating and mitigating circumstances in sentencing with reference to the methodologies[44] cannot reduce the sentence below the minimum prescribed or increase it beyond the maximum prescribed by the law.

The evaluation of circumstances that impacts the determination of the sentence, more specifically establishment and evaluation of mitigating and aggravating circumstances is not a mathematical formula. It requires a professional

[44] Analytical method of judicial evaluation of circumstances means that the court determines each individual circumstance both in terms of its content and its impact, aggravating or mitigating, on the sentence. Synthetic method means that the court determines and evaluates overall circumstances including aggravating and mitigating factors and determines the punishment for the criminal offence in question.

approach and skills the court must possess to determine how each individual circumstance should be identified, to evaluate each of them, and assess its impact on the severity of the punishment, taking into account the purpose of the punishment to demonstrate a social disapproval of the criminal offence in question; to deter the defendant from repeating the criminal offence and encourage their rehabilitation; to deter others from committing criminal offences, and to send the message to the public on perniciousness of crime, and justice in punishing the perpetrators.

3. Analysis of Judgment – Case 1

In the criminal case initiated by the indictment of the Cantonal Prosecutor's Office of the Una-Sana Canton (USC) in Bihać, having held an oral trial in a closed session, with the presence of the defendant, the Cantonal Court in Bihać handed down a verdict[45] finding the defendant guilty of the rape offence referred to in Article 203 of FBiH CC, citing the basic form of the offence, and sentencing him to a prison term of two years:

> *On May 20, 2019 around 12:00 in the place D.R., the Municipality of K., having drank to the extent that he was intoxicated, without having been invited, he came to the house of the victim, a woman born in 1948, entered the house, knowing that the victim lived on her own, that she was old and sick, entered her bedroom with the intention to satisfy his sexual arousal; when the victim saw him, she moved to the door and left the house, but he caught up with her in the front yard, wrestled her to the ground, making her feel terrified and anxious; after this he removed her clothes against her will, took off his clothes, and placed the victim on the ground on her side holding her tight with his arms and legs, thrusting his penis into her anal opening causing her excruciating pain; she resisted and cried for help, and he let her go, and when she got up and managed to dress she hurried towards "R.m" (populated part of the village) in order to look for help; while she was heading there, the defendant caught up with her again, wrestled her to the ground, and removed her clothes from the waist down, and in the same way thrusted his penis in her anal opening, penetrating the anus of the victim; than he let off her and left again; the victim got up, dressed and rushed back to her house, and he caught up with her for the third time, wrestled her to the ground, and penetrated her anal opening with his penis against the will of the victim; the victim tried to fend off the attacker and cried, she resisted and begged him to stop; at one point they heard cattle bells, he stopped suddenly having been afraid that someone might see him, and run away; the victim sustained injuries in the anal region in form of shallow excoriations from gluteus to the anal area where they end, including five excoriations of 2.5 to 3.5 centimetres, with some blood clots at the base, with small discrete haematoma of 0,5*0,5cm in two places.*

[45] Judgment no. 01 0 K 16617 21 K of April 27, 2022

The Judgment of the Cantonal Court in Bihać was modified by the Decision of the Supreme Court.[46] An appeal filed by the Prosecutor's Office was partly upheld in the part on the sentence, and the defendant was sentenced to a prison term of 4 (four) years. The Cantonal Prosecutor's Office of USC filed the indictment for the aggravated rape – perpetrated in a particularly cruel and particularly humiliating manner, which was not accepted. For this reason, the focus of this paper will be on this part. The minutes of the plea hearing held on November 16, 2021 reflect that the prosecutor specified the indictment stating that the offence was committed in a "humiliating manner".

In listing the circumstances surrounding the commission of the offence the Court failed to take into account that it was committed for the purpose of gratifying lust, and did not accept the submission that it was committed in a humiliating manner. Also, the court failed to take into account the circumstances of the defendant's alcohol intoxication and emotional instability, and living conditions. This leaves an impression that the Court sought to justify the offence, more specifically failed to take into account the evaluation of the circumstances, and it sought to determine if the act of commission was such that it meets the requirement to be treated as "humiliating" and to make the offence an aggravated offence.

Hence, the Judgment fails to provide a substantiated explanation why the act of commitment (that the victim tried to run away, that she begged him to stop, that she did escape once, and that he caught up with her, and repeatedly committed the offence) is not humiliating for the victim who is an elderly women. Alcohol intoxication, living conditions and mental state were not considered to be aggravating circumstances for the suspect, although they corroborate that the way in which the offence was committed was cruel and humiliating. Furthermore, the Court holds that the mode of commission "simply was dictated by the time and place of the commission, and it takes into consideration the understanding and knowledge the defendant had of the offence he had committed, more specifically his diminished capacity." These arbitrary explanations obviously send a message that although a criminal offence may be committed in an extremely cruel and humiliating manner, a perpetrator will be not held accountable, because of his diminished capacity. This is in contravention of the provisions of FBiH CC which does not exclude the liability for an aggravated offence in the state of a significantly diminished capacity, and only allows for a more lenient sentence in such circumstances. It is therefore entirely unclear within the meaning of the law, why the Court held that this factor excluded the existence of the aggravated offence.

Likewise, this Judgement states that the Court took into account that the defendant had no previous convictions, particularly noting that a finding of an expert witness which stated that the defendant at the time of the commission had a significantly diminished capacity, due to severe alcohol intoxication, was the main (mitigating) factor, which lead the Court to hand down the sentence of two years in

[46] Decision no. 01 0 K 016617 22Kž of November 21, 2022.

prison. This finding has a devastating effect on this victim and all the victims of gender-based violence, because the crime of rape carries a sentence from 1 to 10 years, and the Court imposed the sentence of only two years in prison due to his being alcohol intoxicated.

The Judgment shows that the Court found a number of reasons to justify the suspect and his motive to commit the offence, which again sends a very bad message to all the victims of gender-based violence. Such judgments contribute to an increased rate of violence against women and to prevalent gender injustice. The Court shows understanding for the defendant's alcohol intoxication, emotional state, family and living conditions, which is fine in the context of efforts to understand how the criminal offence occurred, but not in sentencing, because this sends a message to all offenders that the Court shall take the fact of alcohol intoxication when committing a crime as a mitigating factor in sentencing. The Court did not show any respect for the victim, except when they state that they gave trust to the testimony of the witness. The victim is an elderly person (74 years old), a returnee, who had known the defendant, so that he also abused the confidence she had in him. It is commendable that the Supreme Court of FBiH upheld the appeal of the Cantonal Prosecutor's Office of USC, and that this Court having commuted the sentence to 4 years in prison, to a certain extent rectified the obvious injustice done to the rape victim.

4. Analysis of Judgment – Case 2

The Cantonal Court in Bihać in the criminal case[47] following an indictment filed by the Cantonal Prosecutor's Office in Bihać, having held the trial in a closed session in the presence of the defendant, his defence lawyer, and victim, rendered a verdict[48] finding the defendant guilty of the offence of rape defined in Article 203(5) in connection with paragraph (1), more specifically of aggravated rape because of the age of the victim (when the criminal offence was committed against a minor) and convicted the defendant to a prison term of one year:

> *On January 1, 2020, between 1:00 and 2:30 hrs, in the basement of a residential building, in the vicinity of the catering facility "Madona" in Bosanski Petrovac, where he brought the underaged girl, born in 2002, allegedly to talk to her, having been aware that she was a minor and in love with him; he kissed her while they talked and threatening "that she may call her sister and parents, but she will surely sleep with him", he forcefully grabbed both her hands, which instilled fear and discomfort in the victim; she started crying because she was unable to resist, although she tried; ignoring her crying and fear, he forcefully made her bend to lift her skirt as he was much stronger from her, ripped of her tights and panties, and after that thrusted his penis into her vagina; she felt an excruciating pain and started screaming; in order to prevent her from screaming, the defendant put his hand over her mouth telling her that she had to hold on, that she must not scream, because*

[47] No. 01 0 K 017360 23 K 2 of October 6, 2023
[48] Judgment no. 01 0 K 017360 23 K 2.

someone in the building may hear her, and then he ejaculated onto her skirt; when she saw sperm traces on the skirt, she pushed him off and run from the building to return to the disco club, and when she later was heading home alone, a minor friend followed her, who was concerned because she saw that the victim was in a very bad shape; when she caught up with her, the victim told her what had happen to her crying all the time.

The Cantonal Prosecutor's Office of USC in Bihać filed the indictment on August 12, 2021. The Cantonal Court in Bihać passed the verdict on June 10, 2022 finding the defendant guilty and sentenced him to a prison term of one year. The Cantonal Prosecutor's Office of USC appealed the decision. So did the defendant through his defence counsel. The Supreme Court upheld the appeal filed by the defence counsel[49] and returned the case for retrial to the Cantonal Court in Bihać. In the retrial, the court decided that the bulk of evidence should not be presented again, and only some evidence – testimonies were presented again at the main trial.

In the reasoning of the Judgment, the Court evaluated every individual evidence in connection with other evidence, and in relation with the same evidence as presented in the first instance proceeding. Finally, the Court decided beyond reasonable doubt that the defendant had committed the offence of rape, as described in the operative section of the Judgment, and that he committed rape against a minor, which made it an aggravated rape referred to in Article 203(5) of FBiH CC, this offence carrying a prison sentence of "minimum three years".

This is the part where we came across an entirely unprofessional, arbitrary and highly patriarchal, gender-insensitive approach to the assessment of circumstances surrounding the case, and a conclusion on aggravating and mitigating circumstances, where Court found mitigating circumstances and provided the following explanation:

The Court holds that the defendant is a young person with no particular life experience, and that at the time when he committed the crime he was a young adult, 19 years and 7 months old, did not yet turn 21, he had no previous convictions; and that the victim at the time was a minor over the age of 16, she was 17 years and two months old, which means she was just about becoming of age, that the victim fancied the defendant and persisted to get involved with him, persistently sending him messages, made sure she knew bars he hanged in and went to these bars, and persistently followed him across the town of Bosanski Petrovac, in shopping malls and persevered to be around all the time.

This situation when a single fact turns an offence into an aggravated offence, while Court treated it as a mitigating fact, is a result of the lack of knowledge how the Criminal Procedure Code should be applied, more specifically the result of a wrongful application of the law. The question that arises is why the Court made derogatory and humiliating comments about the victim such as that she fancied the defendant. This does not justify the rape. On the contrary, the sentence should take

[49] Decision no: 01 0 K 017360 22 Kž of April 18, 2023.

into account "that he had known the victim and abused her trust in him, abused her youthful infatuation with him."

It is surprising that the Court failed to find any aggravating circumstances for the defendant, although there were some which certainly should have an impact on the severity of the punishment. We discussed some of them in the paper.

The conduct of the defence counsel of the accused who reiterated throughout the proceedings that "the victim had fancied the defendant and persistently pursued him" was strikingly unethical. She was aware that such defence was irrelevant, because the purpose of the criminal proceedings was to establish the fact of the criminal offence and the culpability, rather than someone's feelings. Yet, by doing so, she persistently sought to make the victim's testimony irrelevant and ensure a better position for her client in the proceeding. A defence counsel is required to provide a professional defence, respecting the victim, which was not the case here, especially because love cannot be put in context of a rape, in other words, persons may have emotions (both the perpetrator and victim), and engage without raping one another.

As above discussed, mitigating and aggravating circumstances indeed cannot lead to a sentence below the legal minimum or beyond the legal maximum, it is it therefore unclear how and why the Court found "particularly mitigating circumstances for the defendant". The Court made this qualification without any explanation and reduced the sentence below the legal minimum, more specifically reduced the sentence that the offence carries of "minimum three years" to one year in prison, which is apparently a breach of the Criminal Code of FBiH and giving privileges to rapists, deeply undermining all the efforts of experts, professionals, activists, and all other stakeholders in the fight to achieve gender equality in the institutional system, and protect women.

A statement of the victim with reference to the entire proceedings, also confirms this, and it reads:

> *On February 17, 2022, I received the first summons to the Court. My feelings were confused. And I was happy, because I finally had an opportunity to resolve the whole situation, and on the other hand I felt sadness and pain, because I had to process everything all over again. The hearing was scheduled for March 4, I came to the hearing, 5 minutes before the scheduled time, they said that there was a change, the hearing was cancelled and rescheduled for April 7; the idea that I will be in the same room with a person who destroyed my life was terrible. The defence counsel started her examination and the hell opened. Awful questions were asked, and they brought me back to that night, I started thinking why this had happened to me. I braced myself and started talking crying and sobbing, I finished my testimony. After my testimony, they started questioning my girlfriends, I was again flooded with thoughts what I did wrong to make my girlfriends tell all those lies, praise the defendant, I looked at them and tears flew freely. At the next hearing they started examining*

his mother and his girlfriend (at his and his counsel's request). A hell of experience again. All those judgments, words, horror. So many hearings I had to attend, so many nightmares after the hearings. The second last hearing, the defendant on the stand, starts telling his story, and I hear the noises from that night, I hear myself crying for help, I hear sobs, me crying, and I started crying, but again I braced myself to move on, because at the next hearing the Court will pass a verdict. On June 10, 2022. I did not sleep that night before the hearing thinking what will come next, and if he will receive the punishment he deserved, I think what will happen after the verdict is passed, and if I will find peace and finally resume with my life, at least half of the life I had before the incident. The time came for the verdict to be passed, the judge enters the courtroom we all get up. The Court sentenced him to only one year in prison, I watch, I listen, and I cannot believe. I think if it's possible, for three years I had been living hell, that night the world had fallen apart, he took away my teenage years, life, everything…A sea of tears, nightmares, psychological support, sessions with a psychiatrist, and he got one year in prison. I managed to pull myself together and told myself, indeed one year is a short time, but it will be a long year for him. I am thinking, I'll finally put an end to this and fight for the life I want to have. After the trial, the hell continued, his family started posting terrible things about me on social networks, on the following day his sister assaulted me physically, again I asked for a psychological support, I could not cope on my own, because I realised that after what had happen to me, I will not have a peaceful life.

The Judgment of the Supreme Court of the Federation of BiH, following appeals of both the Prosecutor's Office and defence counsel, finally sentenced the defendant to 1.5 years in prison.

5. Final Considerations

The analysis of two judgments of the Cantonal Court in Bihać reveal that the judiciary used a patriarchal approach in these two cases of gender-based violence, which primarily manifested in portraying victims in a humiliating way. It also shows that, while courts accepted that violence (in these cases a rape) is an unlawful act, they seem to seek to justify men's need to satisfy their sexual desire. On the other hand, the cases clearly reveal several irregularities, even unlawful actions, in evaluation of both the mitigating and aggravating circumstances, which resulted in an inappropriate punishment of both rapists.

The court's conduct and the two judgments lead to the conclusion that in these cases the approach of the judges who tried the cases was gender-insensitive, devastating for both the victims in these two cases and other victims of violence in Bosnia and Herzegovina. Such approach discourages victims from reporting violence, from testifying, and going through the whole process, and finally devaluates the fight for women's human rights and the rights of all those who advocate for changes and gender-sensitive approach in cases of gender-related violence.

It is necessary to provide professional training for judges, prosecutors and lawyers on the principles of gender-sensitive approach to justice for victims of gender-based violence and raise their awareness on the need that all of them, as the stakeholders in the chain of institutional protection, should apply the gender-sensitive approach.

Judges should be made aware that courtrooms are not a place where they should feel sorry for the defendant, but rather a place where the law should be applied and sentences determined for criminal offences. It is important that they understand social consequences of gender-based violence, the harmfulness of this phenomena, and the importance of proper evaluation of aggravating and mitigating circumstances in sentencing. They also should understand that sentencing should primarily be in compliance with the applicable legislation.

For more detailed discussion on the topic of gender-sensitive approach in judicial proceedings, the authors recommend consideration of the issue of damages, more specifically an analysis of victims' claims for damages in criminal proceedings. Given that victims are commonly referred to a civil proceeding to pursue their claims for damages against defendants, it is important to analyse the need and/or stress the need that these claims should be decided in the judgment passed in the criminal trial in each individual case.

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III. FEMICIDE: CHALLENGES AND RESPONSES OF JUSTICE

Zlatan Hrnčić

Possibilities to Prosecute Femicide Cases in Bosnia and Herzegovina

Abstract

Femicide is killing of a woman or girl motivated by misogyny, mainly driven by prejudice against women. The objective of this research was to identify opportunities for prosecution of femicide cases in Bosnia and Herzegovina. The research comprised an analysis of the content of the applicable criminal laws in Bosnia and Herzegovina, and a qualitative analysis of 246 judgments which may be associated with femicide, rendered in 38 courts in Bosnia and Herzegovina in the period 2017-2022. The analysis showed that 33.74% of the judgments may be associated with femicide, while 69.88% may contain grounds for this qualification, because the murders were motivated by misogyny, yet none of the judgments explicitly cites this ground.

While femicide has not been defined as a separate criminal offence in the applicable criminal codes, they do contain articles which may be associated with femicide, allowing courts to impose harsher sentences for murders motivated by misogyny, and enabling prosecution and monitoring of femicide cases. However, the application and use of these provisions varies depending on how individual judicial officials understand the problem. Consequently, the judgments analysed reveal a lack of awareness of the 'killed because they were women or girls' aspect, and failure to use the provisions of the international conventions in reasonings, and to take into account aggravating circumstances.

Keywords: femicide, violence against women, gender, domestic violence, judgments in criminal cases

1. Introduction

Femicide is killing of a woman or girl, and it differs from other homicide cases because it is motivated by misogyny, and it is mainly driven by prejudice against women. Article 46 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: the Istanbul Convention) notes that if the killing is a result of violence against women or domestic violence, this should be taken into consideration as an aggravating factor in the determination of the sentence in relation to the offences ("Official Gazette of BiH – International Agreements", 2013, 59).

Although femicide is not defined as a separate criminal offence, the applicable criminal codes in Bosnia and Herzegovina comprise elements which may be associated with femicide, and to this end, the requirements for prosecuting and sanctioning femicide offences under the criminal legislation in Bosnia and Herzegovina, as a state party of the Convention, are satisfied.

In view of the above stated, this paper explored available options to prosecute femicide cases in Bosnia and Herzegovina. In this regard, we examined the presence of femicide in the legislation of Bosnia and Herzegovina, how the legal provisions have been used in judgments in the cases with female victims of homicide, and to which extent the applicable legislation in Bosnia and Herzegovina complies with the obligations from the Istanbul Convention, and enables processing and monitoring of femicide cases. The paper also affirms that amendments to the criminal legislation to define femicide as a separate criminal offence would be meaningful.

The criminal legislation in Bosnia and Herzegovina and judgments, which can be associated with femicide, rendered in the period 2017-2022, were also analysed for the purpose of this research.

2. Theoretical Framework

Violence against women amounts to a human rights violation, and being a form of discrimination against women, it is prohibited and regulated in several national and international documents. Violence against women means a continued physical, mental, economic, and sexual violence and/or threat of such violence (Warshaw and Ganley, 1996, 15-16). Article 3(1)a of the Istanbul Convention defines violence against women as a violation of human rights and a form of discrimination against women which includes all acts of gender-based violence that result in, or are likely to result in physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life ("Official Gazette of BiH – International Agreements", 2013, 55). Femicide is a special and most severe form of violence against women, more specifically, killing of a women or a girl motivated by misogyny, perceiving women as objects, gratification in the act of killing a women which has its roots in a disbalance of power between men and women (Caputi and Russel, 1990, 34). At the global level, 47,000 women and young girls have been killed annually by an intimate partner or family member with 2,600 of the killings recorded in Europe (EIGE, 2023, 8). In Bosnia and Herzegovina, 56 women were killed in the period 2015-2020, which amounts to 11 homicides with female victims annually (Halilović, 2022, 11). UNDOC data for the period 2015-2022 also indicate that in Bosnia and Herzegovina on

average 11 women have been killed annually, with a total of 85 women killed in the period 2015-2020 (see Table 1)[50]

Table 1: Number of women killed in Bosnia and Herzegovina

2015	2016	2017	2018	2019	2020	2021	2022
18	15	10	8	10	5	7	12

Source: UNDOC, 2023

As for the incidence of female homicide in the region, the rate of killed women in 2020 per 100,000 population amounts to 0.96 in Kosovo, 0.93 in Montenegro, 0.63 in Albania, 0.57 in Serbia, and 0.30 in Bosnia and Herzegovina (Konstantinović-Vilić, Petrušić, and Beker, 2023). Ever since the first time when the term femicide was mentioned in 1801 in reference to killing of a woman perpetrated by a man, there had been many different approaches to defining the scope and cause of femicide. The feminist approach finds the causes of femicide in the patriarchal domination, sociological approach analyses specifics of femicide as a social phenomenon, criminal justice approach treats femicide as a single criminal event, the human rights-based approach looks at it as an extreme form of violence against women, decolonial approach as a consequence of colonial domination and so-called "honour killing" (EIGE, 2021); the ecological approach finds the causes of femicide in a complex multidisciplinary framework of interactions of social violent conduct which has its causes at the micro, medium, and macro level (Knap, 2021). The definition and qualification of femicide varies depending on the interpretation of the causes and circumstances surrounding a female homicide.

The European Institute for Gender Equality – EIGE, in its literature review (EIGE, 2021), recognises intimate partner femicide (killing of a woman committed by an intimate partner, most commonly because of jealousy, divorce, or control), sexual murder/femicide (rape and other acts stressing the woman's inferiority, power and control over the sexual act that preceded the murder), femicide of women aged 60+ (it occurs mainly due to their vulnerability, and it is most commonly committed by their intimate partner, but also neighbours, who tend to be unemployed or addicts), femicide-suicide (perpetrator kills a woman and then himself), teenage femicide (killing of teenagers who began their relationship with the perpetrator during their teens, this type of femicide also includes "honour killings"). Femicide

[50] Cited from the UNODC website: https://dataunodc.un.org/dp-intentional-homicide-victims, database with the last update on December 7, 2023.

committed outside the family sphere. The review also refers to "killing of female sex workers or gender-related killing of women and girls in conflict situations."

Dobash and Dobash distinguish three types of femicide in their paper, including an intimate partner femicide, sexual murder, and femicide of women aged 60+, but they also discuss femicide-suicide, and femicide of girls and young girls (Dobash and Dobash, 2015).

A comparative review prepared by the Research Centre of the Parliament of Monte Negro shows that femicide has most commonly been perceived as a wanton killing of a woman, most frequently by men, sometimes with the participation of female members of the family (Research Centre of the Parliament of Monte Negro, 2023). This research identified: intimate femicide (an intimate partner as the perpetrator), honour killing (a member of the family perpetrated the murder because of a de facto sexual offence or an alleged sexual offence or behaviour), femicide in relation to a dowry (killing of a newly married woman committed by the husband's family because of a poor dowry), non-intimate femicide (the perpetrator is a person who was not in a close or intimate relationship with the victim), and sexual femicide (murder which involves a sexual aggression).

In accordance with the Vienna Declaration on Femicide, femicide can take multiple forms, including: killing of women as a result of an intimate partner violence; the torture and misogynist slaying of women; killing of women and girls in the name of "honour"; targeted killing of women and girls in the context of armed conflict; dowry-related killing of women; killing of women and girls because of their sexual orientation and gender identity; gender/sex-related killing of aboriginal and indigenous women and girls; female infanticide and gender-based sex selection foeticide; genital mutilation related deaths; accusations of witchcraft; and other femicides connected with gangs and other crimes. The Declaration urges the Member States, to prevent and prosecute femicide, to undertake institutional initiatives to improve the prevention of femicide and the provisions of legal safeguards, remedies and reparation to survivors of domestic violence.

Given different forms of femicide, prosecution and monitoring of acts of femicide gave rise to overlapping, and as a result some forms of femicide have been classified into different categories of criminal offences. If we take the example of the European Union and its 27 Member States, femicide has not been defined in the criminal legislation of any Member States a separate criminal offence. Killing of women is covered by other criminal offences, while it is obvious that monitoring of femicide requires a specific approach.

The applicable legislation of Malta does recognise the term femicide in the provisions regulating the criminal offence of premeditated murder, while the legislation of Cyprus treats femicide as an aggravating fact circumstance, if the death resulted from domestic violence or an intimate partner violence. Spain does not have femicide as a separate criminal offence, however the gender-related killing constitutes an aggravating fact, while the applicable legislation in some regions defines femicide as a separate criminal offence, for instance in Andalusia and Navarra (EU Policy, 2022).

Only Belgium adopted a special anti-femicide legislation which defines different categories of femicide, such as an intimate partner femicide, non-intimate femicide, indirect femicide, and gender-related homicide[51]. In this regard, EIGE prepared a proposed classification of monitoring femicide (*hereinafter: EIGE's proposed classification*) defining three groups: intentional killing of a female partner and/or family member (intentional killing of a woman committed by an intimate partner, intentional killing of a woman committed by a family member, other types of homicide committed by a family member); other types of intentional killing (killing of a woman committed by a person who is not a family member, which includes sexual violence, killing of a woman which includes sexual exploitation, killing of a woman associated with human trafficking, killing of a woman committed by an officer, killing of a female human rights defender, hate killing, killing of women aged 65+, and other types of gender motivated killing), and accidental killing of a woman (death of a female partner that resulted from domestic violence, death that resulted from female circumcision, and other types of accidental gender motivated killing of women) (EIGE, 2021a). This approach allows monitoring of the share of individual types of femicide regardless of the applicable criminal legislation in individual EU countries. Legislation of the countries of the South America mainly defines femicide as a separate criminal offence, however an analysis of this approach used in Mexico for example, shows that this has not decreased the number of femicide cases (Gutierrez-Romero, 2023). As for the countries in the region, a new criminal offence was defined in the criminal code, and while it is not entitled femicide, it can be classified as such. It is defined as killing a woman or a girl younger than 18 in the context of gender based violence (Beker, 2023).

3. Results of the Research

Given the that objective was to explore the options for prosecuting

[51] The Law on Prevention of Femicide was published on August 31 in the Official Gazette of Belgium, and entered into force on October 1, 2023, while some articles of this Law will become effective on October 1, 2024 and October 1, 2025, respectively.

femicide cases in Bosnia and Herzegovina, the research started with an analysis of the content of the applicable legal provisions, and/or criminal legislation in Bosnia and Herzegovina. Due to complex administrative arrangements of Bosnia and Herzegovina, the analysis included the Criminal Code of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH", 2017), Criminal Code of Republika Srpska ("Official Gazette of RS, 2023), and the Criminal Code of the Brčko District of BiH ("Official Gazette of BD", 2020), as well as the laws which prescribe the protection of the right to life in the territory of Bosnia and Herzegovina.

The second phase of the research focuses on the analysis of judgments in criminal cases with female victims, which can be associated with femicide, more specifically criminal offences in which the death was caused by a criminal offence.

The research included 246 judgments obtained through the High Judicial and Prosecutorial Council of Bosnia and Herzegovina from 38 courts in Bosnia and Herzegovina. This qualitative analysis was accompanied by a questionnaire designed to obtain quantitative data from the judgments.

Table 2: Questionnaire for the analysis of the judgments

1.	Please specify the year when the judgment was rendered.
2.	Which court rendered the judgment?
3.	Please specify article of the law under which the judgment was passed and the type of the judgment.
4.	Please specify the sex of the victim and perpetrator and their relationship.
5.	Did the perpetrator have any previous convictions?
6.	Can the judgment be associated with femicide, in other words, was the judgment rendered in accordance with a criminal offence which includes death of a woman caused by a criminal offence?
7.	Can the homicide or attempted homicide discussed in the judgment be associated with femicide?
8.	Did the judgment identify femicide?
9.	Which circumstances were considered to be mitigating and/or aggravating, focusing on murder motivated by misogyny, or any provisions from Article 46 of the Istanbul Convention?
10.	Does the reasoning of the judgment cite any international conventions ratified by Bosnia and Herzegovina?
11.	Which arms were used to commit the murder, and did the perpetrator possess a licence?

3.1. Analysis of Legal Provisions

The analysis of the legal provisions comprises an analysis of the content of the criminal legislation, and/or the share of criminal offences which may be associated with femicide, killing of a woman, because she is a woman, and/or killing motivated by misogyny.

Article 2 of the Criminal Code of the Federation of Bosnia and Herzegovina defines the meaning of the wording "hate crime" as any criminal offence committed, among other things, because of the sex of another person, and such conduct shall be considered as an aggravating factor, unless this Code explicitly prescribes a harsher sentence for aggravated hate crime. Criminal offences which involve a homicide are defined in the following Articles of the Code: Homicide – Article 166; Voluntary Manslaughter – Article 167; Involuntary Manslaughter – Article 168; Infanticide – Article 169; Involvement in another person's Suicide – Article 170; Unlawful Termination of Pregnancy – Article 171; Grave Bodily Injury – Article 172 (5) (causing death of another person); Abandoning a Helpless Person – Article 176(2) (causing death of another person); Rape – Article 203(3) and (7)) (causing death of another person); Sexual Intercourse with a Helpless Person- Article 204(5) and (6)) (causing death of another person); Sexual Intercourse with a Child- Article 207(5) (causing death of another person); Human Trafficking - Article 210a(7) (causing death of another person); Violation of Family Obligations – Article 221(2) (causing death of another person); and Domestic Violence – Article 222(5) and (6) (causing death of another person). Taking into consideration the above stated, the Criminal Code of the Federation of Bosnia and Herzegovina provides a possibility to prosecute different forms of femicide through harsher sentencing based on the gravity of the underlying criminal offence, enabling harsher sentences for killings motivated by misogyny.

The Criminal Code of Republika Srpska, in Article 123 defines the meaning of the wording "hate crime" as any criminal offence committed, among other things, because of the sex of another person, and such conduct shall be taken into account as an aggravating circumstance under Article 52 of this Code, unless hate is an aggravating element of the criminal offence. The criminal offences which include a homicide are defined in the following articles of the Code; Homicide – Article 124; Aggravated Homicide – Article 125; Voluntary Manslaughter – Article 126; Infanticide – Article 127; Unvoluntary Manslaughter – Article 128; Procuring and Aiding Suicide – Article 129; Unlawful Termination of Pregnancy – Article 130; Grave Bodily Injury – Article 132 (causing death of another person); Female Genital Mutilation – Article 133(4) (causing death of another person); Rape – Article

165(3) (causing death of another person); Sexual Intercourse with a Helpless Person- Article 167(3) (causing death of another person); Sexual Intercourse with a Child Aged under 15 - Article 179(4) (causing death of another person); Domestic Violence and Violence in the Family Unit – Article 190(4) (causing death of another person); Violation of Family Obligations – Article 191(3) (causing death of another person); Taking into consideration the above stated, the Criminal Code of Republika Srpska provides a possibility to prosecute different forms of femicide through harsher sentencing based on the gravity of the underlying criminal offence, enabling harsher sentences for killings motivated by misogyny.

Article 2 of the Criminal Code of the Brčko District of Bosnia and Herzegovina defines the meaning of the wording "hate crime" as any criminal offence committed, among other things, because of the sex of another person, and such conduct shall be considered as an aggravating circumstance under Article 49 of this Code, unless this Code explicitly prescribes a harsher sentence for qualified hate crime. The criminal offences which include a homicide are defined in the following articles of the Code; Homicide – Article 163; Voluntary Manslaughter – Article 164; Involuntary Manslaughter – Article 165; Infanticide at birth – Article 166; Aiding and Procuring Suicide – Article 167; Unlawful Termination of Pregnancy – Article 168; Abandoning a Helpless Person – Article 173(2) (causing death of another person); Rape – Article 200(3) and (7) (causing death of another person); Sexual Intercourse with a Helpless Person - Article 201(5) and (6) (causing death of another person); Sexual Intercourse with a Child - Article 204(5) (causing death of another person); Human Trafficking – Article 207a(6) (causing death of another person); Violation of Family Obligations – Article 217(2) (causing death of another person); Domestic Violence – Article 218 (5) (causing death of another person); Taking into consideration the above stated, the Criminal Code of the Brčko District of BiH provides a possibility to prosecute different forms of femicide through harsher sentencing based on the gravity of the underlying criminal offence, enabling harsher sentences for killings motivated by misogyny.

As for femicide as a separate criminal offence, none of the applicable criminal codes in Bosnia and Herzegovina defines femicide as a separate criminal offence. Each code has the definition of "hate crime" which stipulates that a homicide motivated by misogyny (definition is gender-neutral, among other things based on person's sex) which indeed is a femicide, shall be an aggravating factor in sentencing, unless the law prescribes a harsher sentence for an aggravated hate crime. All the codes analysed have provisions on a death as a result of the criminal offence, and every individual code has a

separate criminal offence of homicide, but also a criminal offence of domestic violence with death of a member of the family caused by a prolonged domestic violence as an aggravated form of the offence.

The analysis of different forms of the criminal offences which result in the victim's death, and therefore fall in the categories of the EIGE's proposed classification, shows that these criminal offences can be classified and presented in this classification of femicide.

Table 3: Classification of criminal offences in the EIGE's proposed classification of femicide

EIGE's proposed classification		**Criminal Code of the Federation of Bosnia and Herzegovina**	**Criminal Code of Republika Srpska**	**Criminal Code of the Brčko District of BiH**
Intentional killing of a woman by an intimate partner or by a family member	Intentional killing committed by an intimate partner, intentional killing of a woman committed by a family member, other types of killing a woman committed by a family member	Homicide – Article 166; Voluntary Manslaughter – Article 167; Domestic Violence – Article 222 (5) (causing death of another person);	Homicide – Article 124; Aggravated Homicide– Article 125; Voluntary Manslaughter – Article 126; Domestic Violence and Violence in the Family Unit – Article 190(4) (causing death of another person);	Homicide – Article 163; Voluntary Manslaughter – Article 164; Domestic Violence – Article 218 (5 and (6)) (causing death of another person);
Other types of intentional	Killing of a woman committed	Rape – Article 203(3) and	Infanticide at Birth – Article 127;	Infanticide at birth – Article 166;

killing of a woman	by a person outside the family which includes sexual violence, killing of a woman which includes sexual exploitation, trafficking-related killing of a woman, killing of a woman committed by an officer, killing of a female human rights defender, killing motivated by misogyny, killing of women aged 65+, and other types of intentional gender motivated killing	(7) (causing death of another person); Sexual Intercourse with a Helpless Person- Article 204(5) and (6) (causing death of another person); Sexual Intercourse with a Child - Article 207(5) (causing death of another person); Infanticide – Article 169; Involvement in a Suicide – Article 170; Unlawful Termination of Pregnancy – Article 171	Procuring and Aiding Suicide – Article 129; Unlawful Termination of Pregnancy – Article 130; Rape – Article 165(3) (causing death of another person); Sexual Intercourse with a Helpless Person- Article 167(3) (causing death of another person); Sexual Intercourse with a Child Aged under 15 – Article 172(4) (causing death of another person);	Aiding and Procuring Suicide – Article 167; Unlawful Termination of Pregnancy – Article 168; Rape – Article 200(3) and (7) (causing death of another person); Sexual Intercourse with a Helpless Person- Article 201(5) and (6) (causing death of another person); Sexual Intercourse with a Child - Article 204(5) (causing death of another person); Human Trafficking – Article 207a(6) (causing death of

				another person);
Unintentional killing of a woman	Death of a female partner as a result of domestic violence, death as a result of female circumcision, other types of unintentional gender motivated killing	Involuntary Manslaughter – Article 168; Violation of Family Obligations – Article 221(2) (causing death of another person); Grave Bodily Injury – Article 172 (5) (causing death of another person); Abandoning a Helpless Person – Article 176(2) (causing death of another person);	Unvoluntary Manslaughter – Article 128; Grave Bodily Injury – Article 132 (causing death of another person); Female Genital Mutilation – Article 133(4) (causing death of another person); Violation of Family Obligations – Article 191(3) (causing death of another person);	Involuntary Manslaughter – Article 165; Abandoning a Helpless Person – Article 173(2) (causing death of another person); Violation of Family Obligations – Article 217(2) (causing death of another person);

3.2. Analysis of judgments

In addition to the qualitative analysis of contents of 246 judgments, a special questionnaire was used to quantify certain data. As for judgments which can be associated with femicide among the cases selected based on criminal offences which may give rise to femicide, 35,77% (88) judgments

were passed in cases of murder or attempted murder. Given that men are victims in five of these cases, the judgments in these cases were not further analysed. This means that 33,74% judgments or (83) of them may be associated with femicide with female victims of a murder or an attempted murder.

Out of 83 judgments which may be associated with femicide, 53,01% of them (or 44) were rendered in cases in which the criminal offence resulted in the victims' death, while in 46,99% cases the victims survived an attempted murder. Given that femicide means the killing of a woman because she is a woman, more specifically the killing motivated by misogyny, the analysis found the presence of this ground in 69,88% of the judgments (58). To wit, the reasonings of these judgments reveal that in each case the murder may be associated with misogyny, as the women in the relevant cases were treated as if they had been owned by the perpetrators, who commonly made humiliating remarks on their victims, articulating this perception in phrases such as "you whore, if I don't have you, no one else will! You are done! You whore, I'll kill you, and the children, and myself! I'll kill you and serve my time, because I don't give away what's mine!" etc.

In 23.64% of the cases the victims had left the perpetrator. Also, in one of the cases, a female lawyer, who had represented the former wife in a divorce case, and whom the perpetrator blamed for the loss of the wife and property, had been murdered in a particularly cruel manner. While the applicable legislation in Bosnia and Herzegovina defines "hate crime" to be any crime committed, among other things, because of the sex of another person, and while such conduct is considered to be an aggravating circumstance, unless the law explicitly prescribes a harsher sentence for an aggravated form of this criminal offence, this qualification has not been used in any of the judgments. In this regard, it is fair to say that the judges have failed to identify and name femicide, either as an aggravated form of the hate crime, or through a description of a criminal offence which could make it obvious that the murder was motivated by misogyny.

In five cases the criminal offence was recognised as a qualified aggravated murder, given that the murder was committed in an exceptionally cruel manner, but the judgments did not qualify the criminal offence as the hate crime. On the other hand, some judgments cite aggravating circumstances such recklessness, hate, atrocity, or abuse of the safe family setting, continued and persistent abuse, but these descriptions have not been associated with gender aspect of the relationship between the perpetrator and the victim. As for the application of the international conventions ratified by Bosnia and Herzegovina, which have priority over the national legislation, only one

judgment refers to the Convention on the Rights of the Child. However, the judgment states that this Convention cannot be applied because it is inconsistent with the applicable national legislation.

As for the modus operandi in the cases of murder and attempted murder, in seven cases the defendant used an automatic rifle, in thirteen cases a handgun (in four cases the defendants had a licence), in four cases a bomb, in other individual cases scissors, hammer, screwdriver, scalpel, knitting needles, metal bar, baton, patrol, in one case the victim was pushed of a balcony, in one case hit by a car, in three cases the victim was suffocated. With respect to the way in which the crime was committed, only in 7,89% cases the murder was committed by an instrument for which the defendant had a licence, while in 60,53% of the cases no licence was required, and in 31,58 cases the murder was committed by a gun possessed without a licence.

As for the sanctions imposed for the criminal offence of homicide, in four judgments the defendant was sentenced to 30 years in prison, in one judgment to 25 year in prison, in four judgments to 20 years in prison, in 27 judgments to a prison term ranging from 10 to 20 years, while in other judgments the term in prison is less than ten years, and in five cases the defendant was referred to a medical facility. In two cases, the defendant attempted suicide after he had committed the crime.

Specific elements of violence against women and domestic violence are discernible in the case of attempted murder of a girl by an axe. In this case, the victim sustained serious head injuries, and the perpetrator was sentenced to one year in prison and fined, and he married the victim after he had served the sentence. The analysis of the judgments in other cases showed that many victims returned to the offender, which in some instances unfortunately had a deadly outcome.

As for the type of potential femicide cases that may be found in the analysed judgments, based on the proposed femicide classification of EIGE, the analysis shows the following:

Classification: Intentional killing of an intimate female partner and/or a family member

The bulk of the judgments analysed in the research concern an intentional killing of an intimate partner and/or a family member. In most cases, it was a former intimate female partner, and/or women who did not want to continue the relationship with the defendant or did not want to return to them. In one case, the defendant went to the house of his father-in-law and killed the woman who did not want to continue their marriage in her bed. The

most murders were committed knowingly using different types of instruments. In one case the murder was committed by hitting the victims 39 times with a hammer, in another the victim was stabbed to death with thirteen stub wounds, while in one case a husband killed his wife (who had left him due to prolonged abuse and then returned to him) by pouring gasoline on her and setting her on fire. In one case a father killed a ten months old daughter in cold blood showing callousness and insensitivity both during the act and thereafter. In one case, the victim was thrown out of a car and subsequently run over.

Classification: "Other types of intentional killing of a woman"

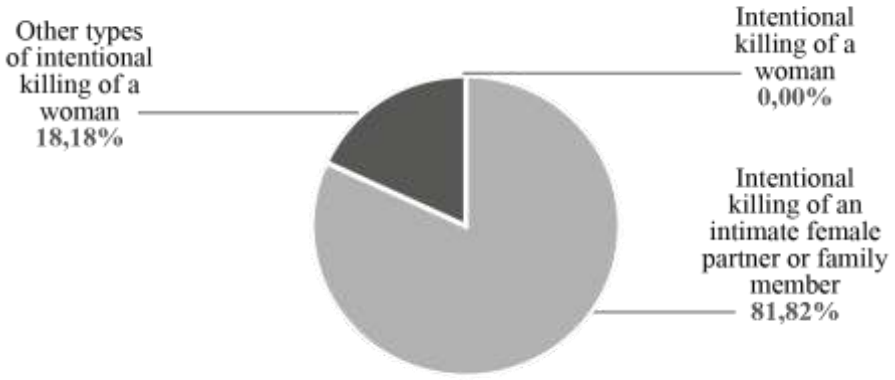
The judgments analysed in the research include a case in which a female work colleague was killed because she did not want to continue an intimate affair with the perpetrator. In this case the defendant had earlier threatened the victim that he would kill her if she returned to her husband. One of the cases can be associated with suicidal and teenage femicide. The case concerns a suicide of a teenager who was stalked by her first partner with whom she did not want to continue the relationship. He threatened her, harassed and blackmailed her into being his girlfriend, humiliated and embarrassed her in the presence of other persons she knew, he hit her, slapped her, interrogated the victim and her girlfriends about her whereabouts and contacts, used abusive language saying that she was a whore and coursing her dead mother in the presence of her girlfriends. In this case the victim had said that she could not bear that anymore and threatened that she would kill herself, which she ultimately did. One judgment convicted a defendant for killing a child at birth. The defendant was a mother who killed a newly born child by strangulation. However, the analysis of the judgment revealed that this case was about an infanticide and cannot be associated with femicide. In one of the cases a female lawyer, who represented the wife of the defendant and whom the defendant blamed for the divorce and loss of property, was killed in an extremely brutal way, by planting a bomb at her entrance door.

Classification: "Unintentional killing of a woman"

None of the judgments analysed concerns a case that can be classified as unintentional killing of a woman.

In view of the above stated, the majority of potential femicide cases can be qualified as intentional killing of an intimate female partner and/or family member, more specifically 81.82% of the cases, while 18.18% are cases involving other types of intentional killing, and no cases of unintentional killing were identified in the analysed judgments.

Graph 1: Percentage of cases of potential femicide within the EIGE's proposed femicide classification



4. Conclusion

The analysis of the applicable legal provisions in Bosnia and Herzegovina shows that it is possible to prosecute different forms of femicide and that the minimum standards have been satisfied under the Istanbul Convention, ratified by Bosnia and Herzegovina, which notes that any killing of a women that occurs as a result of violence against women and domestic violence has to be considered a particularly aggravating fact, as defined in all three criminal codes analysed. However, the analysis of judgments shows that the relevant provisions have not been applied in the judicial case processing, more specifically, the judgments do not use the qualification 'the killing a woman motivated by misogyny', although some reasonings manifestly show that the defendants' killing of a woman was indeed motivated by hatred of women, who in their understanding are the possession of their partners and do not have rights of their own. The sanctioning standards allow the court to impose appropriate sentences based on the gravity of the criminal offences, thus the sentences tend to be a long-term imprisonment. However, this possibility has not been used in some individual cases.

Apparently, amending the law to define femicide as a separate criminal offence is affirmative would make a difference, because as a separate criminal offence, femicide would require a more careful consideration. However, there is still a risk that special forms of femicide would not be covered, and the

problem of recognising and proving femicide as a gender-related killing motivated by misogyny would remain unaddressed. Furthermore, the caselaw in the countries where femicide is defined as a separate criminal offence shows that this provision has not reduced the number of femicide cased.

The above discussion clearly indicates the need for a training of judicial officials on the gender-related killing of women, the need to apply the international conventions in reasonings of judgments, and to use the provisions of Article 46 in order to identify aggravating circumstances in sentencing, and to standardise the case-law. Regardless on the applicable laws, judicial officials are independent in the performance of their duties, and they need to be sensitised and made aware of gendered dimensions of women killings in order to be able to clearly identify the specific elements of this criminal offence. To this end, regardless how these provisions are defined, femicide as a separate criminal offence, their understanding of this problem determines how the judicial officials will apply and use the provisions on aggravating circumstances in the criminal offence motivated by misogyny or femicide as an aggravated form of the offence. The application and use of the legal provisions depend how the judicial officials understand the problem. For this reason, their training is crucial to improve this area.

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Nermin Šehović

Gender-Based Violence in the Context of Femicide – Current State in the Legislative and Legal Framework in Bosnia and Herzegovina

Abstract

Gender-based violence is a widespread social issue that results in severe consequences, frequently categorised as femicide, which is often carried out in an exceptionally brutal and cruel manner.

To effectively combat all forms and specific manifestations of gender-based violence, it is essential for the state to establish clear rules, i.e., legal regulations that address such unacceptable behaviour. Failing to do so may lead to so-called structural violence, characterised by insufficient or absent societal intervention in tackling violence within the community.

Establishing clear regulations requires a thorough revision of existing legal and sub-legal provisions, harmonisation of current regulations, and targeted amendments to effectively address femicide as a form of gender-based violence within Bosnia and Herzegovina's criminal legislation. This approach would facilitate the comprehensive implementation of the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence, aligning with the recommendations and proposals presented in the most recent GREVIO report regarding legislative and other measures for enforcing the Convention's provisions.

Keywords: gender-based violence (GBV), femicide, legal framework, structural violence

1. Introduction

1.1. The Concept and Forms of Violence

Violence is any act of cruelty inflicted upon another individual, whether through the actual use or the mere threat of force, leading to psychological and/or physical harm. This definition is just one of many interpretations of violence, which manifests in various forms in daily life.

When discussing victims of violence, violence against women is a form of gender-based violence that, depending on the act committed and the harm inflicted upon the victim, can be categorised as follows: **Psychological** violence – involving coercive tactics that instil feelings of fear, insecurity, distress, or a sense of violated dignity in the victim**.** It is carried out through verbal attacks, insults, derogatory name-calling, stalking, or harassment via communication channels, electronic or written media, etc.; **Physical** violence – involves the use of physical force, regardless of whether it results in bodily injury. **Economic** violence – includes the destruction of personal or shared property, deprivation of financial resources, prohibition of employment, demands for justification of every expense, or control over what and when something can be purchased, etc.; **Sexual** violence – is any act or attempt, comment, or advancement of a sexual nature; **Sexual harassment/assault** – includes unwanted sexual remarks and verbal advances, various unsolicited invitations, physical contact, body language (staring, standing too close, making suggestive gestures), emotional stalking, inappropriate attention, and sexual bribery; **Sexual abuse** – manifests through unwanted bodily contact, sexual activities obtained through deception, coercion, and other manipulative means; **Rape** – the most severe form of sexual violence.

Sexual violence encompasses a range of severe abuses, including incest, female genital mutilation, forced virginity testing, and coerced marriages, forced and selective abortions, as well as sterilisation. Many of these harmful practices are deeply entrenched in tradition, culture, religion, and superstition. Notable examples include acid attacks, breast ironing, dowry-related violence, female infanticide, gang rape, and various other forms of abuse.

Technological advancement, specifically the internet, has introduced a unique form of electronic violence (Cyberbullying) in the form of virtual abuse[52]. This refers to any deliberate and aggressive behaviour by an individual or group using digital means with the intention of harassing others by creating, publishing, and sharing inappropriate content.

All the aforementioned forms of violence, classified into specific categories of criminal offenses[53] based on protected interests, are grouped by the legislator in Bosnia and Herzegovina under the criminal code. These

[52] Forms of virtual abuse on the internet in communication through e-mail, chat, or via social media networks and applications include: sending disturbing messages, stealing or changing passwords, publicly disclosing private information and falsehoods, sending disturbing images, creating online polls about the victim, sending viruses, spam, or pornographic content to the victim, and so on.

[53] Article 21 of the Criminal Code of FBiH: "A criminal offense is an unlawful act defined by law, with specific elements prescribed by law, for which a criminal penalty is mandated

include crimes against humanity and values protected by international law, crimes against life and bodily integrity, crimes against sexual freedom and morality, and crimes against marriage, family, and youth, among others.[54]

1.2. Femicide – feminicide

The most severe form of gender-based violence against women is femicide (from Latin *femi* or *femina* – woman, and *cidere* – to cut or kill), which refers to the murder of a woman. In practice, it is often referred to as "intimate partner femicide" or "intimate or romantic femicide," as the act typically involves a perpetrator who is the woman's current or former partner, spouse, or someone with whom she has had an intimate or marital relationship.

Femicides, or feminicides, are often described as hate crimes targeting women, driven by the gender of the victim. This is also evident in certain cases of serial killings, where the perpetrator kills the victim without knowing her and having no prior relationship with her, simply because she is a woman—or women whom the perpetrator feels a pathological urge to kill.

It is important to emphasise that the growing acknowledgment of femicide as a form of homicide in Bosnia and Herzegovina primarily refers to the most severe type of gender-based violence, which results in death. This specifically involves the murder of a woman by someone with whom the perpetrator had previously been in a relationship—whether marital, extramarital, or an intimate partnership.

2. Legislative and Legal Framework

Gender-based violence against women, resulting in the victim's death and marked by increasing frequency and brutality, has prompted society to take action. As a result, there is a growing push for the explicit criminalisation of femicide within the criminal legislation of Bosnia and Herzegovina, particularly in the Federation of BiH.[55]

It is important to emphasise that the primary criminal offense against

[54] See more in B. Petrović i D. Jovašević, "Krivično/kazneno pravo Bosne i Hercegovine: opći dio", Pravni fakultet Univerziteta u Sarajevu, 2005.

[55] Since September 4, 2023, the Federation of Bosnia and Herzegovina Parliament has been considering the proposed amendments to the Criminal Code of the Federation of Bosnia and Herzegovina (sponsored by Dr. Dennis Gratz, member of the House of Representatives of the FBiH Parliament).

life and body, defined by the criminal laws of Bosnia and Herzegovina[56] as murder, stipulates that "anyone who causes the death of another shall be punished with a prison sentence of at least five years."[57] In cases where the victim is a woman, regardless of her relationship with the perpetrator (the murderer), the criminal code does not define this as an aggravating factor. Instead, it generally refers to the victim of the crime as "another person" and the perpetrator as "who". Regarding aggravating circumstances and the imposition of a harsher sentence, such as at least ten years in prison or life imprisonment, the law includes factors such as a cruel or insidious method of execution, reckless violent behaviour, hatred, personal gain, concealment of another crime, revenge, low motives, or the murder of a public official, prosecutor, judge, or law enforcement officer when the crime is linked to the performance of their duties.

2.1. Proposal – Recommended legislative measures

Although discussions on femicide have become louder due to the increasing frequency and brutality of murders of women, we see that in the category of criminal offenses against life and body, which includes murder, femicide is not recognised as a separate offense, nor is the victim specifically identified as a woman in any other way. It is necessary, as outlined in the proposed amendments to the Criminal Code of the Federation of Bosnia and Herzegovina, to provide additional protection for women who are victims of murder or other criminal offenses against life and body (e.g., aggravated bodily harm, minor bodily harm). This could be achieved by introducing a qualified aggravating factor, leading to a stricter penalty. For instance, in Section (2) of Article 166 (Murder) or Article 172 (Aggravated Bodily Injury) of the Criminal Code of the Federation of Bosnia and Herzegovina, lawmakers could add an aggravating provision stating that a higher sentence—greater than the legally prescribed minimum—would apply to someone who kills or severely injures another person if the perpetrator (the "who") had previously been in any kind of gender-based relationship with the victim (the "another")—such as a current or former spouse or partner, an intimate

[56] The Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, 36/2003, 21/2004, 69/2004, 18/2005, 42/2010, 59/2014, 76/2014, 46/2016, 75/2017, and 31/2023); The Criminal Code of the Republika Srpska (Official Gazette of RS, 64/2017, 104/2018 - decision of the Constitutional Court, 15/2021, 89/2021, 73/2023, and Official Gazette of BiH, 9/2024 - decision of the Constitutional Court of BiH); The Criminal Code of the Brčko District of BiH (Official Gazette of Brčko District BiH, 19/2020)

[57] Article 166 of the Criminal Code of the Federation of BiH, Article 163 of the Criminal Code of the Brčko District of BiH, and Article 148 of the Criminal Code of the Republika Srpska.

relationship, or cohabitants.

At the same time, the proposed amendments to the substantive criminal legislation in the Federation of Bosnia and Herzegovina, concerning the definition of qualified circumstances for gender-based violence that results in death, bodily harm, or other consequences depending on the specific type of crime, would, by establishing stricter penalties, have a general preventive effect on potential perpetrators. It would also accelerate criminal proceedings for other cases of gender-based violence. For instance, when it comes to the prosecutorial supervision over the work of authorised officials[58], the Criminal Procedure Code of the Federation of Bosnia and Herzegovina differentiates the timeframes within which authorised officials must notify the prosecutor and take necessary measures under the prosecutor's supervision to identify the perpetrator, prevent the concealment or escape of the suspect or accomplice, discover and preserve evidence of the crime, and gather information that may be useful in the criminal proceedings. The Criminal Procedure Code of FBiH distinguishes that if the criminal offense carries a penalty of over five years of imprisonment, the authorised official must notify the prosecutor IMMEDIATELY. However, in cases where the offense carries a penalty of up to five years, this notification must occur "no later than seven days from the date when there is reasonable suspicion[59] that the crime was committed."

Given the specific nature of gender-based violence, which often escalates from initial disturbances, such as public order violations, arguments, and shouting, to severe bodily harm and, in some cases, murder (femicide), the recommendation is for the Criminal Procedure Code of the Federation of Bosnia and Herzegovina to require authorised officials to IMMEDIATELY inform the competent prosecutor upon becoming aware of such incidents. This would allow for effective case documentation and evidence collection under the prosecutor's supervision, helping to prevent femicide—the most brutal form of gender-based violence.

In addition to the justified and clear legal definition of femicide within the context of gender-based violence resulting in death or bodily harm, the fight against this issue must also address the troubling and unacceptable practice of so-called "honour killings". In such cases, men kill women who refuse to stay in an abusive marriage, women suspected of infidelity, or women blamed for other reasons based on the tradition that views women as

[58] Article 233 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina
[59] Article 21(m) of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (ZKP FBiH) states: "Reasonable suspicion is a higher level of suspicion based on collected evidence that points to the conclusion that a criminal offense has been committed."

male property, with their "purity" seen as a valuable asset This also extends to the dangerous practice of presenting the argument in court that the act of femicide "greatly affected the perpetrator", claiming that he "killed what he loved most", which is absolutely legally indefensible.

In addition to the aforementioned, it is crucial to properly implement the recommendations and suggestions made for Bosnia and Herzegovina by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in their Report on Legislative and Other Measures for the Implementation of the Istanbul Convention.[60]

2.2. State and Societal Responsibility

To prevent violence in all its forms, society—specifically the state—must establish clear rules against such unacceptable behaviour. Otherwise, we face what is known as structural violence, which refers to the failure or lack of response by society to the occurrence of violence within the community.

Femicide, the most extreme form of gender-based violence against women, driven by sexist ideology, stereotypical gender roles, and unequal power dynamics between men and women, is inadequately addressed in Bosnia and Herzegovina's current legislation. This is particularly concerning given the high rates of violence and crimes committed against women, where the motives are often rooted in gender-based violence and directly tied to the relationship between the perpetrator and the victim.

The Council of Europe, through the Convention on the Prevention and Combating of Violence against Women and Domestic Violence, mandates that legislative bodies in Bosnia and Herzegovina address the need for change in the current situation and approach.[61]

An additional issue in Bosnia and Herzegovina is the fact that the current legislation, which addresses gender equality and the prohibition of violence and discrimination at the entity level, including the Brčko District of Bosnia and Herzegovina, is not fully harmonised in certain areas and treats specific

[60] The GREVIO Report on Legislative and Other Measures for the Implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, dated June 26, 2022.

[61] The Convention on the Prevention and Combating of Violence against Women and Domestic Violence was signed by the member states of the Council of Europe on May 11, 2011, and is commonly known as the Istanbul Convention.

issues differently.[62]

A more effective legal framework addressing gender-based violence, including sexual harassment as a common manifestation, should be the subject of serious legislative intervention within Bosnia and Herzegovina's criminal laws. This should particularly focus on crimes against life and body, and/or crimes against personal dignity and morality, rather than following the approach seen in current practice. For example, the Government of the Federation of Bosnia and Herzegovina has adopted a *Decision on a zero-tolerance policy towards sexual harassment*, suggesting that the criminal law in this area is neither sufficiently effective nor serious enough, as it treats unwanted and inappropriate physical behaviour of a sexual nature in a way that encourages such behaviour, requiring employees to report incidents to their employer (Federation administrative bodies, government organisations, services, and other bodies established by the Government of the Federation of Bosnia and Herzegovina)[63] where these cases are addressed through internal or disciplinary procedures that offer a far weaker level of protection, procedural handling, and sanctions for perpetrators compared to the stronger protections that would result from addressing such acts through criminal law and criminal procedures at the entity level. This regulation leaves unresolved how to protect victims (primarily women) of sexual harassment and gender-based harassment outside the scope of Federation administrative bodies, organisations, services, and other entities established by the Government of the Federation of Bosnia and Herzegovina.

The "seriousness" of the Federation of Bosnia and Herzegovina government's adoption of this decision – which is of an "informative nature" – and its intent to implement it is reflected in the fact that the decision "mandates all FBiH bodies to inform employees of its contents. Additionally, each employee must sign a statement confirming that they have read and understood the decision, and this signed statement will be added to their

[62] Domestic Violence Protection Act of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, 20/2013 and 75/2021); Domestic Violence Protection Act of the Republika Srpska (Official Gazette of the Republika Srpska, 102/2012, 108/2013, 82/2015, and 84/2019); Domestic Violence Protection Act of Brčko District of BiH (Official Gazette of Brčko District of BiH, No. 7/2018); Gender Equality Act of Bosnia and Herzegovina (Official Gazette of BiH, 102/09, 16/03, and 102/09); Anti-Discrimination Act of Bosnia and Herzegovina (Official Gazette of BiH, 59/2009 and 66/2016).

[63] The Decision on the Zero-Tolerance Policy for Sexual Harassment and Gender-Based Harassment in Federation Administrative Bodies, Federation Administrative Organisations, Services, and Other Entities Established by the Government of the Federation of Bosnia and Herzegovina, No. 1784/2022, dated December 15, 2022 (Official Gazette of the Federation of BiH, 101/2022).

personnel file within the FBiH administrative bodies".

It is concerning that, even before the Government of the Federation of Bosnia and Herzegovina adopted this decision (due to inadequate legislative protection at different levels of government), sexual harassment and gender-based harassment were already occurring within police structures in Bosnia and Herzegovina—institutions the public expected to provide adequate primary protection when handling reports from victims of sexual harassment and gender-based harassment. The fact that such cases were recorded within the police led the "Network of Female Police Officers" to publish a brochure in 2021 titled *Guidelines for Handling Cases of Sexual Harassment and Gender-Based Harassment in the Police.*

The fight against gender-based violence and sexual harassment, which are common forms of abuse, requires a concerted effort from the state. This may include the development of unified guidelines to ensure equal protection for all women victims, whether they are employed in FBiH public services, law enforcement agencies, the private sector, healthcare, education, retail, or are unemployed. Otherwise, issuing partial guidelines reflects an inability to effectively address the issue, while appropriate regulation through criminal procedure would provide the most effective public and practical outcome.

A serious approach to combating gender-based violence in all its forms, particularly in light of the growing prevalence of various, including the most extreme, forms of such violence, demands legislative regulation within substantive criminal law.

It is also evident that the domestic violence protection acts in Bosnia and Herzegovina[64] *de facto* regulate the protection from domestic violence, the types and purposes of protective measures, the relationships between the entities involved in domestic violence protection, and other relevant issues. Furthermore, these acts define in detail the forms of psychological, physical, sexual, and other types of violence, along with the harm they cause.

For example, in the Federation of Bosnia and Herzegovina, the Domestic Violence Protection Act stipulates that the Federation Government should adopt a strategy for preventing domestic violence, which should define strategic goals for prevention and the means to secure funding for their

[64] Domestic Violence Protection Act of the Federation of Bosnia and Herzegovina (Official Gazette of FBiH, 20/2013 and 75/2021); Domestic Violence Protection Act of the Republika Srpska (Official Gazette of the Republika Srpska, 102/2012, 108/2013, 82/2015, and 84/2019); Domestic Violence Protection Act of Brčko District of BiH (Official Gazette of Brčko District of BiH, No. 7/2018)

implementation. However, the current strategy and the measures taken need to be revised, as the general indicators tracked during its implementation, particularly the "reduction in all forms of domestic violence", suggest that further action is required. This is especially true in light of the ongoing cases and the frequent occurrence of brutal killings (murders), which call for a change in the current approach.

The implementation of the Domestic Violence Protection Acts in Bosnia and Herzegovina, particularly regarding the sanctioning of domestic violence acts or threats, is a complex issue. Some of these acts, such as using physical force against the physical or psychological integrity of a family member, causing or threatening physical or psychological pain or suffering, instilling fear or personal danger through blackmail or coercion, and physical assault by authorities, fall under criminal offenses against life and bodily integrity. However, these actions are often penalised through misdemeanour proceedings (rather than criminal ones) in the misdemeanour department of municipal courts. Notably, in the Federation of Bosnia and Herzegovina, those who violate the law face fines ranging from BAM 100 to 3000, while in the Republika Srpska, fines range from BAM 300 to 7000, and in the Brčko District of Bosnia and Herzegovina, the fines range from BAM 300 to 1500. As for oversight of the enforcement, it is the responsibility of the Department of Health and Other Services in Brčko District, the Federation Ministry of Justice in the Federation of Bosnia and Herzegovina, and the Ministry of Internal Affairs and the Ministry of Health and Social Protection in the Republika Srpska.

3. Conclusion

Gender-based violence, in all its forms, is prevalent in Bosnian society, particularly in the form of severe physical abuse, injury, and femicide, the most extreme manifestation of this violence.

Femicide, which reflects the relationship between the perpetrator and the victim, is not explicitly recognised as a separate criminal offense in Bosnia and Herzegovina's criminal code. This lack of specific legal recognition hampers an appropriate response to the growing incidence of gender-based violence (femicide) or physical harm arising from abusive relationships between perpetrators and victims.

The Convention on the Prevention and Combating of Violence Against Women and Domestic Violence, signed by Council of Europe member states, including Bosnia and Herzegovina, must finally be integrated into domestic

criminal law, as current laws addressing gender-based violence have not provided the expected protection for victims, particularly given the increasing frequency of these offenses.

Adequate legal regulation and its harmonisation, both in terms of provisions and oversight at the level of Bosnia and Herzegovina would reduce the risk of the serious issue of gender-based violence and its consequences being inadequately addressed through government decisions or partial "guidelines", which creates the perception of state impotence in tackling this problem.

The need for an effective societal response to prevent and combat violence against women and domestic violence—especially as Bosnia and Herzegovina strives for full EU membership—is highlighted in the GREVIO Report on legislative and other measures for implementing the Council of Europe Convention on preventing and combating violence against women and domestic violence, dated June 24, 2022.

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IV. GENDER JUSTICE FROM THE PERSPECTIVE OF SURVIVORS

Sabiha Husić and Zilka Spahić Šiljak

Justice in the Mirror of Domestic Violence Survivors

Abstract

This paper is based on a critical discourse analysis of the reporting and prosecution of domestic violence. Methodologically, the paper consists of two parts: the first part includes a qualitative analysis of interviews with women who have survived various forms of domestic violence and who differ in terms of education, age, employment status, and place of residence. The second part encompasses an analysis of available documentation from competent institutions (reports, statements, decisions, medical records, documentation from judicial institutions and safe houses in the process of care and support), which is found in the personal files of women who have survived violence and have been accommodated in safe houses. In discourse analyses, documents, statements by representatives of relevant institutions, and media appearances are usually taken into account, while the perspective of individuals who have experienced violence is often overlooked. It is important to highlight how women who have survived domestic violence perceive and experience the processes from reporting the violence to the conclusion of the case or the final court verdict, as well as how socio-cultural pressures and the normalisation of violence contribute to the internalisation of guilt and shame. This paper will be grounded in feminist theoretical insights on gender-responsive justice, which is based on women's experiences, and gender inequality, which results from various social, cultural, and political factors.

Keywords: gender-based violence, domestic violence, critical discourse analysis, justice, socio-cultural influences

1. Introduction

Feminist approaches to domestic violence (Dobash & Dobash 1979; Frazer & Hutchings 2022; Campbell 2022; Verges 2022; Spahić Šiljak, Kovačević, & Husanović 2022a; Husić 2023), as a form of gender-based violence, are based on the premise that in patriarchal societies, women are subjected to oppression by men, who, according to most studies, are the perpetrators of violence in the vast majority of cases – over 95% (UN Women). Due to physical, political, and economic power dynamics, women have been subordinated to men for centuries and have suffered various forms of violence and exploitation.

Feminist approaches attribute this to learned socialisation patterns of behaviour, which are socially constructed through binary gender roles. Consequently, it is argued that what has been constructed should be deconstructed, and new roles should be established, emphasising that hierarchical gender relations are not a natural occurrence.

Feminist approaches use gender as an analytical category in analysing all major social issues. Gender is defined as "a concept that refers to the social differences between women and men – differences that are learned, that change over time, and that vary widely within and across cultures" (Anić 2011: 25). In this context, gender-based violence is rooted in gender roles and is "defined as an act committed based on someone's sex, gender, and sexual orientation, which results in sexual or psychological harm and suffering, including threats of such acts, coercion, or arbitrary deprivation of liberty…" (Spahić Šiljak, Kovačević, & Husanović 2022b). Feminist approaches to gender-based violence include four key elements: a) women's experiences of violence, b) those experiences include a wide range of acts, c) that exist in a continuum in peace-time and war-time, d) and express unequal gender orders (Campbell 2022: 33). The development of clear responses and the documentation of violence against women with specific indicators are prerequisites for creating gender policies free from gender biases and policies aimed at eliminating violence against women (Walby 2005). Merry S. Engle (2009: 3), on the other hand, emphasises that different forms of violence depend on a person's gendered identities and gendered relationships. For instance, a man may justify the physical disciplining of his wife in marriage as a response to her disobedience, or a soldier may justify wartime rape as an act of dishonouring the "symbolic body of the enemy nation" (Engle 2009: 3).

This form of gendered violence and relations perceives the female body as a battlefield and the territory of the enemy, or as the property of a man that he controls. In patriarchal cultures, women are the transmitters and guardians of tradition and culture and have symbolically played a crucial role in the construction and preservation of ethno-national identities, as well as in upholding the moral values of the family (Spahić Šiljak 2010). Positioned in this way, women simultaneously reflect society and the values it upholds while also serving as the normative reference for gender relations within the family and society. In Bosnia and Herzegovina, numerous non-governmental organisations work to protect women from domestic violence and other forms of gender-based violence. *Medica Zenica*, as the first and one of the most prominent non-governmental organisations since its establishment in 1993, has been dedicated to the protection and support of survivors of rape and victims of sexual violence, including other forms of gender-based violence, both in times of war and in peacetime.

Over the past three decades, *Medica Zenica* has supported thousands of women, children, and families, gaining recognition beyond the borders of BiH for its methods of working both with survivors and with representatives of state institutions responsible for protection and support. These institutions are obligated to enforce the law and apply a multidisciplinary approach tailored to the individual needs of women. The developed and implemented methods have had an empowering and therapeutic effect, as well as transformative impacts (Husić 2023).

2. Methodological and Theoretical Framework

What makes this paper *diferentia specifica* is that it turns the mirror toward the perspectives of survivors. In addition to analysing the social reality of gender-based violence, it is essential to include their testimonies and experiences. Typically, analysis focuses on documents, media statements, and the prosecution of violence within the judicial system, while the pursuit of justice is rarely observed from the perspective of those who are disenfranchised, excluded, and silenced.

The aim of this paper is to use critical discourse analysis and interviews with survivors to show how they experience the process of reporting and prosecuting domestic violence and how they cope with social stigma and pressures, which often lead to the internalisation of guilt and shame.

Critical discourse analysis examines power structures and different forms of social injustice while also uncovering the role of discourse in maintaining unjust structures and dominance. It highlights the connections between what is said, power structures, and ideology. To understand how judicial and other institutions of the system of power perpetuate gender-discriminatory practices and other subtle forms of violence, it is crucial to use critical discourse analysis to reveal the mechanisms through which legal and symbolic forms of violence are exercised against women who have survived domestic violence (Weiss & Wodak 2003).

According to Van Dijk (2001: 353), critical discourse analysis encompasses speech or text as a body of knowledge and a set of conditions and procedures that determine acceptable ways of communicating and using that knowledge. Additionally, critical discourse analysis examines how the discursive structures of a society establish, legitimise, and reproduce power relations. Ruth Wodak (2002: 12) emphasises the importance of considering the following principles in critical discourse analysis: interdisciplinarity; problem orientation (e.g., identities, racism, discrimination); eclecticism (integrating various methodological and theoretical approaches); ethnographic fieldwork; abductive reasoning (moving between theory and data);

intertextuality and interdiscursivity; context and problem orientation; and combining grand theories as a foundation with smaller theories for specific research (Wodak 2002: 14).

What differentiates critical analysis from other sociolinguistic research is the analysis of the relations between social hierarchy, the power it produces, and the language through which that power is expressed. The symbolic power of language in relations between those who hold authority, such as state institutions, and citizens seeking their legally guaranteed rights is significant. However, the ways in which certain groups are excluded, particularly women, who are not only removed from positions of power but also restricted in their ability to articulate their views and opinions, often remain insufficiently visible (Bourdieu 1992: 23–37).

Women also experience symbolic violence through language, which perpetuates gender discrimination during the reporting and prosecution of cases of violence. Their character is questioned, their ability to reason and understand relations and events is diminished, and ultimately, they are not recognised as individuals capable of clearly describing their own experiences (Bourdieu 1992: 153). In society, survivors face condemnation as if they themselves had committed violence, leading to rejection, non-acceptance, and exclusion (Husić 2023: 41).

Therefore, in addition to analysing institutional documentation, it is essential to turn the mirror toward the survivors, to listen to the language they use, how they have experienced these processes, how they understand power discourses, and whether and how they manage to resist exclusion in symbolic violence.

This paper employs critical discourse analysis through two types of examination – an analysis of interviews with respondents and an analysis of documents. The first type focuses on interviews conducted with survivors who stayed in a safe house for an average of three months between 2021 and 2023. The analysis also includes in-depth interviews with six survivors who received care and support at the *Medica* safe house. The age range of the respondents varies from 35 to 56 years, and their educational backgrounds differ – two have completed secondary education, while four have primary education. Three respondents live in rural areas, one in an urban area, and one in a suburban area. None of them have formal employment; they mostly work as needed, in maintenance, as assistant cooks, or in agriculture. They have children ranging from one to 35 years of age.

The research questions guiding this paper include the following:

1. How do women recognise violence, and what is crucial in their decision to report it?
2. Whom do women trust when they decide to report violence, and what do they expect?
3. How do women perceive institutional responses in terms of their own safety and protection?
4. How do institutional responses to reports of violence affect women's self-esteem?
5. What are the reasons why women abandon the process of criminal prosecution?

A semi-structured questionnaire for in-depth interviews consisted of seventeen questions, covering key demographic variables (urban or rural background, education, employment, religiosity, family, and social environment). It also addressed the types of violence the respondents had experienced, their experiences when reporting the violence, institutional responses, the support they received (if any), whether they felt safe and protected, whether they continued the legal process to the end or withdrew and why, as well as how they perceive justice for survivors.

An analysis of the available documentation included 143 documents, with an average of 24 per respondent. Thus, the second type of analysis focused on the documentation on women accommodated in the *Medica* Zenica safe house. This documentation was obtained from law enforcement authorities (police), social protection services (social work centres), judicial institutions (prosecutor's offices and courts), as well as documents related to support and protection during their stay in the safe house.

The analysed documents were categorised into four groups:

- Documents related to admission to the safe house: 30 documents.
- Documents related to provided support and activities in the safe house: 58 documents.
- Documents related to the end of stay and departure from the safe house: 15 documents.
- Other documents obtained from relevant institutions: 40 documents.

1. Admission to the safe house: proposal for accommodation, statement of voluntary stay, admission record for a woman,

notification of the woman's and/or children's admission to relevant institutions, house rules.
2. Provided services and activities in the safe house: service provision form, initial interview with a woman, individual work programs, contacts with institutions, evaluation questionnaire at the end of treatment and stay.
3. End of stay and departure from the safe house: statement on the end of stay and departure from the safe house, notification to relevant institutions, confirmation of stay, duration and recommendations for the continued protection of a woman and children.
4. Other documents: minutes of the party's (survivor) hearing, decision on protective measures imposed, minutes of mediation proceedings, written correspondence with institutions regarding child contact, summons to the witness (survivor) to testify in the investigation, medical findings and opinions, social worker's report, decision on the allocation of temporary financial assistance to a woman by the social work centre.

3. Research Findings Through In-Depth Interviews – Perceptions and Experiences of Domestic Violence in the Mirror of Survivors

The analysis of in-depth interviews reveals the discourses of power within the family and the institutions that are supposed to protect them, as well as the dynamics of family relationships in which the woman is subordinated to the will of the man and exposed to various forms of violence, such as control, pressure, threats, and abuse. Through a participatory feminist approach to listening to survivors' experiences, justice is viewed primarily through the mirror of the disenfranchised. This approach provides a safe space for women to share their experiences of violence, as well as their perspectives on the support and protection system, while maintaining their own narrative control. This method enables women to share painful experiences while following their own emotions and maintaining control over their narratives, with support, trust and understanding. The women who were accommodated in the safe house voluntarily chose to testify and share their experiences to contribute to a better understanding of justice from their perspective. Their experiences reveal the various forms of violence they have faced.

3.1. **"He loves me, but…"**

Survivors testify about various forms of control, pressure, and physical disciplining aimed at discouraging women from speaking out publicly and reporting violence. Women describe violence in their own words: "I had to work with him even when I was sick." "He would take me to the field, then harass me, hit me, and threaten to cut me up with a chainsaw." Sharing their experiences,

women explain that problems in their marriages arose immediately: "I endured it, believing he would change when the child was born, but that never happened. I had nowhere to go back to – my father would not accept my return because I was married, and he was not happy with my marriage." Women reveal that their partners try to downplay the situation, saying: "He did not mean it, he loves me," suggesting that the woman is misinterpreting his behaviour. Additionally, the partner attempts to shift the woman's focus elsewhere, stating: "He would not do that, it is not like that," further undermining the woman's sense of reality and justifying the man's actions.

A noticeable sense of self-blame for the experienced violence is present, along with fear of being stigmatised and concern about how society will react. Stigmatisation is thus based on attitudes, beliefs, behaviours, imbalanced power dynamics, misinformation, or a lack of knowledge. It is deeply rooted in social factors, including social and gender norms as well as cultural taboos. The internal and external interaction of these factors further complicates relationships, leading women to develop a negative self-image and self-stigmatisation. The impacts contributing to the establishment of stigmatisation include "patriarchal factors" in 80% of cases, linked to rejection, belittlement, and exclusion, as well as "gender relations" in 45% of cases (Husić 2023).

Constructed masculinity, associated with strength and domination, and femininity, linked to emotion and weakness, are reflected in the lives of men and women by demonstrating that men seek to maintain their superiority through coercive control, while women endure because no one believes them, leaving them paralysed by trauma and fear (Stark 2007; Spahić Šiljak, Kovačević, Husanović 2022). The ways in which coercive control manifests in cases of gender-based violence vary. As Stark defines:

In coercive control, male domination is constructed from person to person through a series of specific constraints that are created, applied, produced, presented, improvised, organised, discovered, challenged, stolen, borrowed, adopted, or manipulated in unique relational contexts and for various immediate purposes and effects. (2007: 195)

The experiences of survivors reflect a constant state of waiting and anxiety, which is characteristic of women who are victims of psychological abuse: "I was always waiting for something," while the partner "convinced me that it was not violence." This highlights the partner's manipulative behaviour, which successfully diminished the woman's sense of self-worth and perception of reality. The partner uses offensive language, "making me feel like a fool," indicating that the woman is subjected to humiliating behaviour: "I endured it for 32 years, maybe because I was younger and could take it, but

I have no more strength, I cannot anymore, I was just praying to God to disappear… he told me, when you bow down in prayer, I will stab you in the back, you will never stand up again." Another survivor shares: "I endured violence for about seven years, hoping that the situation would change and believing in better moments in the marriage."

Speaking out about violence is not easy, but there is a decisive moment for reporting it – violence against children: "…he used to hit them, especially our eldest son. He would line us all up, take a wire rope like a stick, and use it to beat us."

The key moment in a woman's decision to report her partner for violence comes when she feels that "something inside her has broken," a moment she describes as "enough, now or never." This highlights her firm determination to put an end to the violence and take action to resolve the situation.

3.2. Who Do Eomen Trust When They Decide to Report Violence and What Do They Expect?

After reporting violence, women trust in the support and understanding of individuals, family, and institutions, yet they also express numerous disappointments: "My sister helped me so that neither my child nor I would go hungry"; "My neighbour encouraged me to report him." More than 65% of survivors of rape and sexual violence identified "believing in good people" as a source of strength while coping with their traumatic experiences (Husić 2023: 123).

In their search for resources in facing violence, women recognise strength in faith: "I hope that God will help and that the situation will improve." Faith in God is identified by more than 90% of rape survivors in situations that seemed hopeless (Husić 2023: 142–143).

A woman describes that she would never have reported the violence because her husband's words were ingrained in her subconscious: "I will kill you, but I will not kill you first – I will kill all your loved ones first, so you can watch, and then you will be killed." She endured the abuse, believing his threats, and after the murder of Nizama, she became even more convinced that his threats were real. The decisive moment to report the violence came when her children stood by her side – she saw it as a sign that she would not be judged or abandoned. "First, I confided in my parents, and they called the police to report it; they had had enough of him mistreating me and the children." When she arrived at the police station, she was in shock, terrified, beaten, but determined to speak out.

Women place their trust in the police; however, some women felt a lack of support while giving their statements, especially if they had to take care of their children at the same time. Some turned to emergency medical services but did not feel supported. This may be due to the absence of visible physical injuries or the failure to recognise psychological violence as a serious issue. Violence against women is acknowledged only when it escalates into severe physical abuse, while other forms of violence are overlooked. This obscures the full spectrum of other forms of violence, including symbolic violence perpetrated by institutions of the system (Bourdieu 1992: 23–37).

While some women trusted and received support from social protection services, others faced difficulties. This was especially evident when they sought shelter in a safe house. Additionally, they lacked legal and economic support, which further made them vulnerable and less able to leave their abusive partner.

3.3. **Police Protection and the Role of the Social Work Centre**

After women gather the courage to break their silence, institutions fail to provide an adequate response to their needs. Survivors report that the police did not explain that their husband would be detained for eight hours due to intoxication, that they would need to give a statement the next day and go to the emergency room for a medical examination. A gender-insensitive system leaves women in fear, telling them to stay at home without any information on what will happen next, thereby perpetuating symbolic violence, as reflected in survivors' testimonies (Bourdieu 1992: 23–37).

Survivors find it reassuring when the police inform them about the safe house: "(...) I am protected, I feel good, I feel safe, I finally got some sleep… I was terrified, afraid that he would hit me, that he would kill me, and now I can talk about my fears, whereas before, I mostly remained silent"; "The legal advisor at the safe house explained what would happen next in my case."

They also value being informed about where they can receive medical assistance: "It meant a lot to me when the police took me to a doctor."

Survivors do not receive detailed information regarding divorce, child support, and the criminal prosecution of the perpetrator, as institutional representatives fail to show sensitivity to their situation. This lack of support constitutes a form of symbolic and legal violence (Weiss and Wodak 2003). Discursive justice includes survivors as stakeholders who must be fully informed to understand their rights, their position, and the legal actions they can take (Bourdieu 1992: 23–37).

"Nobody explained to me what happens after reporting the violence or when he will be held accountable for his actions." "When I ask about something I do not understand or do not hear properly – because I have a hearing impairment – they just say, 'We already explained this to you, you are not the only one we are dealing with.'"

One of the forms of insecurity that women experience is the treatment they receive from institutions that monitor mothers after custody has been granted to them, particularly during home visits. Women have highlighted the inappropriate and humiliating behaviour of institutional representatives who impose control over them without having the authority to do so, while at the same time failing to scrutinise the behaviour of their former husbands: "He gets praised for doing the bare minimum, while it is simply assumed that I must be good and do everything right my whole life, exactly as others expect." "They took my phone without asking, checking on me, yet they do not question whether he takes care of the child or pays child support. They lecture me on motherhood and try to control my child."

This violation of privacy and degradation of women can be linked to learned stereotypical attitudes of control over women. Another form of control is the pressure placed on women to withdraw their reports and reconcile with their abuser, particularly if they are in a less favourable financial position: "My child will be given to my husband just because he has a job, while I do not, and he will not be held accountable for the violence he inflicted on me."

Women identify humiliation due to frequent expert examinations, assessments by psychiatrists and psychologists, while institutions rarely address their traumatic experiences. In custody and divorce proceedings, the lack of economic resources poses a significant challenge, which is linked to the concept of economic power being in the hands of men. Women, having fewer financial resources, find themselves at a disadvantage in legal battles:

"I did not have the money to pay for a lawyer, so I had to fight on my own however I could, while he had money and sat there with two lawyers beside him."

3.4. **Why Do I Have to Feel Guilty?**

The experience of violence can profoundly impact a woman's self-esteem, damaging her self-image and her ability to believe in her own worth. Women go through numerous personal and social struggles that significantly affect their self-esteem. Feelings of guilt and shame, expressed in the words: "When I walk down the street, I ask myself, why do I have to feel guilty?" can trigger deep internal conflicts and a sense of worthlessness.

A woman may feel as if she is personally responsible for the situation she is in, which is also linked to the fear of being unable to protect herself and her children, as well as fear of society's reaction, which manifests in stigmatisation. Patriarchal power structures continue to uphold a binary perception of relationships between men and women, emphasising male superiority and female inferiority. As a result, women constantly question their own actions, search for faults within themselves, and deepen their feelings of shame, self-blame, and inferiority (Fulchiron et al. 2009).

Bureaucratic procedures are complex, and in order to achieve justice or receive support, women must gather a large number of documents. The symbolic violence reflected in language demonstrates how the bureaucratic system undermines women. The phrase that a woman has "experienced violence" is offensive to survivors, as they describe it in these words: "…I did not experience violence, I did not taste it; I endured violence, believing he would change." Language reveals the power of those who decide the fate of survivors through various documents in which power discourses are expressed through words, such as the notion of "tasting" violence (Wodak 2002: 12).

The structural forms of patriarchy that dominate institutions encourage women to report violence while simultaneously perpetuating stereotypical expectations that they should be patient and submissive. Instead of receiving public acknowledgment that they are not to blame, women are constantly burdened with feelings of guilt, which further erodes their self-esteem and self-confidence.

4. Research Findings Through Document Analysis: Institutional Injustice in the Prosecution of Domestic Violence

The analysis of 143 documents from safe houses, social work centres, police, and judicial institutions (prosecutor's offices, municipal, and cantonal courts) reveals that the power discourses of institutions of the system, while enforcing the law, do not always act *bona fide* toward women who report domestic violence. However, what happens when individuals do gather the courage to report violence? Not only do institutions of the system fail to provide protection for survivors, but by perpetuating discriminatory practices and issuing unclear instructions, they discourage them and place them in a position where they begin to question themselves and "their own guilt."

In addition to direct forms of institutional violence, indirect and subtle forms are more common, which survivors often struggle to recognise. These include, for example, the use of language that indicates violence, the withholding of information that would help survivors understand their rights, the means of protection and support available to them, as well as intentional

or unintentional mistakes that can place survivors in a disadvantaged position – leading to case dismissal or termination due to procedural shortcomings.

4.1. **Inconsistent Data and Withholding of Information**

Institutions of the system are obligated to provide accurate and precise data. However, significant shortcomings are evident, including incorrect data entries and insufficient information in documents. This serves as a means of reproducing power and devaluing survivors, which can impact their pursuit of justice, create confusion, and lead to numerous difficulties in proving the violence they have endured.

There is noticeable inconsistency in practice when it comes to taking statements for official records in social work centres – some routinely follow this procedure, while others do not. Furthermore, statements are often unclear and confusing. For example, at the beginning of a statement, the identity of the woman, as the victim of violence, is noted, but further in the text, the perpetrator's information is mistakenly inserted instead. As a result, the statement appears to indicate that the victim is also the perpetrator of violence "against themselves."

Additionally, women face increased stress and re-traumatisation due to having to provide statements multiple times to different institutions, including social work centres, the police, and the prosecutor's office. Due to the trauma they have experienced, women may be unable to give identical statements to institutions each time, which can be used against them by the perpetrator and/or their legal defence.

In decisions on protective measures, these measures apply to the woman but not to her minor children who are with her. This complicates the protection process, as the children's father can still contact them, which inevitably results in continued contact with the woman despite the issued protective measures.

It has been observed that when women are placed in a safe house as a last resort, if they have nowhere else to go, institutions often disregard their voices and requests for professional protection. The party hearing minutes (a term used for the survivor) typically include only a brief statement about the violence and a note that the woman does not want reconciliation, seeks a divorce, and sees peace in the safe house. One such statement reads: "I ask to stay in the safe house so I can recover from years of mistreatment and violence."

In correspondence from social protection services, it is stated: "The Centre, in accordance with its competencies, will endeavour to appropriately

accommodate the woman (name stated) and her minor children." From such wording, women generally do not understand what these competencies entail, and the term 'endeavour' does not specify how the accommodation will be provided. Institutional correspondence, aside from being unclear, lacks specificity. Although certain measures may be formally declared, they are difficult to implement in practice, leaving women insufficiently informed. Medical records, examinations, and other survivor documentation remain in healthcare institutions and are generally issued only upon personal request, which requires additional time and effort from the survivor.

Another form of symbolic violence, as identified in interviews with women, is the withholding of crucial information necessary for survivors to make informed decisions about whether and how to proceed with the criminal prosecution of the perpetrator. Discursive power structures utilise the system to enforce legal and symbolic forms of violence (Weiss & Wodak, 2003) by hiding behind complex legal terminology and providing information in a reduced form that even highly educated individuals struggle to comprehend.

In the decision on imposed measures, the woman is also asked whether she wishes to pursue criminal prosecution of the perpetrator, with the document stating: "…as described by the witness (referring to the survivor of violence) in her statement, she declared that she had been suffering violence for a long time and that she wishes for protective measures to be imposed on the perpetrator but does not want criminal prosecution." It is questionable whether the woman was adequately informed about the procedures under two separate laws: the FBiH Law on Protection from Domestic Violence and Article 222 of the FBiH Criminal Code. This issue is further highlighted by the survivor's misunderstanding of the law, as seen in the analysis of the Record of Mediation Proceedings, which states: "…stating the name of the perpetrator, he was convicted of domestic violence, and protective measures were imposed on him for a period of one year." Such examples indicate a lack of clarity regarding the distinction between protective measures and criminal prosecution. The FBiH Law on Protection from Domestic Violence recognises protective measures aimed at ensuring the protection and safety of victims of violence and preventing the recurrence of violence. However, protective measures should not be misunderstood as a sanction against the perpetrator, as their imposition does not exempt him from criminal prosecution for domestic violence.

The clarity of these procedures is crucial for a woman's decision on prosecuting violence. In cases where women stated that they did not wish to pursue criminal prosecution against the perpetrator or did not want to testify, the cases were dismissed. This indicates that the criminal offence of domestic

violence is not treated with the same level of seriousness as other criminal offences and that the burden of proving the violence is placed on the woman.

A lack of coordination and connection between the relevant stakeholders further complicates the protection of victims of violence, as illustrated by the statement: “We have done our part; let others do theirs.” This raises the question: Who are “we” and who are the “others” in the support process? Institutions have a duty to protect victims of violence, but by shifting responsibility to others, women are left without protection. For survivors, this represents an additional form of symbolic violence, despite the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence clearly stating that the state is obligated to ensure the prompt protection and care of women, victims of violence, through general and specialised services.

4.2. **Are There Enough Evidence for Criminal Prosecution?**

Whether there is sufficient evidence to initiate criminal proceedings often depends on a number of factors, including the testimonies of women survivors of violence, the availability of material evidence, and the presence of witnesses. Victims of violence are frequently subjected to institutional violence, having to provide statements to multiple institutions, which are then insufficiently utilised in criminal prosecution due to observed formal-legal deficiencies.

There are various documents, some of which are mentioned in this paper. However, if women choose not to testify in the criminal prosecution process, which is their legal right, perpetrators are most often not prosecuted *ex officio*. This raises several critical questions: Why is the burden of proof placed on the woman? Why is she subjected to additional demands and responsibilities? How many times has she had to give a statement? As one survivor describes: “I do not even know who I have given my statement to anymore, yet they keep calling me again and I have to repeat all of it from the beginning.” Why is a single statement, along with other collected documents from relevant institutions, not considered sufficient material evidence for the criminal prosecution of the perpetrator of violence? A review of the documentation of women accommodated in a safe house reveals a significant number of documents that could be examined and used as material evidence.

There is evidence, but it is insufficiently utilised in the prosecution of domestic violence cases. This largely depends on the commitment of professionals handling them, their gender sensitivity, and the cooperation of relevant stakeholders. Structural patriarchy is a reflection of male dominance and power discourse in both private and public spheres. Therefore, it is

essential to effectively utilise material evidence through a systematic approach, which includes standardisation of procedures and cooperation with experts, while simultaneously protecting and accommodating victims of violence.

5. Conclusion

This paper has demonstrated that when the mirror is turned toward women who have survived domestic violence, a clearer picture of the problem emerges. Through critical discourse analysis of documentation and survivors' experiences, the need for systemic changes in domestic violence protection becomes evident, as it represents a social, health, and economic issue. Survivors have some level of trust in institutions, but they are often left to navigate the system alone, without adequate legal, psychosocial, and economic support. The constant feelings of fear and guilt, reinforced by socialisation that conditions them to question themselves and their actions, deeply affect their self-confidence and self-image. The analysis further reveals that institutions of the system operate with double moral standards – women are judged and scrutinised for every minor detail, while mitigating circumstances are sought for men.

In addition to the various forms of violence that women endure within the family, they are further subjected to symbolic forms of violence within institutions of the system that ignore them, withhold full information about their rights, keep inconsistent documentation, implement interventions, and re-traumatise them through multiple interrogations and statements.

It is essential to focus on gender-sensitive approaches to justice that will enable survivors to exercise their rights, while recognising their experiences and feelings of insecurity, as well as providing support in the criminal prosecution of violence. To achieve this, it is necessary to work on deconstructing the structural forms of patriarchy that discourage women from reporting violence and persisting in the criminal proceedings.

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The collection *Discourses of Gender Justice* stands out for its interdisciplinarity and comprehensiveness. The authors approach the topic of gender-based violence against women from various perspectives—legal, sociological, psychological, and feminist—providing a deeper insight into the issue of gender-based violence, as well as the legal frameworks in Bosnia and Herzegovina, Serbia, and Croatia. The collection highlights the complexity, multidimensionality, and interconnectedness of gender stereotypes, judicial practices, legal regulations, and social norms. Particularly significant is the analysis of court rulings, which clearly demonstrates the presence of gender stereotypes and their impact on sentencing policies and judicial decisions in specific cases. Additionally, the collection contributes by deconstructing gender stereotypes and critiquing judicial systems that often overlook aggravating circumstances while favoring mitigating circumstances for perpetrators of violence.

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The content of this collection forms a unique thematic whole in which the authors present the legal framework and analyze judicial practice in Bosnia and Herzegovina, Croatia, and Serbia, clearly articulating key shortcomings in criminal proceedings related to acts of sexual violence, domestic violence, and femicide. The collection is theoretically significant while also holding practical value for the educational needs of a broader audience. By providing a critical perspective in this field, the collection presents content in an accessible and comprehensible manner, and the included literature offers opportunities for further independent research. *Discourses of Gender Justice* will undoubtedly serve as a valuable resource for students, the academic and professional community, activists, and all those with a professional interest in the topics covered.

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A key contribution of this collection lies in its ability to integrate theoretical approaches with practical experiences, offering a comprehensive overview of the issues and potential solutions. This contribution is particularly valuable for legal professionals, judges, academics, and policymakers in the field of gender equality, as it provides essential insights and recommendations based on thorough research and analysis. Some papers offer concrete proposals for improving legislative frameworks, while others suggest measures for better implementation of existing laws and policies. The collection is thus not only academically relevant but also practically useful for advancing policies and practices in the field of gender justice.

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A particularly important aspect of the collection is the research focused on the experiences of the victims themselves—their perceptions of the violence they have endured, as well as the institutional responses when seeking protection and assistance in securing even their most basic rights, such as being informed about legal options and procedures. Due to its comprehensive scientific approach and its insights into the shortcomings of current practices in protecting women's rights and combating gender-based violence, I can conclude that the works in *Discourses of Gender Justice* make a significant scholarly contribution to raising awareness of both symbolic and structural inequalities in society. This contribution is crucial not only for the education of institutions and services dedicated to combating gender-based violence and assisting victims but also for the media, whose reporting plays a key role in shaping public awareness of the unacceptability of such violence.

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