Research Report

GENDER AND THE JUDICIARY

The Implications of Gender within the Judiciary of Bosnia and Herzegovina

Majda Halilović and Heather Huhtanen

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Atlantic Initiative

DCAF
a centre for security, development and the rule of law

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The Geneva Centre for the Democratic Control of Armed Forces

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

1 See the DCAF website at: www.dcaf.ch

Atlantic Initiative

The Atlantic Initiative (AI) is a non-governmental organisation based in Bosnia and Herzegovina (BiH). It was established in 2009 by a group of university professors, journalists, and analysts and researches topics such as security risks in BiH, the integration of BiH into NATO, the security of women and the implementation of UN Resolution 1325 in BiH, gender and the judiciary, and the security of Roma people and returnees in BiH.[2] It also publishes an academic journal, *Democracy and Security in Southeastern Europe*, which promotes open and informed debate about the Euro-Atlantic integration process in BiH. AI is trusted within BiH and the larger Balkan region as a source of information for BiH government officials as well as other policy makers and professionals working in the international security field.

Gender and Justice Reform Project in Bosnia and Herzegovina

Together, DCAF and AI implement The Gender and Justice Reform Project in Bosnia and Herzegovina, which is funded by the Norwegian Ministry of Foreign Affairs. This multi-year project is aimed at increasing the capacities of judges and prosecutors to more effectively integrate gender awareness into the procedures and practices of the BiH judiciary. The project's goal is to strengthen the justice system's delivery of non-discriminatory services. It also seeks to strengthen the role of women in the justice sector, particularly at the decision-making level. Some project activities aim to produce concrete outcomes, such as resources and research, while others are designed to produce developmental outcomes that will create catalysts for change, i.e. a gradual transformation of thinking and organizational approaches related to gender in the judiciary. DCAF and AI have relied on the leadership, direction, and knowledge of professionals in the BiH justice sector to design and implement this project. The following organisations and professionals have closely collaborated with DCAF and AI for this project: the **Association of Women Judges of BiH** (AWJ); the **Centres for Judicial and Prosecutorial Training in the Federation of BiH and the Republika Srpska** (FBiH CEST and RS CEST); the **High Judicial and Prosecutorial Council of BiH** (HJPC); and judges and judicial professionals in the FBiH and the RS. In addition, Norwegian Ambassador to Bosnia and Herzegovina, **H.E. Ambassador Vibeke Lilloe**, has provided important support and leadership throughout the implementation of the project.

2 See the Atlantic Initiative website at: www.atlanticinitiative.org

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EXECUTIVE SUMMARY

The purpose of this research inquiry was, first, to uncover the gender related opinions, attitudes, and reflections held by legal professionals working within the BiH judiciary; and secondly, to identify the ways in which gender might serve to either advantage or disadvantage women or men within the court system – whether judge, prosecutor, attorney, victim, witness, or defendant. In other words, the research was aimed at gaining an understanding of how gender-based stereotypes and attitudes may lead to gender bias that impacts the work of court professionals and the experiences of victims, witnesses, and defendants. The research methodology was developed in late 2012 and implemented from February to July 2013. The views of approximately 161 judges, attorneys, prosecutors, and court associates were collected using an anonymous online questionnaire and individual semi-structured interviews.[3] While this research does not reflect the views of the entire population of legal practitioners and members of the BiH judiciary, the research does offer insights into the thinking and opinions held by representatives of this community. The completion of this research represents the first of its kind in BiH and in the region, and therefore makes a substantial and important contribution to research on gender, the implications of gender within the judiciary, and gender bias.

Researchers explored the influence of gender in three areas.

- ***Collegial relationships and courthouse atmosphere,*** including how court and judicial professionals interact with each other and refer to each other.
- ***Substantive legal topics***, including determinations of child custody, domestic and sexual violence sentencing, and perceptions of victim and witness credibility.
- ***Material support***, including physical infrastructure such as the availability of childcare services and technology to support video-link hearings.

Not every topic under examination revealed insights relevant to this inquiry; and some brought to light only very limited findings. This report details the most relevant research findings and provides an analysis of those findings, aimed at developing recommendations.

3 Thirty in-person interviews were conducted and 131 anonymous online questionnaires were collected for a total of 161 responses. It is possible, however, that some individuals who participated in an in-person interview also completed an anonymous online questionnaire.

For example, the majority of research respondents reported that collegial relationships and the courtroom atmosphere are strictly formal, devoid of endearments, diminutives, colloquialisms, or joking. Yet some respondents disclosed experiencing or witnessing sex- or gender-based jokes, or that their colleagues are referred to by gender-based diminutives or terms of endearment in the courthouse at large and, in some cases, in the courtroom. The research also revealed gender-based variation in the attitudes of legal practitioners concerning the representation of women within the BiH judiciary. That is, a number of women associated the slight majority of women in judicial appointments with the hard working and responsible character of women; while some men associated it with the relatively "easy" nature of the job or cited questionable motivations on the part of women for seeking the position. These findings suggest that gender-based stereotypes and attitudes are present among legal practitioners. The extent to which they lead to a biased or discriminatory working environment is not clear, yet in the context of a courtroom, such behaviour could arguably lead to actual or perceived impartiality.[4]

Research findings also revealed that judges and prosecutors are generally not informed about sexual and gender-based harassment nor have they received training on the topic. In addition, a number of comments reflected a dismissive attitude about the phenomenon and its effect on employees. A number of anecdotes shared in interviews suggest that sexual and gender-based harassment may be present within the BiH judiciary but not readily identified by legal practitioners as such. A lack of clear and detailed in-house policies, in combination with little or no training on different forms of harassment, can lead to conditions in which harassment occurs; which can result in a discriminatory or biased professional environment. These findings suggest that the BiH judiciary could benefit from a concerted effort to address sexual and gender-based harassment.

A number of substantive legal issues, such as cases of domestic violence, rape, and child custody, emerged as areas where gender-based stereotypes and attitudes appear to influence some legal practitioners. These stereotypes and attitudes can lead to gender bias in legal decision making, particularly when they are accepted as facts. For example, women appear to be presumed as the best choice for primary custody of children regardless of the father's

4 Jerry Kang, Professor of Law, University of California Los Angeles notes that, "in order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decision making." See: Jerry Kang, "Implicit Bias: A Primer for Courts," prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts (2009), 5.

interest and involvement in child rearing. And, when mothers are granted primary custody, fathers are reported to be disadvantaged in trying to access visitation rights. Furthermore, in some cases, what constitutes a "good mother," "good wife," or "well-behaved woman" was reported to be the subject of attention during legal proceedings.

Legal practitioners from BiH generally adhere to the belief that they apply the law in a strictly impartial manner.[5] Research findings affirmed this; in response to questions related to the objectivity of legal deliberation, many court professionals asserted that they simply "apply the legal code," which is seen to be inherently objective. In other words, legal practitioners generally seem unaware of the possibility that gender-based stereotypes or attitudes (among other things) could influence their legal decision making. In fact, one male prosecutor shared his opinion that the judiciary is among the few professional fields where discrimination related to gender does not exist. This comment appears to reflect the belief that the legal profession and individual legal professionals stand above other professions and individuals in their ability to be fair and impartial. This attitude is partly attributable to the specific legal framework in Bosnia and Herzegovina. Until 2003, BiH employed a comprehensive civil law approach. Though significant elements of the common law system have been introduced into criminal procedures over the last decade, influenced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and other international agents, judges and legal professionals are still trained mainly in civil law practices.[6] The fact that the civil law system is highly codified can intensify the notion among practitioners that they are simply implementing laws that are designed to guard against subjectivity. Thus, legal practitioners in BiH generally express the opinion that legal decision making is a matter of establishing facts and applying appropriate laws; and therefore not at risk of subjective influences.

Thus, the purpose of this report is to: 1) identify the existence of gender-based stereotypes and attitudes among legal practitioners, 2) illustrate the ways in which the existence of gender-based stereotypes and attitudes can lead to gender bias, and 3) reveal how gender bias can impact collegial relationships and the court atmosphere, as well as legal decision making. This

5 This generalized assertion is based in work with legal practitioners, members of the judiciary, the entity Centres for Judicial and Prosecutorial Training, and the High Judicial and Prosecutorial Council over the course of the last three years. DCAF and AI have been engaged with members of the judiciary and other legal practitioners as well as with the Association of Women Judges of Bosnia and Herzegovina through the Gender and Justice Reform project, since September 2011.

6 Christopher P. DeNicola, "Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism," *DePaul Rule of Law Journal* (Fall 2010).

report ultimately makes the argument that increasing legal practitioners' awareness of how gender-based stereotypes and attitudes can lead to bias is a necessary strategy to increase the impartial administration of justice.

Recommendations

On the basis of this research, it is recommended that the BiH judiciary, in collaboration with the HJPC and the Centres for Judicial and Prosecutorial Training, make a comprehensive effort to integrate information and research within professional training programs on how gender-based stereotypes and attitudes can result in gender bias and thus affect collegial relationships, the court atmosphere, and legal decision making. In the interest of educating legal practitioners to be self-aware and to take an active role in overcoming the influence of bias, it is also recommended that Law Schools in BiH make additions to their curriculum. University Law Faculties are thus advised to incorporate required course work on gender bias, implicit and explicit bias, and the effects of bias on legal practice.

Additional recommendations are offered throughout the body of this report and addressed in the Conclusion. These recommendations are aimed at identifying training and education that addresses gender bias, as well as unique opportunities for improvement within specific areas of the judiciary or legal practice.

1. INTRODUCTION: ABOUT THE RESEARCH AND THE TOPIC

1.1. Organization of the Report

The first chapter of this report, the Introduction, provides an overview of the research methodology, outlining the theoretical basis and purpose of the research, the methods of data collection and analysis, and the limitations and ethical considerations of the research. Chapter 2 provides a review of existing international research related to gender and the judiciary and gender bias. Chapters 3, 4, and 5 present the research findings in each area of inquiry: the influence of gender on collegial relationships and the courthouse atmosphere, the influence of gender on substantive legal topics, and the influence of gender on material support for victims and witnesses. Each chapter on research findings is further divided into sections that details the results of the BiH research and present discussion and analysis that includes international research findings. The final chapter, Chapter 6, summarizes the findings and elaborates on recommendations.

1.2. Theoretical Basis for the Research

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

This represents a central question confronted by legal practitioners and scholars throughout the world: whether the application of laws through individual practitioners can result in fair and impartial decision making. Essentially, can legal practitioners implement the law outside the influence of their feelings and opinions? The researchers assert that the answer to this question is that

they cannot; and in principle, the very design of court systems is meant to counterweigh this reality. That is, if the implementation of the law were a truly objective process then we would not expect to see modifications to court decisions, let alone complete reversals by second instance, appellate, and supreme courts – but we do. Thus, this research assumes that the application of objective law is in fact, subjective. In other words, the law is open to varied interpretation and understanding by practitioners who hold unique values, feelings, opinions, and indeed, biases. This ultimately results in differing legal opinions, including dissenting opinions and appellate and superior court reversals. Thus, in practice, the law is not static and unchanging, but an evolving system that is vitally informed both by broader socio-cultural contexts and by individual legal practitioners.

It is therefore not surprising that the intersection of codified law and its implementation has been studied by legal anthropologists in contexts across the world.[7] Sally Falk Moore, a legal anthropologist who has published extensively on cross-cultural, comparative legal theory found that regardless of the legal system, context, or continent, legal practitioners can be found using, abandoning, bending, sidestepping, replacing, and reinterpreting the law.[8] In addition to socio-cultural-political values, the implementation of the law is further influenced by the different categories of identity – sex, gender, race, ethnicity, religion and class – represented among individual legal practitioners and court users. In other words, "…the ways in which race or gender have been constructed in society at large [are] inseparable from the rules of evidence or the presumptions at work in… courthouses."[9] Thus, the law is inextricably linked to, and informed by, the socio-cultural context in which it exists; and thereby influenced by the prevailing ways of thinking and understanding within that context.

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

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

8 Moore, *Law as Process*, 4.

9 Rosen, *Law as Culture*, 65.

> *…while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.*[10]

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

> *True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.*[11]

But, legal practitioners must come to terms with the idea that the "notion that judges are invariably impartial is an indispensable myth used to sustain faith in the legal system."[12] Because impartiality is importantly linked to awareness, this research inquiry explores awareness within the judiciary of gender, gender-based stereotypes, and gender-based attitudes, or a lack thereof, in order to assess the potential influence of gender on the impartial delivery of justice.

1.3. The Research Inquiry: What is Gender and Gender Bias, and How Does it Influence the Work of the Judiciary?

This research inquiry was aimed at uncovering the gender-related opinions, attitudes, and reflections of legal professionals working within the BiH judiciary; and to identify the ways in which gender might serve to either advantage or disadvantage women or men court professionals or users.

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

11 Ibid.

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

Researchers explored the influence of gender in three areas. First, questions were asked about the working relationships among court and judicial professionals, including how they interact with each other, how they refer to each other, and their perspectives on the representation of women in the BiH judiciary. These questions were aimed at providing insights into the influence of gender on ***collegial relationships and the courthouse atmosphere***. Second, a series of questions were asked in relation to ***substantive legal topics***, including child custody decisions, domestic and sexual violence cases, and victim and witness credibility. Finally, questions were asked about ***material support*** such as the availability of childcare services, appropriate bathroom facilities, security infrastructure and procedure, and technology to support accommodations for victims and witnesses in cases of gender-based violence. A number of issues relevant to the efforts of the BiH judiciary to achieve a fair and impartial justice system emerged.

Researchers explored the existence of gender-based stereotypes and attitudes among legal practitioners and members of the judiciary as a means to identify the influence of gender, particularly gender bias. Gender-based stereotypes are generalizations about gender that are broadly applied to either women or men. Gender stereotypes are often based on rigid gender roles and can serve to limit access or opportunities for a particular sex. The term ***gender*** *refers to the social characteristics, roles, behaviours, and activities assigned to women and men within a particular socio-cultural context*. Concepts of gender, like society and culture, are changeable over time and vary within and across contexts, while sex denotes biological features that are relatively un-changeable or fixed.[13] Gender refers not simply to women or men but also to the relationships between them.[14]

The term ***gender bias*** was coined in the US to describe the unequal treatment or expectations of an individual or group, based on their sex, as a result of gender roles. Research efforts in the US aimed to uncover how attitudes and behaviours toward women and men, based on stereotypes about the 'true nature' and 'proper role' of women and men, might result, *inter alia*, in pervasive sexual harassment, biased legal outcomes, and unfair promotional

13 Sex refers to the biological or physical presence of sexual and reproductive organs, like the vagina and penis and ovaries and the testes, as well as female and male hormones and chromosomal differences (i.e. XX/XY) that differentiate between female and male. It is also possible to be born with biological or physiological characteristics of both sexes. In addition, sex can be changed with surgical intervention and/or hormone therapy.

14 Kristin Valasek, "Security Sector Reform and Gender," in *Gender and Security Sector Reform Toolkit*, ed. Megan Bastick and Kristin Valasek (Geneva: DCAF, 2008), 3-4.

policies.[15] The results of this US-based research will be covered in more detail in Chapter 2 and comparative data from US research on gender bias will be used throughout the report.

This research builds on existing knowledge of ***explicit*** and ***implicit bias***. Explicit bias refers to consciously held attitudes, opinions, stereotypes, and associations. Still, while explicit bias is conscious, individuals who hold biased attitudes are not necessarily aware that these attitudes are biased. In other words, in a given socio-cultural context, attitudes toward a particular group may be seen as a reflection of truth, rather than as a negative generalization, stereotype, or the product of current or historical disadvantage and discrimination. Perhaps one of the most poignant examples of explicit bias widely accepted as truth is the example of slavery in the US in the 18th and 19th centuries. In that case, many Americans saw black slaves as less than human and therefore justifiably subject to enslavement; a view which was endorsed by an Article in the Constitution that counted slaves as only 3/5 persons.

This research revealed the presence of gender-based stereotypes and attitudes in members of the BiH judiciary in responses to both the online questionnaire and in-person interviews. These stereotypes and attitudes are explicit to the extent that respondents openly provided their opinions. Yet, openly expressing gender-based stereotypes and attitudes may be different than being aware that these beliefs can constitute or result in gender bias. If stereotypes and attitudes are not challenged in a social context, people are more likely to express them freely; but if biases are seen as unfavourable in a social context, people generally try to hide them.[16] While it is unclear whether any of the respondents in this research would identify or recognize their comments as explicitly gender biased, the sum of their comments would suggest that these stereotypes and attitudes are generally not challenged and are therefore more or less accepted within the socio-cultural context of BiH. Moreover, it is plausible that members of the BiH judiciary may associate gender-based constructions such as social characteristics, behaviours, roles, and responsibilities assigned to women and men with what they see as biologically-derived and innate qualities of women and men. In this context, explicitly held gender-based stereotypes and attitudes would not be seen as such, but as factual assessments of the differences between the sexes.

15 William Eich, "Gender Bias in the Courtroom: Some Participants Are More Equal than Others," *Judicature* 69 (1986-1985): 339.

16 Jerry Kang et al., "Implicit Bias in the Courtroom," *UCLA Law Review* 59, no. 5 (2012): 1124–86. In particular, see: pp. 1135-1152.

In contrast to explicit bias, *implicit bias* refers to the ways in which the human brain automatically and without conscious awareness or thinking, assigns stereotypes and attitudes to the people and events around us. Stereotypical characteristics associated with a particular group can reflect a negative or positive evaluation of that group or individuals within it. This implicit or automatic assignment is based on our direct experiences with people and events as well as the information we get indirectly through media, culture, religion, politics, language, and so on.[17] Implicit bias can even exist in conflict with consciously adopted attitudes and opinions.[18] For example, an individual may advocate the consciously held world view that all people are equal, but discover an implicit bias against or for a particular group through specialized implicit association testing.[19]

Legal practitioners as well as scholars in other fields have noted that the influence of gender is "not limited to conscious, intentional discrimination..." Rather, it manifests through "unconscious or subconscious discrimination that occurs because we look at the individual based on stereotypes that we have accurately or inaccurately assigned to one gender or the other..."[20] Indeed, "people are products of cultural conditioning which frequently obscures recognition of social wrongs.... Discrimination frequently goes uncorrected because it is undetected."[21]

Thus, this research inquiry represents a preliminary effort to uncover the presence of gender-based stereotypes and attitudes and identify whether they can be linked to gender bias within the judiciary of BiH. In the context of this research, ***the judiciary*** refers to the people working within the court system – *judges, prosecutors, legal practitioners, attorneys, and defence counsel*. In the formal legal sense, the judiciary refers to judges, prosecutors, and court associates and does not include private attorneys and defence counsel.

17 Kang, "Implicit Bias: A Primer for Courts."
18 Justin D. Levinson and Danielle Young, "Implicit Gender bias in the Legal Profession: An Empirical Study," *Duke Journal of Gender Law and Policy* 18, no. 1 (August 2010): 6.
19 See the Project Implicit website, here: https://www.projectimplicit.net/index.html, and a listing of publications of research generated by Project Implicit tools, here: https://www.projectimplicit.net/papers.html.
20 Sam W. Coleman, "Gender Bias Task force: Comments on Courtroom Environment," *Washington and Lee Law Review* 58, no. 3 (2001): 1101.
21 Castellano v. Linden Board of Education, 400 A.2d 1182, 79 N.J. 407 (1979). See the concurring and dissenting opinion by Justice Handler. Available at: http://law.justia.com/cases/new-jersey/supreme-court/1979/79-n-j-407-0.html (accessed August 3, 2014).

This research assumes that gender itself is not a natural fact, but is shaped in changing socio-cultural contexts; and in BiH, this context has changed significantly during the last two decades – a shift that has been reflected in the country's formal legal framework.[22] This research captures a snapshot view of a relatively small group of legal practitioners working within the courts of BiH at a specific time. Yet, the sum of the topics explored provides important insights into how gender-based stereotypes and attitudes are both present and influential within the BiH judiciary.

1.4. Sample and Methodology: Who We Surveyed and How

The research effort began with a comprehensive review of existing international literature on the topic of gender bias and gender and the judiciary, which helped the researchers to develop the research methods and tools for this study. This research constitutes an initial inquiry into the opinions, attitudes, and experiences of approximately 161 legal practitioners or members of the judiciary from a total of at least 2,000 working within the BiH court system.[23] Both quantitative and qualitative data collection methods were used, including an anonymous online questionnaire and semi-structured in-person interviews. The aim of this research was not to identify the outcome of gender bias in substantive legal terms, i.e. to quantify its affect on actual court decisions, but rather to begin to understand the opinions, attitudes, and beliefs represented within the BiH judiciary on a number of topics that directly intersect with gender. Thus, the data is not presented or treated as a statistically significant representation of the judiciary and thus strong claims about the generalisability of the data are avoided. Nonetheless, the methods and approach employed enabled the collection of rich and descriptive data on a topic that has never been explored in BiH. The research illustrates that, at the very least, there are examples of gender bias within the courts

22 For more information on recent changes in the BiH judiciary, see: Vlado Azinović, Kurt Bassuener, and Bodo Weber, "The Judiciary," in *Assessing the Potential for Renewed Ethnic Violence in Bosnia and Herzegovina: A Security Risk Analysis* (Sarajevo: The Atlantic Initiative, 2011), 48–49; For a more detailed account of the history of BiH's criminal justice system, see: DeNicola, "Criminal Procedure Reform in Bosnia and Herzegovina."

23 While 161 total respondents participated in the research, through the anonymous online questionnaire and in-person interviews, it is possible that a number of them responded in both forms; therefore, the exact total number of individual respondents is not known. According to the 2012 Annual Report of the HJPC, there were an estimated 1,272 judges and prosecutors in BiH in 2012. In addition, there are an estimated 1,000 attorneys and court associates working in the BiH court system.

of BiH and a need for the adoption of strategies to mitigate the impact of such bias. The research also presents further avenues for exploration into this interesting and important subject.

1.4.1. The Online Questionnaire

The researchers, with assistance from a multi-disciplinary working group, developed an anonymous online questionnaire to capture the views of judges, prosecutors, attorneys, and court associates on topics related to gender. The majority of questions were designed to capture quantifiable data. These questions allowed respondents to choose one or several answers from a set of choices, or to rank choices by importance. Some questions allowed for additional qualitative responses by offering respondents the option to provide examples or explanations for particular response choices. Finally, at the end of the survey, respondents had the option to make additional comments about anything they felt was relevant.

The questionnaire was posted online using the Survey Monkey platform and was designed by the researchers to ensure the confidentiality of the survey and anonymity of respondents, who were not required to provide any identifying information.[24] Those who provided such information did so voluntarily. (See the questionnaire in Annex A.)

In support of this research, the HJPC wrote a letter to court presidents calling on them to encourage court staff to participate. In the letter, the HJPC urged court presidents to distribute the web link that allowed access to the online survey and to encourage their professional staff to complete the questionnaire. Researchers also followed up by contacting court presidents, chief prosecutors, and presidents of law chambers to reinforce the HJPC's request. In total, 131 online questionnaires were completed by 42 judges, 21 prosecutors, 9 lawyers, 21 court associates, 3 respondents who identified themselves as "other," and 35 individuals who did not disclose information about their professional status. Of the 96 respondents who disclosed their sex, 52.1 % were male and 47.9% were female.

A number of questionnaire respondents chose to skip questions, particularly those that could arguably be used to identify them. Skipping questions may indicate a concern about anonymity and sensitivity related to the topics explored in the research.

24 See: www.surveymonkey.com

1.4.2. The Interviews

Researchers also designed a series of questions to guide and facilitate in-person interviews, loosely based on the questions in the survey. However, the interviews were semi-structured so as to leave room for open-ended responses and discussion. A total of 30 in-person interviews were conducted with 7 prosecutors, 14 judges, and 9 attorneys, in both the FBiH and the RS – in Sarajevo, Visoko, East Sarajevo, Mostar, Banja Luka, Bijeljina, and Sanski Most. Interviewees included judges from first and second instance courts and prosecutors from cantonal and district prosecutor's offices. Researchers tried to target a mix of female and male interviewees of varying ages, from diverse professional backgrounds, and from both the criminal and civil-legal sectors. While court presidents, chief prosecutors, and presidents of law chambers were required to approve the selection and scheduling of interviews, the results of interviews were not shared with the interviewees' managers or colleagues. Moreover, all interviews were held in a private location without interference or observation from other courthouse staff, legal practitioners, or members of the judiciary.

Interviews lasted approximately one hour in order to provide time for respondents to answer questions and engage in impromptu discussions. While interviewees were free to conclude the interview at any time, none of them elected to end an interview prematurely. In fact, the researchers often needed to keep interviewees from straying away from the focus of the questions as many of them saw the interview as a chance to discuss more general challenges they face in the judiciary. Usually, two researchers attended each interview in order to ensure that responses were accurately captured.

The design of both research instruments – the questionnaire and interview questions – was aimed at minimizing any influence on the views of respondents. So, while the research was aimed at exploring the influence of gender, questions never used either the word "gender" or "influence." In addition, 'value language' that could imply either a negative or positive association was avoided. Thus, terms such as "gender bias," "discrimination," "differential treatment," and "harassment" were avoided except in the case of sexual harassment, about which direct questions were asked regarding the existence of policies and in-house training programs.

1.4.3. Analysis: The Means by Which We Interpreted the Findings

Analysis of the 131 questionnaires and 30 interviews was conducted in a variety of stages and using a number of analytical methods. The response rate standard did not apply to this research because the research team did not have control over who received and completed the questionnaire. In addition, the questionnaire sample size was not statistically significant and therefore the data is not generalisable to legal practitioners or the BiH judiciary as a whole. Instead, quantitative research data from the questionnaire was enriched with qualitative responses captured in written narratives provided on the questionnaire and through interviews.

Qualitative analysis was conducted through a combination of thematic[25] and discourse analysis.[26] Thematic analysis was used to categorize responses by theme, and then identify and examine patterns across and within thematic categories. These patterns were compared to existing qualitative research on the same thematic topics. The researchers used discourse analysis to identify values, opinions, and perspectives reflected within the data. This allowed researchers to uncover gender-based stereotypes and attitudes from oral narratives offered during interviews and written narratives provided on the questionnaire. For example, a respondent may provide an affirmative answer to a survey question, followed by an anecdote contradicting their initial response. Discourse analysis allows the researcher to weigh the sum of expressed opinions, perspectives, and values against short affirmative or negative answers to reach a more accurate conclusion about the implications of a data set.

Methodological, interviewer, and theory triangulation were used to interpret the qualitative data and identify findings.[27] By using two methods of gathering data, researchers were able to gain greater insight from it. Similarly, the involvement of several researchers in preparing the questions, conducting the interviews, and analysing the data increased the critical examination of

25 A. Michael Huberman and Matthew B. Miles, "Data Management and Analysis Method," in *Collecting and Interpreting Qualitative Materials*, ed. Normal K. Denzin and Yvonna S. Lincoln, Fourth Edition (Thousand Oaks: Sage Publications, 2013), 179–210.

26 Martyn Hammersley, "Discourse Analysis: A Bibliographical Guide" (Teaching and Learning Research Programme, University of London, April 2002), http://www.tlrp.org/rcbn/capacity/Activities/Themes/In-depth/guide.pdf.

27 Triangulation is a method used in qualitative research to establish the validity of a study. Triangulation helps in overcoming bias that can arise from a single-method, single-investigator, or single-theory approach. See: Norman K. Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (New Brunswick, NJ: Aldine Transaction, 2009).

the findings. Throughout the process, researchers challenged and confirmed interpretations and observations, satisfying the standard of interviewer triangulation. Further, professionals from a wide variety of fields (including law, sociology, psychology, and international relations) worked together to analyse the data, and brought multiple and varied perspectives. The analytical findings in this report include conclusions drawn from all of these disciplines and satisfy the requirement of theory triangulation.

Finally, the review of pre-existing research contained in this report provides a comprehensive analysis on the exploration of this topic in other locations. The research collected in this study was informally compared against findings and conclusions from that existing research. This enabled researchers to identify that the same or similar conclusions have been drawn elsewhere regarding links between gender-based stereotypes and attitudes in legal practitioners and gender bias in court systems.

1.5. Limitations of the Research

The researchers identified limitations of this research in the following categories: the self-report method used to collect some of the data; the sample size; the lack of independent access to research participants; and the lack of prior existing research in the same location. Several efforts were made to mitigate the impact of these limitations, described in more detail below.

Self-report method: The online questionnaire relied on self-reported data that, in most cases, was not independently verified. Thus, research results dealing with concrete topics such as the existence of policy or technology, or substantive legal outcomes like child custody awards, reflect the opinion of the reporter and are not validated facts (for example, the outcomes of relevant court cases were not analysed). Research results related to qualitative data, such as opinions, attitudes, or values, can also sometimes be exaggerated or embellished, or respondents can attribute positive characteristics to themselves and negative characteristics to others.

Sample size: The sample size and diversity of respondents does not allow for statistical comparisons among different groups. As such, the research does not make claims related to the representativeness of the sample. Percentages were provided in some portions of this report to show the proportion of the total responses to a question that were answered in the same or in similar ways. While this cannot be generalised to the entire population of legal practitioners and members of the BiH judiciary, these trends do provide insights into the thinking and opinions held by a portion of this population.

Access to research participants: In most cases, the researchers did not have direct access to members of the judiciary and relied on the assistance of court presidents, chief prosecutors, and presidents of law chambers to forward the anonymous questionnaire to their employees and members.[28] These professionals also, on the basis of given criteria, identified the personnel who would be available for in-person interviews. Thus, the research team did not have control over who completed the questionnaire or who participated in interviews. This limited participation and made it impossible for the researchers to insure a sample representing the composition of the judiciary in terms of sex, ethnicity, age, position, and function. Finally, despite the request of researchers that participation be voluntary, they could not assure that respondents and interviewees had not been solicited by their superiors to participate.

Lack of prior research: The researchers found an absence of research on the topic of gender bias and gender and the judiciary in BiH and the region.[29] However, there were several reports and other resources specific to BiH that helped the researchers frame the results of the research and provided additional evidence to support findings. Also, significant research on the topic has been conducted in the US, Canada, and to a slightly lesser degree, Europe. The researchers used international research to contextualize the study and to aid in analysing and drawing conclusions from the study's results.

1.6. Ethical Considerations

The research team made it a priority to maintain the anonymity of individuals who participated in this study and the confidentiality of the research records. The online questionnaire was designed so that the researchers could not identify who submitted a questionnaire or know the location from where it was submitted. The comprehensive data set that resulted from completed questionnaires has only been seen by the research team and will not be shared. The results of interviews will also being kept confidential. Finally, while efforts have been made to limit the possibility of associating a quote or response to a particular individual, the researchers acknowledge the

28 In some cases DCAF and AI were able to encourage judges and, to a lesser extent, other members of the judiciary with whom they have worked previously to complete the online questionnaire.

29 A notable exception is the study published by Croatian scholar Ivana Radačić on how gender stereotypes and rape myths influenced courts procedures and outcomes in the district court of Zagreb. See: Ivana Radačić, "Kazneno djelo silovanja: pitanja definicije, (ne)odgovornosti za otklonjivu zabludu o pristanku i postojanje rodnih stereotipa u sudskom postupku na primjeru prakse županijskog suda u Zagrebu," *Hrvatski ljetopis za kazneno pravo i praksu* 19, no. 1 (July 2012): 105–125.

possibility that members of the judiciary may know colleagues who either completed a questionnaire or participated in an interview and therefore may be able to connect a particular quote or narrative in this report to an individual. The close-knit nature of court working environments is such that the absolute anonymity of individual respondents cannot be guaranteed, despite every attempt by researchers to ensure it.

2. WHAT PREVIOUS RESEARCH ON GENDER AND THE JUDICIARY CAN TELL US

2.1. An Overview of Research from the US and Europe

While there has been a wealth of literature dealing with gender and the judiciary in the US since the 1980s, research on the topic in Europe was comparatively scarce until the early 21st century. For this study, researchers identified hundreds of articles, reports, handbooks, and best practices from the US, along with a smaller sample of English-language and non-English publications from other countries. Yet, the topic of gender and the judiciary does appear to be gaining increased interest in Europe and beyond.

American and European research communities have approached the topic of gender and the judiciary differently over the years. European researchers first began exploring the topic by looking at the representation of women judges in the judiciary. To a lesser extent, they have also examined the impact of the gender of defendants and the gender of judges on sentencing. Then, beginning in 2000, they began to examine the relevance of gender on judicial practice and decision making. There has also been a noticeable increase in European literature examining gender perspectives in judging and feminist adjudication that goes beyond the popular topics of quotas and diversity. While significant literature exists in Europe on the topic of gender and the judiciary, European research efforts have not focused as much on the implications of gender-based stereotypes and attitudes in legal decision making or collegial relationships and courthouse atmosphere – in other words, on *gender bias.*

On the other hand, US researchers have approached the issue of gender and the judiciary from an experiential and practical standpoint. Their central question has been how or why women may be treated differently or unequally by the judiciary, whether judges, attorneys, or court users. Researchers and practitioners alike have sought to identify the specific consequences of gender bias on the delivery of justice. This research eventually led to the development of practical applications meant to increase awareness of the existence and impact of gender bias within legal practice, courts, and the judiciary. In addition, scholars from the US have explored and developed a significant body of contemporary research on the existence of *implicit bias*.

More recently, researchers from Europe, the US, Canada, and occasionally some Asian and African countries have come together to collaborate on this topic. European civil law and North American common law researchers and legal practitioners have begun to exchange information and ideas with the creation of a research network on gender and judging. This cooperation facilitated the publication of a significant edited volume entitled *Gender and Judging*, which includes contributions from 27 scholars and practitioners from around the world.[30]

2.2. Research on The Representation of Women in the Judiciary

European research on gender and the judiciary began by exploring the representation of women in the judiciary and how they are perceived. Several scholars examined whether the equal representation of women and men in the judiciary was important. They wondered how a lack of gender parity in the judiciary impacted justice. Scholars from the US and Europe have put forth various arguments advocating for equal representation of women on the bench.[31] Primary among these is the assertion that an impartial and credible judiciary should be representative of the population it serves.[32] Another body of research from Europe sought to uncover the experiences and perceptions of the first generation of women judges. They explored how they perceived themselves and were perceived by the public and their colleagues, the reasons they chose the profession, and their experiences in a previously all-male profession. Studies of this kind have been conducted in several countries, including Switzerland and France.[33]

30 Ulrike Schultz and Gisela Shaw, eds., *Gender and Judging*, Oñati International Series in Law and Society (Oxford; Portland, Oregon: Hart Publishing, 2013).

31 For example, see: Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (New York: Routledge, 2013); Sally Jane Kenney, "'It Would Be Stupendous for Us Girls': Campaigning for Women Judges without Waving," in *Breaking the Wave Women, Their Organizations, and Feminism, 1945-1985*, ed. Kathleen A. Laughlin and Jacqueline L. Castledine (New York: Routledge, 2011), 209–28; and from the UK, see: Kate Malleson, "Justifying Gender Equality on the Bench: Why Difference Won't Do," *Feminist Legal Studies* 11, no. 1 (2003): 1–24.

32 Schultz and Shaw, *Gender and Judging*, 23.

33 See: Revital Ludewig, Kathleen Weislehner, and Evelyne Angehrn, *Zwischen Recht und Gerechtigkeit: Richterinnen im Spiegel der Zeit* (Bern: Stämpfli, 2007); Anne Boigeol, "Le genre comme ressource dans l'accès des femmes au «gouvernement du barreau»: l'exemple du barreau de Paris," *Genèses* 2, no. 67 (2007): 66–88; Anne Boigeol, "French Women Lawyers (Avocates) and the 'Women's Cause' in the First Half of the Twentieth Century," *International Journal of the Legal Profession* 10, no. 2 (July 2003): 193–207.

Anne Boigeol, a French academic and one of the first scholars in Europe interested in the implications of gender in the judiciary, published several articles (mostly in French) on the feminization of the judiciary in France, and how this has resulted in changes to the judicial profession and its public perception.[34] More recently, Boigeol identified a number of areas where inequality persists despite a numerical majority of women judges in France. For instance, male candidates for the position of judge consistently score better in the oral examinations. Boigeol speculates that this is due to a conscious or unconscious effort from the selection team to counter the feminization process of the French judiciary. She notes that there is still a glass ceiling; for, despite a largely female pool of candidates, heads of courts are largely men.[35] Several other scholars have also asked why women remain scarce in the judiciary and in particular in higher level positions. In the UK, Kate Malleson has investigated the lack of women judges in British courts.[36] And in Germany, Ulrike Schultz conducted an empirical study for the Ministry of Justice of the State of North Rhine-Westphalia to examine both why women want to be judges and why they are not well represented in leadership positions.[37]

34 For example, see: Anne Boigeol, "Feminisation of the French 'Magistrature': Gender and Judging in a Feminised Context," in Gender and Judging, Oñati International Series in Law and Society (Oxford; Portland, Oregon: Hart Publishing, 2013), 125–143; Boigeol, "Le genre comme ressource;" Anne Boigeol, "Les femmes et les cours. La difficile mise en œuvre de l'égalité des sexes dans l'accès à la magistrature," Genèses 22, no. 22 (1996): 107–129; Anne Boigeol, "La magistrature française au féminin: entre spécificité et banalisation," Droit et Société 25 (1993): 489–522.

35 Boigeol, "Feminisation of the French 'Magistrature,'" 128–129; compare also with: Anne Boigeol, "So Many Women in French Magistrature and so Few at the Top" (presented at the International Seminar "Women and Judicial Professions," Buenos Aires, Argentina, 2007); Anne Boigeol, "The Unquestionable Rise of Women in the Corporate Bar in France and the Reproduction of Gender Inequalities" (presented at the Research Congress of the Committee of Sociology of Law of the International Sociological Association, Oñati, Spain, 2009); Anne Boigeol, "Talking about Judicial Selection in France, or How to Limit the Rise of Women in French Judiciary" (presented at the Congress of the Law and Society Association, Montréal, Canada, 2008); Boigeol, "Les femmes et les cours."

36 See: Kate Malleson, "Gender Quotas for the Judiciary in England and Wales," in *Gender and Judging*, ed. Ulrike Schultz and Gisela Shaw, Oñati International Series in Law and Society (Portland, Oregon: Hart Publishing, 2013), 481–500; Kate Malleson and Lizzie Barmes, "The Legal Profession as Gatekeepers to the Judiciary: Design Faults in Measures to Enhance Diversity," *Modern Law Review* 74, no. 2 (March 2011): 245–271; Kate Malleson, "Diversity in the Judiciary: The Case for Positive Action," *Journal of Law and Society* 36, no. 3 (September 2009): 376–402; Kate Malleson, "Ending Elitism in Judicial Appointments," *Legal Action* (December 2, 2008); Kate Malleson, "Prospects for Parity: The Position of Women in the Judiciary in England and Wales," in *Women in the World's Legal Professions*, eds. Ulrike Schultz and Gisela Shaw, Oñati International Series in Law and Society (Portland, Oregon: Hart Publishing, 2003), 175–190; Kate Malleson, "Judging Judicial Review: Criteria for Judicial Appointment," in *Judicial Review in the New Millennium: Criteria for Judicial Appointment*, ed. Richard J.F. Gordon (London: Sweet & Maxwell, 2003), 19–31; Kate Malleson, "Promoting Diversity in the Judiciary: Reforming the Judicial Appointments Process," in *Discriminating Lawyers*, ed. Philip A. Thomas (London: Cavendish, 2000), 221–236.

37 See: Ulrike Schultz, "'I Was Noticed and I Was Asked...' Women's Careers in the Judiciary: Results of an Empirical Study for the Ministry of Justice in Northrhine-Westfalia, Germany," in *Gender and*

A number of scholars have compared the representation of women in the judiciary in civil and in common law countries. This strain of research has revealed that women's numerical representation is generally higher in civil law countries; a phenomenon which has been hypothesized to be linked to the higher status judges are awarded in common law systems.[38] Interestingly, the question of gender bias in the judiciary became the focus of academic research, public debate, and advocacy efforts much earlier in common law countries than in civil law countries. Boigeol suggests that this is one of the reasons why professional associations of women judges, such as the International Association of Women Judges (IAWJ), with strong roots in the US, are often present and very active in common law countries (and in some developing countries) but are almost absent in civil law countries. In France, for instance, the International Association of Women Judges (IAWJ) counts only two members.[39] In addition, a number of scholars have examined the role and participation of women on international courts. An article by Nienke Grossman, for example, questioned the legitimacy of international courts on the basis of their relatively low representation of women judges.[40]

As women judges began entering the judiciary in more significant numbers, academics, practitioners, and the public began to question whether the gender of a judge made a difference. To explore this question, Canadian

Judging, ed. Ulrike Schultz and Gisela Shaw, Oñati International Series in Law and Society (Portland, Oregon: Hart Publishing, 2013), 145–166; or, in German: Ulrike Schultz, "„Ich war sichtbar, und ich bin gefragt worden…" Frauen in Führungspositionen der Justiz in NRW," in *Rechtshandbuch für Frauen- und Gleichstellungsbeauftragte*, ed. Sabine Berghahn and Ulrike Schultz (Hamburg: Dashöfer, 2013); for more on the question of career options for women judges, see (in German): Ulrike Schultz, "Frauen in Führungspositionen der Justiz. Eine Untersuchung von Frauenkarrieren in den Justizbehörden," *Mitteilungsblatt des Schleswig-Holsteinischen Richterverbandes*, no. 2 (2012): 4–22.

38 See: Anne Boigeol, "Gender and Judging in Common Law and Civil Law Countries" (presented at the Research Congress of the Committee of Sociology of Law of the International Sociological Association, Milan, Italy, 2008); Adélaïde Remiche, "General Introduction to the International Symposium 'The Judge Is a Woman'" (presented at the International Symposium "The Judge Is a Woman," Université Libre de Bruxelles, Belgium, November 7, 2013), http://droit-public.ulb.ac.be/wp-content/uploads/2013/11/02.-Introduction-par-MAD.-REMICHE.mp3.

39 Boigeol, "Feminisation of the French 'Magistrature,'" 135–136. In contrast to France, BiH has its own national Association of Women Judges. The AWJ in BiH was established in 2009 and has been steadily growing since, counting 105 members in early 2014. The AWJ in BiH organizes workshops, capacity-building trainings and round table discussions, and is engaged in research and advocacy activities on topics related to professional capacities and the position of women in the BiH judiciary. The AWJ in BiH issues a periodic newsletter, available at: http://www.mrezapravde.ba/mpbh/english/vijest.php?id=301.

40 "In mid-2010 women accounted for 58% of sitting judges at the International Criminal Court, but only 6.3% and 23.1% respectively, of permanent judges for the International Criminal Tribunal for the Former Yugoslavia and Rwanda." See: Nienke Grossman, "Sex Representation on the Bench and the Legitimacy of International Criminal Courts," *International Criminal Law Review* 11 (2011): 643–644; and Nienke Grossman, "Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?," *Chicago Journal of International Law* 12, no. 2 (2012): 647–684.

scholars Marie-Claire Belleau and Rebecca Johnson examined the implications of gender on the dissenting opinions of Canadian Supreme Court cases. Their findings reveal that the first women judges appointed to the Supreme Court offered a particularly high number of dissenting opinions. The first woman judge from Québec and second woman to be elected to the Supreme Court of Canada, Claire L'Heureux-Dubé, holds the highest record for the total number of dissenting opinions of all Supreme Court justices between 1982 and 2011.[41] British legal scholar Erika Rackley, commenting on these findings, noted that while Belleau and Johnson "found little evidence of a unified women's voice... their study did reveal a single – crucial – commonality among women judges: an ability and willingness to disagree."[42] This willingness could indicate that, no matter how female judges decide on any given case, the way they come to their conclusion and the reasoning behind may be different than that of male judges.

Research by Céline Bessière and Murièle Mille of France exploring whether the fact that a majority of family court judges are women has a substantive legal impact on the outcome of custody cases found that female and male judges do indeed perceive their roles differently and hold different values or perspectives, but are nonetheless significantly consistency in their judgements. In the Netherlands, research examining the outcome of alimony and child support disputes in divorce cases came to the same conclusion.[43] In contrast, earlier studies from Poland and Brazil found that female judges tended to apply their own personal values as financially independent women to cases involving housewives who were filing for divorce, child support, and alimony. That research found that women judges were more likely to be harsher than their male colleagues toward women seeking support in divorce cases.[44]

41 For example, see: Marie-Claire Belleau, Valérie Bouchard, and Rebecca Johnson, "Rapport minoritaire: La dissidence fait juge," *Canadian Journal of Women and the Law* 21, no. 1 (2009): 1–17 (in French); Marie-Claire Belleau and Rebecca Johnson, "Judging Gender: Difference and Dissent at the Supreme Court of Canada," *International Journal of the Legal Profession* 15, no. 1–2 (July 2008): 57–71.

42 Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (New York: Routledge, 2013), 148.

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

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

Boigeol has noted that relatively little research has been undertaken in this field in civil law countries, asserting that:

> *... the first reaction of judges is always to reject the assumption that there might be a correlation between gender and judging. [But] we know that, as all pioneers, the first women judges did their best not to be different from men, sometimes to be like a man. They experienced a lot of pressure, as many male judges were waiting to see them stumble.*[45]

Yet researchers from the US have uncovered slightly different results related to the impact of women judges on the justice system; in fact, that male judges may be influenced by their female colleagues in some cases, instead of vice versa. For example, while Boyd, Epstein, and Martin concluded that the presence of women on federal appellate panels rarely has an effect on judicial outcomes in general, they did find significant and substantive effects in cases of sex discrimination specifically.[46] They concluded that the presence of a woman judge on a panel can cause male judges to vote differently. Indeed, while "[t]he majority of researchers and judges share the opinion that it should not matter by whom you are judged, in practice it does." [47]

2.3. Research on The Gender of Defendants, Victims, and Judges

Thomas Léonard from the University of Lille in France has contributed to literature analysing the impact of the gender of defendant and victims on case resolution, and has evaluated the interactions between defendants and judges and prosecutors based on gender.[48] Similarly, Canadian researchers Annik

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

46 Christina L. Boyd, Lee Epstein, and Andrew D. Martin, "Untangling the Causal Effect of Sex on Judging," *American Journal of Political Science* 54, no. 2 (2010): 389–411.

47 Dijksterhuis, "Women Judges in the Netherlands," 274.

48 See: Thomas Léonard, "Les jugements devant le tribunal correctionnel en France selon le sexe des magistrats" (presented at the International Symposium "The Judge Is a Woman," Université Libre de Bruxelles, Belgium, November 8, 2013), http://droit-public.ulb.ac.be/wp-content/uploads/2013/11/10.-Expos%C3%A9-de-M.-LEONARD.mp3; Thomas Léonard, "La construction des 'histoires' des délits en comparution immédiate en France au prisme du genre" (presented at the Séminaire "Féminités et masculinités en révolution," École des hauted études en sciences sociales, Paris, France, February 12, 2013); Thomas Léonard and Maxime Lelièvre, "Une femme peut-elle être jugée violente? Les représentations de genre et les conditions de leur subversion lors des procès en comparution immédiate," in *Penser la violence des femmes*, ed. Coline Cardi and Geneviève

Mossière and J. Thomas Dalby undertook a mock trial study to determine whether the gender and/or age of a defendant can have a prejudicial impact on the jury and on subsequent judicial sentencing.[49] Conclusive evidence of gender bias (where one gender is advantaged over the other) was found in neither the Canadian nor the French research. In contrast, a study conducted by two German scholars who sought to identify whether women and men who commit murder receive different sentences revealed that women were much more likely to receive lesser sentences. This research found that women are often perceived as having had limited agency and control over the situation that led to their crime and as a result are seen as less culpable.[50] Similarly, German researchers Rainer Geißler and Norbert Marißen found that male juvenile perpetrators received harsher sanctions than female perpetrators in nine out of fourteen categories. The gender bias the researchers identified was attributed to the perception of (mostly male) judges that young women are better than young men at reintegrating into society.[51] This is consistent with findings from the US, beginning in the late 1970s, that reveal a historically paternalistic approach to the sentencing of women and girls.[52] Geißler and Marißen also found that women's sentencing advantage before the court seemed to decrease with increasing emancipation of women in society.[53] However, a more recent article by Gabriele Schmölzer comes to the conclusion that differences in sentencing are more often due to differences in the type of crime committed by women and men rather than to gender.[54] This conclusion may be supported by

Pruvost (Paris: La Découverte, 2012), 314–329; Thomas Léonard, "Discriminations En Comparution Immédiate," *Plein Droit* 89, no. 2 (2011): 24–27.

49 Thomas Dalby and Annik Mossière, "The Influence of Gender and Age in Mock Juror Decision-Making," *Europe's Journal of Psychology* 4, no. 4 (2008).

50 Aldo Legnaro and Astrid Aengenheister, "Geschlecht und Gerechtigkeit – Aspekte der Aburteilung von Tötungskriminalität," *Kritische Justiz* 28, no. 2 (1995): 188–202.

51 Rainer Geißler and Norbert Marißen, "Junge Frauen und Männer vor Gericht: geschlechtsspezifische Kriminalität und Kriminalisierung," *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 40, no. 3 (1988): 505–526.

52 See: Meda Chesney-Lind, "Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place," *Crime & Delinquency* 23, no. 2 (January 1977): 121–130; Elizabeth F. Moulds, "Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System," *The Western Political Quarterly* 31, no. 3 (September 1978): 416–430; Darrell J. Steffensmeier, "Sex Differences in Patterns of Adult Crime, 1965-77: A Review and Assessment," *Social Forces* 58, no. 4 (June 1980): 1080–1108; Kathleen Daly, "Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment," *Social Forces* 66, no. 1 (September 1987): 152–175; David R. Johnson and Laurie K. Scheuble, "Gender Bias in the Disposition of Juvenile Court Referrals: The Effects of Time and Location," *Criminology* 29, no. 4 (November 1991): 677–699.

53 Geißler and Marißen, "Junge Frauen und Männer vor Gericht," 505.

54 Gabriele Schmölzer, "Geschlecht und Kriminalität: Zur kriminologischen Diskussion der Frauenkriminalität," *Der Bürger im Staat* 53, no. 1 (2003): 63. For more literature on this topic published in German, see: Tanja Köhler, *Straffällige Frauen: eine Untersuchung der Strafzumessung und Rückfälligkeit* (Universitätsverlag Göttingen, 2012); Gönke Christin Jacobsen, *Sozialstruktur und Gender: Analyse geschlechtsspezifischer Kriminalität mit der Anomietheorie Mertons* (Wiesbaden:

research from the US and UK that has determined that women and girls tend to commit different types of criminal offenses than men and boys.[55]

During the review of literature for this research, a special effort was made to identify literature from BiH and the Southeastern European region. This includes BiH-specific materials that are relevant to the topic of the impact of gender, such as a 2011 OSCE report on domestic violence sentencing, "Ensuring Accountability for Domestic Violence,"[56] and Maja Šoštarić's 2012 research, "War Victims and Gender-Sensitive Truth, Justice, Reparations and Non-recurrence in Bosnia and Herzegovina."[57] In addition, Croatian legal scholar Ivana Radačić published an article critically analyzing the legal framework and judicial practices in cases of rape in Croatia that identified the existence of gender stereotypes and the influence of rape myths on legal outcomes.[58]

2.4. Implicit Bias

The literature review also revealed significant research on the phenomenon of *implicit bias*. Implicit bias refers to the automatic or unconscious process of assigning a stereotype or associating a negative or positive attitude with a particular group or individual.[59] The process of automatically identifying, categorizing, differentiating, and labelling the world around us is referred to as implicit cognition. Implicit cognition allows people to understand the world around them without active thinking. For example, we automatically understand the purpose of a spoon without needing to think about what it is or how it is used. However, implicit cognition also influences our understanding of people. "We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race and role."[60] These automatic associations linked to individuals or groups can

Verlag für Sozialwissenschaften, 2008); Gaby Temme and Christine Künzel, eds., *Hat Strafrecht ein Geschlecht? Zur Deutung und Bedeutung der Kategorie Geschlecht in strafrechtlichen Diskursen vom 18. Jahrhundert bis heute* (Bielefeld: Transcript, 2010).

55 See: Marisa Silvestri and Chris Crowther-Dowey, *Gender and Crime*, Key Approaches to Criminology (Thousand Oaks: Sage Publications, 2008); Darrell Steffensmeier and Emilie Allan, "Gender and Crime: Toward a Gendered Theory of Female Offending," *Annual Review of Sociology* 22, no. 1 (August 1996): 459–487; Mary Ann Zager, "Gender and Crime," in *The Generality of Deviance*, ed. Travis Hirschi and Michael R. Gottfredson (New Brunswick, NJ: Transaction Publishers, 1994), 71–80.

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

57 Maja Šoštarić, *War Victims and Gender-Sensitive Truth, Justice, Reparations and Non-Recurrence in Bosnia and Herzegovina*, Perspectives Series (Impunity Watch, 2012).

58 Radačić, "Kazneno djelo silovanja."

59 Kang, "Implicit Bias: A Primer for Courts."

60 Ibid.

include stereotypes or attitudes that may or may not have factual bearing on the individual or group in question, thereby resulting in implicit bias.

Research shows that the development of implicit bias begins early in life, when children learn from family, friends, and other social influences "to ascribe certain characteristics to members of distinct ethnic and social groups."[61] With age, these stereotypes become more ingrained such that even if a person develops an explicit (consciously adopted) non-biased view of the world, "their stereotypes remain largely unchanged and become implicit (or automatic)."[62] As this relates to gender stereotypes in the US, for example, children are likely to learn that men are "competent, rational, assertive, independent, objective, and self confident," and women are "emotional, submissive, dependent, tactful, and gentle."[63]

Implicit biases may oppose a person's adopted world view, but because they are not consciously controlled, they may nonetheless be reflected in their behaviour – including in the professional realm. Implicit bias complicates gender bias research because research participants may be unaware of the implicit biases that influence their real-time response to people and events. They may offer researchers responses that reflect a sincere, but potentially idealized, self assessment. A collaborative effort known as Project Implicit was established in 1998 by researchers from three US universities, who designed a test known as the Implicit Association Test (IAT) to help investigate "the gap between intentions and actions."[64] Over a decade of research using the IAT has revealed the existence of implicit bias among people in every country tested, consistent with established social hierarchies: white over black, men over women, youth over elderly, straight over gay, etc.[65]

Still, in the US, where research on implicit bias spans almost two decades, legal practitioners may be slow to accept the role or possibility of bias in their work. In 2011, Hilarie Bass, Chair of the American Bar Association Litigation Section noted:

61 Levinson and Young, "Implicit Gender Bias," 6.
62 Ibid.; also see: Timothy D. Wilson, Samuel Lindsey, and Tonya Y. Schooler, "A Model of Dual Attitudes.," *Psychological Review* 107, no. 1 (2000): 101–126, and in particular p. 104.
63 Diane L. Bridge, "The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace," *Virginia Journal of Social Policy and the Law* 4, no. 1 (Spring 1997): 604.
64 See the Project Implicit website, here: https://www.projectimplicit.net/index.html, and a listing of publications of research generated by Project Implicit tools, here: https://www.projectimplicit.net/papers.html.
65 Kang, "Implicit Bias: A Primer for Courts," 3.

> *...if anyone were to suggest, even politely, that lawyers were as biased as anyone else, few in our profession would not instinctively take umbrage. Indeed, we fashion ourselves the very stewards of equality in our society; the leaders charged with eradicating discrimination.*[66]

Yet the concepts of judicial impartiality and fairness are intrinsically tied to the ability of legal practitioners to mediate their own biases – explicit or implicit. Jerry Kang, Professor of Law at the University of California in Los Angeles and a leading author on the question of implicit bias concludes his "Primer for Courts" by explaining that:

> *...Americans view the court system as the single institution that is most unbiased, impartial, fair and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social background, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias rich social situation to the end that fairness and justice be done – and be seen to be done.*[67]

The notion of a fair and impartial judiciary is just as important to the legal practitioners and citizens of BiH. While the influence of gender may be but one small area in relation to broader issues of judicial impartiality, it is nonetheless an element that must be addressed in the larger effort to achieve an impartial judiciary.

2.5. Gender Bias Task Forces in the United States

There is also a body of literature detailing how research findings have been translated into action and used to overcome or reduce the negative impact of gender in judicial processes and decision making. Here, US literature comes to the fore, especially related to task forces on gender bias in the courts. Since 1982, and beginning with New Jersey, US states have initiated state-based task forces to identify the existence of gender bias, examine its consequences, and

66 American Bar Association Section of Litigation, "The Neuroscience of Implicit Bias," YouTube video, 21:10, 6 December 2011, http://youtu.be/kzz5Ae-Jq0s (accessed 22 June 2014).
67 Kang "Implicit Bias: A Primer for Courts," 6.

develop mechanisms to mitigate its effects.[68] Task forces have most often been chaired by a judge or by the highest level court member of each state. Like the scholarly research that exists on the topic, these state task forces have concluded that gender does influence the work of the judiciary (the courthouse atmosphere and legal decision making) and, in most cases, they have gone on to develop guidelines, recommendations, or updated codes of conduct for attorneys and judges geared to mitigate gender bias. It is notable that the bulk of available research, identified best practices, recommendations, and other forms of guidance, have been conducted and developed by members of the judiciary themselves. But, perhaps the foremost lesson from the experience of the US is the critical importance of judicial leadership in efforts to develop mechanisms to reduce gender bias and increase fairness and impartiality.

The impetus for the initiation of task forces in the US was the development of resources by the National Judicial Education Program (NJEP), a project of the NOW Legal Defense and Education Fund – later renamed Legal Momentum – in cooperation with the National Association of Women Judges (NAWJ).[69] Founded in 1980 by Dr. Norma Juliet Wikler, the mission of the NJEP is to promote equality for both women and men in the courts. NJEP and its director since 1981, Lynn Hecht Schafran, pioneered the earliest research and exploration of the topic of gender bias and researchers from the NJEP characterized gender bias as having three components:

1. Stereotypical thinking about the nature and roles of women and men;
2. How society values women and men, including what is perceived as women's work; and
3. Myths and misconceptions about the social and economic realities of women's and men's lives.[70]

NJEP researchers set out to uncover if and how each one of the above components of gender bias operated in US courts. This conceptual framework enabled gender bias task forces to begin assessing the status of their state's courts. Ultimately, all US task forces found evidence of the existence of gender bias in their court

68 Lynn Hecht Schafran and Norma Juliet Winkler, *Operating a Task Force on Gender Bias in the Courts: A Manual for Action* (Washington DC: The Foundation for Women Judges, 1986), 1; and Lynn Hecht Schafran and Norma J. Winkler, *Gender Fairness in the Courts: Action for the New Millennium* (NJEP, 2001), ix.

69 For more information on the NJEP, see: Legal Momentum, "National Judicial Education Program," http://www.nowldef.org/national-judicial-education-program (accessed February 4, 2014). The NOW Legal Defense Fund was established in 1970 by the National Organization for Women (NOW) as a separate non-profit organization, to provide legal advocacy for women's rights. The Fund changed its name to Legal Momentum in 2004. Also see the website of the NAWJ at: http://www.nawj.org.

70 Lynn Hecht Schafran, "Is the Law Male: Let Me Count the Ways," *Chicago-Kent Law Review* 69, no. 2 (1993): 397–398.

systems. Since then, judges, attorneys, court personnel, and legal scholars have been working to mitigate, overcome, and ultimately eliminate gender bias in US courts. However, the first and most difficult step was acknowledging that legal practitioners are not inherently objective or impartial. Thus, task forces and judicial leadership concluded that the true measure of a court's impartiality was whether it was educated, aware, and self-critical. Chief Justice Peter Popovich from the Minnesota Task Force articulated this sentiment:

> *I'm here talking to you – not as a paragon of virtue – but as a fellow traveller on the road to gender fairness and a court system that is free of any kind of bias. My comments today are directed as much to myself as they are to you.*

> *Gender fairness goes right to the heart of judicial administration. It is not just a matter of being up-to-date with gender neutral terminology or being aware of changing roles and lifestyles. Gender bias affects everything from the way we address women to our judicial philosophy. It's not just window dressing. Gender fairness goes right to the integrity of the entire judicial system.*[71]

Similarly, the New York Task Force, which was one of the first state task forces initiated, reflected on the far reaching and significant impact gender can have as it relates to the treatment of women within the court system:

> *Gender bias against women…is a pervasive problem with grave consequences…. Cultural stereotypes of women's role in marriage and society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.*[72]

While these inquiries occurred later on the federal level in the US, the Ninth Circuit Court of Appeals was the first federal court to initiate a task force, in the early 1990s, and found similarly pervasive impacts of gender bias, affecting both the judiciary and court users.

71 Justice Peter Popovich, remarks at Minnesota District Judges Association, 6 September 1989, quoted in: Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation* (Florida Law Review; University of Florida, College of Law, 1990), 195.

72 New York Task Force on Women in the Courts, "Report of the New York Task Force on Women in the Courts," *Fordham Urban Law Journal* 15, no. 1 (1986): 17–18.

> *Gender can have an effect on one as litigant, witness, lawyer, employee, or judge, with regard both to process and substantive outcome. Gender plays a role – in the appointments process, in interactions in and outside the courtroom, in the work one does, and in federal adjudication. As a participant in the Ninth Circuit, one's gender affects how one views the judicial system and, often, how one is viewed by it*.[73]

These task force findings illustrate the range of areas in which gender can operate and how gender can influence the work of the judiciary. Task forces revealed that gender can have an influence at the level of procedure (interactions between and among legal practitioners and court users), the level of substantive law (evidentiary findings, adjudication, and sentencing), and the level of court structure (functional accommodations or lack thereof). Moreover, task force reports and studies have illuminated the need to comprehensively identify and eliminate gender-based stereotypes affecting judicial professionals' differing expectations, assumptions, and treatment of both women and men in court systems. Indeed, "**for the legal system to dispense justice even-handedly it must not embody the same social biases and stereotypes that operate in society at large**."[74]

73 Ninth Circuit Task Force on Gender Bias, "Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias," *Stanford Law Review* 45, no. 6 (July 1993): 2171–2172.

74 Leslie A. Cadwell, "Gender Bias against Fathers in Custody? The Important Differences between Outcome and Process," *Vermont Law Review* 18, no. 1 (1993): 215.

3. THE INFLUENCE OF GENDER ON COLLEGIAL RELATIONSHIPS AND THE COURTHOUSE ATMOSPHERE

In this research, interviews and, to a lesser extent, the online questionnaire revealed that legal practitioners and members of the judiciary in BiH adhere to a number of gender-based stereotypes and attitudes. These gender-based stereotypes and attitudes are reflected in both the opinions expressed by respondents as well as the interactions they disclosed taking place between and among legal practitioners. This chapter elaborates on a number of areas in which gender-based stereotypes and attitudes were found and identifies how they can be seen influencing collegial relationships and the courthouse atmosphere.

3.1. Courthouse Decorum and Communication

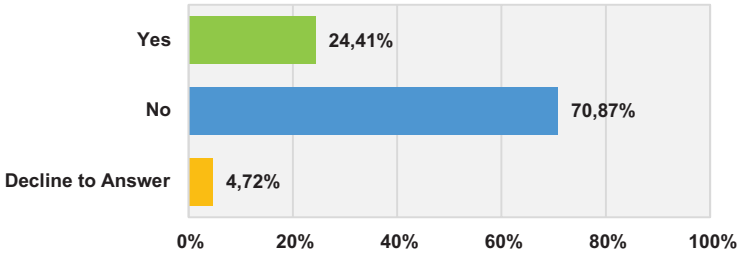
Results of BiH Research

According to most interviewees, legal practitioners in BiH are formally addressed by their title alone or possibly by their title and surname, particularly in the courtroom. In other words, respondents reported that first names or nicknames are not used within the BiH judiciary. Judges are addressed as *your honour*, and lawyers are addressed as *defence counsel* or *prosecutor*. Yet, a number of examples were also provided by interviewees that run contrary to this claim. One interviewee noted that he has heard his colleagues use the terms "young lady" or "young man" with legal practitioners, especially with court associates who are "young" or "appear young." Further, a female attorney recounted being called "girl" in the courtroom by a male attorney; behaviour she interpreted as an attempt to discredit her. A female judge recalled a male judge turning to her during a courtroom proceeding and asking, "What did you want to say beautiful?" And a male judge disclosed his opinion that courtroom formality is less strict than in years past.

Results from the online questionnaire revealed that over 24% of respondents had witnessed a judicial professional calling a colleague something other than their given name or title, or had personally experienced being called by something other than their given name or title (see graph below). A number of questionnaire respondents provided examples that included diminutives and endearments such as "honey," "sweetie," and "girl." The question formulation

does not specify the environment in which these comments were made (the courtroom or courthouse), and so it is not possible to determine whether these reports reflect experiences from the courthouse environment in general or the courtroom specifically.

Have you ever witnessed a colleague or a member of the court staff refer to someone by something other than their name or title (for example, honey, sweetheart, boy, girl, etc.), or experienced this yourself?



The online questionnaire also asked judicial professionals to indicate whether they had experienced being criticized by a judge or colleague for being too emotional or too aggressive in their communication style, or because of their manner of speech or their level of knowledge of a topic. While only 22 respondents answered this question, over twice as many women as men (15 women and 7 men) indicated they had been criticized in this manner by a judge or colleague. One attorney in particular disclosed that his more experienced female colleague, who is known to be "tough," is sometimes referred to with negative or pejorative language by (male) colleagues.

Participants from the interviews revealed that sometimes women, particularly younger women, are mistaken for having a lower level position than they actually hold. For example, a female judge relayed a story about a male lawyer who arrived at her court and expressed surprise that she was the judge. The lawyer said he was expecting an "older balding man." Another female judge reported having been called a "snot nose" by an older male lawyer in the courthouse hallway; but reported never having felt disrespected in the courtroom.

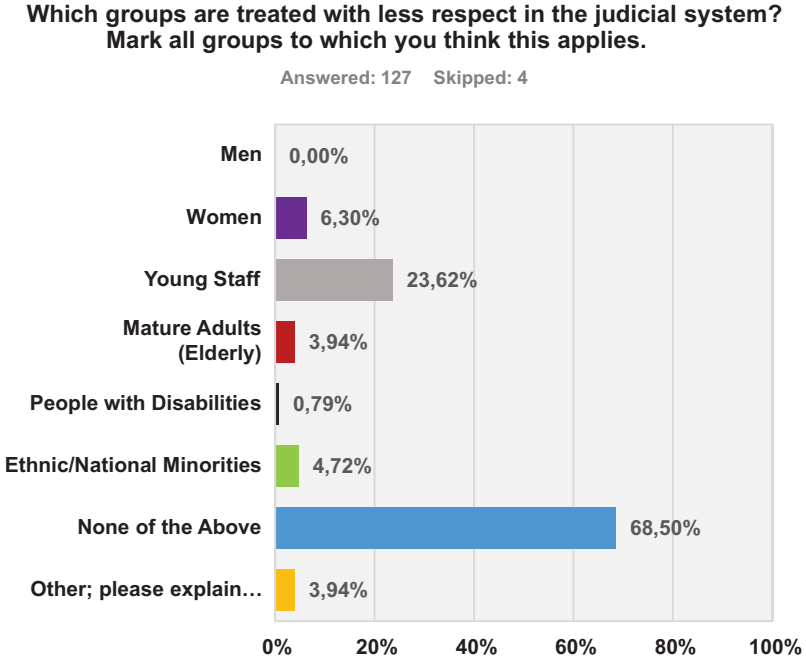
Another area related to communication is that of language itself. The Bosnian/Serbian/Croatian language allows for the use of male and female nouns for legal professions, including for judges, prosecutors, attorneys, and court associates. Yet the female forms of these words have not been institutionalized in BiH courts or in the broader society. Indeed, nearly all interviews revealed that legal practitioners are generally not concerned about the use of the male

version of nouns in the courtroom and courthouse environment, including for example, in the witness oath, which uses male nouns throughout.

Nonetheless, one female lawyer shared the following opinion:

> *The use of female forms is more frequent among younger judges than older judges. In my court paperwork, I always use the female forms and refer to my title in the female form, such as advokatica or braniteljica.*

The questionnaire also asked respondents to identify who is treated with the least respect in the court system (see graph below). A significant majority of respondents indicated that none of the listed groups were afforded less respect; though nearly a quarter of respondents identified young professionals as being treated with less respect. Just over 6% said women are treated with less respect, followed closely by national or ethnic minorities; but notably, not a single respondent answered that men are treated with less respect in the BiH judiciary.



Analysis and Comments

Referring to someone as "honey" or "sweetie" in the court environment is diminutive, even if intended as an endearment. When other legal practitioners in the courthouse or courtroom are referred to by their professional titles, endearments and diminutives can call an individual's professional credibility into question. Indeed, official or professional titles are used in order to confer credibility or authority to a professional. Titles such as counsellor, prosecutor, or professor denote a superordinate position, while familiar terms, endearments, or diminutives denote a subordinate position.[75]

Furthermore, the concept of credibility is of paramount importance for legal professionals. Previous international research has revealed that women within the judiciary, whether lawyers, witnesses, litigants, or court employees, are significantly more likely to be perceived as less capable, intelligent, expert, and pleasant than their male counterparts.[76] In fact, one legal scholar argued that:

> *Women attorneys may be treated with a presumption of incompetence that is only overcome by a flawless performance while male counterparts have the advantage of a presumption of competence that is only lost after a number of significant mistakes.*[77]

It is therefore critically important that in the courtroom as well as the courthouse at large, communication and decorum among and between legal practitioners and members of the judiciary avoid terminology that could call into question the credibility of a legal practitioner.

In addition, while this research did not collect extensive data in relation to the use of language, this topic represents an important area related to courthouse decorum and communication. Indeed, language is a reflection of broader socio-cultural values and customs as well as individual beliefs. And the law itself is a language-based profession. After all, the extent to which an oral or written argument is compelling or convincing plays a decisive role in the success or failure of a case. Thus, the issue of language, particularly gender-specific language, is not a trivial matter in the legal setting. In fact, there is strong evidence that gender biased language, or the use of male pronouns for

75 Levine, "Preventing Gender Bias in the Courts: A Question of Judicial Ethics," 778–779.
76 For example, see: Schafran, "Credibility in the Courts: Why Is There a Gender Gap;" Lynn Hecht Schafran, "Women as Litigators: Abilities vs. Assumptions," *Trial* 19, no. 37 (1983): 41–100.
77 Kathleen L. Soll, "Gender Bias Task Forces: How They Have Fulfilled Their Mandate and Recommendations for Change," *Southern California Review of Law & Women's Studies* 2 (1992): 637.

generic purposes, creates barriers to women's equality and skews perceptions.[78] Evaluating jury instructions, witness oaths, and legal code often reveals an underlying cultural assumption that women are included in men, but men are not included in women. This has the potential to cloud the intended message of the court as well as reinforce gender biased attitudes and assumptions.

An important resource for gender-sensitive language in BiH is a handbook entitled, "Methods for Overcoming Language Discrimination in Education, Media, and Legal Documents."[79] The authors argue that gender-sensitive language is a tool for overcoming inequality and an important mechanism for women to achieve greater visibility in their professional roles. The legal basis for this handbook is the Law on Gender Equality of BiH. Article 9 of the Law states: "language discrimination exists when only one sex is used grammatically as a generic term."[80]

It is therefore recommended that BiH courts reform policies concerning court language using the "Methods for Overcoming Language Discrimination" handbook as a guide. BiH courts are encouraged to pay particular attention to the use of male versions of nouns as a generic reference for women and men. Instead, official court documents, such as witness oaths, legal codes, judicial decisions, and rules of evidence and procedure should include both female and male versions of nouns when appropriate.

It is additionally recommended that the BiH judiciary institutionalize the practice of using professional titles in the courtroom and during proceedings. While the courthouse at large might reasonably be a place where informal communication can occur, BiH courts are cautioned against overlooking the impact of the use of diminutives and endearments in the workplace generally. Rather, first names, in lieu of surnames and titles, are a more professional, yet informal, model for communication.

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

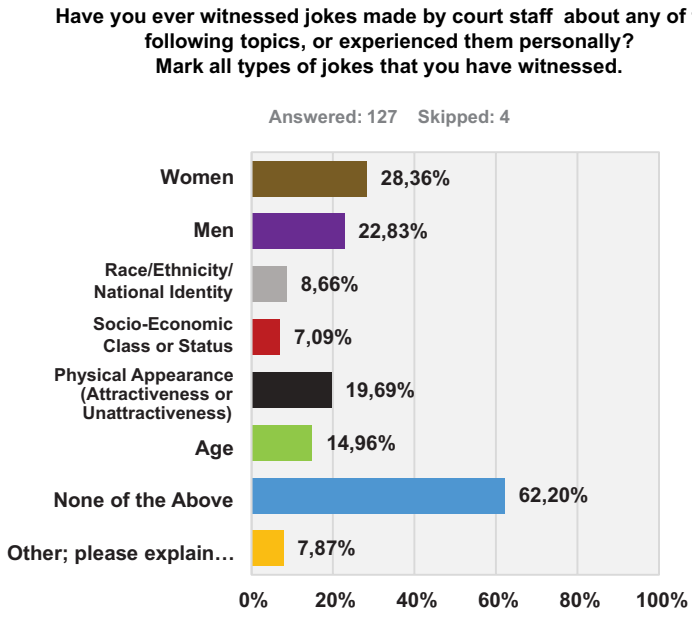
79 Jasmina Čaušević and Sandra Zlotrg, *Načini za prevladavanje diskriminacije u jeziku u obrazovanju, medijima i pravnim dokumentima* (The Association of Language and Culture Linguists and the Center for Interdisciplinary Post-graduate Studies, University of Sarajevo, 2011). Available in Bosnian only.

80 Parliamentary Assembly of Bosnia and Herzegovina, *Law on Gender Equality in Bosnia and Herzegovina*, *Official Gazette of Bosnia and Herzegovina 16/03 and 102/09*, consolidated version of 25 March 2010, Article 9§2.

3.2. Collegial Relationships and Joke Making

Results of BiH Research

The results of the online questionnaire found that 28% of respondents had either witnessed or been the subject of jokes about women, including references to attractiveness or the lack thereof, as well as 'dumb blonde' jokes. Jokes about women were witnessed or experienced by judicial professionals more than any others, though jokes made about men were a relatively close second. While the majority of respondents – over 60% – reported that they had neither witnessed nor experienced jokes made about women, men, race, ethnicity, national identity, socio-economic status, physical appearance, age, or other topics, it is notable that the three greatest categories of jokes respondents did report observing involve women, men, and physical appearance (see graph below). However, the questionnaire does not identify whether such jokes take place in the courtroom, the courthouse in general, or in another context altogether. In addition, the survey data does not indicate who is making jokes about whom, i.e. the sex of the individual making the joke in contrast to the sex of the individual being joked about. Nonetheless, gender-based stereotypes and attitudes about women can be held by other women and gender-based stereotypes and attitudes about men can be held by other men.



Respondents were asked to give examples of jokes or comments they had either witnessed or experienced. Examples of particularly gendered joking included the following:

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

In addition, 41 of the questionnaire respondents provided narrative answers to the survey question about jokes, nine of whom reported that they did not believe jokes were offensive but rather a form of relaxation during breaks. In contrast, one narrative response disclosed that jokes are sometimes directed at homosexual people and can be incredibly hostile. Another female respondent explained:

> *According to the rules of ethical behaviour for state employees, jokes in the above categories are inappropriate. When those jokes are made, they are typically about physical appearance and, as a woman, I have expressed my dissatisfaction with them.*

Nonetheless, the majority of interviewees reported that inappropriate jokes and comments are not made in the courtroom environment. However, a number of individuals did disclose that within the context of the courthouse in general, jokes or comments may occur. In interviews, a number of people did express discomfort with joking, but many downplayed its impact, and some interviewees asserted that "no one is bothered" by it.

Analysis and Comments

The examples of jokes provided by questionnaire respondents suggest that many jokes have a distinctly gendered nature. Most are directed at either men or women – with a particular focus on women, women's appearance, and women's behaviour. The data seems to suggest that while there is not a pervasive problem of inappropriate joking within the BiH judiciary, there is room to improve conduct. This research may also illustrate a lack of awareness of how jokes of this nature can constitute sexual or gender-based harassment and therefore contribute to a workplace environment that feels biased or

discriminatory. Moreover, jokes that are particularly focused on women can call into question women's credibility and professionalism as a group. This can affect perceptions of court users, victims, witnesses, and defendants should they be aware of such conduct.

3.3. Sexual and Gender-Based Harassment

BiH Research on Sexual and Gender-based Harassment

There is no precise quantification of the incidence or prevalence of sexual harassment in BiH organizations and institutions today, and no data from courts or the judiciary. However, research from 2013 on the readiness of institutions to implement obligations from the Law on Gender Equality did inquire into the prevalence of sexual harassment within BiH government institutions through a survey. That study found that 16% of employees in state level institutions of BiH believe that sexual harassment takes place in the institution in which they work; and most respondents recognized that sexual harassment can take on a variety of forms – including physical and verbal, as well as inappropriate non-verbal inferences and sexually offensive jokes.[81]

Results of BiH Research

This research did identify behaviours and comments that could constitute sexual harassment in the workplace. Indeed, despite the assertion of one male judge that "...this topic is overrated and women think that, too," a number of interviews revealed questionable behaviour, including in the courtroom. For example, one male lawyer shared the following anecdote:

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

Another male lawyer indicated that sometimes, in the courthouse, his male colleagues will make inappropriate or offensive comments toward female colleagues. He shared:

81 Ministarstvo za ljudska prava i izbjeglice Bosne i Hercegovine i Agencija za ravnopravnost spolova Bosne i Hercegovine, "Istraživanje o spremnosti institucija BiH da provode obaveze iz zakona o ravnopravnosti spolova u BiH" (2013).

> *…it can happen that, when an attractive (female) trainee is passing by, one hears some comments such as 'Oh, I would like to...her!' and these comments are said in such a way that the person who is passing by cannot hear them. This behaviour is a matter of upbringing, which a person gets from home.*

This same lawyer shared his opinion that comments of this nature are typically limited to things like "hey cutie" and are therefore not seen as negative by legal practitioners and court personnel. Though, he subsequently reflected that perhaps whether a negative association is ascribed to these comments depends on how the individual receiving the comment perceives it. A female lawyer confirmed that colleagues tell stories about and discuss sex. She reported that this happens in the judicial records office but not in the courtroom. She said she did not necessarily find this kind of talk problematic, but then added that she was annoyed by one colleague who frequently brags about having a mistress despite being married. Both male and female interviewees suggested that talk of this nature typically occurs in small groups and "outside the hearing" of other colleagues.

During another interview, a lawyer claimed "one could write a novel about [sexual harassment]." He said telling someone that they have pretty eyes can be received as a compliment by one person and as sexual harassment by another. He pointed out that there is a general lack of awareness among legal practitioners and members of the judiciary concerning what constitutes sexual harassment. He said this lack of clarity creates problems for court employees and co-workers in communicating and developing professional relationships with colleagues.

One male prosecutor revealed that he is the target of harassing jokes about his appearance, namely his size – he is openly teased and called "fat" by a number of colleagues. He described his workplace experience very much in terms of a hostile environment. It is unclear whether the harassment directed at this individual would constitute a form of gender-based harassment; for example, if the jokes and comments accused him of being less masculine because of his physical appearance.[82]

82 The Law on Gender Equality defines *gender based harassment* in Article 5 §1.

Analysis and Comments

The topic of sexual harassment is complicated and sensitive, and yet it is a documented workplace reality the world over.[83] Estimates are that 30-50% of women and 10% of men have experienced some form of sexual harassment.[84] Moreover, sexual and gender-based harassment is deeply intertwined with gender stereotypes and attitudes. Sexual and gender-based harassment can include a wide variety of behaviours, including, among other things, jokes targeting women or men, referring to colleagues by terms of endearment or diminutives, or sexual innuendos and advances. All of these behaviours can contribute to uncomfortable, unfair, and discriminatory working conditions.

A few anecdotes illustrating inappropriate or sexually suggestive comments by legal practitioners working within the BiH court system do not conclusively indicate that sexual and gender-based harassment is prevalent. Nonetheless, these anecdotes in combination with a number of other reflections from interviewees and the study that found 16% of employees in BiH state institutions believe sexual harassment occurs in their workplace suggest that legal practitioners would benefit from training on sexual and gender-based harassment. Research from the US has shown that openly negative or sexualized attitudes toward women can directly impact their credibility – their own sense of credibility as well as perceptions of their credibility by others.[85] And this can result in a *de facto* court environment that lacks impartiality and fairness.

Additionally, research has indicated that when men are subjected to sexual advances they are less likely to recognise it as harassment and do not make a complaint. However, men do report feeling harassed, particularly when they feel they are being mocked for not living up to "…traditional heterosexual male gender role[s]."[86] For example, if they are ridiculed for being effeminate. In such cases, male-to-male sexual harassment is found to be as common as or even more common than female-to-male harassment.[87]

83 Anne M. Fiedler and R. Ivan Blanco, "The Challenge of Varying Perceptions of Sexual Harassment: An International Study," *Journal of Behavioral & Applied Management* 7, no. 3 (April 2006).
84 European Commission, "Sexual harassment at the workplace in the European Union" (Brussels, 1998).
85 See for example: Lynn Hecht Schafran, "Credibility in the Courts: Why Is There a Gender Gap," *Judges Journal* 34 (1995): 5; Lynn Hecht Schafran, "The Less Credible Sex," *Judges Journal* 24, no. 16 (Winter 1985): 16; Wendy Murphy, "Gender Bias in the Criminal Justice System," *Harvard Women's Law Journal* 20 (1997): 14–26; Shari Hodgson and Bert Pryor, "Sex Discrimination in the Courtroom: Attorney's Gender and Credibility," *Psychological Reports* 55, no. 2 (October 1984): 483–486; Jennifer A. Levine, "Preventing Gender Bias in the Courts: A Question of Judicial Ethics," *Georgetown Journal of Legal Ethics* 1 (1987): 783–786.
86 Craig R. Waldo, Jennifer L. Berdahl, and Louise F. Fitzgerald, "Are Men Sexually Harassed? If So, by Whom?" *Law and Human Behavior 22,* no. 1 (February 1998): 61.
87 Ibid., 72.

Perhaps the greatest argument in favour of increasing awareness and training on harassment for members of the BiH judiciary is the extent to which international research has documented the significant negative impacts on victims of sexual and gender-based harassment. Victims can suffer damage to their mental health, experiencing things such as self-blame, self-doubt, loss of self-esteem, and long-term depression. In fact, women and men who experience frequent sexual harassment at work have significantly higher levels of depression than non-harassed workers, and sexual harassment early in one's career can have long-term effects on depressive symptoms later in life.[88] The high levels of stress that are likely to be experienced by people exposed to sexual harassment also negatively affect their physical health, increasing the incidence of things like high blood pressure, sleep problems, and chronic pain.[89]

A review of over 15 studies on sexual harassment also revealed serious negative occupational outcomes for the organizations or institutions in which harassment takes place.[90] For example, numerous studies have identified organizational withdrawal as an outcome of sexual harassment. Organizational withdrawal may mean that an employee resigns or that they remain in their employment but lose interest in their work, demonstrated by absenteeism, fatigue, and the neglect of work duties. These behaviours are understood as protections against exposure to further sexual harassment.[91] In addition, sexual harassment is associated with a lack of organizational commitment, performance, and productivity, as well as damaged team relations, increased team conflicts, and lowered perceptions of justice within the organization.[92]

The gendered nature of joke making that was revealed in responses to the online questionnaire, along with interview data, suggests that behaviour which could constitute sexual or gender-based harassment may occur in the courthouse environment and among and between legal practitioners working there. In particular, women appear to be the subject of sexual attention –

88 J. Houle, J. Staff, J.T. Mortimer, C. Uggen, and A. Blackstone, "The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career," *Society and Mental Health* 1 (July 2011): 89-105.

89 Rachael Rettner, "6 Ways Sexual Harassment Damages Women's Health, " 9 November 2011, LiveScience, http://www.livescience.com/16949-sexual-harassment-health-effects.html

90 L.M. Cortina and J.L. Berdahl, "Sexual Harassment in Organizations: A Decade of Research in Review," in *The SAGE Handbook of Organizational Behavior*, vol. 1, *Micro Approaches*, eds. Julian Barling and Cary L. Cooper (London: Sage Publications, 2008), 469-497.

91 Ibid.

92 S. Parker, and M.A. Griffin, "What is so bad about a little name-calling? Negative consequences of gender harassment, over performance demands, and psychological distress." *Journal of Occupational Health Psychology* 7 (2002): 195-210.

signalling that women may not always be treated equally in the workplace. It is recommended that the judiciary and BiH courts address this issue within their workplace environments through policy development and implementation, training, awareness, and outreach.

3.4. Sexual Harassment Policies, Awareness, and Preventive Mechanisms

Results of BiH Research

The Law on Gender Equality in BiH was introduced in 2003 and amended in 2009. This Law, for the first time in BiH history, defines and recognizes sexual (and gender-based) harassment as:

> *…every unwanted form of verbal, non-verbal or physical behaviour of a sexual nature that aims to harm the dignity of a person or group of persons, or has such effect, especially when this behaviour creates an intimidating, hostile, degrading, humiliating or offensive environment*.[93]

While there are "rule books" that govern the courthouse workplace and codes of ethics for judges and prosecutors, these policy documents do not specifically elaborate on the issue of sexual or gender-based harassment. In other words, there are no in-house policies on sexual harassment for courts in BiH, and no preventive practices implemented at the individual court level or procedures for internal resolution of complaints.

Of the BiH legal practitioners who participated in the survey questionnaire for this research, 57% were not aware of policies or laws on sexual and gender-based harassment that govern the court. This suggests that legal practitioners and members of the judiciary do not see the Law on Gender Equality, court rule books, or their codes of ethics as relevant legal or policy documents addressing sexual and gender-based harassment within courts. It further suggests that there is little or no effort made within the judiciary to establish a normative policy standard on the topic of sexual and gender-based harassment.

93 *Law on Gender Equality in Bosnia and Herzegovina*, Article 5§2. The Law was first adopted in 2003 and amended in 2009.

In addition, interviews revealed an even greater disparity between existing policy documents and the awareness of legal practitioners of such documents (rule books and codes of ethics). All thirty interviewees reported that they were not aware of existing policies nor had they ever been to an in-house training or seminar on the subject of sexual or gender-based harassment.[94] One prosecutor elaborated:

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

The same prosecutor shared an anecdote about a female colleague he characterized as "good looking." He said she told him that she would be unhappy if, because of potential sexual harassment charges, she no longer received compliments on her appearance.

A number of interviewees did not seem to take the issue of sexual harassment very seriously. For example, one interviewee asked, "What if I give a compliment to someone? Will I be charged with sexual harassment?" When asked whether there is a need for sexual harassment policies, another interviewee responded, "We will be scared to be alone with a woman." Still, around one third of the interviewees explicitly expressed the need for clearer guidelines for addressing the issue of sexual and gender-based harassment in the court system.

Analysis and Comments

Research from the US also reveals a lack of policies and practices for preventing, eliminating, and responding to sexual harassment in individual courts. For example, a review of more than 100 circuit courts in Virginia showed that only four of them had adopted in-house policies on sexual harassment. Furthermore, the clerks in those four courts were largely unaware of existing policies.[95] Thus, having an in-house policy for preventing and responding to sexual harassment in the workplace is only the first step; it is also essential that an existing policy be put into practice through effective awareness-raising and training activities.

94 Several interviewees noted that they were aware of laws addressing sexual harassment, in particular, the Law on Gender Equality. Among those interviewees who noted awareness of laws on sexual harassment, a number of them attended training on the topic through the Association of Women Judges of Bosnia and Herzegovina, organized by DCAF and the Atlantic Initiative as a part of the multi-year Gender and Judicial Reform Project, funded by the Norwegian Ministry of Foreign Affairs.

95 Coleman, "Gender Bias Task Force: Comments on Courtroom Environment," 1105.

Indeed, research supports that just having a sexual harassment policy is not sufficient and suggests that a sexual harassment policy must be met with a number of developmental processes to effectively curtail sexual harassment and make a work environment more secure for all employees.[96] For example, policies that are developed through a multi-stakeholder process and are based on a sufficiently broad definition that includes examples of behaviour are considered best practices.[97] Finally, it is critically important to provide training and awareness on any policy to ensure comprehensive implementation and effective enforcement.[98]

This research revealed that there is a lack of specific policies concerning sexual and gender-based harassment governing the courts in BiH and a lack of awareness of how existing policy documents address sexual and gender-based harassment. There seems also to be a limited awareness of the Law on Gender Equality among legal practitioners and members of the judiciary – perhaps indicating that an understanding of sexual and gender-based harassment does not broadly exist within the judiciary of BiH. Yet, the Law on Gender Equality mandates the introduction of preventative mechanisms and the development of institutional polices by employees and institutions to help reduce and combat sexual and gender-based harassment.[99] This is a common sense requirement, as unwanted behaviour can be prevented and resolved more efficiently at the institutional level than through the courts. Thus, it is recommended that BiH courts develop in-house policies on sexual harassment and implement those policies through training, outreach, and awareness-raising activities.

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

97 For more on a multi-stakeholder process, see: Goldstein Hode, "Wicked Problems Defy Simple Solutions: Why Sexual Harassment Policy Doesn't Work," 4. For more on best practices as far as definitions of harassment, see: James E. Gruber, "The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment," *Gender & Society* 12, no. 3 (June 1998): 301–320.

98 See: Laura A. Reese and Karen E. Lindenberg, "The Importance of Training on Sexual Harassment Policy Outcomes," *Review of Public Personnel Administration* 23, no. 3 (September 2003): 175–191.

99 "...[t]he employer shall take effective measures to prevent harassment, sexual harassment and gender based discrimination in employment and labor relations [...] and shall not take any measures against the employee due to the fact that he/she complained about harassment, sexual harassment and discrimination based on gender." *Law on Gender Equality in Bosnia and Herzegovina*, Article 13§2.

3.5. Attitudes Concerning the Representation of Women in the BiH Judiciary

Results of BiH Research

In 2013, 64% of all judges in BiH were women.[100] This number places the country among the top ten in Europe regarding the representation of women in that position.[101] Yet, while women represent a relative majority in judicial appointments overall, they are not represented at the same rate in the highest-level judicial positions of court president, where they fill only 40% of these roles. As prosecutors, women occupy 48% of prosecutorial appointments, and 33% are chief prosecutors.[102] This imbalance also exists in the composition of the High Judicial and Prosecutorial Council (HJPC), which is comprised of nine men and six women. The HJPC is responsible for making all judicial and prosecutorial appointments, in addition to handling ethics complaints and overseeing training and policy requirements for judges and prosecutors.[103]

When interviewees were asked for their reflections on why there are more women in judicial positions in BiH, they generally expressed initial surprise at their numbers. But a number of explanations for this phenomenon revealed the presence of gender-based stereotypes and attitudes among both female and male respondents. In addition, responses were clearly differentiated by the gender of the respondent. In other words, women tended to reflect positively on the role of judge and, in particular, the work of women judges, while men tended to minimize the role of judge and, by association, women's capabilities as judges.

For example, a female judge framed the gender balance of judges in this way:

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

100 High Judicial and Prosecutorial Council of BiH, *Annual Report: 2013* (HJPC, 2013), 68.
101 The European Commission for the Efficiency of Justice, *Evaluation Report on European Judicial Systems: 2012* (CEPEJ, 2012), http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf
102 High Judicial and Prosecutorial Council of BiH, *Annual Report: 2013*, 69
103 See the members of the HJPC on the council's website (in Bosnian): High Judicial and Prosecutorial Council of BiH, "Članovi VSTV," http://www.hjpc.ba/intro/bios/?cid=18,2,1.

This opinion was consistent with that of another female judge who remarked that "...court is work with a large case load that needs to be dealt with, and women are more dedicated in that way." A female lawyer also reiterated this belief when she asserted, "…women are more dedicated to their jobs."

In contrast, a male judge remarked that the job of judge is easy:

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

One male prosecutor went so far as to link the gendered nature of power relations between women and men in the home to the representation of women in the BiH judiciary. He postulated:

> *Maybe because women are subordinate to men at home they apply for judicial positions; because in this position they are dominant at work, which compensates for their situation at home.*

In addition, two of the 131 respondents to the online survey, who identified themselves as male judges and offered voluntary narrative comments, indicated their belief that the "gender imbalance" in the BiH judiciary was "interfering with their work." It is unclear precisely how these two male judges see women's representation as "interfering" with judicial work, but comments of interviewees suggest that they may be concerned that women do not meet the professional standard of male judges.[104]

When asked about women's access to leadership positions within the judiciary, the reflections of female members of the judiciary were not inconsistent with the perspectives expressed by men. One female prosecutor noted that women feel a large responsibility for caring for their families. She said:

104 Professor Reg Graycar has documented that women and minority judges are subject to particular scrutiny for a lower standard of practice by their white, male counterparts. See: Graycar, "Gender, Race, Bias and Perspective," 73-86.

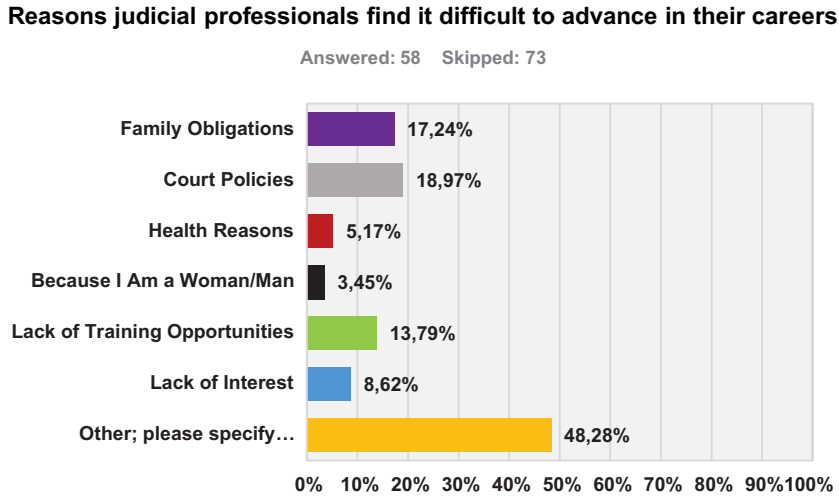
> *I would not try for the position of chief prosecutor. That position requires a prominent man. I feel that I do not have the skills for that. However, [I have] younger female colleagues who would like to be in a leading position. I would not want to be a chief prosecutor because I have children I need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

This particular woman holds what appears to be a gender-specific view of what is required to be a chief prosecutor – *a prominent man*. But in terms of her assessment of family obligations, her opinion was shared by a female judge who, when asked if she would apply for the position of court president, said she would not because of obligations to her family. She further elaborated that childcare and household duties would not leave her enough time, whereas men are not burdened by such expectations at home.

Another male judge, considering why women are not better represented in leadership positions despite being the majority of judges, expressed the following opinion:

> *Men do not stay for long in the position of judge. They become lawyers or prosecutors. Women are more ready to put up with hardship. My feeling is that if the salaries [of leadership positions] went down, the majority of men would leave and women would stay. Maybe they are more used to putting up with things within their families...*

Unfortunately, only 58 questionnaire respondents (44%) elected to answer the question related to challenges or difficulties they face in career advancement. However, among those who answered, only 37% reported difficulties in advancing in their career, and only slightly more women than men responded in this way. The chart below shows reasons why both women and men find it difficult to advance in the judicial hierarchy. Research results disaggregated by sex indicate that slightly more women than men attribute this difficulty to family obligations, court policies, or their sex. Those who answered "other" noted the following obstacles to career advancement: nepotism, corruption, undefined criteria for advancement, unequal treatment by management, political pressure, and court politics.



Analysis and Comments

Interview responses to the question related to why there is a slight majority of women in the judiciary provide examples of gender stereotyping by both women and men. Women distinguish themselves as better suited for legal positions in relation to their "natural" characteristic of being harder working and more responsible than men – and by contrast suggest that men are not hard working and responsible. Men characterize women as innately less capable (by characterizing the job itself as not difficult) or motivated by a desire for power and domination (in contrast to an interest in the law or justice).

Responses also seem to reveal a gendered practical reality for women in BiH that they bear a greater responsibility for child care, family care, and household duties, regardless of their profession. Data from the HJPC also illustrate the existence of the *feminization* of the BiH judiciary. The term feminization generally refers to the process of women's integration into a particular field or profession that has traditionally been male-dominated. A number of researchers have examined the loss of prestige and recognition that can result from feminization, noting that feminization can undermine work and/or professional remuneration.[105] Research conducted in Eastern Europe has

105 For more detail on the phenomenon of feminization, see: Sharon Bolton and Daniel Muzio, "The Paradoxical Processes of Feminization in the Professions: The Case of Established, Aspiring and Semi-Professions," *Work, Employment & Society 22*, no. 2 (June 2008): 281–299; for research on the feminization of the judiciary, see: Carrie Menkel-Meadow, "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession," *Women at Work: The Conference Papers 3*, no. 4 (May 1987); Boigeol, "Feminisation of the French 'Magistrature.'"

revealed that many former socialist countries had judiciaries with a majority of women; and the position of judge was neither well respected nor well paid.[106] It is therefore particularly interesting that one male judge acknowledged that male judges would not choose to remain in their leadership positions (e.g. court president) should their salary decrease.

The European Commission for the Efficiency of Justice has also noticed the feminization of the judiciary in Europe, in combination with an apparent barrier for a majority of women judges to reach the highest levels of leadership within their respective judiciaries.

> *From a general point of view, a feminisation within the judiciary can be noted, resulting in near gender equality when considering the whole staff. However, to make equality between women and men a reality in practice, some additional efforts are needed: indeed, a general trend can be noted where the percentage of women decreases vis-à-vis men when considering progress within the hierarchy, for judges and even more as regards prosecutors; the "glass ceiling" remains a reality...*[107]

This research illustrates important differences in how female and male legal practitioners and members of the judiciary view the position of judge. Their comments also show the gender-based stereotypes and attitudes held by both women and men related to each other's abilities, assumed responsibilities, and professional motivations. To what extent these stereotypes and attitudes influence which candidates are selected as judges and promoted to leadership positions was not identified through this research. However, further exploration of this issue is recommended, with a particular focus on identifying how and why women are not represented at equal levels within leadership positions in the BiH judiciary.

106 Zdenêk Kűhn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformations?* (Martinus Nijhoff, 2011), 53-54.

107 *Evaluation Report on European Judicial Systems: 2012*, 389.

3.6. The Influence of Gender on Perceptions of Impartiality

Results of BiH Research

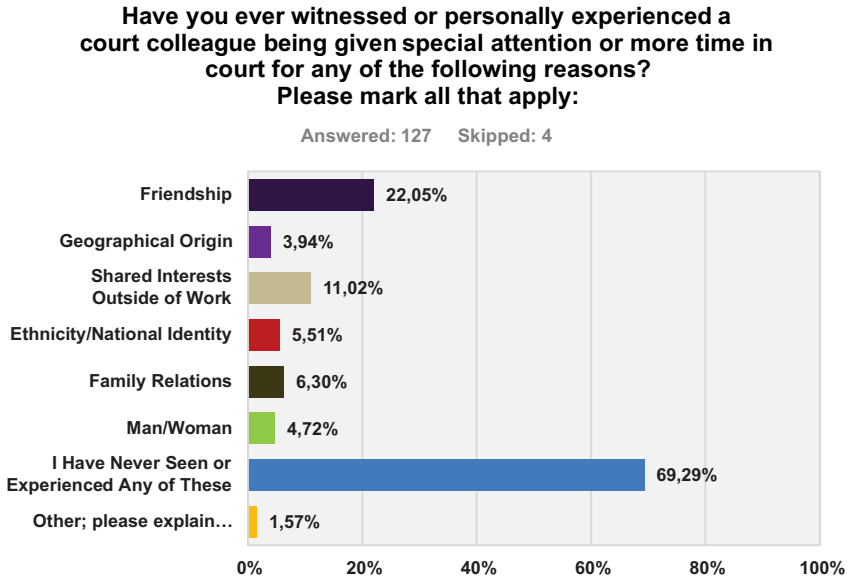
Researchers asked interviewees if friendly relationships among prosecutors, judges, and lawyers exist and if these relationships are evident in court. The majority of interviewees indicated that relationships are professional and any relationships that exist beyond the courthouse are not evident to the parties in court.

Only two interviewees specifically highlighted complications of female-male relationships, including flirting. One judge reported hearing from another female judge that she had received a box of chocolates from a lawyer in her court – which she rejected. The judge who gave this account said she believed the gift was inappropriate, particularly if the lawyer and the judge had joint cases.

A male prosecutor shared his opinion that particular attention is paid to women in the court. He relayed the following opinion:

> *There is fondness in the court toward the opposite sex [women]. I don't know to what extent this influences the decision-making process, it probably does not, but procedurally there is a possibility that it does. I think the issue is not so important, and there is no way to address it and to teach people not to do it. And it is much easier to flirt outside the courtroom than when my colleague, for example, comes into my office*.

The topic of special consideration on the basis of certain characteristics or relationships, such as family relations or ethnicity, was also addressed in the online questionnaire. Over 69% of questionnaire respondents indicated that they had never received any kind of special consideration or attention, nor seen other legal professionals in the courtroom receiving special considerations (see graph below). In this case, friendship was the most commonly reported reason for special considerations, despite the fact that interviewees claimed relationships beyond the professional realm were not evident in the courtroom.



Analysis and Comments

While data in this area of inquiry is notably limited and special considerations on the basis of sex were selected by only 4.72% of respondents, the reflection offered by the male prosecutor about a "fondness" for women in the court is nonetheless interesting, for it suggests that gender bias can at times serve to advantage women over men, or lead to the perception that they are advantaged. Research reflects this as well, showing that women can receive preferential treatment in the form of greater courtesy and deference in the courtroom.[108] In addition, the comment also reveals that a sense of impartiality is as important as factual impartiality. The prosecutor expressed his understanding that the possibility of an influence of gender or sex on judicial decision-making is in and of itself problematic, even if there is in fact no such influence.

108 Eich, 1985.

4. THE INFLUENCE OF GENDER ON SUBSTANTIVE LEGAL TOPICS

The substantive legal realm and its functions refer to legal practice and decision making. In principle, the implications of gender in this realm refers to how gender influences or appears to influence judicial decision making and legal outcomes, including criminal adjudications, civil awards, and interpretation of procedural law. Judicial decision making and legal outcomes are an important benchmark of an impartial and fair justice system; they can serve to reproduce and reinforce gender inequality or, ideally, reduce and eliminate it.

4.1. Cases of Child Custody

Results of BiH Research

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

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

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

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

Interviewees also expressed the belief that mothers often end up with primary custody of children because fathers are passive and do not petition for custody; A number of interviews conducted with attorneys for this research suggest that fathers may not petition for custody because they believe judicial practice will automatically place children with the mother, regardless of factors that might support giving custody to the father. About one third of judicial professionals interviewed thought that fathers generally do not want full custody.[109] However, they admitted they do not really know the reason fathers do not petition for custody. Nonetheless, one female judge indicated that courts do consider the option of giving custody to fathers. She made the following remark:

> *... it depends a lot on the concrete situation, because I know many situations when a child is entrusted to the father. It is not so rare, but more often a child is entrusted to its mother because of the natural connection.*

This comment still reflects the belief that mothers share a natural connection with children that fathers do not. This judge also asserted that a child is entrusted to the father in "many situations." However, a majority of other interviews and online data suggest that women constitute the preferred choice for primary caregiver by far; which, if not assessed carefully, is not always necessarily a choice in the best interests of the child, the legal standard in BiH.

Also notable, approximately one third of the interviewees expressed the belief that fathers are often given unfairly limited visitation rights following divorce or separation. In the words of one prosecutor:

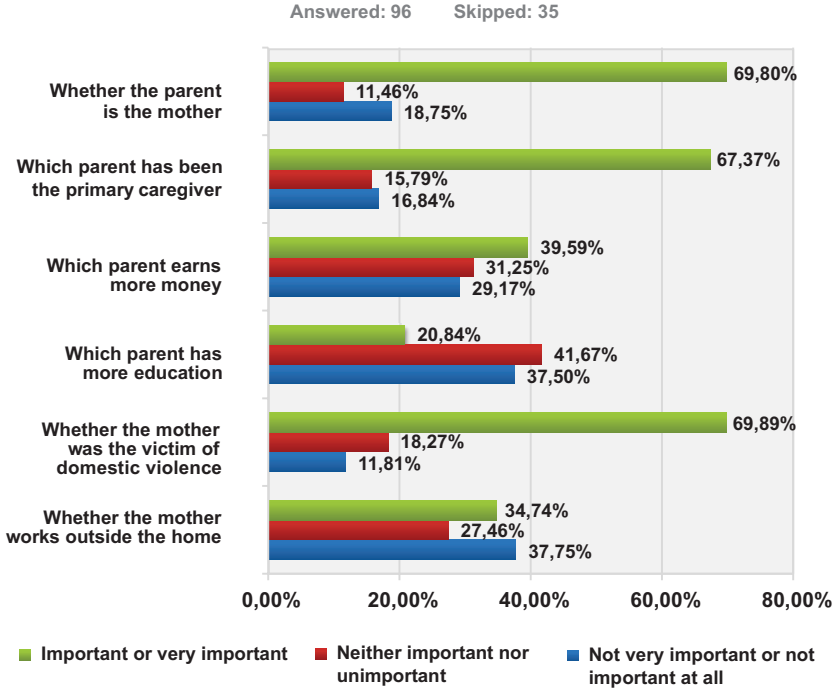
> *A father who lives with a child and is committed to that child is suddenly reduced to only seeing his child every second weekend and a few hours a week.*

Similarly, several interviewees discussed the struggle fathers have in maintaining contact with their children and getting the help they need to contest custody awards and/or enforce visitation orders.

109 This opinion is consistent with the findings of a large-scale study on custody cases recently conducted in France, which came to the conclusion that, in a majority of cases, parents agree that the children should live primarily with their mothers. See: Le collectif onze, *Au tribunal des couples enquête sur des affaires familiales* (Odile Jacob, 2013).

Data from the online questionnaire also illustrates that a high number of respondents place a great deal of importance on whether the "parent is the mother" in decisions of custody. While this data does not indicate whether being the mother is a positive or negative attribution, interview responses consistently supported a positive attribution. The questionnaire asked respondents to asses which factors they thought were relevant in child custody cases based on a range of importance, and responses revealed that whether the parent is the mother is a key factor (see graph below). In contrast with interviews, however, which parent is the primary caregiver was also ranked by questionnaire respondents as important or very important. Assuming a positive attribution to this response, it may signal an impartial or less gendered approach to the issue of custody.

Please assess how important each of the given factors are in making the decision with which parent a minor child will live, i.e. which parent will be awarded custody.



Researchers also inquired in interviews about what makes a "fit parent" or "good spouse." Interviewees reported that in child custody and divorce cases, the morality and behaviour of a wife and mother is likely to be scrutinized in the courtroom, whereas the behaviour of a husband or father is generally not

considered. For example, several interviewees disclosed that the practice of making allegations against a wife or mother for adultery is generally accepted by judges even though the topic of adultery should not be relevant in determining child custody. In addition, two women judges reported during their interviews that the issue of adultery does not come up with respect to husbands or fathers. Over one third of questionnaire respondents indicated that whether the mother works outside the household is important. Because the questionnaire did not require respondents to indicate a positive or negative correlation to this factor, it is unclear whether being a stay-at-home mom is considered a positive factor or if working outside the home is considered a positive factor. Nonetheless, this presents an interesting area for further inquiry.

Analysis and Comments

Interviews and the questionnaire results both revealed that gender-based stereotypes related to parenting influence the opinions and perspectives of legal practitioners and members of the BiH judiciary. Arguably, such gender-based stereotypes and attitudes can thereby impact judicial decision making and substantive legal outcomes. One example of this in the US was discovered in a relatively recent study, which found a family court that had previously abolished a formal doctrine of giving mothers preference for child custody in cases involving young children nonetheless continued to treat mothers preferentially.[110]

This research also revealed that while women in BiH do not appear to lose custody on the basis of their gender, they are likely to be subjected to more public and legal scrutiny than men. Several interviewees noted that judges condone the practice of examining the sexual behaviour of women in divorce cases. However, the sexual behaviour of men was not reported to be explored in the courtroom, or at least not to the same degree or frequency as that of women. Some research from the US has similarly found that judges may apply a different standard to women than to men seeking child custody. For example, stereotypes about what makes a "fit" or "good" mother have led some courtrooms to scrutinize the personal and social behaviour of women with children in a way that men are not scrutinized, for the same behaviour. In some cases, US gender bias task forces have also found mothers punished for working outside of the home. [111]

110 Julie E. Artis, "Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine," *Law and Society Review* 38 (2004): 769-771.

111 Hecht Schafran, "Gender Bias in Family Courts," 26.

Previous scholarship by legal practitioners and academics in the US has linked gender-based stereotypes associated with parenting to child custody case decision making. Lynn Hecht Schafran, Director of the National Judicial Education Program in the US for over twenty years, asserted the following:

> *Many judges, domestic relations commissioners, family services officers, and custody evaluators have an underlying sense that women belong in the domestic sphere of the home, providing care to young and old, whereas men belong in the public sphere of the paid work world, bringing home the bacon, but never cooking it*.

In other words, men can be confronted with gender-based stereotypes that cause court professionals to assume they are simply not as capable or appropriate as women in the role of primary caregiver. This may have little to do with their actual interest, ability, or experience in parenting. No matter which parent is advantaged or disadvantaged, gender-based stereotypes as the basis for judicial decision making can clearly be problematic in the resolution of child custody cases, and especially to efforts to decide such cases impartially. The practice of automatically awarding custody based on gender is inconsistent with the concept of a fair and impartial judiciary and as Hecht Schafran noted two decades ago, "the different standards applied to mothers and fathers reflect deeply embedded beliefs about the sexual division of the private and public spheres." [113]

The European Court of Human Rights (ECHR) has addressed these different standards by establishing case law on the legality of using gender-based roles and stereotypes to determine policies related to parental leave. The ECHR asserted that:

> *…references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on the grounds of sex.* [114]

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

112 Lynn Hecht Schafran, "Gender Bias in Family Courts: Why Prejudice Permeates the Process," *Family Advocate* 17 (1994): 26.
113 Schafran, "Gender Bias in Family Courts," 26.
114 European Court of Human Rights, Grand Chamber, *Konstantin Markin v. Russia*, No. 30078/06 (Strasbourg, 22 March 2012).

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

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

4.2. Gender-Based Violence

Gender-based violence is an umbrella term for any harmful act that is perpetrated against an individual and based on socially ascribed (gender) differences between males and females.[116] Domestic violence and sexual violence – rape, attempted rape, and other forms of sexual assault – were explored for the purpose of this research. Researchers attempted to uncover the existence of gender-based stereotypes and attitudes associated with victims and perpetrators of domestic and sexual violence within the legal community and members of the judiciary in BiH. The research then attempted to identify whether those stereotypes and attitudes could be linked to gender bias and, ultimately, to influencing judicial decision making and substantive legal outcomes.

4.2.1. Domestic Violence

Existing Research on Domestic Violence from BiH

According to a 2013 report, "Distribution and characteristics of violence against women in Bosnia and Herzegovina," 47% of women surveyed reported that they had experienced at least one form of gender-based violence during their

115 Ibid.

116 Inter-Agency Standing Committee, *Guidelines for Gender-based Violence Interventions in Humanitarian Settings, Focusing on Prevention of and Responses to Sexual Violence in Emergencies* (Geneva: September, 2005).

lifetime, since the age of fifteen.[117] The report identified the second most frequent form of violence against women in BiH as physical violence, with 24% of respondents disclosing they have been the victims of domestic or family violence.[118] Sexual violence was reported by 6% of women during their lifetime. The research found that perpetrators of domestic violence are predominantly former or current partners and their acts of violence ***are not isolated incidents***, but are rather "systematically repeated," a pattern known as battering.[119] The report also indicated that violence is more likely to occur if a partner and victim are uneducated, live in a rural area, or experience material deprivation.

Research on domestic violence sentencing from BiH (and the US) reveals that domestic violence offenders are likely to receive suspended sentences, probation, and treatment in lieu of jail time or more severe penalties.[120] Notably, the OSCE Mission in BiH examined sentencing practices for domestic violence cases and found them to be at or below the minimum penalty prescribed by the law, and cited an overuse of suspended sentences.[121] The same report found frequent under-charging by prosecutors, a reluctance to combine domestic violence with other charges, and a failure to revoke suspended sentences when violations occurred. The practices outlined in the OSCE report seem to suggest that crimes occurring in the family are viewed as less serious by BiH courts than crimes occurring outside of the family. Whether this is a reflection of a broader socio-cultural acceptance of family and domestic violence or of an assumption by court professionals that private matters should not be resolved in public institutions (e.g. the judiciary) is unclear. In either case, the result is the same.

Results of BiH Research (views on sanctions)

For the purposes of this study, researchers chose to explore the opinions and perspectives held by legal practitioners on criminal sanctions for perpetrators of domestic violence. Some of the results from this research were consistent with findings from the OSCE report; that legal practitioners and members of the BiH judiciary generally believe domestic violence should not be sanc-

117 Marija Babović, Olivera Pavlović, Katarina Ginić, and Nina Karađinović, *Prevalence and Characteristics of Violence Against Women in BiH: 2013* (Gender Equality Agency of BiH, 2013), 13

118 Ibid. The most frequent form of violence identified by the research is psychological violence, reported by 42% of survey respondents.

119 Ibid., 56. On battering, see: Nenad Galić and Heather Huhtanen, eds., *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* (Sarajevo: DCAF, 2014), 10.

120 See: Cheryl Hanna, "The Paradox of Hope: The Crime and Punishment of Domestic Violence," *William and Mary Law Review* 39, no. 5 (1998): 1507–1508; and for BiH, see: OSCE Mission to Bosnia and Herzegovina, *Ensuring Accountability for Domestic Violence*, 32.

121 OSCE Mission to Bosnia and Herzegovina, *Ensuring Accountability for Domestic Violence*, 32–33.

tioned with jail time or a fine. Indeed, approximately one half of the judicial professionals interviewed for this research expressed the belief that suspended sentences in cases of domestic violence are effective. Further inquiry revealed that a perceived lack of recidivism in cases of domestic violence is seen as evidence to support this approach.

Yet, just over one quarter of interviewees did assert the need for more severe sanctions in domestic violence cases. One in particular thought that suspended sentences were ineffective because they believe perpetrators will continue to repeat the behaviour until they are caught and sentenced to prison. There were also those who felt that imprisonment should be just one part of a larger solution that includes efforts to educate perpetrators and prevent the crime.

One female judge poignantly remarked:

> *In the judiciary, we do not care enough about domestic violence cases. They are not seen as a priority.*

Research generally revealed that while decision makers take certain factors into account when reviewing domestic violence cases, those factors are not usually the same factors that are considered in cases of physical assault by a stranger. For example, some interviewees raised concerns about the impact on victims and their family if sanctions result in the perpetrator going to jail and losing income. Several interviewees argued that victims often pressure legal authorities to drop charges after changing their mind during the legal process. In these cases, the prosecutor may ask for a less severe penalty and/or the judge may decide to apply a less severe sanction.

Analysis and Comments (views on sanctions)

A number of important perspectives related to domestic violence were revealed in interviews. The majority of interviewees support the use of suspended sentences in cases of domestic violence – a finding substantiated by the OSCE report. The expressed belief of a number of respondents that an overall lack of recidivism in domestic violence cases is evidence of the effectiveness of this practice is questionable. Rather, contemporary criminal justice research on domestic violence from the US has identified that victims of domestic violence are less likely to report the crime a second time if they believe the system (police, prosecution, and judiciary) failed them the first time.[122]

122 Compare to: Laura J. Hickman and Sally S. Simpson, "Fair Treatment or Preferred Outcome? The Impact of Police Behavior on Victim Reports of Domestic Violence Incidents," *Law & Society Review*

Moreover, this perspective is also contrary to the survey findings from the most recent violence against women prevalence report in BiH, which indicates that acts of domestic violence in BiH ***do not occur in isolation***, but are part of a pattern of repeated violent behaviour.[123]

Civil society and social work proffesionals reported at stakeholder meetings held during the preparatory phase of the development and publication of the "Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in BiH," that victims are often disappointed by the handling of domestic violence cases by the courts.[124] Representatives from police, centres for social work, and civil society organizations that work with domestic violence victims also generally reported frustration with the judiciary's treatment of domestic violence cases. For example, one police officer made the following assessment:

> *I feel that domestic violence is completely marginalized in BiH and that domestic violence is the basis of all other criminal offenses.... When you have unsanctioned domestic violence and a small child witnesses it, the child turns into a juvenile delinquent and later becomes an adult criminal.*[125]

This assertion, that domestic violence has consequences for child witnesses into adulthood, is also supported by international research. A number of studies have linked witnessing or being subjected to domestic violence as a child to increased risk for adolescent delinquency and criminal behaviour, and violent criminal behaviour in adulthood.[126]

37, no. 3 (September 2003): 607–634.

123 Babović, et al., *Prevalence and Characteristics of Violence Against Women in BiH: 2013*, 56.

124 Stakeholder meetings were conducted by DCAF and AI across the country in the winter of 2013 with the aim to explore issues pertinant to domestic violence in BiH, as prepration for the development of a domestic violence Benchbook. Those present at meetings included representatives from law enforcement and the judiciary, and from agencies and organizations that work with families in crisis, including with perpetrators and victims. Meetings took place in Doboj on 15 February, in Banja Luka on 22 February, and in Sarajevo on 28 February 2013.

125 Ibid.

126 See for instance: Robert H. DuRant et al., "Intentions to Use Violence among Young Adolescents," *Pediatrics* 98, no. 6 (December 1996): 1104–1108; Joy D. Osovsky, "Children Who Witness Domestic Violence: The Invisible Victims," *Social Policy Report* 9, no. 3 (1995): 1–16; Cathy Spatz Widom, "The Cycle of Violence," *Science* 244, no. 4901 (April 1989): 160–166. It has also been noted that, "In general, childhood exposure to domestic violence can be associated with increased display of aggressive behavior, increased emotional problems such as depression and/or anxiety, lower levels of social competence, and poorer academic functioning." See: John W. Fantuzzo and Wanda K. Mohr, "Prevalence and Effects of Child Exposure to Domestic Violence," *The Future of Children* 9, no. 3 (Winter 1999): 21–32; and, Office of the Attorney General, California Department of Justice, "First Impressions: Exposure to Violence and a Child's Developing Brain," *YouTube* video 14:43, 22 September 2011, http://youtu.be/brVOYtNMmKk.

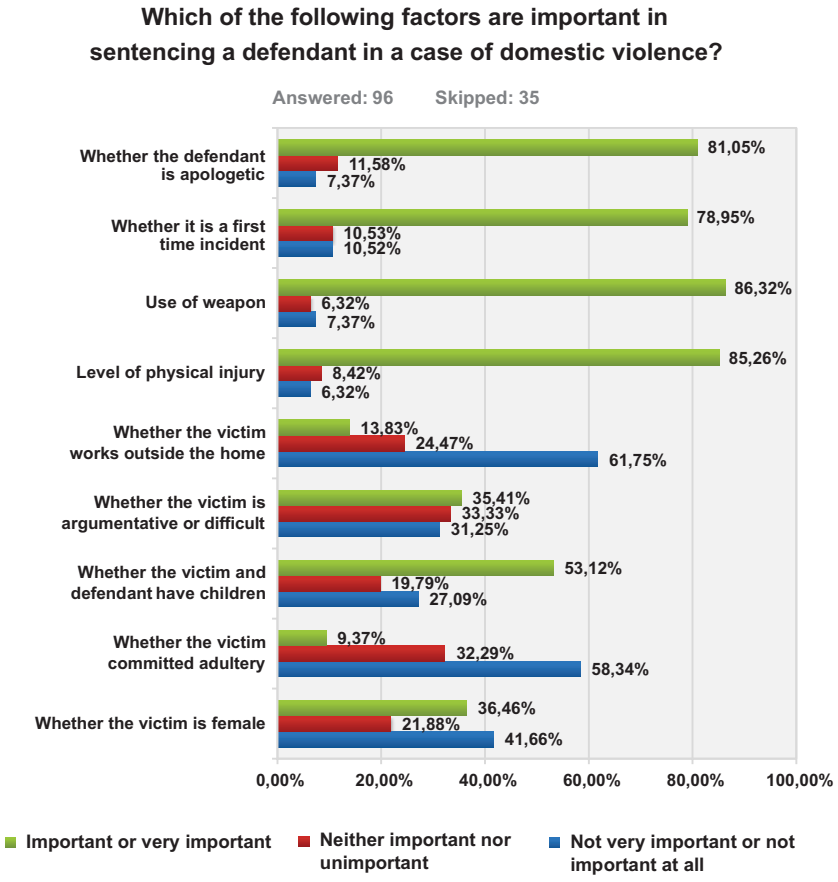
In general, participants at stakeholder meetings reported that the BiH courts seem to accept domestic violence as a normal phenomenon in BiH society, as demonstrated by lenient court judgments. And stakeholders also affirmed what research has shown, that the consequence of failing to hold perpetrators responsible is that victims do not report future crimes or refuse to participate in the judicial response.

Additionally, civil society representatives with trial monitoring experience also reported their impression that judges frequently refer to the financial status of a family in domestic violence cases, yet do not express similar concern about a family's financial status when determining a fine for a traffic offense or other financially sanctioned offense that would pose an equal burden on a family.[127]

Results of BiH Research (factors deemed important in sentencing)

This research also inquired into factors that are taken into consideration, or considered important, when determining an appropriate sentence for domestic violence perpetrators. The online questionnaire asked respondents to assess how important a number of factors are in making such decisions. Responses illustrate that relevant factors seem to be a combination of official criminal-legal standards, such as whether a weapon was used or the level of physical injury, and social factors like whether the defendant is apologetic or the victim is argumentative or difficult (see graph below). The directionality of valuation is not clear from questionnaire data, but in combination with interview data, reasonable assumptions can be made with respect to positive or negative attribution.

127 See *supra* note 124.



Consistent with the questionnaire data, the majority of interviewees did not believe that whether a victim committed adultery is an important factor in domestic violence cases. Nonetheless, one interviewee suggested that adultery could be considered a mitigating factor in the case of domestic violence. He explained:

> *A slap in the face as a [reaction to] an adultery case; that can be a mitigating circumstance, but it depends on the particular judge.*

Similarly, if a victim is thought to have "contributed" to the violence is also considered by some interviewees to be a potential mitigating factor in favour of the defendant. A female interviewee shared the following:

> *...a victim sometimes asks that a perpetrator is not punished or that a less severe sentence is given. Usually they say that they contributed to it. You know, I think sometimes one needs to withdraw and keep these things in the family.*

Analysis and Comments (factors deemed important in sentencing)

While the level of physical injury and the use of a weapon are criminal-legal aggravating factors, the contrition of a defendant is not identified as a mitigating factor within the criminal-legal framework in BiH. Indeed, all nine judges from the panel of judges who developed the "Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in BiH" recommend that defendant remorse is not automatically valued as a mitigating factor.[128] They suggest that apologies of defendants be assessed with a high degree of scepticism due to the fact that their sincerity is difficult to gauge. Moreover, an insincere apology that serves to mitigate a sanction can legitimately challenge the notion of equal access to justice for victims of domestic violence. The panel further recommended that judges and other legal practitioners instead give primacy to consideration of whether there is an ongoing pattern of violence and abuse in a particular household.[129]

Over 35% of respondents assessed whether the victim is argumentative or difficult as important for determining a sentence for the perpetrator. While respondents were not asked to specify whether this factor would positively or negatively impact their sentencing decision, existing research illustrates that victims may be subject to deeply held stereotypes concerning the characteristics of "real victims," suggesting a negative correlation. A "real victim" is someone seen as credible and likeable. According to the Task Force on Gender Bias from the US state of Maryland:

> *...too often judges and court employees deny the victim's experiences, accuse the victim of lying about her injuries, treat the cases as trivial and unimportant, blame the victim for getting beaten, and badger the victim for not leaving the batterer.*[130]

128 Galić and Huhtanen, *Judicial Benchbook*, 28.
129 Ibid.
130 Karen Czapanskiy and Tricia O'Neill, Maryland Special Joint Committee on Gender Bias in the Courts, *Report of the Special Joint Committee on Gender Bias in the Courts* (1989), v.

Assessments about whether the victim is argumentative or difficult may reveal underlying gender-based stereotypes and attitudes associated with domestic violence victims. The importance of this factor may reflect the dangerous stereotype that sometimes domestic violence is understandable, if not justified, on the basis that women can be demanding, contentious, or provocative. Or, it may reflect a stereotype about victims – who they are, what they look like, and how they sound; in other words, whether they adhere to the model of a "good victim" or "innocent victim," wherein the victimized person is not seen as someone who contributed in any way to their victimization.

While this factor was not rated as important as other factors, this data may nonetheless reflect the presence of a punitive attitude toward women who are considered to be "difficult" (the majority of victims of domestic violence in BiH and elsewhere are women).[131] This punitive attitude could extend from gender stereotypes that lead to assumptions and expectations about appropriate behaviour for women (and victims). While not conclusive, these findings do suggest that gender-based stereotypes about women victims of domestic violence may impact judicial decision making. If gender-based considerations are indeed evaluated to determine sentencing, BiH courts run the risk of reinforcing gender bias and implementing gender biased judicial decisions.

It is also notable that only a little over half of the respondents (53%) assessed whether the victim and the defendant have children together as important or very important. Studies from other countries indicate that fatherhood is often considered a mitigating factor. For example, a Croatian research study that analysed the way rape cases were sentenced in a Zagreb court found that if the perpetrator of rape in an intimate relationship had children, fatherhood was repeatedly considered a mitigating factor.[132] In addition, a gender bias task force in the US identified the deeply held belief that domestic violence perpetrators can be good fathers, and that children do not suffer from violence directed

131 More than half of the women surveyed (47.2% in BiH, 47.2% in the FBiH and the RS, 47.3%) experienced at least one form of violence from the age of 15. During the 12 months preceding the survey, 11.9% of women in BiH had experienced some form of violence: Babović et al., *Prevalence and Characteristics of Violence Against Women in BiH: 2013*, 13; According to a 2005 World Health Organization study based on data collected from over 24,000 women from 15 sites in 10 countries on all continents, the proportion of ever-partnered women who had ever experienced physical or sexual violence, or both, by an intimate partner in their lifetime, ranged from 15% to 71%, with most sites falling between 29% and 62%: World Health Organization, *WHO Multi-Country Study on Women's Health and Domestic Violence against Women: Summary Report: Initial Results on Prevalence, Health Outcomes and Women's Responses* (Geneva: WHO, 2005), 5.

132 Radačić, "Kazneno djelo silovanja," 115.

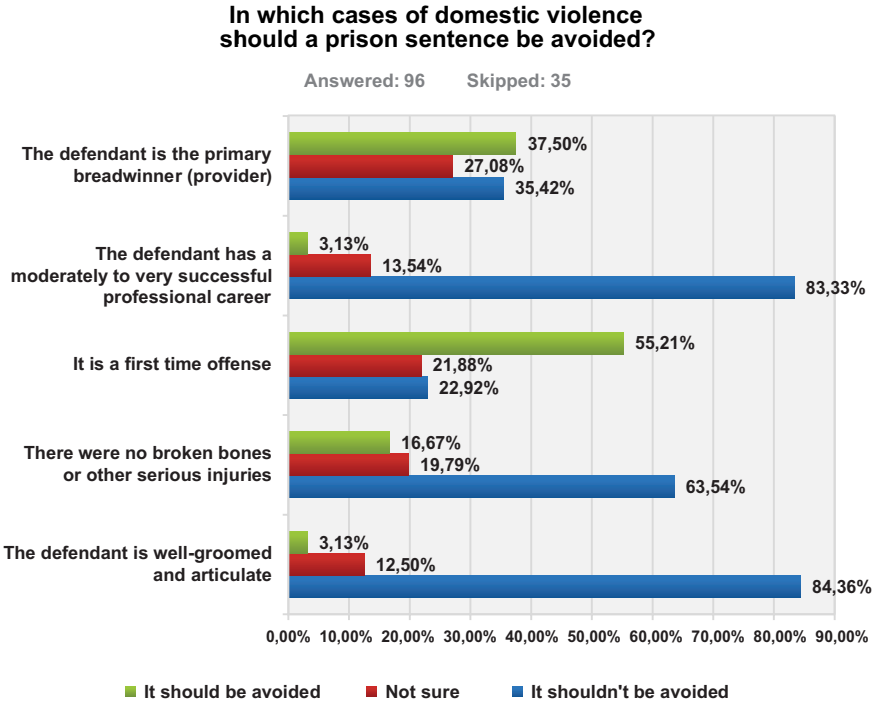
against their mother.[133] This belief exists despite international research clearly showing the significant traumatic risk to children who live in homes where domestic violence occurs, witness domestic violence, or are themselves subjected to violence and abuse.[134] The data from this research indicates that court and legal professionals in BiH do not fully recognise the seriousness of domestic violence and it's far reaching socio-cultural consequences.

Results of BiH Research and Comments (the question of jail time for perpetrators of domestic violence)

The online questionnaire also provided respondents with a series of hypothetical situations related to domestic violence cases and asked them to identify under which of those circumstances prison time should be avoided. The largest number of respondents indicated that imprisonment should be avoided in the case of first time perpetrators (see graph below). While this opinion was also noted in the OSCE report, it is contrary to international criminal justice research that illustrates the importance of a strong and clear initial response by the criminal justice system in order to deter future incidents of domestic violence.[135]

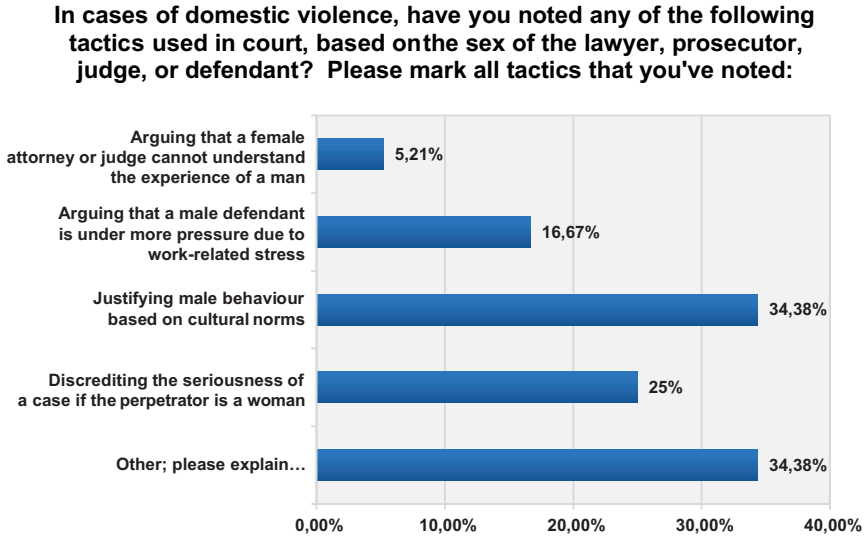
In addition, the results of the online questionnaire together with interviews uncovered the common view that when the defendant is the primary breadwinner, prison time should be avoided.

133 New York Task Force on Women in the Courts, "New York Task Force Report," 42.
134 See *supra* note 126.
135 Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, National Institute of Justice Special Report (US Department of Justice, Office of Justice Programs, 2009), 16–17, 55–58.



Results of BiH Research (procedural tactics in defence of domestic violence)

The online questionnaire also explored the topic of procedural tactics used in court in cases of domestic violence. Respondents were asked to identify whether they had ever observed specific lines of argumentation in defence of domestic violence perpetrators (see graph below). The responses indicate that there can be a gendered dimension to procedural defence tactics used in court. Over one third of respondents observed a male domestic violence perpetrator's behaviour justified by socio-cultural norms. Responses further revealed that sometimes male perpetrators are defended as breadwinners that experience more work-related stress and pressure. Although it occurs rarely, the argument that a female attorney or judge cannot understand the experiences of a man was also reported as a defence tactic. On the other hand, the seriousness of a case can be questioned or discredited when the perpetrator is female.



Supplemental written responses in the online questionnaire regarding defence tactics included:

- *Male professionals are more likely to justify and defend male behaviour*
- *Judicial professionals act according to their personal convictions*

Analysis and Comments (procedural tactics in defence of domestic violence)

The influence of gender is illustrated by the fact that the tactic of "justifying male behaviour based on cultural norms" was selected more than any other option; and that the second most selected option was "undermining the seriousness of a case when the perpetrator is female." The combination of these two procedural tactics suggests that men are associated with (culturally accepted) violence and women with a lack of (serious) criminality. It is useful to bear in mind that legal practitioners make arguments and use tactics that they believe will be most effective in light of existing socio-cultural beliefs and values. Thus, reflecting on the arguments and procedural strategies employed in domestic violence cases can be useful in identifying underlying stereotypes and attitudes held by legal practitioners working in the courtroom, or their perceptions of broader socio-cultural stereotypes.

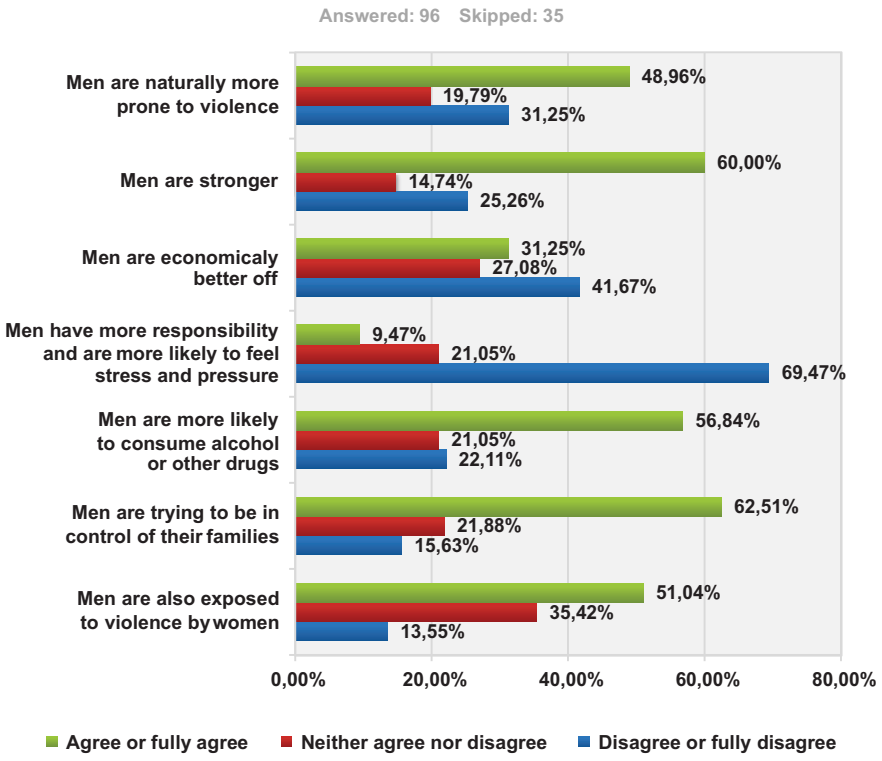
Results of BiH Research (beliefs about why men perpetrate gender-based violence)

The researchers also asked interviewees why men commit gender-based violence. Approximately half of the interviewees attributed gender-based violence to male physical characteristics and their "innate inclination" to resort to violence. One female lawyer reflected this belief when she said:

> *… men are more aggressive. Just look at history – they have always waged wars. It is in their genetic make-up, and women are much more devoted to families.*

Questionnaire respondents were asked to rate their level of agreement with a variety of assertions about why men commit more gender-based violence. At least 60% of respondents expressed agreement with the statements that men commit more gender-based violence because they are "trying to be in control of their family" and that "men are stronger." Nearly half of respondents agreed that "men are naturally more prone to violence." These results and information collected in the interviews reveal a similar perspective – that the greater occurrence of male perpetrated gender-based violence is linked to men's physical characteristics and nature. And this perspective seems to be held more by men than women. Regarding whether "men are naturally more prone to violence," slightly more men than women agreed; and a significantly higher number of men than women expressed agreement that men perpetrate gender-based violence because they are stronger.

Statistical data indicates that men commit gender based violence more often than women. Please mark your level of agreement or disagreement with all of the following assertions:



Analysis and Comments (beliefs about why men perpetrate gender-based violence)

The belief of some questionnaire respondents and interviewees that men's "nature" is related to their increased perpetration of gender-based violence is disproven by international research. Rather, studies link domestic (and sexual) violence to a lack of gender inequality, male dominance, and entitlement, and not with biological differences between women and men or physical strength.[136] It is notable that there was very little mention of gender inequality, male dominance, patriarchal culture, or the acceptance by BiH society of violence during interviews (or in narrative responses to the

136 UN General Assembly, *In-Depth Study on All Forms of Violence against Women: Report of the Secretary-General* (New York: UN, July 6, 2006), 28–30. Also see: Marianne Hester, Liz Kelly, and Jill Radford, eds. *Women, Violence and Male Power* (Buckingham: Open University Press, 1996)

online questionnaire).[137] Interview data further revealed that some judges, lawyers, and prosecutors do not feel responsible for addressing issues related to gender-based violence or sending a message to the community that the behaviour is unacceptable. It is possible that a belief that men's violent behaviour is "natural" may serve to excuse such behaviour. In other words, if male violence is seen as a natural product of being male, then it makes sense that judges, lawyers, and prosecutors would not feel compelled to address the issue through criminal justice system intervention.

This report recommends that comprehensive efforts are made to improve the judicial response to domestic violence. This includes a critical evaluation of how gender influences substantive legal outcomes in cases of domestic violence – and whether established legal standards, like minimum sanctions, are being upheld by the judiciary. In addition, it is recommended that judges and prosecutors who work on cases of domestic violence receive specialized training that incorporates contemporary empirical research on perpetrator and victim profiles; outlines common types of domestic violence, effective judicial intervention strategies, and risks to children; and reviews the criminal-legal codes in BiH. It is also recommended that the Benchbook developed by a panel of nine judges from across BiH on domestic violence case considerations be used in all courts across BiH.

4.2.2. Rape, Attempted Rape, and Sexual Assault

Results of BiH Research

Treatment of the topics of rape, attempted rape, and sexual assault were also explored in this research. While the research findings are limited, they nonetheless reveal the possibility that gender-based stereotypes concerning sexual assault can come into play in the BiH court system. For example, a female judge remarked on the line of questioning that can occur when young women are victimized and how their credibility as a witness is determined in contrast to young men.

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

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

In addition, a number of defence counsel made illuminating remarks questioning the credibility of a victim's allegation or the legitimacy of a victim as an authentic victim of sexual assault. One lawyer commented that there are ambiguous circumstances in some cases; though the example he offered was of a case in which forensic evidence was present. Still, he argued that these ambiguities can make it difficult to determine whether any wrongdoing occurred or who is ultimately responsible. He explained:

> *The case was somewhat unclear. There was medical evidence of forced penetration and PTSD, which developed as a result of rape, but the friend of the victim testified against her. There was also expert testimony that the PTSD was not due to rape. Still, the court believed that the rape happened, but I still do not know if it really happened.*

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

This anecdote represents a potentially problematic line of criminal-legal reasoning – suggesting that because the defendant was drunk he was particularly vulnerable to the seduction of an underage girl. There may also be two possible criminal-legal contradictions present in this case. In the first place, the BiH criminal code clearly classifies "sexual intercourse" with a child (or sexual abuse

of a child) as a criminal offense.[138] If the girl was under fourteen years old, then any sexual intercourse was a crime in its own right. In the second place, despite this lawyer's assertion that drunkenness constitutes a mitigating factor, the BiH criminal code specifically notes that intentionally being under the influence of alcohol does *not* constitute a mitigating factor.[139] The outcome of this case suggests that members of the judiciary may also adhere to the belief that the alleged promiscuity, seductiveness, and sexually liberal attitudes of an underage girl, and the drunkenness of a perpetrator, are mitigating factors.

In another remark, attempted rape was contested as a legitimate criminal offense by a lawyer. He expressed surprise that someone could be sentenced for attempted rape when there was no violence, at least by his assessment. He shared the following anecdote:

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

This example illustrates the opinion that attempted rape is not rape and therefore does not constitute a serious criminal-legal issue. Moreover, this anecdote reflects the belief that forcibly kissing and touching someone behind a locked door does not constitute violence. In addition, this comment also displays a level of ongoing scepticism following a criminal conviction – in which the criminal elements of the case were proved beyond a reasonable doubt. While such scepticism may be attributable to continued defence of a lost case, or concerns with appeal, it points to a worthwhile area for further inquiry.

138 A child is defined as a person under the age of fourteen (14). Article 207 of the Criminal Code of FBiH specifies that "Sexual Intercourse with a Child" is a crime; Article 195 of the Criminal Code of RS specifies that "Sexual Abuse of a Child" is a crime; and Article 204 of the Criminal Code of Brcko District specifies that "Sexual Intercourse with a Child" is a crime. A juvenile is defined as someone who has not reached the age of eighteen. Sexual offenses against juveniles, while not considered a separate crime, constitute an aggravating condition and therefore include a higher minimum penalty within the FBiH criminal code, Article 203. Criminal Code of the Federation of BiH ("Official Gazette of the Federation of BiH", 36/03, 37/03, 21/04, 69/04,18/05, 42/10, 42/11); Criminal Code of Republika Srpska ("Official Gazette of Republika Srpska", 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13); and Criminal code of Brcko Distrikt ("Official Gazette of Brcko Distrikt", 10/03, 45/04, 06/05, 21/10, 52/11).

139 *Criminal Code of the Federation of Bosnia and Herzegovina*, *Official Gazette of the Federation of Bosnia and Herzegovina 36/03. Amendments in 37/03, 21/04, 69/04, 18/05 and 42/10.*, 2003, Article 36§3; *Criminal Code of Republika Srpksa*, *Official Gazette 49/03*, 2003, Article 14§3; *Criminal Code of Brčko District*, *Official Gazette of Brčko District 10/03. Amendments in 6/05, 21/10 and 9/13.*, 2013, Article 36§3.

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

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

This reflects a potentially troubling attitude held by a member of the judiciary – that addressing a serious crime is somehow not as important as the integrity of the defendant's business reputation. The anecdote may reflect a gender-based attitude that places more value on a (male) perpetrator's professional life and money making capacities than on justice for the (female) victim.

A number of interviewees also expressed dismissive attitudes regarding male rape. In fact, questioning on this subject typically led to laughter and joking. One lawyer actually asserted that it is not possible for men to be raped.

Still, some of the opinions shared by legal practitioners concerning sexual assault were promising. For example, judges and prosecutors generally asserted the need for protection of victims and witnesses through the use of video link testimony. They expressed that protecting victims from contact with the perpetrator is a priority because it prevents the possibility of harassment, threats, and additional trauma. One male judge reinforced this point with an anecdote regarding a case of child sexual assault. He explained that his courtroom did not have the technology for video link testimony so he elected to improvise, using audio-video equipment to pre-record the testimony of the victim. When the CD containing the testimony was damaged and the defence counsel requested that the victim be required to offer testimony a second time, the judge denied the request on the basis of the UN Child Rights Convention, asserting the court's responsibility to prevent further trauma to the child. A female prosecutor also communicated the importance of preparing victims to provide testimony in sexual assault cases and reported she dedicates significant time for this.

Analysis and Comments

This research reveals a number of gender-based stereotypes and attitudes held by legal practitioners concerning sexual assault. These stereotypes and attitudes have also been identified in other criminal-legal-judicial contexts. Perhaps most notable is the stereotype of the promiscuous, sexually provocative, or seductive woman – who therefore could not have been sexually assaulted. In this way, a woman's sexual behaviour is equated with immorality, and sexual immorality is equated with a greater likelihood to be dishonest, or at the very least, to lack credibility.[140] In other words, if a woman is sexually active, or even worse, promiscuous, then she is considered to be 'loose' – loose with her morals, loose with her body, and ultimately loose with her words – and therefore does not always tell the truth. A sexually active or promiscuous woman also challenges deeply held socio-cultural stereotypes of men as sexual aggressors and women as passive (and chaste) recipients of men's advances. A sexually active woman ultimately defies a fundamental gender role that shapes many societies. It is therefore not surprising that some of the interviews reflected these attitudes associated with women and men and their respective sexual behaviour and responsibilities.

In addition, international research has also identified the stereotype of the "real victim" in cases of sexual assault. This typically relates to both the victim profile and the perpetrator profile – and calls on a number of gender-based stereotypes. For example, such a victim might be described as:

> *…[a woman] who has little-to-no relationship to the offender, is virtuous and going about legitimate business, was above reproach in behaviour prior to the rape, reports a single occurrence, was raped by an unambiguously bad offender, has demographic characteristics that signal power, influence, or sympathy, shows visible, appropriate expressions of trauma, and are open to help.*[141]

And indeed, women victims of rape and sexual assault were found by gender bias task forces across the US to routinely be judged harshly on their appearance, demeanour, lifestyle, and reputation; while defendants escaped similar scrutiny.[142] Croatian scholar Radačić found that the same was true for

140 See: Julia Ann Simon-Kerr, "Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment," *Yale Law Journal* 117, no. 1854 (2008): 1854–1898.

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

142 Kearney and Sellers, "Sex on the Docket," 590.

the Zagreb district court. For example, in one of the cases she analysed, a victim's credibility was questioned because she did not immediately report the rape, despite doing so the following day.[143] Notably, research has also found that, beginning with police and continuing throughout the judicial response, victims of rape and sexual assault who do not meet the "real victim" standard are routinely treated with mistrust and subjected to accusations of false reporting (allegedly based on the desire for revenge or remorse for consensual sexual activity).[144] This corresponds to various "rape myths" that strengthen the notion that women enjoy being raped, want to be raped, or are "asking for it."[145]

This research does not conclusively indicate that gender-based stereotypes and attitudes are resulting in gender biased judicial decision making or legal outcomes in cases of rape and sexual assault in BiH. And moreover, there is certainly legitimacy in legal practitioners closely examining the credibility of witnesses and defendants, as well as victims. Yet, reflection from a number of legal practitioners reveals a tendency to focus on the social and behavioural characteristics of victims rather than the crime – even following a conviction. This suggests the presence of gender-based stereotypes and attitudes among at least some legal practitioners in BiH; and these kinds of stereotypes and attitudes have been shown to negatively affect substantive legal outcome in other contexts. Indeed, the subject of sexual violence is in and of itself a deeply gendered topic that can result in a number of competing stereotypes, attitudes, and values concerning who can be a victim and who can be a perpetrator. Thus, this research, albeit limited, signals that gender-based stereotypes and attitudes concerning sexual violence may play a role in criminal-legal outcomes in BiH.

It is recommended that all judges and prosecutors who work on cases of rape, attempted rape, and sexual assault receive specialized training, including for those cases that involve minors. Training should directly address gender-based stereotypes and attitudes in order to build the capacity of judges and prosecutors to confront motions, lines of argumentation, and expert testimony that employs gender-based stereotypes as part of a defence strategy, and allows them to better identify whether gender-based stereotypes are influencing their perceptions of mitigating and aggravating factors for sentencing.

143 Radačić, "Kazneno djelo silovanja," 117.
144 Philip Rumney, "False Allegations of Rape," *The Cambridge Law Journal* 65, no. 1 (2006): 125–158.
145 Renae Franiuk, Jennifer L. Seefelt, and Joseph A. Vandello, "Prevalence of Rape Myths in Headlines and Their Effects on Attitudes Toward Rape," *Sex Roles* 58, no. 11-12 (June 2008): 790–801.

4.3. How Gender Influences Perceptions of Credibility in the Courtroom

Results of BiH Research

Interviewees for this research generally asserted that witness credibility is primarily, if not entirely, determined by the consistency of the witness statement and the degree to which their testimony is convincing. Yet, this claim was sometimes inconsistent with anecdotes shared in those same interviews as well as data from the online questionnaire. For instance, one prosecutor openly disclosed that any number of factors might be considered when determining the credibility of a witness – but nonetheless, said that gender is not one of those factors. He explained that:

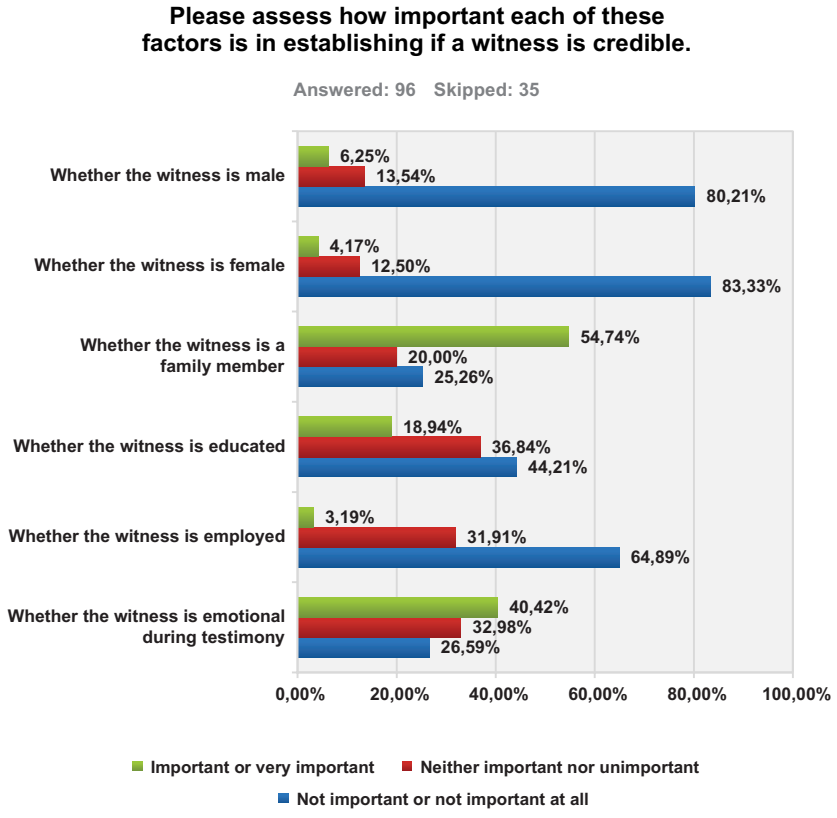
> *...it all plays a role. If you are a judge, it all is taken into account, including education and background, but it does not matter if someone is male or female.*

On the one hand this comment is reflective and realistic. On the other hand, it is hard to imagine that education and background are considered but gender is not, especially if "it all plays a role."

The online questionnaire also examined the topic of witness credibility (see graph below). The questionnaire data indicated that 55% of the respondents believe that whether the witness is related to either the victim or the defendant is important or very important for determining credibility. Another 19% of respondents answered that the witness's level of education is also important. Finally, roughly 40% of respondents answered that whether the victim is emotional during their testimony is important in assessing their credibility. While it is unclear whether respondents see the level of emotion expressed by a witness as a positive or negative factor in determining their credibility, prevailing socio-cultural attitudes concerning acceptable emotional responses by women and men are distinct and influential. For example, it has been well documented in research that female rape victims who do not appear distraught, tearful, and afraid during testimony are far less likely to be believed.[146]

146 Lynn Hecht Schafran, "Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist," *Fordham Urban Law Journal* 20, no. 3 (1993): 450–451; Lynn Hecht Schafran, "Writing and Reading about Rape: A Primer," *St. John's Law Review* 66, no. 4 (Winter/Fall 1993): 988; See also: David Lisak, "The Neurobiology of Trauma," in *Unpublished Paper* (University of Massachusetts, Boston, 2002). Parts of the paper's content appear in the DVD "Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases" published by the National Judicial Education Program in 2000. A

Alternatively, men may be penalized, shamed, or accused of having ulterior motives if they cry, exhibit distress, or fail to appear sufficiently masculine. Thus, this research suggests that gender-based roles and stereotypes concerning appropriate emotional responses could play a role in perceptions of witness credibility.



In terms of expert witness selection, a number of conflicting opinions were offered during the interviews. For example, a female judge expressed her opinion that defence counsel and the prosecution more often choose male rather than female expert witnesses, especially when selecting experts from the field of economics. This opinion was confirmed by a number of interviewees who reported that the prevailing stereotype is that women are not good in economics or mathematics and therefore cannot provide credible and strong

filmed lecture by Dr. Lisak on the same topic is also available online: David Lisak, Arkansas Coalition against Sexual Assault, "The Neurobiology of Trauma," *YouTube* video 34:31, February 5, 2013, https://www.youtube.com/watch?v=py0mVt2Z7nc/.

expert opinions on these topics. According to one judge, individual prosecutors are responsible for choosing their experts and they most often choose men.

In contrast, another female judge asserted that:

> *There is a list, and experts are chosen from the list. It does not matter if someone is male or female, but they look for someone who is relatively close to reduce the costs [of transportation]. I have an example of a woman who is a building expert and everybody calls her because she is good.*[147]

It stands to reason that both of these narratives hold truth – the defence or prosecution choose witnesses from the list based on who they believe will most effectively support their case. Expert witness selection is therefore based largely on their assessment of who is most likely to be perceived as having the greatest credibility and authority on a particular subject. If men are indeed called as expert witnesses more often than women, this may be attributed to their greater numbers in certain professions, or it could be related to a perception that they are inherently more credible. Determining to what degree there is an imbalance in the gender of expert witnesses in BiH, and why, is yet another area worthy of further exploration.

Analysis and Comments

Previous research in other countries on the use of experts has consistently revealed not only that men appear more often as experts, but that they are significantly more likely to appear as stand-alone experts, while women are more likely to be a part of an expert team.[148] This may suggest a preference for men as experts, either because they are perceived by the counsel calling them as more credible, or because that counsel believes that other parties to the proceedings – including judges – will perceive them as such.

147 Lists of Court Experts for both the FBiH and the RS are publicly available (in Bosnian). An examination of these lists generally revealed a clear gender imbalance in favor of men. In medicine, the disparity was particularly striking; only 15% of 137 experts listed were women. Several research and health reform initiatives have recorded considerably higher numbers of women in the medical field than are represented on the Court Experts list, noting rates well above 50%, particularly in certain specialties. For example, see: "From Family Medicine to Community Nursing: A Project in Bosnia-Herzegovina and its Potential for NCD Control and Prevention," *Bulletin of Medicus Mundi Switzerland*, no. 128 (June 2013).

148 Walters, "Gender and the Role of Expert Witnesses in the Federal Courts," 638.

During the symposium entitled, "The Judge is a Woman," held in Brussels in November 2013, several judges from Europe addressed the similar issue of women judges being heard but not listened to by their male colleagues. They observed that male judges often refer to each other among themselves "...as my colleague correctly noticed..." but tend to ignore statements made by their female counterparts. This was noted at the symposium first by Françoise Tulkens and later by Brenda Hale and Susanne Baer.[149] Behaviour of this nature on the part of male judges during a hearing contributes to decreased credibility of female judges in the eyes of the parties to court, as well as defendants, witnesses and victims. This is reinforced by body language or non-verbal communication, which can be a form of gender bias that is pervasive yet difficult to detect. Such behaviour can have profound implications on a trial. For example:

> *If the jury senses a judge's disinterest when a woman speaks, but has no red flag that his behaviour is gender-biased, the female attorney and her client lose their right to impartiality. Moreover, as legal transcripts do not record the judge's body language, such bias is not apparent on appeal.*[150]

When it comes to expert testimony, women seem to be confronted by the same barriers related to credibility. A review of completed cases from 1980 to 1993 in two federal courts in the US showed that women represented only 11% of testifying experts and were significantly less likely than their male counterparts to testify as sole experts in a case.[151] While this data is dated, it may inform or serve as a baseline for contemporary analyses of perceptions of witness credibility related to gender.

Realistically, gender is a factor in both the representation of women and men in specific professions as well as the selection of experts within those professions. In 2000, the Judicial System Assessment Programme (JSAP) of the United Nations Mission in BiH (UNMBiH) released a thematic report concerning expert witnesses. The report called into question the selection of

149 François Tulkens is a Belgian lawyer and expert in criminal and penal law, and Vice-President of the European Court of Human Rights. She has been a member of the Court since 1998, Section President since 2007, and Vice-President since February 2011. Brenda Marjorie Hale, Baroness Hale of Richmond, is a British legal academic, barrister, judge, and Deputy President of the Supreme Court of the United Kingdom, as well as the first and only woman judge to ever have served in this highest instance court in the UK. Susan Baer is a justice at the Federal Constitutional Court of Germany and a legal scholar and professor of law at Humbolt University in Berlin.

150 Levine, "Preventing Gender Bias in the Courts: A Question of Judicial Ethics," 779–780.

151 Amy P. Walters, "Gender and the Role of Expert Witnesses in the Federal Courts," *Georgetown Law Journal* 83 (n.d.): 638.

court experts and raised concerns that there were very few women on the lists of experts.[152]

It is recommended that updates to the expert witness lists are made annually in order to ensure the addition of new professionals in the field. Moreover, efforts should be made to insure that those lists reflect the gender representation of fields of expertise more broadly. Finally, it is recommended that BiH courts and court professionals actively work to avoid reinforcing gender stereotypes through judicial practice (i.e. questioning female witnesses differently than male witnesses or calling on specific expert witnesses based on gender).

152 UNMBiH JSAP, *Expert Evidence: The Use and Misuse of Court Experts*, Thematic Report VI (Sarajevo: UNMBiH, 2000), 8–9; 9, 20–21, 23, 26.

5. THE INFLUENCE OF GENDER ON MATERIAL SUPPORT FOR VICTIMS AND WITNESSES

For the purposes of this research, material support refers to the physical infrastructure and organizational supports in place for victims and witnesses (and other court users) within the BiH court system. This can include, for example, childcare services and technology to support video link hearings. The kinds of material support available for victims and witnesses can illustrate the extent to which gender considerations have been mainstreamed or integrated into court procedure and operations. This in turn can serve as an indication (in combination with other data) of the extent to which the judiciary, as an institution, has accounted for the different needs and experiences of women, men, girls, and boys. This research only minimally explored the issues of material support, through two topics – child care and support for victims and witnesses of gender-based violence – that significantly intersect with gender.

5.1. Support for Victims and Witnesses in Gender-Based Violence Cases

Research from BiH on Victim and Witness Protection and Support

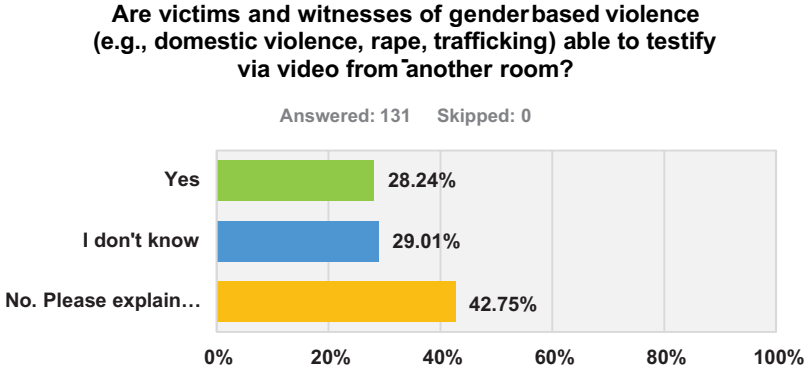
A 2010 OSCE study of witness protection and support in domestic war crimes cases found that such support was generally inadequate in the BiH judiciary and that this deficit impedes access to justice.[153] This lack of support is especially evident at the entity level, according to a 2012 Impunity Watch report. The report's author, Maja Šoštarić, observed that: "While the witness support offices of the Court of BiH and the State Prosecutor's Office have not yet reached [ICTY] standards, they do serve as a good example for the entity courts, which have hardly any policies in place to ensure witness protection and support."[154]

153 Organization for Security and Cooperation in Europe Mission to Bosnia and Herzegovina, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and Recommendations a Year after Adoption of the National Strategy for War Crimes Processing*, A Report of the Capacity Building and Legacy Implementation Project (Sarajevo: OSCE, 2010).

154 Šoštarić, *War Victims and Gender-Sensitive Truth*, 44.

Results of BiH Research

The reports from the OSCE and Impunity Watch referred specifically to war crimes cases processed in domestic courts, whereas this study focused on how the BiH court system supports victims and witnesses in cases of gender-based violence. Roughly 43% of questionnaire respondents believed it was *not* possible, in their court, for victims of gender-based violence to testify via video link from outside the courtroom – also referred to as an *en camera* hearing (see graph below). Narrative responses indicated that courts lack the necessary equipment to conduct video link hearings and are more likely to ignore, rather than address, the special needs of victims and witnesses in gender-based violence cases.



Still, there was indication that improvements are being made and members of the judiciary are aware of the importance of infrastructure that supports victims during court procedures. One survey participant noted the following positive development:

> *A female witness can request support from the president of the court council who, in cooperation with the team for support of this court, addresses the individual request. In 2012, the department for witness support was established so that these questions would be addressed before the main trial. This project is still not finished but it already has good results.*

Analysis and Comments

The efficacy of using video link testimony in the courtroom to avoid further traumatising victims and witnesses is well documented; and prevents them from confronting the perpetrator in court, which can not only be a harrowing

experience but can sometimes result in isolation or retaliation.[155] The International Criminal Tribunal for the former Yugoslavia (ICTY), considering the high level of sensitivity involved in cases of rape and sexual assault, adopted rules of evidence specifically designed for processing cases of this nature.[156] Establishing policies, programs, and infrastructure that will address the needs of victims and witnesses of gender-based violence facilitates their participation in court hearings and thus enhances access to justice. Furthermore, adapting infrastructure and policy to address such needs indicates the extent to which the judiciary is cognizant of the gendered implications of domestic and sexual violence.

In addition, providing childcare facilities and covering travel expenses are other forms of material support that facilitate victim and witness participation in court processes. For example, the UK court system compensates certain classes of victims and witnesses in order to ensure their participation before and during trials.[157] Generally, this kind of support is not available in BiH courts, though some courts have begun to move in that direction by instituting support for victims and witnesses of war crimes before and during the investigation, and during the main trial. They have achieved this through the UNDP program "Support in Processing Cases of War Crimes;" a program that was created in cooperation with the HJPC. In 2013, Witness Support Sections, established to help witnesses of war crimes, were launched in the district courts and prosecutors' offices in Banja Luka and East Sarajevo; and in the

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

156 Rule 96 of the "Rules of Procedure and Evidence" of the ICTY, on "Evidence in Cases of Sexual Assault" (adopted 11 February 1994) states that:
In cases of sexual assault:
(i) no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defence if the victim
(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (Amended 3 May 1995)
(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (Amended 30 Jan 1995)
(iv) prior sexual conduct of the victim shall not be admitted in evidence.
See: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), *Rules of Procedure and Evidence*, *United Nations IT/32/Rev. 48*, last amended on 19 November 2012.

157 The Crown Prosecution Service, "Witnesses Expenses and Allowances: Legal Guidance: The Crown Prosecution Service," http://www.cps.gov.uk/legal/v_to_z/witnesses_expenses_and_allowances (accessed January 21, 2014).

cantonal court and prosecutors' offices in Sarajevo, the Una-Sana Canton, and the Central Bosnia Canton.[158] In addition, a Witness Support Office was established in the State Court of BiH to provide psychological support to victims and witnesses of war crimes.[159]

The efforts of some BiH courts reflect an increasing awareness within the judiciary of the importance of providing support during criminal prosecutions involving gender-based violence. Unfortunately, this awareness is not yet sufficiently comprehensive throughout BiH. With only a minority of courts taking actions to address the current lack of adequate support for victims and witnesses in cases of gender-based violence, there is still ample room for improvement. Thus, it is recommended that BiH courts make an effort to provide material support to victims and witnesses in order to facilitate their participation; and so that ad hoc solutions created on a case-by-case and court-by-court basis are avoided.

5.2. Childcare Facilities

Results of BiH Research

This research revealed that childcare facilities are not available at or near courthouses for the purpose of facilitating victim, witness, defendant, or court user participation in court. The research also revealed that courts do not have information or referral resources available concerning local child care options. Nonetheless, unlike similar research in the US, this study also found that women lawyers, and other women court employees in BiH, are not singled out to care for children during court proceedings. Questionnaire respondents indicated that when a child accompanies a witness to court the most likely people asked to care for the child are the porter (usually male) or the administrative person or court clerk staff (usually female).

One possible reason why the BiH courts do not address the need for child care or even provide referrals to child care facilities is the existence of informal networks in BiH that have traditionally met the needs of working parents and those who need sporadic child care support. Grandparents, relatives, friends,

158 For more on this, see the following news article: "Bihac Court to Get Witness Support Section," *Balkan Insight*, December 12, 2012, http://www.balkaninsight.com/en/article/bihac-court-to-get-witness-support-section; also see the HJPC press release on this topic (in Bosnian): High Judicial and Prosecutorial Council of BiH, "Početak rada Odjela za podršku svjedocima pri Kantonalnom sudu u Novom Travniku i Kantonalnom tužilaštvu Srednjebosanskog kantona," November 9, 2013, http://www.hjpc.ba/pr/preleases/1/?cid=5746,2,1.

159 Šoštarić, *War Victims and Gender-Sensitive Truth*, 46.

and neighbours often provide this kind of support in BiH. But the nature of BiH society has changed and continues to evolve, in part as a result of significant population migrations. Thus, informal networks may not exist for everyone and the need for childcare support for court users may be growing. One survey participant noted that:

> *...the courts do not have staff people who would take care of such things. This would happen on the explicit request of a judge or not at all. Anyway, conditions in the courts are bad when it comes to supporting children.*

Analysis and Comments

The BiH judiciary does not currently have a system for surveying court user satisfaction.[160] However, one way to identify whether there is a need for court-based childcare or childcare referral would be a court user survey. Such a survey could enable courts to determine the extent of the needs of court users and whether traditional social networks are still meeting this need.

The HJPC published a Strategy for Care of Court Users in BiH in 2006 and adopted an action plan for implementation in 2012.[161] The goal of this strategy is to increase public confidence in the court systems and strengthen the rule of law; it was developed to reflect the principles of judicial independence, objectivity, justice, equality, and transparency. Since publication of the 2006 Strategy, BiH has provided its citizens online internet access to a site where they can track the progress of their court cases.[162] BiH also integrated the same goals and principles into the Justice Sector Reform Strategy, which is currently under revision and will involve consultations with stakeholders.[163] It

160 *Evaluation Report on European Judicial Systems 2012*, 94.

161 The strategy is available on the High Judicial and Prosecutorical Council's website (in Bosnian): High Judicial and Prosecutorial Council of BiH, "Strategija za brigu o korisnicima sudova u Bosni i Hercegovini," November 26, 2006, http://hjpc.ba/docs/odocs/?cid=3172,2,1 .

162 See: http://pravosudje.ba/predmeti.

163 See: "Bosnia and Herzegovina Justice Sector Reform Strategy 2008-2012" (Sarajevo, June 2008); Bosnia and Herzegovina Ministerial Conference, "Action Plan for Implementation of the Justice Sector Reform Strategy in Bosnia and Herzegovina for the Period 2009-2013 (fourth Revised)" (Ministerial Conference of Bosnia and Herzegovina, Sarajevo, January 2013); also see regular implementation reports published by justice sector institutions and civil society organizations active in the field: "Report of the Justice Sector Institutions in Bosnia and Herzegovina on Implementation of the Action Plan of Justice Sector Reform Strategy in Bosnia and Herzegovina for the Period January-June 2013" (Ministerial Conference of Bosnia and Herzegovina, Sarajevo, July 2013); Vaša Prava BiH-Legal Aid Network et al., "Annual Report Civil Society Organisations (CSOs) on Implementation of the Action Plan for Implementation of the Justice Sector Reform Strategy (JSRS) of Bosnia and Herzegovina. Reporting Period: 1 January-31 December 2012," January 30, 2013.

is recommended that the issue of childcare support as well as other forms of material support, including *en camera* infrastructure for victims and witnesses of sexual assault and domestic violence, be taken into consideration during the revision and implementation of the BiH Justice Sector Reform Strategy. In addition, it is further recommended that BiH courts develop childcare provider referral lists for court users.

6. CONCLUSION: THE IMPLICATIONS OF GENDER WITHIN THE JUDICIARY

The purpose of this research was to uncover the gender related opinions, attitudes, and beliefs held by legal professionals working within the BiH judiciary; and to identify the ways in which gender might serve to either advantage or disadvantage women or men – whether judge, prosecutor, attorney, or court user. This research revealed that gender-based stereotypes and attitudes are present among some legal practitioners and members of the judiciary in BiH. Moreover, some research findings suggest that gender-based stereotypes and attitudes influence the work and practice of the judiciary. In some cases, men appear to be advantaged over women, and in others, women appear to be advantaged over men. In addition, the influence of gender-based stereotypes and attitudes was reported to affect collegial relationships among and between legal practitioners and members of the judiciary as well as the broader court atmosphere; and this has implications for perceived and factual judicial impartiality.

Yet, openly expressing gender-based stereotypes and attitudes may be different than being aware that these beliefs can constitute or result in gender bias. Indeed, a limited understanding of gender among legal practitioners in BiH may mean that gender-based stereotypes are seen as reflections of the innate and biologically derived characteristics of sex rather than of socially ascribed, constructed, and reinforced roles. This suggests that the first step to improving the court atmosphere, collegial relationships, and the impartial delivery of law and justice is training and education on gender and the existence of gender-based stereotypes and attitudes.

The research also revealed a consistent perspective among legal professionals from BiH that they apply the law in a strictly objective and impartial manner. In other words, that an impartial legal outcome is achieved through the application of (neutral) laws. This is likely linked to the civil law tradition of BiH as well as to the focus of legal training and education in the country. Yet, a significant body of international research has increasingly revealed the limits to which an individual is able to be neutral and objective, regardless of their profession.[164] Studies examining the influence of subconscious attitudes,

164 A meta-analysis of 122 research reports, involving a total of 14,900 subjects, revealed that the implicit bias test (IAT) scores where stereotyping and prejudice are identified better predict behavior than self-reports. Anthony G. Greenwald, et al., "Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity," *Journal of Personality and Social Psychology* 97, no. 1 (2009): 17-41.

assumptions, and stereotypes on decision making have determined that nearly every aspect of behaviour, from how we relate to people who are different from us to how we make choices about the products we buy, are influenced by *implicit bias*.[165]

Thus, in addition to identifying explicitly held gender-based stereotypes and attitudes, this report asserts that legal practitioners in BiH are likely to hold implicit biases based on existing social hierarchies and stereotypes. The contention that legal decision making and judicial practice in BiH is not devoid of socio-cultural influence and gender bias is consistent with international research findings. An important second step to improving the ability of the judiciary to apply the law impartially therefore includes training efforts intended to increase awareness of the existence of implicit and explicit bias.

On the basis of this research, in combination with international literature, the researchers have identified education, training, and awareness as keys to mitigating the effect of gender-based stereotypes and attitudes and thereby the possibility of gender bias in the courts of BiH. Research and international best practices indicate that there are a number of ways this can be achieved; for example, encouraging and facilitating legal practitioners' motivation to be egalitarian has proven successful in the US.[166] Another approach is to incorporate the topic of explicit and implicit gender bias into the required education for legal practitioners and into law school curricula. Yet another strategy is to challenge legal practitioners' confidence in their ability to be objective, as those who see themselves as objective are more likely to be prone to gender biased thinking and acting.[167] In addition, specialized training that incorporates specific examples of the myriad ways in which gender bias, whether implicit or explicit, can affect legal reasoning and decision making has proved effective.[168] It is also important that training and education address categories of identity and difference rather than taking a neutral or "blind" approach (e.g. not recognizing the existence of gender roles and characteristics).[169] And, some experimental studies have reported that if

165 See: Kang et al., "Implicit Bias in the Courtroom," especially pages 1135-1152. Also see the Project Implicit website: https://www.projectimplicit.net/index.html, and publications of research generated by Project Implicit tools: https://www.projectimplicit.net/papers.html

166 Nilanjana Dasgupta and Luis M. Rivera, "From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control," *Journal of Personality and Social Psychology* 91, no. 2 (2006): 268-280.

167 Kang, et al. "Implicit Bias in the Courtroom, " 1124-1186.

168 Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, and Jennifer K. Elek, "Helping Courts Address Implicit Bias: Resources for Education" (National Center for State Courts, 2012). Available at: http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx

169 Evan P. Apfelbaum, Michael I. Norton, and Samuel R. Sommers, "Racial Color Blindness: Emergence, Practice, and Implications," *Current Directions in Psychological Science* 21, no. 3 (June 2012): 205-209.

judges and court staff exhibit unbiased behaviour, others might automatically engage in similar behaviour through modelling alone.[170] Finally, there are a number of examples and best practices in various legal and judicial guidelines on gender bias from the US that could be useful for developing procedural and educational approaches to addressing the influence of gender bias in BiH.[171]

Thus, the broad recommendation of this research is that the BiH judiciary, in cooperation with the Centres for Judicial and Prosecutorial Training and the High Judicial and Prosecutorial Council, initiate comprehensive steps to address the influence of gender-based stereotypes and attitudes on court operations, procedures, and decision making. While members of the judiciary are faced with the difficult task of exercising legal impartiality despite their own opinions and socio-cultural environment, education and awareness, an open mind can mitigate these influences. Indeed, committed judicial institutions should promote, if not insist on, training and awareness efforts intended to address the influence of both explicit and implicit gender-based stereotypes and attitudes. Ultimately, the assurance of judicial impartiality requires confronting the reality that conscious views and prejudices as well as automatic and subconscious stereotypes and attitudes can and do affect the administration of justice.

170 Henk Aarts, Peter M. Gollwitzer, and Ran R. Hassin, "Goal contagion: Perceiving Is For Pursuing," *Journal of Personality and Social Psychology* 87, no. 1 (2004): 23-37.

171 See: The Supreme Court of Texas Gender Bias Task Force, "Guidelines for Practicing Gender Neutral Courtroom Procedures" (2004), https://www.supreme.courts.state.tx.us/rules/pdf/GenderNeutralCourtroomProcedures-NoCovers.pdf; or: Casey, Warren, Cheesman, and Elek, "Helping Courts Address Implicit Bias: Resources for Education"; or: Legal Momentum, "Legal Resource Kit: A Guide to Court Watching in Domestic Violence and Sexual Assault Cases"(2005), https://www.legalmomentum.org/sites/default/files/kits/courtwatching.pdf; and: Hecht Schafran and Winkler, "Operating a Task Force on Gender Bias in the Courts."

A number of additional recommendations were developed in response to specific findings from the research. These recommendations are complimentary to and consistent with a comprehensive training, education, and awareness program.

Use of Language in Formal versus Informal Settings

This research identified that formal titles are not always used in the courtroom. In addition, examples provided by both interviewees and questionnaire respondents suggest that gender-based endearments and diminutives are sometimes used in both the courtroom and the courthouse at large. It is recommended that BiH courts institutionalize the practice of using formal titles in the courtroom (a formal setting) and first names in the courthouse at large (an informal setting). BiH court professionals are encouraged to avoid informal communication that includes nicknames, diminutives, and endearments.

Use of Gender Neutral and Gender Specific Language

This research revealed that gender neutral and gender specific language is generally not institutionalized within BiH courts. Language has been identified as an important source of socio-cultural values and the law is also a reflection of socio-cultural and legal values. Thus, legal language can play an important role in either promulgating or mitigating gender bias. It is recommended that BiH courts use the "Methods for Overcoming Language Discrimination in Education, Media, and Legal Documents" handbook to eliminate the default use of male nouns and pronouns in legal documents, writing, and procedures.

Awareness of the Law on Gender Equality

Research results suggest that the legal practitioners who participated in this research are not well aware of the Law on Gender Equality in BiH. BiH courts, in collaboration with the HJPC and the Centres for Judicial and Prosecutorial Training, are encouraged to engage in training and awareness activities to increase awareness and promote policy implementation of the Law on Gender Equality.

In-house Sexual and Gender-Based Harassment Policies

This research suggests limited knowledge among legal practitioners in BiH of what constitutes sexual and gender-based harassment and how it can be harmful in the workplace. Moreover, it further suggests that legal practitioners do not generally recognize court rule books or codes of ethics as policy material that addresses sexual harassment. Thus, it is recommended that courts develop in-house sexual and gender-based harassment policies aimed at preventing and responding to sexual and gender-based harassment in the workplace (consistent with the mandate of the Law on Gender Equality).

Representation of Women in Leadership Roles within the BiH Judiciary

Existing data from the HJPC reveals that while women represent 64% of judicial appointments, they only represent 40% of leadership posts like court president. Similarly, women represent 48% of prosecutors and only 33% of chief prosecutors. The results of this research identified a number of gender-based stereotypes and attitudes held by legal practitioners about why this may be true. This research does not make the claim that gender-based stereotypes and attitudes, or gender bias, result in women not being appointed to leadership positions, but it is nonetheless recommended that an examination of the application and selection process be undertaken.

Child Custody Case Determination

A presumptive preference for mothers in cases of child custody was identified in this research. While placement with mothers may very well be in the best interest of the child in most cases, it is recommended that BiH courts avoid de facto legal decision making on the basis of gender stereotypes that conceive women as better parents than men. Rather, it is recommended that the BiH judiciary, or an appropriate body, develop a policy that outlines criteria for the determination of child custody cases.

Specialized Training for Prosecutors and Judges on Domestic Violence

Domestic violence is a complex legal and social problem that strongly intersects with gender and gender-based stereotypes. The results of this research suggest that legal practitioners may hold a number of gender-based stereotypes specific to domestic violence. This finding seems to be substantiated by other empirical research in BiH that has established that sanctions routinely do not meet minimum legal standards. It is recommended that judges and prosecutors who work on cases of domestic violence receive specialized training that incorporates contemporary empirical research outlining perpetrator and victim profiles, common types of domestic violence, effective judicial intervention strategies, and the harmful effects domestic violence has on children; in addition to reviewing the criminal-legal codes in BiH. It is also recommended that the Benchbook developed by a panel of nine judges from across BiH, "Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in BiH," be used as official guidance for all courts across BiH. These practices can help to build the capacity of judges and prosecutors who work on domestic violence cases to be able to avoid using harmful gender-based stereotypes and attitudes as a basis for determining guilt or identifying mitigating and aggravating factors for sentencing.

Specialized Training for Prosecutors and Judges on Sexual Violence

This research revealed a tendency among some legal practitioners to focus their attention on the behaviour and credibility of a victim – even after a conviction – in cases of rape and attempted rape. While examining victim and witness credibility is an important component of a thorough criminal investigation, criminal investigations and prosecutions should be focused on the alleged perpetrator of a crime. Moreover, similar to domestic violence, sexual violence represents a socio-cultural and legal topic that intersects with gender-based stereotypes and attitudes. It is therefore recommended that judges and prosecutors who work on cases of rape, attempted rape, and sexual assault (including against minors) receive specialized training that includes contemporary empirical research outlining perpetrator and victim profiles, common criminal patterns for sexual violence and sexual abuse, and effective judicial intervention strategies; in addition to reviewing the criminal-legal codes in BiH. Training of this type can build the capacity of judges and prosecutors who work on cases of this nature to be able to avoid employing damaging gender-based stereotypes and attitudes as a basis for determining guilt or identifying mitigating and aggravating factors for sentencing.

Use of Experts

While the data from this research on expert witnesses is limited, it nonetheless seems to suggest that female experts in certain categories may not be used to the same extent as male experts and that their representation in court may not reflect their representation in their professional fields more broadly. It is therefore recommended that courts update expert witness lists regularly and actively make an effort to avoid reinforcing existing gender-based stereotypes that might associate women with certain professions and men with other professions.

Material Support for Victims and Witnesses of Gender-based Violence

This research, in combination with other data, suggests that BiH courts are increasingly recognizing the importance of providing support to victims of gender-based violence during criminal prosecutions. Nonetheless, there are still indications of a general lack of infrastructure for the material support of victims. Thus, it is recommended that BiH courts make an effort to provide material support to victims and witnesses in order to facilitate their participation and so that ad hoc solutions are avoided.

In conclusion, this research is fundamentally aimed at determining whether gender-based stereotypes and attitudes are present among legal practitioners and members of the judiciary and can be linked to gender bias. These recommendations are aimed at raising awareness and questioning the assumed impartiality of BiH legal practitioners. While the diligence, expertise, and commitment of court professionals in BiH is not in question, substantive international research points to the need for legal practitioners to bring awareness to and confront their biases. The impact of gender is not always simply a matter of whether a judge considers gender in reaching a verdict, but "whether gender affected or was perceived to have affected the process by... having some impact on the players – lawyers, litigants, judges, clerks, magistrates, witnesses, jurors, and others." In this way, gender can influence and be manifested in judicial interpretation of otherwise neutral laws through a filter of unconscious values, beliefs, stereotypes, and assumptions.

Thus, judges and other legal practitioners must be conscious of their own biases and prejudices in order to be critical, self-reflective, and thoughtful about their decision making; and must adhere to (and in the case of judges, enforce) a fair and transparent court environment in which both women and men are expected to engage in their duties free from biased, partial, or prejudicial practices.

7. ANNEX A – ONLINE QUESTIONNAIRE

*The purpose of this questionnaire is to establish whether structural, procedural and/or operational differences exist within courtrooms and among judicial professionals. This research is **anonymous** and your identity will not be disclosed, nor will any information that could connect you to the answers you give. In order to complete this questionnaire you will need approximately 20 minutes.*

I. Structural Considerations

1. In the building where you work, are adequate bathrooms available for:

Men	Yes	No	Don't Know
Women	Yes	No	Don't Know
People with disabilities	Yes	No	Don't Know

2. If a witness (or juror) comes to court with children, will a court/judicial employee be asked to care for the children?

No	Don't Know	Yes. Please explain who will be asked to watch the children, indicating the sex and position of the person (e.g. female court secretary, or male administration staff)

3. Are you aware of policies or laws regarding discrimination or harassment used by the court?

No	Don't Know	Yes. Please explain what these policies address: sexual harassment, anti-discrimination (sex, religion, race, ethnicity, etc.), other?

4. If you answered Yes to Question 3, please indicate how you learned about these policies (e.g. through training, staff meetings, job orientation, or other).

5. Can victims/witnesses of gender-based violence (domestic violence, rape, human trafficking, etc.) testify via video link from another room?

   Yes Don't Know No. Please explain what happens in such cases (e.g. the case isreferred to another court, improvisation is used, the need for protection is neglected), if anything is done.

6. How difficult is it for you to advance in your career?

   Very difficult Not very difficult Not difficult at all

   I don't want to answer

7. If you answered in Question 6 that you consider your career advancement difficult, please mark all reasons why, or give an explanation under "other".

   - Family obligation
   - Court policies
   - Health reasons
   - Because I am a woman/man
   - Lack of training
   - Lack of interest
   - Other – please explain

8. Have you ever witnessed any of the following security measures at the courthouse, or experienced them personally?

   - Young men treated with more suspicion
   - During security check, women's handbags dumped out in public view
   - People with higher status allowed to pass through security without being checked
   - Body search performed by a person of the opposite sex

- None of the above
- Other – please explain

II. Operational Considerations

9. Have you ever witnessed jokes by court staff or judicial professionals about any of the following topics, or experienced them personally? Mark all types of jokes that you have witnessed, or mark "other."

   - Women
   - Men
   - Race/Ethnicity/Nationality
   - Socio-economic class or status
   - Physical appearance (whether a person is considered attractive or unattractive)
   - Age
   - None of the above
   - Other

10. If you marked an answer in Question 9, please briefly give examples of the types of jokes you marked, which you have heard in the courthouse.

11. Have you ever witnessed a colleague or a member of the court staff refer to someone by something other than their name or title (for example, honey, sweetheart, boy, girl, etc.), or experienced this yourself?

    Yes No Don't want to answer

12. Have you ever witnessed a member of the court refer to a court user, i.e. the witness, victim, defendant, or accused, by something other than their name or title (for example, child, woman, fool, dude, low life, druggy, loser, etc.)?

    Yes No Don't want to answer

13. Have you ever witnessed or personally experienced a judge criticizing a witness or court/judicial employee for not fulfilling their family obligations (for example, being a bad parent, wife, husband, or for working late or too much, etc.)?

    No Yes. Please explain who was criticized, noting their sex and position in the judiciary.

14. Have you ever witnessed or personally experienced a court colleague being given special attention or more time in court because of any of the following factors. Please mark all that apply, or write in another answer under "other."

    - Friendship
    - Geographical origin
    - Shared interest outside of work
    - Ethnicity/nationality
    - Family relations
    - Man/woman
    - I have never experienced any of these
    - Other – please explain

15. Have you ever been criticized by a colleague or judge on the basis of the following? Mark all that apply to you:

    - Because you are overly emotional
    - For being too aggressive
    - Because of the way you dress
    - Because of the way you speak
    - Because of your level of knowledge about a certain issue or topic
    - I have never experienced any of these

16. Has a court employee or judicial professional ever assumed that your position is lower than it is?

No	I don't want to answer	Yes. Please note who made this assumption, stating their position and sex.

17. Which groups are treated with less respect in the judicial system? Mark all groups of which you think this is true:

- Men
- Women
- Young staff
- Mature adults (elderly)
- People with disabilities
- People from ethnic/national minorities
- None of the above
- Other – please explain

III. Procedural Considerations

18. Please assess on the scale, how much each of the given factors are important in making the decision with which parent a minor child will live, i.e. which parent will be awarded custody. Assess the importance of each factor on the scale from "not important at all" to "very important."

- Whether the parent is the mother
- Which parent has been the primary caregiver
- Which parent earns more money
- Which parent has more education
- Whether the mother was the victim of domestic violence

- Whether the mother works outside the household
- Please state if you think there are other important factors

19. Which of the following factors are important in sentencing a defendant in a case of domestic violence? Assess the importance of all factors from "not important at all" to "very important."

- Whether the victim is female
- Whether the victim committed adultery
- Whether the victim and defendant have children
- Whether the victim is argumentative or difficult
- Whether the victim works outside the household
- The level of physical injury
- Whether a weapon was used
- Whether it was a first time incident
- Whether the defendant is apologetic
- Please state if you think there are other important factors

20. In which cases of domestic violence should a prison sentence be avoided? For each situation, indicate that a prison sentence should be avoided, not avoided, or that you are not sure.

- The defendant is the primary breadwinner (provider)
- The defendant has a moderately to very successful professional career
- It is a first offense
- There were no broken bones or other serious injuries
- The defendant is well-groomed and articulate
- Please state other cases in which prison time should be avoided, which are not offered above

21. Have you ever known a male defendant to be given a more severe sentence than a female defendant in a same/similar case?

    No I don't want to answer Yes. Please explain.

22. Please assess on the scale how important each of these factors are in establishing if a witness is credible. Assess the importance of all factors on the scale from "not important at all" to "very important."

    - Whether the witness is male
    - Whether the witness is female
    - Whether the witness is a family member
    - Whether the witness is educated
    - Whether the witness is employed
    - Whether the witness is emotional during their testimony
    - If not given above, please offer other factors that are important in establishing witness credibility

23. In cases of domestic violence, have you noted any of the following tactics used in court, based on the sex of the lawyer, prosecutor, or judge? Please mark all tactics that you've noted.

    - Justifying male behaviour based on cultural expectations
    - Arguing that a male defendant is under more pressure because of work-related stress
    - Arguing that a female lawyer or judge cannot understand the experience of a man
    - Discrediting the seriousness of the case if the perpetrator is a woman
    - Other – please explain

24. Statistical data indicates that men commit GBV more often than women. Please mark your level of agreement or disagreement with all of the following assertions.

- Men are naturally more prone to violence because of their sex
- Men are stronger
- Men are economically better-off
- Men have more responsibility and are more likely to feel stress and pressure
- Men are more likely to consume alcohol (and other drugs)
- Men are trying to be in charge of their families
- Men are also exposed to violence by women

IV. Personal Data

This research is completely anonymous and your name, position, or place of work will not be mentioned anywhere. The data will only be used for this research and it will be analysed jointly with other data obtained.

25. Age (year of birth) _____

26. Sex: ☐ female ☐ male

27. Your position:
    - Judge
    - Prosecutor
    - Lawyer
    - Court Associate
    - Other – please explain

28. How long have you been working in this profession (in your given position)? Input number of years and months.

29. What is your place of work (Municipal, Cantonal, Supreme, Constitutional, District, or Court of BiH; or Prosecution of BiH, FBiH, RS, or Brcko; District or Cantonal Prosecution; Law Practice; or other)? Please explain.

30. Are you a member of any professional associations? Please mark all that apply to you.

- Association of Judges of BiH
- Association of Judges of FBiH
- Association of Judges of RS
- Association of Prosecutors of BiH
- Association of Prosecutors of FBiH
- Association of Prosecutors of RS
- Association of Women Judges of BiH
- Law Chamber of FBiH
- Law Chamber of RS
- Other – please explain

v. Concluding Comments

31. Please spend a few minutes thinking about the answers you gave and, in the space provided, write whether there are behaviours or procedures related to sex, age, or ethnicity which discredit or negatively impact the work of the court.

Thank you for completing this questionnaire.

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