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THROUGH A FEMINIST LENS: A CRITICAL ANALYSIS OF DOMESTIC
VIOLENCE JUDGMENTS IN BOSNIA AND HERZEGOVINA

...Through analyses of context, perception, language, and gender roles, this study illustrates the painful breakdown in intimate relations burdened by violence. It may not be easy reading, but it is necessary literature in educating actors throughout the whole process of addressing domestic violence. Academic and professional communities, policymakers, and judicial office holders all need this text. In simple terms, the study is compulsory reading for legislators, persons protected by the law, and those who apply and interpret the law.

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

This manuscript is special for several reasons. While there has been some previous research raising and analysing these issues in Bosnia and Herzegovina, it has lacked deeper qualitative analysis in the framework of feminist epistemology and so-called gender de(con)struction. And although this research is focused on court judgements; given that inequality and various forms of discrimination, and their increasing intersection in case law, can be further reproduced but also changed, this text is not limited only to these judgements but also points to broader contexts and influences and the role of other actors often involved in processes before the courts...

Professor Zlatiborka Popov Momčinović
Associate Professor, Faculty of Philosophy,
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I am confident that the libraries of criminal departments within courts across Bosnia and Herzegovina need this publication; as even the most experienced judges require guidance and must be reminded to try domestic violence cases in the most timely and efficient manner, in proceedings set out in the law, in order to deliver proper and lawful judicial decisions that constitute an appropriate and purposeful criminal justice response to perpetrators of [domestic violence] - which poses a threat to society - and also to encourage victims of violence and send a message to the professional community and the general public.

Judge Marija Aničić-Zgonjanin
President of the District Court in Banja Luka



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Sarajevo, 2020

**THROUGH A FEMINIST LENS:
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DOMESTIC VIOLENCE JUDGMENTS
IN BOSNIA AND HERZEGOVINA**

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Acknowledgements

The Atlantic Initiative extends its gratitude to the Embassy of Sweden in Bosnia and Herzegovina for its financial support to the Gender and Justice Project, including for this publication, as well as to the US Departments of State and Justice for supporting translation of this publication.

Publisher

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Naslov originalnog djela: "Ponovno čitanje i analiza presuda za nasilje u porodici u Bosni i Hercegovini"



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Sarajevo, 2020



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EXCERPTS FROM REVIEWS

Beyond a doubt, this study has educational value, because it uses examples to show the extent to which cultural matrices and gender inequality influence the legal and judicial treatment of the domestic violence phenomenon. Through a feminist reading of judgments, analyzing the circumstances of each case, the authors shed some light on how specific cultural contexts influence the interpretation of legislative standards. Their analysis focuses on these standards and their interpretation, broader family contexts and the perpetrator-victim relationship, the credibility of statements valued by the court in concrete cases, the approach taken to the experiences of the perpetrator and victim... all of which results in a deeper insight into the social phenomenon of violence and the attitude of the courts toward this phenomenon.

... Through its analysis of context, perception, language, and gender, this study illustrates the painful breakdown [that occurs] in the cycle of intimate relations burdened by violence. It may not be easy reading, but it is necessary literature in the education of those who participate anywhere in the process of addressing domestic violence. In the academic and professional communities, and among policymakers and holders of judicial offices, this text is needed. In simple terms, this study should be compulsory reading for legislators... and those who apply and interpret the law in its application.

Professor Jasna Bakšić-Muftić
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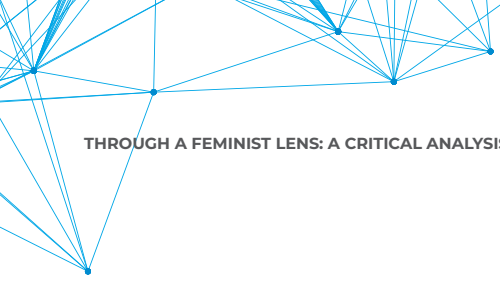
The selection of these seven judgments for re-reading, detailed analysis, objective criticism and well-reasoned evaluation is worthy of professional commendation, because this sample is appropriate and sufficient for this purpose, and the authors used it for genuine educational aims. This is where I see the essential value of the publication... I am confident that every library in the criminal departments of courts in Bosnia and Herzegovina needs this publication; it is even the most experienced judges who need it, as a concrete benchmark and a notice that they should try domestic violence cases in a timely and efficient manner, through proceedings laid down in the law and reaching proper judicial decisions based on the law, constituting an appropriate and purposeful criminal justice response to perpetrators of this criminal offence, who pose a threat to society, but also an encouraging message to victims of violence as well as to other professionals and the general public.

Judge Marija Aničić-Zgonjanin
President of the District Court in Banja Luka

This manuscript is valuable for several reasons, as there has been some research that has raised and analyzed these issues in Bosnia and Herzegovina, but there has been an evident lack of deeper, qualitative analysis in the framework of feminist epistemology and so-called gender de(con)struction. Although the research is focused on court judgments, considering that inequality and various forms of discrimination and their increasing intersection in case law can be reproduced further, yet also changed, it is not limited to judgments only but also points to the influence of a broader context and the role of other actors who are often involved in processes before the courts (such as the police, social workers, etc.). This makes this resource even more important, because it stimulates awareness raising, both of the general public and among different institutions that are not sufficiently mindful in their daily work and approach to this issue, which brings about new problems at the expense of solving the problems of domestic violence and violence against women.

... Using the method of [analyzing] selected examples, this study takes a qualitative and in-depth approach in order to uncover what really happens in the dynamics of violence (re)production...

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THROUGH A FEMINIST LENS: A CRITICAL ANALYSIS OF DOMESTIC VIOLENCE JUDGMENTS IN BOSNIA AND HERZEGOVINA

1.

THE NEED FOR A CRITICAL, FEMINIST ANALYSIS OF DOMESTIC VIOLENCE JUDGMENTS

*Majda Halilović, Nejra Veljan, and
Maida Ćehajić-Čampara**

INTRODUCTION

Since 2011, the Atlantic Initiative has worked through the Gender and Justice Project to develop resources and professional materials for judicial office holders in Bosnia and Herzegovina (BiH), to enhance the training of judges and prosecutors, identify the influence of gender bias within the judiciary, and document the perspectives of women who have experienced domestic violence. Educational resources designed to support members of the judiciary in addressing domestic violence have focused on the causes of violence, the consequences of domestic violence for children, and considerations for judges in assessing aggravating and mitigating factors at the sentencing stage. The Gender and Justice Project has also produced a Benchbook and Practice

* The authors are all members of the Atlantic Initiative team that has been responsible for implementing the Gender and Justice Project.

Guide on this subject. The *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* presents the dynamics and mechanisms of family violence and provides several recommendations to judges regarding their evaluation of aggravating and mitigating factors in these cases.² The complementary Practice Guide was later developed by 48 judges from across BiH, with facilitation by the Atlantic Initiative.³

Through the Gender and Justice Project, the development of this publication was undertaken by seven distinguished criminal judges, each with considerable experience adjudicating domestic violence cases in BiH.⁴ Their analysis of seven domestic violence judgments from different courts across the country is intended to highlight various forms of family violence and evaluate the adequacy of current court practices in BiH, as well as to fill some gaps and bring new perspective to legal understandings and treatment of the phenomenon of domestic violence.

THE NEED FOR CRITICAL ANALYSIS OF DOMESTIC VIOLENCE JUDGMENTS

Court judgments are important for victims, who often view them as a validation of their experience. This is why judgments that adequately punish a perpetrator, in which a judge clearly and unambiguously condemns domestic violence, can help a victim more successfully face the traumatic experiences of their past and build a future free of violence, with confidence in the justice system. On the other hand, judgments that appear to reduce the gravity of a domestic violence crime by applying lenient sanctions and failing to critically consider mitigating factors convey the message that the justice system does not attach appropriate weight to domestic violence offenses and/or offers sympathy to perpetrators.⁵ Therefore, the analyses in this text extend from the

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

3 Nenad Galić, ed., *Practice Guide: Domestic Violence* (Sarajevo: Atlantic Initiative, 2016).

4 The work of these judges was facilitated by the Atlantic Initiative, with support from the Embassy of the Kingdom of Sweden in Bosnia and Herzegovina.

5 Majda Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina* (Sarajevo: AI and DCAF, 2015).

assumption that court judgments have both legal and *social* functions, and that judgments are in fact a key tool of domestic violence prevention by sanctioning perpetrators and protecting victims.

Globally, in a majority of cases, women and girls constitute domestic violence victims and men are perpetrators.⁶ However, there are also cases of violence perpetrated against (elderly) parents, sometimes by women.⁷ The diversity of family violence is thus reflected in the seven judgments analyzed in this text, representing cases of intimate partner violence perpetrated against women by men, but also violence perpetrated against elderly parents by their children and violence perpetrated between partners in the presence of children. This analysis addresses court practices related to the assessment and sentencing of domestic violence, noting areas that must be improved.

Critical analyses of judgments and sentencing policies for domestic violence cases in BiH have mostly been undertaken so far by international organizations and NGOs.⁸ These publications have identified problems in court practices and have highlighted the tendency of courts to impose the minimum legal sanctions for perpetrators of domestic violence; however, a 2018 analysis of court judgments and the positions of members of the legal community in BiH indicates a trend toward changes in both court policy and practice, as well as an evolution in the perspectives of judicial office holders regarding the problem of domestic violence.⁹ This is somewhat reflected in sentencing policy as well, with fewer suspended sentences and more prison sentences being handed down by courts.

6 World Health Organization, *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (Geneva, 2013).

7 Maida Čehajić-čampara and Nejra Veljan, *Analiza sudskih presuda nasilja u porodici* (Sarajevo: Atlantic Initiative, 2018).

8 Aleksandra Petrić and Dženana Radončić, *Izveštaj i analiza praćenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj* (Banja Luka: Legal Aid Centre for Women and the Associated Women Foundation, 2014); OSCE, *Ensuring Accountability for Domestic Violence: An analysis of sentencing in domestic violence criminal proceedings in Bosnia and Herzegovina, with recommendations* (Sarajevo: OSCE Mission, 2011).

9 Čehajić-čampara and Veljan, *Analiza sudskih presuda nasilja u porodici*.

This is just one outcome of the work undertaken by the Atlantic Initiative through the Gender and Justice Project that has clarified the importance of engaging members of the judiciary themselves in the analysis of court practices. Indeed, numerous trainings addressing the treatment of domestic violence cases demand critical reflection on the part of judges, and the incorporation of lessons learned. This collegial approach to analyzing domestic violence judgments means that new knowledge and perspectives will be introduced into court practice from within the judiciary, and could eventually lead to new standards for the consideration of domestic violence cases that fully account for the complex dynamics of violence and the gender inequalities that impact families and society. The hope is that this analysis is useful to judges, academics, and non-governmental organizations that work to address domestic violence.

METHODOLOGY

A multidisciplinary qualitative approach was applied in the analysis of judgments in this text. The judges who undertook this analysis used several methods in order to achieve triangulation.¹⁰ First, they analyzed seven sample domestic violence judgments through a legislative lens, before evaluating the application of legal standards in each case. This was followed by a second discourse analysis, realized through a detailed re-reading of each judgment as well as the application of a feminist approach to content analysis that considers each judgment as an individual case study. This discourse analysis enabled a critical look at the use of language in judgments, including specific expressions relevant to domestic violence; clarified the ways in which prosecutors and judges develop arguments, and how they strengthen or weaken established divisions of power; and allowed the authors to assess the meaning of what is and is not included in judgments.¹¹ Further, this analysis and re-reading of judgments supported a deeper understanding of men's and women's

10 Holly Skodol Wilson and Sally A. Hutchinson, "Triangulation of Qualitative Methods: Heideggerian Hermeneutics and Grounded Theory," *Qualitative Research* 1, no. 2 (1991): 263–276.

11 Johanna Niemi-Kiesiläinen, Päivi Honkatukia, and Minna Ruuskanen, "Legal Texts as Discourse" in *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism*, edited by Eva-Maria Svensson, Åsa Gunnarsson, and Margaret Davies (Ashgate, 2007).

social roles, power and control dynamics in the context of domestic violence, and the influence of implicit and explicit gender bias in the courts.¹²

This analysis of judgments (case studies) was guided by the following questions:

- 1) How were legislative standards applied?
- 2) How much space is given to the statement of the victim and that of the perpetrator?
- 3) Did the court consider different forms of violence and the dynamics of violence?
- 4) Did the court consider risk factors?
- 5) Did the court consider the consequences of violence and how?
- 6) Did the court consider whether children were present?
- 7) Did the court recognize the degree of brutality present in relevant cases?
- 8) Did the court acknowledge the traumatic experiences of victims of violence?

The question of whether the application of mitigating or aggravating factors serves to adequately condemn, or justify, violence is also examined, as well as the message conveyed by courts through the sanctions imposed for this specific criminal offense.

The judges who analyzed the decisions featured in this text attended four workshops in 2017 and 2018 on different models of analysis, in which they had the opportunity to apply those methods to these selected cases. In one workshop, professor Rosemary Hunter of Queen Mary University in London – a participant in the Feminist Judgments Project in the UK – presented a methodology for the feminist re-writing of judgments.¹³ Key findings from these analyses were presented in workshops, and each analysis was then written in narrative form using a standard methodology. The Atlantic Initiative team supported both the analysis and writing processes, during which

12 Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Geneva: DCAF, 2014).

13 See: Rosemary Hunter, “Analysing Judgments from a Feminist Perspective,” paper presented at the National Training Day on Law, Gender and Sexuality: Sources and Methods in Socio-Legal Research, 2014.

professor Ivanka Marković from the Law Faculty of the University of Banja Luka provided academic-legal expertise.

THE INTERNATIONAL LEGAL FRAMEWORK

International standards affecting BiH are governed by legally binding international treaties and conventions on three levels: the Council of Europe, the United Nations, and the European Union.¹⁴ Standards arising from documents signed or ratified by a country are to be applied within.¹⁵ The significance of these documents lies in the fact that they have all strongly influenced the expansion of international law to encompass women's rights; and by signing the General Framework Agreement for Peace, BiH incorporated most of these international legal documents, in Annex IV. Additionally, as a member of the United Nations (UN) and the Council of Europe (CoE), BiH has a legal obligation to adequately apply the standards of international human rights protection adopted by these organizations. Some standards have also been grandfathered in from the Socialist Federal Republic of Yugoslavia.¹⁶

Laws in BiH have been harmonized with both the Constitution (Annex IV of the General Framework) and international standards, and the country continues on a path of transition clearly aimed at Euro-Atlantic integration. Hence, BiH is focused on aligning its laws with those in EU Member States, which recognize human rights as universal and applying to all equally and

14 International legal obligations arise from sources of international law. These sources, from which the rules of international law are developed, are laid down in Article 38(1) of the Statute of the International Court of Justice: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law between states in international relations (with few exceptions, these are binding for all states); the general principles of law recognized by civilized nations, such as "good faith" (also binding for all states); and judicial decisions, e.g. of international courts, and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. See: Čehajić-čampara and Veljan, *Analiza sudskih presuda nasilja u porodici*.

15 The Vienna Convention on the Law of Treaties codified existing customary international law relating to treaties. It was adopted in Vienna on 22 May 1969, and entered into force on 27 January 1980.

16 BiH adopted the former SFRY Law on the Conclusion and Enforcement of International Agreements, and laws relating to the ratification of international agreements and treaties, thereby making all international treaties a part of the legal system of BiH.

indiscriminately, as vested, indivisible, and inter-dependent (i.e., one cannot respect some human rights, and neglect others), and as intended to protect individuals and groups from activities that threaten human dignity and fundamental freedoms.¹⁷

The Universal Declaration of Human Rights (UN)

The Universal Declaration of Human Rights stipulates that states are responsible for the protection of human rights and the establishment of legal mechanisms that prevent and ensure the sanctioning of persons who violate them.¹⁸

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Declaration interprets the responsibility of states broadly; asserting that states are responsible for acts perpetrated by individuals if the state has failed to provide a sanction based on the rule of law or to take measures to prevent the consequences of those acts, and thus fails to provide access to justice.¹⁹ According to this principle, BiH can be held responsible for human rights violations by an individual if it does not take action to prevent this kind of violation and ensure protection and compensation to victims with due diligence.²⁰

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- 17 Foundational international documents that protect human rights include: The United Nations Charter, the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights.
- 18 The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948 at the Palais de Chaillot in Paris (A/RES/217, 10 December 1948).
- 19 See: International Law Commission, Draft articles on elements of an internationally wrongful act of a State, 2001, Article 2. Comments to these draft articles clearly indicate that the responsibility for an action or omission includes “fault, culpability, negligence or want of due diligence.” On that, see: Report of the International Law Commission on the work of its fifty-third session (A/56/10), 34. For consideration of the application of the due diligence principle, see: Robert P. Barnidge, Jr., “The Due Diligence Principle Under International Law,” *International Community Law Review* 8, no. 1 (2006): 81–121 (as cited in OSCE, *Ensuring Accountability for Domestic Violence*).
- 20 For example, see: UN General Assembly Resolution 60/147, 21 March 2006, “the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” Annex 4.

Convention on the Elimination of All Forms of Discrimination against Women

With the aim to achieve greater unity between states, and with the view that the preservation and development of basic human rights and freedoms contributes toward that objective, the CoE adopted the Convention on the Protection of Human Rights and Fundamental Freedoms in 1950. Then, in 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted. CEDAW was the first document to address the problem of violence against women, and it referred to the Universal Declaration of Human Rights. In 1989, in order to strengthen CEDAW as an instrument for ensuring the human rights of women, the Committee on the Elimination of Discrimination Against Women published “General Recommendation No. 12: Violence against women,” which requires State parties to the Convention to act to protect women against violence of any kind occurring within the family, at the workplace, or in any other area of social life.²¹ Then, in “General recommendation No. 19: Violence against women” of 1992, the Committee clarified further that, although it is not mentioned explicitly in CEDAW, domestic violence is encompassed by the Convention.²² It thus applies to actions that lead to physical, psychological, and/or sexual injury, and threats of these actions, as well as other forms of violence against women, such as economic violence.

Judgments of the European Court of Human Rights

International documents have been crucial to a greater acknowledgement and understanding of violence against women as a basic violation of human rights that includes discrimination against women. But apart from the texts referred to in the Constitution of BiH, other documents have also helped define the legislative framework for violence against women and domestic violence in BiH; for example, the non-binding international standard set by the 1993 UN Declaration on the Elimination of Violence against Women, which

21 General Recommendation No. 12 is available online at: <https://www.refworld.org/docid/52d927444.html> (accessed January 2020).

22 General Recommendation No. 19 is available online at: <https://www.refworld.org/docid/52d920c54.html> (accessed January 2020). This Recommendation stipulates that “discrimination” includes gender-based violence and asserts the due diligence standard that all parties are obligated to “take appropriate and effective measures to overcome all forms of gender-based violence.”

condemns any kind of violence against women and girls.²³ The European Court of Human Rights (ECtHR) has issued relevant judgments in this context as well. The Court functions within the CoE, on the premise that “respect for private or family life” binds the states to make this protection instrument more effective.²⁴ In 2009, the Court first issued a judgment denoting gender-based violence as a form of discrimination. In this and other subsequent judgments, the Court has taken the stance that states are required to ensure efficient access to justice for victims of domestic violence.²⁵ Accordingly, BiH and other signatories to the European Convention on the Protection of Human Rights and Fundamental Freedoms must incorporate decisions of the Court into national legislation or court practice.

Convention on preventing and combating violence against women and domestic violence

The realization of a *de jure* and *de facto* equality between women and men constitutes the crucial element in the prevention of violence against women. Referring to international documents that govern human rights, the CoE thus adopted the first document directly addressing domestic violence as such, in the 2011 Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).²⁶ The Istanbul

23 UN General Assembly, Declaration on the Elimination of Violence against Women (A/RES/48/104), 20 December 1993. Also see: UN General Assembly, Intensification of efforts to eliminate all forms of violence against women (A/RES/61/143), 19 December 2006.

24 The ECtHR was established in 1959 by the European Convention on the Protection of Human Rights and Fundamental Freedoms.

25 For example, see: *Civek v. Turkey* and *MG v. Turkey*.

26 The Convention on preventing and combating violence against women and domestic violence was adopted in reference to the Convention on the Protection of Human Rights and Fundamental Freedoms (ETS no. 5, 1950) and its Protocols; the European Social Charter (ETS no. 35, 1961, revised in 1996, ETS no. 163); the Council of Europe Convention on Action against Trafficking in Human Beings (ETS no. 197, 2005) and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS no. 201, 2007); the Covenant on Civil and Political Rights (1966); the Covenant on Economic, Social and Cultural Rights (1966); the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979); General Recommendation 19 of CEDAW Committee on violence against women; the UN Convention on the Rights of the Child (1989) and Optional Protocols to the Convention (2000); the UN Convention on the Rights of Persons with Disabilities (2006); and the following recommendations of the Committee of Ministers to Council of Europe member States: Recommendation Rec (2002)5 on the protection of women against violence, Recommendation

Convention defines domestic violence, is the first legally binding CoE document in the domain of preventing and combating violence against women, and prescribes a path to implementation.

As a signatory to the Istanbul Convention, BiH is required to take the legal action necessary to conduct investigations and provide for compensation of damages for acts covered by the Convention and perpetrated by non-state actors.²⁷ The Convention emphasizes that all forms of violence against women should be treated as criminal offenses punishable by law. Chapter five of the Convention addresses substantive law, specifying the categories of gender-based violence that are subject to criminal liability, in addition to physical violence. These include psychological violence, which comprises threats or coercion that impair a victim's psychological integrity; stalking, which constitutes threatening behavior that causes a victim to fear for their safety; and sexual violence, including rape, which involves any non-consensual act of a sexual nature. Causing another person to engage in such acts is also considered sexual violence. Economic violence is another very important category of gender-based violence. Though it manifests in a different way than other forms, it illustrates how financial power can be leveraged by a perpetrator to control a victim by governing their access to money and thus preventing basic existential choice-making.

The Istanbul Convention also calls on state signatories to implement and harmonize institutional and legal frameworks with contemporary international standards. As the most extensive international document condemning violence based on gender and sexual identity, it lays a foundation for the introduction of new criminal offenses, more efficient prevention of violence, better protection of victims, and more effective prosecution of perpetrators. For the purposes of achieving a meaningful implementation of the Convention, it calls for active participation and a multidisciplinary approach among all relevant public

CM/Rec (2007)17 on gender equality standards and mechanisms, Recommendation CM/Rec (2010)10 on the role of women and men in conflict prevention and resolution and in peace building, and other relevant recommendations.

27 See: Article 5 of the Istanbul Convention.

institutions and civil society organizations, through cooperation defined by rules and protocols.

THE NATIONAL LEGAL FRAMEWORK²⁸

Criminal legislation reform initiated in BiH in 2000 resulted in the criminalization of domestic violence, first in the Republika Srpska (RS)²⁹ and then in the Federation of BiH (FBiH)³⁰ and the Brčko District (BD).³¹ These reforms were aimed at sanctioning and preventing various forms of family violence, whether marital violence or violence against other members of a shared household, and including violence that is not just physical but psychological, economic, and sexual. Article 4 of the FBiH Family Law³² and Article 3 of BD Family Law³³ prohibit abusive behavior within the family, defining abusive behavior as any violation of physical or psychological integrity within the meaning of Article 4 of the Law on Gender Equality in BiH. Adopted in 2003, the Law on Gender Equality also criminalized gender-based violence, including violence within a family or household.³⁴ These important legislative interventions have brought gender-based violence out from the private sphere, have recognized this kind of violence as a criminal-social phenomenon, and have made state institutions responsible for its sanctioning and prevention.

For the purpose of providing urgent protection to domestic violence victims, a Law on Protection from Domestic Violence was also adopted in both the FBiH³⁵ and the RS,³⁶ in each case obliging professionals in healthcare, social

28 This section offers only a brief discussion of the legal framework governing domestic violence crimes in BiH; a more detailed overview of this legal framework will be presented in the analyses that follow in the body of the text.

29 Official Gazette of the RS, 22/00.

30 Criminal Code of the FBiH (Official Gazette of the FBiH 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, and 76/14).

31 Criminal Code of the BD BiH (Official Gazette of the BD BiH, 6/05, 21/10, and 9/13).

32 Family Law of the Federation of BiH (Official Gazette of the FBiH, 31/14).

33 Family Law of the Brčko District of BiH (Official Gazette of the BD BiH, 3/07).

34 Law on Gender Equality in Bosnia and Herzegovina (Official Gazette of BiH, 16/03 and 102/09).

35 Law on Protection from Domestic Violence of the FBiH (Official Gazette of the FBiH, 22/05 and 51/06).

36 Law on Protection from Domestic Violence in the RS (Official Gazette of the RS, 102/12, 108/13, and 72/15).

protection, education, and in other institutions and bodies to report domestic violence, and stipulating protection measures and misdemeanor sanctions intended to prevent further perpetration. These laws emphasize protection for the victim and treatment for the perpetrator.

PREVIOUS ANALYSIS OF COURT PRACTICE IN DOMESTIC VIOLENCE CASES IN BIH

A number of approaches have been applied in BiH to improve judicial responses to domestic violence, including the facilitation of trainings for judges and prosecutors, the strengthening of a multidisciplinary approach to victim support, the development of materials and resources for judicial professionals, analyses of judgments, and trial monitoring.³⁷ Still, court practice lags behind these efforts and remains dominated by the imposition of suspended sentences, the lenient qualification of the crime of domestic violence, an unwillingness to prosecute domestic violence in concurrence with other criminal offenses, and the frequent application of sentences at or below the statutory minimum.³⁸

Research has indicated that sanctioning practices in cases of domestic violence are unsatisfactory in BiH, which raises the question of whether sanctions can achieve general and special prevention purposes.³⁹ Recognizing the importance of improving judicial response to domestic violence and enhancing the consistency of court practices, a judicial Benchbook was developed in 2012 by judges in BiH, under the auspices of the Gender and Justice Project. Designed to improve judicial practice by examining the circumstances and risk factors that judges must often weigh, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* addresses

37 For more, see: Maida Ćehajić-Čampara and Nejra Veljan, *Analiza sudske prakse u predmetima nasilja u porodici u Bosni i Hercegovini* (Atlantic Initiative, 2018).

38 Petrić and Radončić, *Izveštaj i analiza praćenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj*; and Ćehajić-Čampara and Veljan, *Analiza sudske prakse u predmetima nasilja u porodici u Bosni i Hercegovini*.

39 OSCE, *Ensuring Accountability for Domestic Violence*; and Petrić and Radončić, *Izveštaj i analiza praćenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj*.

factors such as the genuine or false remorse of perpetrators, the presence of children, strangulation, sexual abuse of a victim, the use of weapons, stalking, and the social status of a perpetrator in the evaluation of domestic violence cases.⁴⁰ The Benchbook has been accepted by judges as a valuable resource because it provides them with detailed insight into the dynamics, causes, and consequences of domestic violence, and provides recommendations to guide their assessment of mitigating and aggravating factors within context of these complex dynamics.

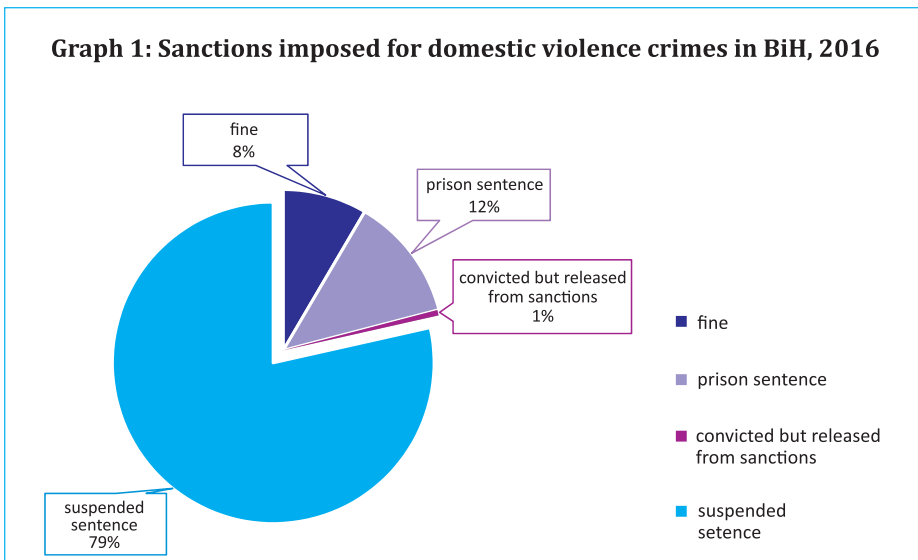
In 2017, the Atlantic Initiative carried out a comprehensive analysis to determine if and how the Benchbook and other resources for judicial professionals were being applied in court practice, and to evaluate any changes in the prosecution of domestic violence cases in the preceding four years.⁴¹ The analysis sought primarily to establish whether the Benchbook had influenced the work of judges. Secondly, it aimed to assess whether the trainings conducted with judges on the topic of domestic violence had any clear effect on the quality of the judgments they issued in these cases.

A number of remaining problems in court practice were identified in this 2017 analysis – which included 150 domestic violence cases from 2016, consisting of 92 final first-instance judgments, 13 second-instance judgments, and 45 penal orders. Judges, it was found, were taking an uncritical approach to decision making, especially in preliminary hearings when confirming indictments, and were imposing minimum or below-minimum sanctions and a high rate of suspended sentences, even in cases involving a qualified form of domestic violence. On top of this, the analysis revealed that suspended sentences were not being revoked when an offense was repeated during the probationary period, and mitigating and aggravating factors were evaluated generically in the sentencing stage, with no consideration for the specificity of domestic violence crimes.

40 Ibid.

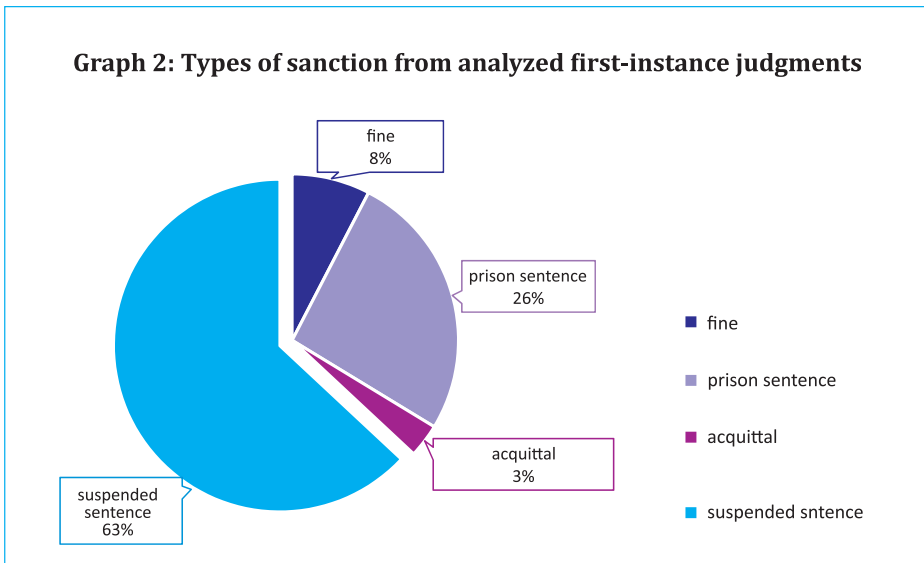
41 Čehajić-Čampara and Veljan, *Analiza sudske prakse u predmetima nasilja u porodici u Bosni i Hercegovini*.

The judicial response to any crime plays a very important role in the life of both the victim and the perpetrator, constituting either condemnation or tolerance of certain behaviors by the community. A judgment, its contents, the sanctions it imposes, and the reasoning it puts forth play a particularly crucial role for victims seeking to obtain legal satisfaction for their suffering. Yet, in 2016, data from the High Judicial and Prosecutorial Council of BiH indicates that out of a total of 1,636 reported cases of domestic violence in BiH, 1,231 investigations were ordered, leading to 734 results of non-initiation or suspension and the issuance of just 731 indictments, resulting in mostly suspended sentences (See Graph 1).⁴² In other words, *less than half* of the domestic violence cases reported in BiH are prosecuted. Given that domestic violence is under-reported overall, when combined with the application of minimum sanctions, this means that relatively few domestic abusers face even mild punishment for their crimes.



42 High Judicial and Prosecutorial Council of BiH, Decision No. 01-07-10-28-39/2018 approving access to statistical information about the number of judgments for the criminal offense of domestic violence (Article 222 of CC FBiH and Article 208 of CC RS), 2016.

The analysis undertaken in 2017 by the Atlantic Initiative, which used a smaller case sample, found a somewhat higher application of imprisonment and a somewhat lower application of suspended sentences, with 24 prison sentences (25.8%), 58 suspended sentences (62.4%), 7 fines (7.5%), and 3 acquittals (4.3%) imposed in these cases (See Graph 2).⁴³ In that analysis, only one second-instance judgment was reversed and all others were upheld, with prison sentences confirmed in eight cases.⁴⁴



The most stringent prison sentence imposed in these cases was just 2 years and 10 months, and the shortest was 1 month. The most frequent term of imprisonment was 3 months, applied in 50% of cases in which a prison term was imposed. Where suspended sentences were imposed, the duration of probationary periods ranged from two years in 31 cases (53%), to a year-and-a-half in 11 cases (19%), to one year in 16 cases (28%). When fines were imposed, the amount was BAM 2,000 in a single case and BAM 500 in the remaining cases.

43 Čehajić-Čampara and Veljan, *Analiza sudske prakse u predmetima nasilja u porodici u Bosni i Hercegovini*.

44 Ibid.

Importantly, the 2017 analysis indicated that suspended sentences prevailed even in cases for which the sanction was not commensurate with the severity of the offense. It also found that accused persons were afforded more space than injured parties in the reasoning of court judgments, where the positive attributes of defendants were often highlighted with references to his status as a family man, a hard worker, or a reliable neighbor. In one case, the accused was not only characterized in this way, but was juxtaposed against a “*psychologically distraught and unstable wife who takes anti-anxiety medications and borrows money behind his back.*”⁴⁵ In some judgements, the court’s reasoning only briefly summarized a short statement by the injured party, often painted with a broad brush and lacking details of the incident in question. This approach limits full insight into the perpetrated offense, because one can draw so little from the resulting judgment about factors such as the duration of violence (was it continuous or isolated?), the severity of consequences for the victim, the types of violence (was physical violence accompanied by psychological, economic, or sexual violence?), and whether the perpetrator was particularly persistent in perpetrating the offense.

A failure to consider the long-term dynamics of domestic violence and the threat faced by a victim over time can have deep and lasting consequences for a victim, precisely because an appropriate assessment of these consequences is lacking. Moreover, research indicates that women who have been exposed to the threat of weapons for a long duration are twenty times more likely to be killed.⁴⁶ For this reason, it is vital that judges work to develop best practices and share examples of complete and concrete responses to cases of domestic violence. The detailed and informed analysis of previous domestic violence judgments supports this effort, and in the following chapters, critical analyses of selected judgments produce recommendations as to what should and should not be included in domestic violence judgments in order for them to fulfill their intended purpose.

45 See: WHAT COURT? Judgment No. 56 0 K 049899 16 K.

46 Ross Macmillan and Catherine Kruttschnitt, *Patterns of Violence Against Women: Risk Factors and Consequences*, No. NCJ 20836 (Washington, DC: US Department of Justice, 2005).

2.

IDENTIFYING MISOGYNY: A FEMINIST APPROACH TO JUSTICE

*Adisa Zahiragić**

INTRODUCTION

On 31 January 2017, a judgment was issued by the first-instance court in the Republika Srpska (RS) against a defendant who committed the criminal offense of domestic violence referred to in Article 208(3), read in conjunction with Article 208(1), of the Criminal Code of the RS (CC RS).⁴⁷ The event in question occurred on 25 September 2016. The punishment for this offense, stipulated by the Code, is a prison sentence of two to ten years.

The defendant in this case was found guilty and sentenced to a cumulative sentence of two years and two months in prison, including a revoked suspended sentence. Following an appeal filed to the second-instance court, this sentence of *two years imprisonment* for the criminal offense of *domestic violence* was confirmed on 23 March 2017.

* Judge of the Cantonal Court in Sarajevo.

⁴⁷ Official Gazette of the RS, 73/10.

INFORMATION FROM THE JUDGMENT

Under the influence of alcohol (0.93 g/kg), in the family house and in the presence of two minor children, without any cause or reason, the defendant insulted his wife using various derogatory terms and physically attacked her and pulled her hair, dragging her down to the floor. Having pushed her down onto the tile floor of the kitchen, he continued beating her with his hands and kicking her with his feet, all over her body and near her right eye, when their daughter came to help her mother. The defendant inflicted several bodily injuries and continued to yell and insult both his wife and daughter, after which the two fled to another room. The defendant continued yelling, “I hope you get cancer; I hope they cut off your breast like they did to your late mother; I hope they cut everything out of you...” The defendant banged on the door of the room the victims were in, and strewed trash and food around the house and onto the door. When the daughter came out from the room, into the kitchen, he insulted her again. He also hit her on the nape of her neck and spat on her, so she escaped back to the bedroom.

The first-instance court revoked the defendant’s prior suspended sentence for the same criminal offense, committed one year before the event in question, and imposed a prison sentence of four months. For the new criminal offense, the court imposed a sentence of two years in prison, making the final cumulative sentence two years and two months.

For the purpose of this analysis, the reasoning of the judgment is relevant; i.e., the way in which the judge explained the facts viewed as germane to this specific case of domestic violence. A theoretical and legal analysis, a discourse analysis, and other methods of analysis are also applied to this judgment to re-imagine it from a feminist perspective.⁴⁸

48 Rosemary Hunter and Danielle Tyson, “The Implementation of Feminist Law Reforms: The Case of Post-provocation Sentencing,” *Social and Legal Studies* 26, no. 2 (2016): 129–615; Rosemary Hunter, “The Feminist Judgments Project: Legal Fiction as Critique and Praxis,” *International Critical Thought* 5, no. 4 (2015): 501–508.

WHY A FEMINIST ANALYSIS?

A feminist analysis assumes a completely different view of the victim and injured party, with a focus on the rights of the victim in criminal proceedings and on the way language is used in describing facts. Calls for a feminist perspective in the analysis of legal judgments have emerged as a form of protest against dominant patriarchal structures, and feminist analysis represents an entirely new approach to understanding domestic violence judgments, without going beyond the existing national legal framework. In the context of domestic violence, a legal analysis from a feminist perspective considers the causes and facts that led to domestic violence. This requires an understanding of socialization, and concepts like gender and sex, as such an analysis addresses gender differences as well as the stereotypes assigned to women (such as passive dependence) and men (such as aggressiveness). As Julia A. Sherman noted, for example, women are born female but become “feminine” under the influence of culture.⁴⁹

Domestic violence, though long viewed as a private matter, is inseparable from the dominant gender stereotypes in society at large. Women are socialized to be gentle, obedient, passive, and empathic, and to take on both child-rearing and the burden of maintaining their marriages. Men are conditioned to ascribe to a concept of masculinity that celebrates aggressiveness, independence, dominance, and taking on roles related to strength and power. This conditioning is reflected in the sociological definition of domestic violence: “a systematic pattern of power and control exerted by one person against another, involving a variety of physical and non-physical tactics of abuse and coercion.”⁵⁰

In the case analyzed here, these stereotypes also appear to have played a role in decision making by the judge. While good practice was adhered to as far as

49 Julia A. Sherman, “Some Psychological ‘Facts’ About Women: Will the Real Ms. Please Stand Up?” in *Beyond Intellectual Sexism, A New Woman, A New Reality*, edited by J. I. Roberts (New York: David McKay Company, 1976).

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

the criminal sanction for domestic violence, the judgment nonetheless demonstrates how the implicit gender bias of a judge can impact a case, particularly because this judge allowed the defendant to repeat all the facts and circumstances of the incident during the trial, reiterating derogatory terms and curses, and thereby retraumatizing the victims (his wife and their underage daughter).

NORMATIVE ANALYSIS

A normative and legal analysis focuses on court practice, legal provisions, legal sources, and relevant legal doctrine. In the given case, the court's explanation indicates that the legal doctrine applied in the context of domestic violence reflects similar cases adjudicated in BiH. Thus, it does constitute a positive example of relevant court practice. The legal qualification of the criminal offense of domestic violence was duly applied and the urgency requirement was met (six months passed from perpetration of the offense to final judgment).⁵¹ The judgment also outlines the reasoning of the court related to decisive facts arising from the adduced evidence, which led to its conclusion regarding the culpability of the defendant. The evidence is relevant and carefully considered; meaning, the conclusion reached by the judge was based on an assessment of subjective evidence – witness statements from the victims, material evidence such as police documentation of the criminal offense, and the medical records of the injured parties.

In deciding on the sanction and in considering aggravating and mitigating factors, the court valued the defendant's two prior convictions as aggravating, one of which was for the same criminal offense committed against the same injured party within a short period of time. On the other hand, the defendant's poor financial standing was assessed as a mitigating factor. Still, the court emphasized in the judgment that the defendant's status as a married man with children was *not* valued as mitigating, given that both his wife and daughter suffered as a result of his irresponsible and violent behavior toward

51 The legal qualification, depending on the stipulated criminal offense, may take several forms (e.g., basic and severe).

them. This is a positive example of the assessment of factors that impact decision making on sanctions, and departs from the standard practice of many judges in BiH who apply stereotypes in assessing mitigating and aggravating factors or assess these factors without any specificity to the criminal offense in question.

REPLICATING THE DYNAMICS OF VIOLENCE IN THE COURTROOM

The judgment in this case allots considerable space to the statement and testimony of the defendant, who attempted to portray his wife as irresponsible, conflict-prone, and psychologically imbalanced, and thus to blame for the defendant's previous time spent in custody. This is typical behavior in perpetrators of systematic domestic violence, who often use any opportunity to convince both their partner-victim and others that she is psychologically unstable, with the aim to undermine her sense of self and her credibility.⁵² Therefore, the question arises as to how much space should be granted in judgments to unfounded statements of this nature, and whether allowing them constitutes a continuation of the trauma and dominance imposed by the perpetrator on the victim. For example, this judgment included statements such as:

“The defendant stated that he made no trouble while in custody, that he threatened no one, that the woman (referring to the injured party) takes four types of medication, that she does nothing but sleep, that she is unable to feed the children, that the children need him to feed them, and that he is charged with things that are not based in common sense. In addition, he stated that the injured party could not keep a job for [more than] 7 days, that she borrowed BAM 2000 from a neighbor he does not know, that he is the one who keeps up relations with the neighbors, and that he wants to prove in these proceedings he is not a monster. During the

52 See: Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*. This behavior is often referred to as “gaslighting” and is intended to sow doubt in an individual and the people around them about their perception or sense of reality.

proceedings, he kept transferring the blame on to the injured party and stating that he has been discriminated against.”

In a majority of judgments in BiH, as a matter of fulfilling the right to a defense, a particular importance is assigned to the statements of the defendant; but the same significance is not given to the statements of the injured party. Irrespective of the fact that criminal process in BiH does not provide clarity as to the position of the injured party in court and does not define the term “victim,” the courts are not prevented from exercising equal treatment of the defendant and injured party, especially when describing the facts in judgments. In the given case, the court’s consideration of the injured party’s statement accounts for only a brief portion of the judgment, and lacks details of the event or the continuous violence perpetrated by the defendant against his family.

The judgment in this case states merely that the injured party sought punishment for the defendant and that she filed a compensation claim. The court then concludes, on the basis of statements made by the victims (the wife and daughter), that the defendant did commit the actions with which he is charged. The judgment quotes the “operative part” of these statements, but the injured parties appear to have played a minimal role in the criminal proceedings.

The attitude of a court toward parties in criminal proceedings is visible not only in the sanction imposed on a defendant. In criminal offenses such as these, the statements of the defendant and injured party should be given clear equal weight in the judgment, reflecting parity by the court in considering the case. The message the court sends to the public is very important, given that courts, i.e. judges, represent the justice sector. Judges must therefore be aware that they are constantly under public scrutiny, both with respect to their independence and impartiality during a trial and with respect to the attitude of the court toward a given criminal offense, as conveyed in a judgment.

In the case analyzed here, the judgment also lacks any explanation, and indicates no consideration during the course of proceedings, of the assault on the child in this family. Yet, her father:

“...threw all the food from the fridge at the door, but left a pot of beans in front of the door; after a while, the underage daughter took the pot and headed towards the kitchen to eat; the defendant approached her calling out the derogatory names, “bitch, whore,” and hit her on the head with an open palm, after which he started spitting on her and she fled to the bedroom again...”

Due to the importance of judgments, training for judges related to domestic violence cases must offer them new approaches to writing judgments, and must improve their skill in evaluating the statements of victims in contrast to those of perpetrators. Aggravating and mitigating factors should also be assessed pursuant to the *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*, with appropriate explanation.⁵³ For victims, judgments and everything they contain hold particular value, and judges play a key role in validating the experiences of victims. Thus, a judgment that unambiguously condemns violence sends the message to a victim that they did the right thing by pursuing criminal proceedings, and that the system protects and believes victims; while also conveying to perpetrators that violence will not be tolerated.

CRITICAL DISCOURSE ANALYSIS

When it comes to the sanctions imposed and the assessment of mitigating and aggravating factors in this case, this judgment illustrates good court practice. Still, a discourse analysis and re-reading of the judgment uncover indications of discrimination against the victim. Specifically, discourse analysis reveals that the communication and presentation of the parties were unequal in court – meaning, they did not have equal opportunities to control the context, nor did they participate equally in terms of the time they spoke, etc.

53 Galić and Huhtanen.

These parties were also socially unequal, in that one had power over the other.⁵⁴ This manifests in numerous, usually subtle forms of abuse of social power, where the key means for dominance is language. This is the subject of critical discourse analysis.

The judge does not display a clear understanding of gender and sex in this judgment, which gives no significance to the fact that the defendant's use of physical force and exertions of power with his wife and daughter could indicate the existence of other similar gender dynamics in the family (i.e., *Has the defendant exerted dominance by making important life decisions for family members? What is the psychological state of the injured party? How has her economic position been impacted? Was the violence continuous, and for how long?*). The court viewed its allotment of space to the parties sufficiently balanced in this case – especially given that the injured party testified – because the judgment included her statement and thus granted respect to her voice and its comparative significance to that of the defendant. Yet, in reading the judgment, it is clear that considerable space was given to paraphrasing statements of the defendant that characterized the psychological state of his wife, thereby highlighting his assertions that she was always medicated, sleeping, and negligent toward the family. The court also repeated his statements that no grounds existed to portray him as violent and that his neighbors all knew him to be kind.

These statements by the defendant about his wife (the injured party) are enough to conclude that gender roles within this family are stereotypically “traditional” and patriarchal, but the court does not comment on these dynamics or question the validity of the defendant's claims, summarizing uncritically that he “*emphasized that the injured party does not have a job, that she is heavily medicated all the time, and that she does nothing but sleep while he works the entire summer*” and that he “*denies any act and states that his wife pulled his hair...*”

54 This power can be direct, wherein a person controls the actions of another (e.g., through orders or prohibitions), or indirect, wherein a “powerholder” influences the opinion of another using language (persuasion, manipulation, etc.).

The fact that the defendant in this case was given the opportunity to describe behaviors of the injured party to the court that related in no way to the criminal offense in question also hints at the judge's understanding of gender by implying that *the word of a man holds more weight and power than that of a woman, even when he is the defendant-perpetrator*. Conversely, the voice of the injured party was not adequately amplified in the courtroom or in the court's explanation in the judgment. It is noteworthy that the victim in this case – the defendant's wife – testified in court, most likely describing the defendant's behavior in some detail; yet, this testimony is barely visible in the judgment, despite partly facilitating the conviction.

In many domestic violence cases, victims withdraw their testimony pursuant to provisions of the law that allow for not testifying against a family member. Regardless of the fact that the victim has provided a statement during the investigation stage, this withdrawal can lead to acquittal or to dismissal by the prosecution. It seems that the statements of victims in these criminal cases constitute not just key evidence but the *only* relevant evidence valued by courts, while other indirect evidence (material evidence, witness statements, etc.) is granted much less importance. In fact, comments made by judges at trainings in this field reveal a near consensus that acquittal is justified when victims withdraw testimony or, as often happens, when they defend perpetrators in court after having reconciled with them between the time of the offense and the time of the trial. In this latter scenario, judges have expressed the belief that it is inappropriate for the court to impact family relations with a conviction, even when conviction is possible on the evidence presented. This ignores the tactics employed by defendants in court to portray themselves in the best light, as better than the criminal acts with which they are charged, including by blaming the victim or claiming to have merely reacted to the behavior of the victim.

How gender roles operate in society is complex, and it can be difficult to understand the ways in which people behave according to habits and learned behavioral models, given that most of us are rarely aware of the consequences of our conditioning. This is true of perpetrators of violence and victims of violence as well, and is among the reasons women's courts have emerged

across the world as places where women victims can tell their stories of violence with the assumption that these stories will be understood in the context of gender.⁵⁵ The judiciary in BiH is unable to satisfy the needs of victims in this way, because when they tell their stories, the picture painted by victims is not always seen clearly by judges who lack knowledge of the reasons for and dynamics of violence.⁵⁶

When viewed in contrast to the thinking and conclusions of gender experts such as Daša Duhaček, the court practices described above and the attitudes of judges who support acquittal in cases where victims recant testimony indicate the degree to which the understanding of gender roles in Bosnian society remains deeply tied to traditional stereotypes, working in favor of men while nonetheless positioning women as the “guardians” of these roles. This is reflected by the fact that an absolute majority of women among judges in BiH has not given rise to a heightened awareness within the judiciary of the dynamics of domestic violence or of gender more broadly.⁵⁷

As to the application of the criminal procedure code, it is noticeable in this judgment that the court worked primarily to avoid any procedural breaches that could lead to possible appeals decisions of a second-instance court revoking the first-instance judgment for formalities.⁵⁸ While opening and closing statements are exclusively delivered by the prosecutor, the defendant, and defense counsel, the injured party does not have that right in accordance with the procedural law; and there is no need to repeat these opening and closing statements in the judgment, as occurs in this case, because they do not impact the court’s decision making, which can be guided only by the evidence presented before the court. Also, the description of the violent event is unnecessarily repeated several times in the judgment. This space could have been

55 Women’s courts existed in the former Yugoslavia as well. See: Daša Duhaček, *Ženski sud feministički ne/pristup pravdi* (Belgrade: Ženski sud proces organizovanja, Žene u crnom, and Centar za ženske studije Beograd, 2015).

56 Ibid.

57 A 2016 report by the HJPC on gender representation in the courts showed that 62% of judges in all BiH courts are women, and 82% of judges in the cantonal courts of the FBiH are women.

58 This is evident in the unnecessary interpretation of statements made by the defendant and defense counsel in the introductory and closing parts of the judgment.

given to the statement of the victim or to an explanation by the court of its specific reasoning in concluding that the injured parties suffered on account of the defendant, both of which would have more strongly rendered the message of the court to the public.

Much of the judgment is dedicated to describing the event laid out in the indictment. On two pages and on two occasions, for example, the behavior of the defendant during the event is portrayed, including the phrases he used to demean the injured parties (words such as “whore,” and “bitch,” and statements like “I wish you were dead,” and “I hope they cut everything out of you”). In the operative part of the judgment, this is necessary, but this also appears in the court’s explanation, affording too much space to derogatory language that can cause additional injury to the victims. Indeed, the language directed by the defendant toward the women victims in this case – his closest family members – demonstrates the misogyny that drives his violent behavior, and re-exposing his wife and daughter to this language has the potential to affect them profoundly and to re-traumatize them if repeated gratuitously during the reading of the judgment. Hence, the unnecessary inclusion of this language in the judgment indicates that the judge was unaware of how the verbal behavior of the defendant was reflective of his misogyny.

Additionally, while the conclusion of the court regarding proof of the defendant’s perpetration of the criminal offense gives significance to the prosecutor’s evidence, as the evidence presented by the defense failed to contest that of the prosecutor, the court does not value the circumstances of the violence in assessing the statements of the injured parties. Their statements are in fact invisible within the judgment. Procedural law allows judges to ask questions at any point during evidentiary procedure, including of the injured party, and this is especially important when deciding on the criminal offense of domestic violence. In doing so, passivity by the court is avoided and, at the same time, the victim is given a voice in the courtroom to inform the judge’s decision on factors surrounding the violent act. The judge thus gets a more complete picture of the event, and the victim gets the space to which they are entitled according to procedure; and whether a victim is heard in court or through the

inclusion of their statement in the judgment, the court's explanation is changed even if it may have otherwise reached the same final decision.⁵⁹

In carefully re-reading this judgment, it is noticeable, too, that not enough attention was paid to statements of the defendant's wife and daughter about his personality, behavior, and relations with them beyond the critical event, given that this criminal offense is specific and is related to an abuse of trust between family members who share a household. It is undisputable that the defendant is a repeat offender of the same offense against the injured parties, as well as that domestic violence occurred with continuity in this family. It was the suspended sentence arising from his previous conviction that was later revoked, because the defendant repeated the offense against the same injured party while under probation. Yet, this is not emphasized in the judgment, which treats the revocation of this previous conviction as a mere formality, and the offense as any other criminal offense committed during a probationary period. Where the judgment considered aggravating factors, specifically the suffering of the victims, there should have been greater focus on the *continuity* of domestic violence in this family, for the obvious reason that the defendant directed violence at both his wife and daughter over time.⁶⁰ To demonstrate his continuity in perpetrating this criminal offense, the judgment should have given more weight to the previous behavior of the defendant toward his wife – under circumstances that may have been similar to those contextualizing the event in question in this case – in evaluating aggravating factors.

It is noteworthy that this judgment was issued relatively recently, in 2017, but fails to make any reference to the Istanbul Convention, which BiH ratified in 2013. The Convention identifies repetition of the criminal offense against a cohabiting family member, and especially against a child, as a particularly aggravating factor in domestic violence cases (Article 46). As a part of implementing international conventions ratified by BiH, training for judges should

59 Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist judgments – From Theory to Practice* (Oxford: Hart Publishing, 2010).

60 Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*, 17.

focus on the value of these conventions in issuing judgments. The fact that numerous international documents addressing gender equality and the protection of women from violence were adopted by the UN, and in Europe, even before the Istanbul Convention of 2011 indicates that violence against women and domestic violence are longstanding international phenomena that deserve more attention by the courts in BiH.

As to the sanction for the defendant in this case, the law stipulates a period of imprisonment ranging from two to ten years for the criminal offense referred to in Article 208(3) of the CC RS, and the defendant received a sentence of two years in prison; meaning that the court opted for the statutory minimum, despite the defendant's previous conviction. The court failed, however, to offer reasoning that justifies punishment by the statutory minimum. Research carried out by the OSCE BiH, published in 2011, examined lenient sanctioning practices for domestic violence offenses in BiH, and found that the vast majority of the sanctions issued for these crimes were suspended sentences or imprisonment *below* the statutory minimum.⁶¹ If criminal sanctions in domestic violence cases are meant to serve as social condemnation, sanctions below the statutory minimum send a clear signal that domestic violence is not seen as a serious crime and does not call for serious punishment. Moreover, when sanctions are issued only at or below the statutory minimum, the significance of that minimum is devalued. This conveys a concerning social and institutional inertia, especially to victims who risk their safety to report abuse and violence.

In the case at hand, explicitly tying the circumstances of the previously adjudicated domestic violence case to this event of family violence would have represented a valuable means by which to make the defendant aware, in court, that this pattern of treatment of his family is unacceptable. The attitude of the court, especially in these types of offenses, should be unequivocal and should manifest not only in the sanctions issued to perpetrators but also in the treatment of both defendants and victims in the courtroom, in order to send a message to the public about the social intolerability of these criminal offenses.

61 OSCE, *Ensuring Accountability for Domestic Violence*.

To that end, a victim should feel that making a statement in court has value and will be appropriately considered.

POSITIVE FEMINIST CRITIQUE

The fact is, gender stereotypes exist even within a 21st-century judiciary; but this does not mean that judicial professionals apply them consciously or intentionally. Indeed, even when judges aim to be neutral, their implicit – or unconscious – bias can still negatively impact both women and men in judicial proceedings.⁶² This is where the need for a positive feminist critique of judgments emerges. Feminist critique relies on gender theory, inspired in many ways by Simone de Beauvoir's *Second Sex*.⁶³ Judith Butler also embarked on critical considerations of gender and sex, focusing mostly on social identity and how it affects the roles of women.⁶⁴ Here, the aim of a “positive feminist critique” is to analyze domestic violence judgments through a “woman’s lens” – i.e., in a way that accounts for gender and the relative social position of women and men – and also to identify positive examples of good practice in this context.

In deciding on the sanction in this case, and assessing mitigating and aggravating factors, the court strayed from the pattern seen in other domestic violence judgments in BiH and took a *more* appropriate approach to this criminal offense. In other words, when a defendant’s personality is valued as a mitigating factor, it is common court practice in BiH to place value on the status of a man as the head of a family (that he is married, the father of underage children, the breadwinner, etc.), but the court avoided applying value to this gender-based stereotype in this case.⁶⁵ Given the suffering caused by the

62 For more, see: Halilović and Huhtanen, *Gender and the Judiciary*.

63 Simone de Beauvoir, *The Second Sex* (1949).

64 For Butler on de Beauvoir, see: Judith Butler, “Sex and Gender in Simone de Beauvoir’s *Second Sex*,” *Yale French Studies*, no. 72 (1986): 35–49.

65 For more, see: OSCE, *Ensuring Accountability for Domestic Violence*; Petrić and Radončić, *Izveštaj i analiza praćenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj*; and Čehajić-Čampara and Veljan, *Analiza sudske prakse u predmetima nasilja u porodici u Bosni i Hercegovini*.

defendant to members of his family, the fact that he was married and a father of two did not, and should not, constitute a mitigating factor.

The court did assess the defendant's poor economic status as a mitigating factor in this case, however. This is a very common mitigating factor cited by courts in BiH in domestic violence cases, yet this court, like many others, failed to place this factor in the context of the criminal act in question, in order to demonstrate its relevance to the decision on sanctions. A reader of the judgment can justly ask whether reduced punishment should be applied in the case of any person who commits domestic violence and also happens to be poor. If economic status was applied as a mitigating factor in a case of theft – for example, if it was committed by an impoverished person trying to feed his family – this connection would be clear and logical. However, applying this factor even when it is not clearly related to the circumstances of the criminal offense suggests that the established court practice is to *search* for mitigating factors that justify more lenient sanctions.

In considering the application of mitigating factors, one question that undoubtedly arises is what happens if a court fails to find any mitigating factors in a case, where they objectively do not exist. Does that mean the imposed sanction should be at or near the statutory maximum, and how does that impact the perpetrator and victim of violence, and society? Can we imagine a society in which severe forms of domestic violence are severely punished?

Still, the assessment of mitigating and aggravating factors aside, a positive example in this case, as noted above, is the form of criminal sanction – a prison sentence. In the context of the BiH judiciary, this represents a bold decision by the court to overcome the convention of imposing suspended sentences or sanctions below the statutory minimum. This excessive imposition of suspended sentences in domestic violence cases has exposed members of the BiH judiciary to various critiques in recent years by international and nongovernmental organizations, which have denounced the reluctance of

Bosnian judges to abandon this practice.⁶⁶ Hence, this judgment is an important step forward, and demonstrates that it is possible – for the purpose of improving judicial response to the phenomenon of family violence – to change established patterns in domestic violence convictions.

Another judgment that is worth mentioning in relation to the one analyzed here, and in the context of positive feminist critique, was issued by the Municipal Court in Sarajevo in 2015. The circumstances of the two offenses were very similar, in terms of the violent behaviors directed by the defendant against his wife and daughter (the use of derogatory terms, for example, and an assault on the defendant's wife).⁶⁷ But, in that case, the court's assessment of mitigating and aggravating factors led to the imposition of a suspended sentence of five months imprisonment. In that case, just as in this one, the defendant's treatment of women was characterized by misogyny; but in the 2015 case, the message of the court was that these same misogynistic behaviors are tolerable.

CONCLUSION

Training for judges in domestic violence case evaluation remains a necessity in order to raise awareness, particularly with respect to the relative treatment of defendants and injured parties in court. The practice of judges in BiH has changed to some extent already – as indicated by a recent increase in the imposition of prison sentences for this offense, compared to the period when suspended sentences prevailed – but it is still unclear whether this is because first-instance judges expect a judgment that imposes a prison sentence will be

66 See: OSCE, *Ensuring Accountability for Domestic Violence*; and Čehajić-Čampara and Veljan, *Analiza sudske prakse u predmetima nasilja u porodici u Bosni i Hercegovini*.

67 “On 26 March 2014, at around 6:30 p.m., in the house he shared with his wife K... and two underage daughters, K. J. and K. A., visibly under the influence of alcohol, [the defendant] yelled, cursed and insulted his wife and daughters, who escaped to the children's room. He then came to the door of this room several times, banged and spat on it, yelling and shouting out derogatory terms directed at the wife and daughters. When, around 10 p.m., the wife came out from the room to go to the bathroom, he used this opportunity to roughly grab her forearm so that she knelt down due to the strength of his grip, after which he hit her forcefully with an open fist on the nape of her neck.”

more acceptable in potential appeal procedures or because their awareness about the nature of these types of criminal offenses has grown. Some positive signs that the latter may be true, at least in some cases, include a noticeable shift in court practice in the context of how mitigating and aggravating factors are evaluated. For example, a man's status as the head of a family or his commission of an offense under the influence of alcohol no longer constitute mitigating factors for a defendant, and there appears to be a general trend toward overcoming formalism in the assessment of mitigating and aggravating factors in domestic violence cases.

The detailed analysis and re-reading of domestic violence judgments is a new phase in the training of judges in BiH, and aims to provide judges with context and insight into the issue of family violence in Bosnian society as well as to improve their skills in developing the text of judgments. By presenting sample judgments in trainings, with the intent not to criticize but to contribute to understanding among judges, judges can be supported in writing better-quality judgments that send a clear message to perpetrators and the public that violent behavior in the family is unacceptable and will be duly punished and convey to victims that they have a right to protection from such behavior.



3.

VICTIM ISOLATION AND EXTREME DOMINANCE: VULNERABILITY AND SUSTAINED PSYCHOLOGICAL VIOLENCE

*Katica Jozak-Madžar**

INTRODUCTION

The criminal offense of “domestic violence” is relatively new in the criminal legislation of BiH. But domestic violence is a serious and fairly widespread social problem, and has been identified as a form of gender-based violence that violates foundational human rights and freedoms, causing harm to society in general. The most traumatic consequences are suffered by the victim-injured party, who has the right to life, dignity, freedom, protection, and satisfaction.

Domestic violence encompasses all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit, or between

* President of the Cantonal Court in Novi Travnik.

former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.⁶⁹ Research examining the prosecution of domestic violence offenses in BiH has indicated that sentencing is inadequately lenient in a majority of cases and that suspended sentences are the most frequently imposed sanction.⁷⁰ Given that domestic violence and violence against women constitute serious human rights violations, this analysis aims to identify problematic positions, dilemmas, and mistakes in applying the law.

The purpose of analyzing the practical application of the law in criminal offenses of domestic violence from substantive and procedural perspectives is to establish whether and how judges assess mitigating and aggravating factors when deciding on sanctions for perpetrators. It is important to understand how judges view the question of adequate punishment for domestic violence, the positions expressed toward domestic violence in judgments, and the message conveyed to the community at large through the sentences imposed; with the knowledge that there is no justification for overly lenient sanctioning from the standpoint of general and social prevention. Of particular interest in this analysis is the legal position of the victim in the proceeding and the procedural treatment of their compensation claims, with consideration of the objectives of a judge's work as imposed by domestic and international documents.⁷¹ The Council of Europe (CoE) has expressed the position, for instance, that sanctions must be "efficient, proportional, and preventive."⁷² CoE Member States are thus obliged to re-examine and, in some cases, tighten sanctions for deliberate violent assaults in the family.

69 Pursuant to the Council of Europe Convention on preventing and combating violence against women and domestic violence, 7 April 2011.

70 OSCE, *Ensuring Accountability for Domestic Violence*, 41. According to the OSCE's survey, of 289 cases reviewed, suspended sentences were imposed in 223 (77.2%), fines in 39 (13.5%), and prison sentences in 24 (8.3%).

71 Primarily, and starting with the Constitution of BiH, these documents are: the European Convention on the Protection of Human Rights and Fundamental Freedoms, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Istanbul Convention (2011).

72 Council of Europe, Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002, para. 56.

This work is intended to contribute to aligning court practices in BiH. It also aims to introduce substantially changed practices vis-à-vis the assessment of mitigating and aggravating factors by educating judicial office holders about the importance of appropriately valuating these factors for the purpose of achieving the sentencing purpose laid down in the law, as well as the need for sufficient explanations in each case. The larger objective is to develop legal explanations that are socially acceptable and avoid arbitrariness or a lack of argumentation. Achieving this is among the keys to improving the future work of the judiciary, increasing legal certainty and equality before the law, and advancing implementation of the rule of law.

INFORMATION FROM THE JUDGMENT

The defendant in the case analyzed here, a man in his forties, is employed as a clerk, is of medium financial status, and is the married father of a minor child, with no prior convictions. The victim is the defendant's wife, who shares the same household. No other data about the injured party is offered; however, evidentiary materials indirectly show that she is an unemployed foreign national and is the mother of a minor child, in the presence of whom she was exposed to the violence in question – though this important fact is not mentioned in the indicting document and was not considered at the sentencing stage. The part of the judgment pertaining to the facts of the case merely indicates that the defendant perpetrated the criminal act during the day, in the apartment he shares with his wife.

The offense perpetrated in this case is presented as a singular, isolated incident of domestic violence. The indicting document describes that the defendant had a verbal fight with his wife on 20 May 2015, before hitting her near the right eye with a laptop charger cable and then pushing her away. This caused the injured party to fall on to the bed, hitting the wooden frame, producing light bodily injuries: a hematoma on the upper right eye lid, and a hematoma on the lower abdominal wall.

NORMATIVE ANALYSIS

The act of perpetration, as outlined in the indictment, is qualified accurately in this case. However, if a more thorough investigation had been conducted, it would have been possible to prosecute the defendant for two or more criminal offenses of domestic violence, according to the testimony of the injured party. Indeed, both the continued criminal offense of domestic violence and the criminal offense of domestic violence in concurrence with the criminal offense of inflicting a light bodily injury could have been charged. The prosecutor's office did fulfill its duty in meeting the standard of trial without delay, issuing the indictment within 15 days. The file does not include information on the confirmation of the indictment, however, but notes that the first main trial was held a year-and-a-half after the criminal incident, on 16 September 2016. The judgement was imposed and announced three days later, on 19 September 2016.

The court specified three mitigating factors in this case – good behavior, no prior convictions, and the fact that the defendant is the father of a minor child – but valued them inadequately and offered no explanation. On the other hand, the court identified no aggravating factors; a concerning sign that the law was not fully complied with when the court decided on the sentence, as it did not value all the factors that should influence sanctions. The court's explanation is also inadequate and incomplete, and used common phrases, unnecessarily simplifying the text of relevant provisions of law. Further, the victim's position, and her protection and satisfaction, are not fully considered. While her statement was fairly well represented in the main trial, it was not valued properly against the statement of the defendant, who denied almost everything.

A suspended sentence of six months imprisonment was imposed on the defendant; meaning, the sentence was only enforced if the defendant perpetrated another criminal offense of the same or similar nature within a two-year supervision period. This was an inadequate criminal sanction.

CONTENT ANALYSIS

The first-instance court explained its reasoning for the type and severity of the sanction in this case in a single paragraph on the last page of the judgment, in which 7 of 21 lines are dedicated to the general purpose of criminal sanctions and the purpose of suspended sentences. Partial quotations of legal formulations were used to justify a suspended sentence, and the court concluded that:

“...this legal sanction will fully achieve the sanctioning purpose and have a preventive effect on the defendant, and on other potential perpetrators of such or similar criminal offenses, and point to the great danger posed by this criminal offense, and that the victim will be provided with the protection and proper satisfaction. Also, the court finds that there was no place for a more stringent sanction or imprisonment, and that the suspended sentence is completely adequate for achieving the sanctioning purpose and social condemnation of the offense.”

In making this decision, the first-instance court does not even quote the full text of the relevant legal provisions (Articles 7, 42, and 60(2), in conjunction with 62(1) and 62(2)), relying instead on a simplified text of the Criminal Code of the FBiH (CC FBiH).⁷³ A comparison of the full and simplified texts reveals that the simplified version diminishes the importance of prosecution for this criminal offense; and a comparison between the full texts and the explanation of the court regarding the purpose of criminal sanctions and punishment, as well as the purpose of suspended sentences, reveals significant omissions in the judgement that pertain directly to the type and severity of

73 Article 7 of the CC FBiH stipulates the “Purpose of Criminal Sanctions” as: a) Protection of society from crime perpetration through a preventive influence on others to honor the legal system and to refrain from criminal offenses, and by preventing perpetrators from perpetrating criminal offenses and encouraging their rehabilitation; and b) protection and satisfaction of the crime victim. According to Article 42 of the CC FBiH, “The Purpose of Punishment” is: a) to express the community’s condemnation of a perpetrated criminal offense; b) to deter the perpetrator from perpetrating criminal offenses in the future and encourage his rehabilitation; c) to deter others from perpetrating criminal offenses; and d) to increase the awareness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators. Article 60(2) of the CC FBiH, on “The Purpose of Warning Measures,” describes the purpose of a suspended sentence as a warning to a perpetrator of a criminal offense, with a threat of punishment, which achieves the purpose of criminal sanctions by pronouncing a punishment, but without executing it when the punishment execution is not necessary to ensure criminal justice protection.

sanctions, related to compliance with the legal order, the fairness of punishment, and the rehabilitation of defendants. The first-instance court specified only some purposes of criminal sanctions (social condemnation, the preventive influence on the defendant and other potential perpetrators, and ensuring victim protection and satisfaction), along with the purpose of sentencing and of suspended sentences, and without adequate explanation. This does not meet the purpose of imposing sanctions, especially when the inadequacy of the court's explanation is exposed simply by asking: *How will a suspended sentence ensure victim protection and satisfaction in a situation where the criminal offense was perpetrated inside the home and the defendant used physical violence against the injured party as a member of a shared household?*

Although the court knows the law (*iura novit curia*), this illustrates the value of the court referring to (full) legal texts that describe the purpose of criminal sanctions (Articles 7 and 42) and the purpose of suspended sentences (Article 60 (2)), as such, in order to bring attention to the elements of these articles and explain clearly what led the court to impose a suspended sentence – a *warning* about *potential* punishment – rather than to conclude that punishment must be imposed immediately for the purposes of criminal protection. Without accounting for all the elements that comprise the purpose of punishment, the court acts arbitrarily, partially, and unjustly. Moreover, a suspended sentence is a mere warning, not a sanction. After a judicial admonition, it is the most lenient criminal sanction, and is thus commonly applied to perpetrators of less severe offenses. It primarily fulfils the special prevention requirement, and only to a lesser extent, that of general prevention. Hence, a suspended sentence is hardly an acceptable sanction for the crime of domestic violence, a serious criminal offense and a form of gender-based violence that violates foundational human rights and freedoms based on the gender inequality of men and women. Indeed, the incrimination of domestic violence must achieve special prevention purposes but must also equally serve the purpose of general prevention.

Of course, the court needs relevant evidence to corroborate its decision on the type and severity of a sanction. This evidence should be provided to the court by the prosecutor's office, and the defendant and defense counsel. The court

may also order evidence collection by both the prosecution and the defense, and can obtain evidence directly from relevant institutions and bodies, because it has the authority to decide on sanctions in accordance with general sentencing rules referred to in Article 49 of the CC FBiH and must consider all the circumstances that influence sanctions.

In cases of domestic violence, the evidence relevant for sentencing includes: reports from a social work center about the status and dynamics of conflict resolution within the family; proof of regular visits to counselling; witness statements; references and/or statements from employers, friends, and co-workers; sincere expressions of remorse by the defendant and a statement of apology to the injured party, and a promise before the court that such behavior will not be repeated; testimony of the injured party in court about reconciliation with their spouse; interviews with children about changes in circumstances in the home; certification by an employer or a statement by the defendant that they do share or are willing to share half their salary with an unemployed spouse who takes care of the household, and thus has regular household expenses; and a description of a plan to guarantee the defendant's rehabilitation.

The very fact that legislators prescribed a fine ranging from BAM 500 to maximum BAM 100,000, or a minimum prison sentence of 30 days to a maximum of three years for the qualified form of this offense sufficiently reveals the *ratio legis* that allows the court to choose a sanction more stringent than a mere warning measure, such as a suspended sentence. Moreover, the judgment can inform the perpetrator that an unpaid fine shall be replaced by imprisonment. By prescribing such sanctions to perpetrators of domestic violence offenses, a message is sent about the danger to the community these offenses represent, and the need to punish perpetrators adequately by imposing a fine or prison sentence instead of just a warning. There is enough allowance for the individualization of sanctions to meet the conditions of each case by deciding from among the different durations and types prescribed, especially since there is no special minimum, giving the court plenty of space to choose the punishment most adequate and proportional to the

severity of the crime that is perpetrated, having evaluated all mitigating and aggravating factors.

Here, one should keep in mind that the prescription of criminal sanctions, and their type and range, is based on the requirement for criminal justice and its proportionality to the degree of harm against personal liberties, human rights, and other basic values within the meaning of Article 3(2) of the CC FBiH.⁷⁴ One cannot say that a suspended sentence is unreasonable for this criminal offense in all cases, but application of this sanction must raise the question of whether the sentencing purpose is fulfilled, and thus demands that the court explain clearly, completely, and transparently how all relevant evidence supports this decision. Such reasoning is itself an element or requirement of a fair trial, as per Article II/3(e) of the Constitution of BiH and Article 6 of the European Convention on Human Rights and Fundamental Freedoms; and is necessary for the adequate exercise of the right to an effective legal remedy protected therein – which is often exerted to rebut the decision on criminal sanctions issued in a first-instance judgment.⁷⁵

A BACKGROUND OF VIOLENCE

The prosecution of domestic violence requires clarity from the court regarding all the facts that are relevant to proper and lawful sentencing, especially in

74 Article 3 of the CC FBiH, “Basis and Limits of Criminal Justice Compulsion,” reads:

- (1) Criminal offenses and criminal sanctions shall be prescribed only for acts threatening or violating personal liberties and human rights, as well as other rights and social values guaranteed and protected by the Constitution of the Federation and international law in such a manner that their protection could not be realized without criminal justice compulsion.
- (2) The prescription of criminal offenses, as well as the types and the range of criminal sanctions, shall be based upon the necessity for criminal justice compulsion and its proportionality with the degree and nature of the danger against personal liberties, human rights and other basic values.

75 See: Decision on Admissibility and Merits, No. AP 1603/05, 21 December 2006, paragraphs (35) and (36), Official Gazette of BiH, 34/07; and *Airey v. Ireland* (1979) in which Article 13 of the ECHR was qualified under Article 6 of the ECHR because the court found that Articles 5(4) (habeas corpus) and 6(1) (fair trial) provide a higher level of protection of rights than Article 13. For more, see: Donna Gomien, “Short Guide to the European Convention on Human Rights,” CoE, 2000. NB: Article 13 of the ECHR does not bind the state to provide the possibility of appeal before a higher court in order to establish whether rights laid down in the Convention are violated.

complex cases. This form of gender-based violence breaches human rights and freedoms; threatens or violates life and bodily integrity, as well as dignity and morale; and undermines the rule of law, legal certainty, and the democratic concept that special protection should be afforded to families, women, and children. Indeed, these violations occurred in the case analyzed here, as corroborated by the evidence. Yet, the prosecutor's office failed to include previous acts of perpetration of this criminal offense in the description of facts in the case, which means these acts are qualified neither as separate domestic violence offenses nor evidence of a continued criminal offense of domestic violence. Further, in this case, the criminal offense of domestic violence could be qualified as an offense with light bodily injury, but is not.

Given the principle that the court is bound by the indictment (Article 295 of the CPC FBiH), it is worrying that the court failed to fully weigh all the circumstances in this case. Article 49 of the CC FBiH stipulates explicitly that the court shall consider all the circumstances that influence sanctions. These are:

i. *Victim isolation*

The defendant took control of the victim's identification documents when they began living together, in case she was tempted to leave. The court failed to value this circumstance, which was not questioned at any point during the evidentiary procedure, even when the defendant testified in his own favor and denied all the facts of the crime, including the victim's reports of his previous perpetration. For victims, isolation by an abuser can be extremely traumatic, because it limits their access to the outside world, amplifies feelings of helplessness, and increases their dependence and subordination. For these reasons, *the court should have valued the defendant's efforts to isolate the victim as an aggravating factor.*

ii. *Extreme dominance*

The victim was afraid to report the defendant because he told her he knew everyone in the police force, and insisted no one would believe her story because she is a foreign citizen. The fact that the injured party did not report the defendant's behavior sooner, out of fear, speaks to the power and control the defendant

had over her. The victim is a foreign citizen, which often makes her vulnerable, and *the court was obligated to explain this circumstance and treat it as an aggravating factor at the sentencing stage.*

iii. *Humiliation and emotional/psychological violence*

The defendant used derogatory terms and name-calling to abuse the victim. If, during a criminal proceeding, psychological violence is found to be an element of the abuse perpetrated and charged as a criminal offense, *it should be treated as an aggravating factor.* The existence of psychological violence should be clearly established or dismissed in every case, and a decisive position should be taken by the court in that regard.

iv. *Threats of violence and continuity of abuse*

The defendant had beaten and abused the injured party in the past, and had forced her to undergo an abortion; in the 20 days before the charged offense, he had mistreated her on a daily basis; five days beforehand, he had abused her physically and had beaten her in the abdominal area, leaving her with bruises. The nature of these circumstances, taken in their entirety, constitutes evidence of clear threats of violence and proves the continuity of that violence against the victim over a period of time. *The court should value such circumstances as aggravating,* as these are not isolated incidents but a continuous and enduring pattern of behavior.

v. *Vulnerability of the victim*

When the victim was eight months pregnant, the defendant punched her. During the period for which evidence of continuous violence existed in this case, the victim's pregnancy placed her in a vulnerable category at a time when she suffered physical violence. For this reason, *the court should have valued this fact as aggravating.*

vi. *Victim's fear for life and safety*

The defendant paid for an abortion for the victim, telling her that the child was a bastard and that she would not be able to use the child to tie him to her. These circumstances demonstrate the vulnerability and fear for safety felt by the

victim for some time, as well as *the defendant's power and control over her, which is an aggravating factor in this case.*

vii. *Obsessive jealousy*

The defendant accused the victim of looking for other men online. The physical assault against the victim in this case was preceded by a verbal argument that extended from the defendant's jealousy; the fact that the defendant escalated to hitting the injured party near her eye with a laptop charger indicates the obsessive degree of his jealousy. Such actions undermined the injured party's autonomy and freedom to make decisions, and *the court should value this factor as aggravating.*

viii. *Exposing a child to violence*

*The violent behavior of the defendant, first in the bedroom and then in the living room, occurred in front of a child.*⁷⁶ If violence is perpetrated against a child or a minor, it constitutes the qualified form of this offense referred to in Article 222(4) of the CC FBiH, which calls for a more stringent sanction of imprisonment from one to five years. Pursuant to the CC FBiH, the very *exposure* of a minor child to domestic violence, whether the child witnesses it, hears it from another room, or sees its consequences at a later time, can be treated as an aggravating factor; whereas the RS code defines it as a special qualified form of the criminal offense.

ix. *Economic status of the family/breadwinner role of the perpetrator*

The defendant regularly responded with violence when the victim asked him for something, for example when she sought money to pay for household necessities. The fact that the family is of limited economic means and the perpetrator is the only breadwinner cannot in itself be mitigating and diminish the punishment imposed on the perpetrator. If this were the case, it would provide an incentive to abusers to continue using violence in order to maintain power and control, particularly of a financial nature, to increase the dependency of their victims.

76 This will be discussed in more detail in the analysis of aggravating and mitigating factors.

x. *Lack of remorse/self-criticism*

As justification for his crime, the defendant stated that the injured party had developed some kind of disorder that had changed her character and made her combative, alleging that she incited conflict with everyone, including her relatives and friends.

Remorse is demonstrated by a defendant through their expressed attitude toward the criminal offense they are accused of perpetrating. In this case, the defendant expressed no remorse of any kind, and offered no self-criticism either. Instead, he made uncorroborated claims about the victim's behavior to rationalize his own violence, or pointed to the influence of others on her. Depending on the case, expressions of remorse, or a lack thereof, can be valued as mitigating or aggravating, but it is important that the court always considers remorse in the context of the duration and intensity of the alleged domestic violence and the resulting violation of the protected good, accounting at the same time for the defendant's attitude toward the violence following perpetration – both toward the victim and toward the consequences.

ANALYSIS OF MITIGATING AND AGGRAVATING FACTORS

In view of these stipulations of Article 49 of the CC FBiH, the explanation of the first-instance court in this case regarding its decision on the type and severity of sanctions does not fulfil the standards laid out by the Code. The first-instance judgement notes that, when deciding on the sanction, the court reflected on the sentencing purpose as well as special and general prevention, and took into account all the aggravating and mitigating factors, the motives behind the offense, the circumstances of perpetration and the intensity of threat on the protected good, and the defendant's earlier life and personal circumstances. As mitigating factors, the court valued the lack of any prior convictions for the defendant, his proper conduct before the court, and the fact that he is the father of a minor child. The court found no aggravating factors. The court believed, in view of the sentencing purpose, bearing in mind the severity of the criminal offense and the degree of the defendant's criminal liability, and considering the legally prescribed limits on sanctions for this offense, that a suspended sentence

imposing imprisonment of six months was sufficient in these circumstances. They offered a sanction that would not be enforced unless the defendant perpetrated another criminal offense of the same or similar nature during a subsequent two-year supervision period.

In its explanation of the purpose of sanctions, sentencing, and suspended sentences, and when deciding on and individualizing punishment for the perpetrator in this case, the court asserts that it considered all the circumstances and factors that influence sentencing (i.e., mitigating and aggravating factors). Yet, by simplifying the legal text and inadequately and errantly valuating those factors, the court decided on a punishment that was inadequate; but even worse, one that was irregular and inappropriate.

For instance, the explanation of the first-instance court treats *proper conduct* before the court as a mitigating factor, but does not describe which behaviors of the defendant constituted this conduct. Given that proper conduct by a defendant in court is expected from *all* defendants, as well as any other participants in court proceedings, this factor should not in itself be valued as mitigating when deciding on the type and severity of sanctions. Indeed, meeting rather common norms is not proof of any feature of a defendant's personality or evidence of changed behavior overall. Still, proper conduct is a common mitigating factor applied in many cases of domestic violence.

This should raise concerns, because *it is illogical that appropriate conduct in public life would diminish the harm of improper conduct in family life*. Therefore, this factor should not be applied to justify the imposition of more lenient sanctions for a qualified form of domestic violence. Moreover, when this factor is applied as mitigating, the court must explain what proper conduct means in the case of each defendant.

Research findings also indicate that courts in BiH value the *lack of prior convictions* as a mitigating factor in 74% of cases; again, without offering detailed analysis or reasoning.⁷⁷ However, courts should consider this factor with

77 OSCE, *Ensuring Accountability for Domestic Violence*.

particular caution, as this does not necessarily mean that someone has not previously engaged in violence or even in domestic violence, simply that they have not been convicted. It is often the case, though, that the first reported incident of violence in a family is presented before the court by prosecutors as an isolated event and not as part of a continuous pattern of violence over a long period of time, even when injured parties report prior abuse.

Judges must recognize that the relatively recent introduction of the criminal offense of domestic violence in criminal legislation in BiH has brought a crime that was long treated as a private matter out of the shadows. For years, domestic violence was seen through a lens of gender bias and stereotyped family roles – including the role of men as breadwinners and heads of their families – and the dominance of men was seen to extend naturally to a right to hold power and control over their spouses and children, from whom they could demand obedience at the risk of physical punishment. In other words, until recently, victims of this form of gender-based violence were not provided with adequate protection, because domestic violence was effectively deemed socially acceptable. Therefore, *a lack of prior convictions does not mean that a perpetrator has not perpetrated the same or similar offenses in the past.*

For a perpetrator of advanced age, a lack of prior convictions may in fact constitute a truly mitigating factor, as this is more likely to reflect that they have lived a relatively honorable life. But when a perpetrator is young, recently married, and has a new family, the fact that they lack a prior criminal record should not be valued as mitigating in a case involving the criminal offense of domestic violence. The legislature prescribes that recidivism or prior convictions should be valued separately, and not a *lack* of prior convictions.

Moreover, on the whole, most people do not come into conflict with the law and most perpetrators seen before the court are actually being prosecuted for the first time. Thus, the non-perpetration of previous criminal offenses or the fact that some criminal offenses have not been prosecuted (due to statutes of limitations, changes in witness statements, or the recantation of accusations by injured parties, for example) should not be treated as factors that improve the status of a defendant. A lack of prior convictions is a social norm,

reflecting acceptable behavior both in public and private life; which is why it is often a precondition for employment. And in the case of public office holders, the perpetration of certain criminal offenses in office disallows the application of a lack of prior convictions as a mitigating factor because it was an eliminatory requirement for their initial appointment.⁷⁸ Therefore, the court must analyze this factor carefully in each case, instead of valuing it *a priori* as mitigating. The court should consider the age of the defendant; the duration of their marriage, common law marriage, or domestic unit; relevant data obtained from social work centers; and all reports filed by police.

In the judgment in this case, the court also valued as mitigating the fact that the defendant *is a father of a minor child*. This factor was mostly considered in conjunction with the defendant's marital and family status. Yet, given the statement of the injured party that she moved into her parents' home, the case file lacks information on any potential divorce (or remarriage), who lives with the minor child at the time of the judgment, and whether the defendant continues to financially support the child.

This factor should not be valued as mitigating in the context of domestic violence. Spouses are assumed to decide on having and raising children by agreement and equally, and regardless of their own relations, parents are to provide parental care in the best interest of any child.⁷⁹ Parents are to care for the life and health of a child; to keep and raise a child in the spirit of harmony, dignity, tolerance, freedom, equality, and solidarity, and depending on the child's age and maturity, to help them exercise their rights to freedom of opinion, conscience, and religion; to fulfil the common needs of a child; and to protect them from vices, violence, and injury.⁸⁰ If a parent neglects their legally recognized obligations, they can be denied child custody.⁸¹

78 See "Specijalci MUP-a RS-a osuđeni na 42 godine zatvora," *Faktor*, 29 May 2017, <https://faktor.ba/vijest/specijalci-mup-a-rs-a-osueni-na-42-godine-zatvora-250588>.

79 Family Law of the FBiH (Official Gazette of the FBiH, 05/14).

80 See: Articles 124–149 of the Family Law of the FBiH, "Rights and duties of parents and children."

81 In a non-contentious proceeding, the court shall deny child custody to a parent who abuses their right or harshly neglects their duties, or abandons the child, or fails to care for the child who does not live with them, apparently jeopardizing the child's safety, health or morale, or who fails to protect the child from such behavior of the other parent or of another person. See: Article 154(1) of the Family Law of the FBiH.

In the case at hand, the indicting document omitted a key circumstance testified to by the injured party – which was not countered by the defense during the proceeding – that the “defendant first pushed her around in the bedroom, and then in the living room, all in the child’s presence.” Given that the defendant abused the parental rights afforded him by the Family Law within the scope of parent-child relations as well as his obligation to provide the child with the protection necessary for wellbeing, the court should not have valued the fact that the defendant is the father of a minor child as mitigating without shedding light on all the circumstances of the case and evaluating them in context. Indeed, the court could have valued this factor as particularly *aggravating*, despite the fact that the violence was not directed at the child. The court cannot ignore the fact that medical science has proven that children exposed to domestic violence experience negative consequences to their later psychophysical development, affecting their education and opportunities in society.⁸²

With this in mind, and as the judicial representative of government, the court must emphasize the obligation of the state to provide the protections to families and children granted by the Bosnian legal system, and send the message that abusive behavior is prohibited within families.⁸³ For this reason, the FBiH Law on Protection from Domestic Violence stipulates that any family member exposed to domestic violence, as defined in Article 7 of this Law, is a victim of domestic violence, and underscores that any person under the age of 18 is a child.⁸⁴ And, in the Family Law of the Republika Srpska, children are deemed direct victims of domestic violence even if they only witness such violence.

The fact that a defendant is the father of a minor child is relevant only if it is considered in light of his obligation to support that child, provided the child was not the victim of violence and was not exposed to violence. Hence, the

82 Neuroscience tells us that the brains of babies and small children absorb everything around them, including the harmful effects of exposure to domestic violence. See: Lynn Hecht Schafran, “Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience,” *The Judges Journal* 53, no. 3 (2014).

83 Articles 2, 4, and 380 of the Family Law of the FBiH.

84 Official Gazette of the FBiH, 20/13.

court should value this factor with caution, in order to avoid the unsubstantiated assumption that marital, family, or parental status in itself represents a special personality trait deserving of greater valuation and respect in the community. This especially cannot be the case when it comes to the criminal offense of domestic violence. In all cases, the consequences for a minor child of any circumstances related to the offense must be taken into account, particularly if the child is the victim of or was exposed to violence.

SENTENCING

In the judgment analyzed here, the first-instance court noted in its explanation that its decision on the severity of sanctions – in this case, a suspended sentence – followed consideration of all the relevant mitigating and aggravating factors, including the harmful impact of exposure to domestic violence, as well as the sentencing purpose and special and general prevention. Specifically, the court weighed the degree of violence, the motives behind the offense, the circumstances of perpetration and the intensity of threat on the protected good, and the defendant’s earlier life and personal circumstances. Yet, the following factors were not considered: the degree of guilt, the extent of violation of the protected good, the behavior of the defendant following perpetration, and other factors pertaining to the defendant’s personality.

The law binds the court to value *all* factors referred to in Article 49 of the CC FBiH, and first-instance courts have the additional obligation and authority to value any other factors that may influence a sanction or aid in deciding on and individualizing the type and severity of a sentence. In this case, the first-instance court provided a list of six other factors, but did not specify the importance it attributed to these factors; and since the court noted it did not find any aggravating factors, it follows that they were all valued as mitigating, although this is not stated explicitly. This constitutes practice by the court at the sentencing stage that does not align with the law, and clearly indicates that the imposed suspended sentence is irregular and improper.⁸⁵

85 Article 305(8) of the CPC FBiH places a clear requirement before the court when it states the following: “If the punishment has been pronounced against the accused, the explanation shall state

Assessing circumstances as mitigating or aggravating in the process of deciding on sentencing and individualizing sanctions is complicated, and it requires that judges possess improved knowledge and training in these areas as well as in fields such as sociology and psychology – which are necessary and useful in the valuation of certain factors as they relate to the punishment for a perpetrator. In the process of individualizing punishments, first-instance courts must both define sanctions and also specify all the mitigating and aggravating factors that influence sentencing within the limits prescribed for a criminal offense. Mitigating factors contribute to a more lenient sanction within the special minimum and maximum thresholds, and aggravating factors to a more stringent sentence. The legislature did not prescribe a special minimum duration of imprisonment for the criminal offense of domestic violence referred to in Article 222(2) of the CC FBiH, which means the general minimum sanctions of a fine in the amount of BAM 500 and 30 days in prison apply. In this way, the legislature excluded the possibility of mitigating the sanction for this offense, as foreseen in Article 50 of the CC FBiH, regarding an increased social threat due to perpetration of this criminal offense and the need to protect the threatened good. Judges must understand this legislation and make decisions on the type and severity of sanctions in accordance with the law.

In this case, the first-instance court not only valued mitigating factors incorrectly and drew an unfounded conclusion about the absence of aggravating factors in its decision to impose a suspended sentence of six months imprisonment, but it errantly stipulated that this sentence could be enforced only if the defendant perpetrated another criminal offense *of the same or similar nature* within two years. In the operative part of the first-instance judgment, and in the court's explanation, this specification that another identical or similar criminal offense must be committed for the sentence to be enforceable runs contrary to Article 62(1) of the CC FBiH, which states simply that **another criminal offense may not be perpetrated**. The court thereby

the circumstances the court considered in fashioning the punishment. The court shall specifically present the reasons which guided the court when it decided that the punishment should be mitigated or the accused acquitted, or when the court pronounced a suspended sentence or a security measure, or ordered forfeiture of property gain.”

narrowed the scope of this legal provision, and limited the potential negative consequences for the perpetrator/defendant if he were to perpetrate further criminal offenses.

The imposition of a six-month prison sentence in this case does fulfill the requirement referred to in Article 62(3) of the CC FBiH (the perpetrator was punished with up to two years in prison), and the court may choose to impose a suspended sentence as a more lenient sanction that constitutes a warning, within the meaning of Article 62(1) of the CC FBiH. But the court is ordered in Article 62(2) to consider the purpose of a suspended sentence when deciding whether to impose one, and to particularly take into account: the perpetrator's personality, earlier life, behavior following perpetration of the offense, degree of guilt, and the circumstances under which the offense was perpetrated. These factors are not reflected in the first-instance court's explanation in this case. Moreover, the court did not impose any obligations on the perpetrator, as per Article 63 of the CC FBiH, alongside the suspended sentence.⁸⁶

The judgment also lacks information about whether certain issues were considered in the process of coming to a conclusion about the appropriateness of a suspended sentence with protective supervision, and offers almost no explanation at all on the important question of individualizing the punishment.⁸⁷ This is because the prosecution and the court did not thoroughly consider the intensity, continuity, and duration of violence, or the nature and variety of its manifestations and consequences. The assertion in the judgment that a suspended sentence would achieve special prevention, social condemnation, and protection and satisfaction for the victim does not offer the

86 Article 63 of the CC FBiH stipulates:

- (1) In a suspended sentence, the court may order the fulfillment of the following obligations: the convict should return the gain obtained through the criminal offense, compensate for the damage incurred by the criminal offense, or fulfil other obligations laid down in the criminal legislation in the Federation.
- (2) The timeframe for the fulfillment of the obligations referred to in paragraph 1 of this Article is defined by the court within the specified probation period.

87 See: ECtHR, *Boldea v. Romania*, 15 February 2007; and ECtHR, *Van de Hurk v. The Netherlands*, 19 April 1994, §61: "In order to respect the principle of a fair trial, the explanation should illustrate that the judge actually analyzed the main issues presented to him."

reasoning of the court in making this decision, except by citing legal texts. Why is the court satisfied that the purpose of imposing a suspended sentence will be achieved in this case? A lack of such reasoning in cases in which suspended sentences are imposed is a serious problem that the judiciary must confront, and simply put, the practice must end. Otherwise, lawfulness is replaced by arbitrariness, and thus inconsistency, putting victims in an even more uncertain and difficult position.

COMPENSATION CLAIM

The judgment in this case does not state whether the injured party was informed about a potential compensation claim when she gave her statement at the prosecutor's office. This obligation of the prosecutor and of the court in relation to the establishment of facts arises from Article 211 of the CPC FBiH. Any claim should be specific and corroborated by evidence, and the court may partially award a claim. Mediation can also be proposed in accordance with the special Law on Mediation.

A compensation claim should be discussed within the criminal proceeding, at the proposal of an authorized person, provided it does not cause substantial delays. In this case, the injured party did not have a proxy in the proceeding and received no professional support from the Witness Support Section (based on the Cooperation Agreement with the Cantonal Court, because municipal courts currently lack their own support sections). The resolution and deliberation of compensation claims in criminal proceedings and the establishment of such court practice could represent an important and improved form of protection and satisfaction for victims.⁸⁸ To that end, injured parties should be informed about their right to compensation at the earliest stage; and if they choose to file a compensation claim within the criminal proceeding, there should be no delay by the prosecutor's office in

88 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, 29 November 1985), states that "victims should be treated with compassion and respect for their dignity. They are entitled to prompt redress, as provided for by national legislation, for the harm that they have suffered."

collecting all relevant facts so that the court can make a proper and lawful ruling on the matter.

CONCLUSION

If we view criminal sanctions as the community response to domestic violence perpetration, the suspended sentence imposed in the case analyzed here conveys the wrong message: that domestic violence is not a serious criminal offense. The court provided a short explanation as to why it did not impose a more stringent sanction (i.e., imprisonment), but offered inadequate and incomplete reasoning for why a suspended sentence was appropriate. Thus, *the imposition of a suspended sentence in this case appears arbitrary.*

The court's application of aggravating and mitigating factors in this case was also arbitrary. The court could have valued a number of factors as aggravating, but chose not to, including: the exposure of a child to violence, isolation of the victim, the continuity of threats of violence and abuse, explicit attempts to humiliate the victim, emotional and psychological violence, the particular vulnerability of the victim, the defendant's obsessive degree of jealousy, the role of the defendant as breadwinner, the defendant's extreme dominance, the severity of the violence, and the defendant's lack of remorse. Moreover, why the court valued the following factors as mitigating was not adequately explained: the proper conduct of the defendant before the court, his lack of prior convictions, and the fact that the defendant is the father of a minor child.

Finally, the judgment included only partial quotes of legal texts as reasoning for both its decisions on mitigating factors and on sentencing. The absence of relevant information relating to circumstances of the case in the judgment indicates a lack of consideration of these circumstances by the court at the sentencing stage. This can reasonably be expected to influence the sentence (by impacting the valuation of mitigating and aggravating factors), and therefore brings into question the transparency, accountability, and impartiality of the court in this case and whether the law was applied arbitrarily.



4.

VIOLENCE AGAINST THE ELDERLY: A LEGAL, LINGUISTIC, AND SOCIOLOGICAL ANALYSIS

*Muhamed Tulumović**

INTRODUCTION

This text takes a legal, linguistic, and sociological approach to analyzing the criminal judgment in a case of domestic violence against an elderly victim. Deficiencies in the fundamental parts of the judgment – its introductory and operative parts, and the court’s explanation – will be addressed, along with some of the legalistic style standards used in drafting judgments. This analysis will thus discuss errors in how the law was applied and in how the judgment was written. It will also provide a critical overview of the judgment from the perspective of domestic violence research and domestic violence discourse analysis, analyze the message of the judgment as reflected in the purpose of punishment, and offer examples of positive good practice. Lenient sentencing practices among courts in BiH in domestic violence cases, delays in justice, and insufficient protections for victims from perpetrators have generated a lack of

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trust among victims in the justice system. Hence, it is necessary to continuously reflect on lessons learned and to implement measures aimed at preventing and eliminating violence in families or domestic units.⁹⁰

INFORMATION FROM THE JUDGMENT

The court found the defendant guilty for threatening his mother on 4 February 2014 in their family apartment, without any cause or reason, stating that he would kill her, set her on fire, and cut her throat because she refused to give him money to buy opioids. In this way, the defendant used violence and behaved insolently and recklessly, jeopardizing the peace and bodily integrity of a member of his family who cohabited in a common household, by which he committed the criminal offense of domestic violence referred to in Article 222(1) of the Criminal Code of the FBiH (CC FBiH).⁹¹ The court, applying Article 43 of the CC FBiH, imposed a prison sentence of three months.

The Cantonal Prosecutor's Office filed an indictment in this case on 10 November 2014, which was confirmed on 12 November 2014. The main trial took place on 12 May 2016, when the defendant pleaded guilty and the first-instance judgment was passed. Criminal records showed that the defendant had been convicted three times previously, and the report from the Prosecutor's Office on the statement of the witness indicated that the defendant was on methadone maintenance treatment and had been a regular patient of a rehabilitation center.

The criminal report of the Ministry of the Interior and the Police Directorate from April 2014 was prepared on grounds of suspicion that the defendant physically and psychologically abused his mother and her husband in their family home on the evening of 4 February 2014. Given that the defendant did not dispute his own mental capacity, the court concluded that the defendant

90 I. Marković, "Nasilje u porodici kao specifičan oblik kriminaliteta u uslovima globalne ekonomske krize," *Zbornik radova, Zaštita ljudskih prava i sloboda* (Tara, 2011), 249–250.

91 For the basic form of the criminal offense of domestic violence referred to in Article 222(1) of the CC FBiH, the perpetrator shall be punished by a fine or imprisonment of a term not exceeding one year.

had been aware of his actions at the time he perpetrated the offense and that he perpetrated it willfully. It follows, then, that he acted with direct intent, and the court thus found him guilty of the criminal offence of domestic violence.

In deciding on the appropriate criminal sanction, the court considered the purpose of punishment and all the factors affecting the sentence (i.e., aggravating and mitigating factors). As a mitigating factor, the fact that the defendant confessed and thus contributed to expediting the criminal proceedings was particularly valued. As an aggravating factor, the court valued his prior convictions.

NORMATIVE ANALYSIS

The content of *the introductory part of a judgment* is stipulated by Article 305(2) of the Criminal Procedure Code (CPC) of the FBiH, and serves to individualize and identify a decision.⁹² This part of the judgment relays who decided the case and when, and who are parties to the proceedings. While no judgment can be challenged for deficiencies in this introductory part, as such challenges can only be due to considerable breaches of criminal procedure provisions⁹³ and of the criminal code⁹⁴ (meaning, elements contained in the operative part and in the court's explanation), this does not mean it is acceptable to make omissions in this part of a judgment.

In the case at hand, the judgment does contain all the elements stipulated by Article 305 of the CPC FBiH; however, more care should have been taken by

92 According to Article 305(2) of the CPC FBiH, the introductory part of the judgment should include: a statement that the judgment is pronounced in the name of the Federation of Bosnia and Herzegovina; the name of the court; the first and last names of the presiding judge and judges in the panel, and the stenographer; the first and last name of the defendant; the criminal offense for which the defendant is charged and whether the defendant was present at the main trial; the date of the main trial and whether the main trial was public; the first and last names of the prosecutor, defense counsel, legal representative, and attorney present at the main trial; and the date when the judgment was announced.

93 Article 312 of the CPC FBiH (Official Gazette of the FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, 59/14).

94 Article 313 of the CPC FBiH (Official Gazette of the FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, 59/14).

the court to use proper acronyms and avoid grammatical mistakes (including merged words and the use of abbreviations without reference). Also, the full title of the law is not used, only an abbreviation.⁹⁵ The judgment lacks references to the numbers and years of the Official Gazette in which laws were published, too, as stipulated by Article 63(5) of the Rulebook on Internal Court Operations of the High Judicial and Prosecutorial Council of BiH.⁹⁶ The first mention of a law should be spelled out as, for example: the Criminal Procedure Code of the Federation of Bosnia and Herzegovina.

The operative part of a judgment resolves all the procedural, factual, and legal matters presented to the court in the charges.⁹⁷ The content of this operative part must be concise, complete, clear, and understandable, otherwise it constitutes a considerable breach of criminal procedure provisions.⁹⁸ This part of the judgment should contain only the elements of the substance of the criminal offence, without redundant and irrelevant details. Professional literature often stresses that the operative part is the most important part of a judgment, as it should serve as a basis for enforcement. Sometimes this is also called a *disposition*, but the legal term *operative part* should be applied in practice.⁹⁹ In

95 Legislation referenced by the court in decisions should be cited using full titles of laws and the official gazette in which they were published; but abbreviations, if common and easily understandable, can be used. Hence, upon first mention of a piece of legislation, its full title and the official gazette in which it was published should be referenced, along with a parenthetical explanation as to how it will be abbreviated later in the text. For more, see: K. Saganić, "Način pisanja prvostupajskih presuda u parničnom postupku," *Croatian Legal Review*, no. 10 (2010).

96 According to Article 63(5) of the Rulebook on Internal Court Operations of the High Judicial and Prosecutorial Council of BiH (Official Gazette of BiH, 66/2012), the text of the judgment may include abbreviations only if generally accepted and understandable so that there is no doubt as to their meaning. Laws and other regulations cited in the text should be referenced by their full titles, with the number and year of the official gazette in which they were published.

97 According to Article 305(3) of the CPC FBiH, the operative part of the judgment contains the personal data of the defendant and a decision declaring the defendant guilty of the criminal offense charged, acquitting the defendant of the charge, or rejecting the charge. Paragraph 4 of the Article stipulates: *if the defendant is found guilty, the operative part of the judgment must include the necessary data referred to in Article 300 of this Code, and if the accused is acquitted of the charge or the charge is rejected, the operative part of the judgment must include a description of the criminal offense for which the defendant is charged and a decision on the costs of a criminal proceeding and a compensation claim if such was made.*

98 Article 312 of the CPC FBiH (Official Gazette of the FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, 59/14).

99 S. Janković, "Greške i propusti pri izradi prvostepene krivične presude," *Bilten Vrhovnog suda Srbije*, no. 2 (2006).

the case analyzed here, the operative part of the judgment is aligned to a significant extent with the legislative requirements referred to in Article 305(3) of the CPC FBiH, read in conjunction with Article 300; but it does contain some grammatical errors.

The court's explanation is an extremely important part of a judgment, and should answer the question of how the court was led to a given decision, as described in the operative part.¹⁰⁰ This explanation should present the court's decision through clear and convincing reasoning so that any reader, irrespective of their legal knowledge, and any second-instance judge can determine what governed the decision of the first-instance court in all aspects.¹⁰¹ Such an explanation allows the parties to contest a decision with legal remedies and allows higher-instance courts to examine the appropriateness and lawfulness of the decision based on those legal remedies.

In the judgment under analysis, the court's explanation contains the following weaknesses:

- i. The guilty plea by the defendant at the main trial (Article 245 of the CPC FBiH) was not considered, and there is merely a brief comment about the defendant having confessed to perpetrating the criminal offense.

100 According to Article 305(6)–(8) of the CPC FBiH, the court's explanation should present the reasons for each count of the judgment. The Article instructs that the court shall specifically and completely state which facts the court finds were proven or unproven, and on what grounds, and must offer an assessment of the credibility of contradictory evidence; the reasons the court did not sustain various motions of the parties; why the court decided not to directly examine a witness or expert whose testimony was read; the reasons guiding the court in ruling on legal matters, and especially in ascertaining whether the criminal offense was committed and whether the defendant was criminally responsible, and in applying specific provisions of the Criminal Code to the defendant and to his act. If the defendant has been sentenced to punishment, the court's explanation shall state the circumstances considered by the court in deciding on sanctions. The court shall specifically present its reasoning when it has decided on a more severe punishment than prescribed, when it has decided that the punishment should be mitigated or the defendant released from punishment, when the court has pronounced a suspended sentence, or when it has pronounced a security measure or forfeiture of property gain.

101 M. Majić, *Prvostepena krivična presuda: veština pisanja* (Beograd: Paragraf, 2014), 15–16.

- ii. The titles of codes are incomplete and there is no reference to the number and year of issue of the Official Gazette in which they were published.¹⁰² Abbreviations should be used only once these complete details are introduced.
- iii. A compensation claim was not mentioned in the judgment, including whether one was filed or not (Article 212(3) of the CPC FBiH), even though the court inspected the interrogation reports of the suspect provided by the competent police authority as well as the report on witness statements that contained, among other standard questions, a mandatory question about a compensation claim by the injured party.

There are minor grammatical mistakes in the decision as well, such as merged words, all lowercase letters used in the title of the criminal offense, etc. Furthermore, the format of the heading for the court's explanation is written as "E X P L A N A T I O N" – spaced and in all capital letters – yet the proper way to format the title is without spaces and with only first letter capitalized, as "Explanation."¹⁰³

The purpose of this part of the judgment is to present the clear and convincing reasoning of the court.¹⁰⁴ However, in the case analyzed here, inconsistency between the operative part of the judgment and the court's explanation is evident, especially where the court states in the operative part that violence "*was committed against the mother*" but notes in the explanation that violence was committed "*against the mother and her husband.*" This could justify revoking the judgment as it constitutes a considerable breach of procedure with respect to the passive subject.

102 Article 63(5) of the Rulebook on Internal Court Operations of the High Judicial and Prosecutorial Council of BiH (Official Gazette of BiH, 66/2012).

103 After the operative part of the judgment and before the explanation, the heading "Explanation" should be inserted, with the first letter capitalized, as per Article 63(7)(c) of the Rulebook on Internal Court Operations of the High Judicial and Prosecutorial Council of BiH (Official Gazette of BiH, 66/2012).

104 Majić, *Prvostepena krivična presuda: veština pisanja*, 15–16.

CONTENT ANALYSIS

Analysis of the judgment in this case reveals that the legal qualification of the offense was not duly established, as the operative part reads that the violence was perpetrated in the family apartment against members of the defendant's family with whom he *cohabited* in a common household. This was corroborated by the statement of the injured party that the household was shared. This should have impacted the legal qualification of the offense; namely, it should have been qualified under paragraph 2 of Article 222 of the CC FBiH and punished by *a fine or imprisonment for a term not exceeding three years*.¹⁰⁵ Instead, the basic form of the criminal offense of domestic violence referred to in paragraph 1 of that Article was charged, punished by *a fine or imprisonment for a term not exceeding one year*. The identity of the passive subject constitutes a qualifying factor for the more severe form of the offense, as the injured party was one of the defendant's closest family members – which includes spouses, children, and parents.¹⁰⁶

In deciding on sanctions, the court assessed that one *mitigating* and one *aggravating* factor had a bearing on the magnitude of punishment. As mitigating, it valued that the defendant confessed to committing the offence and thereby contributed to expediting and increasing the efficiency of the proceedings. As aggravating, the court valued that the defendant had prior convictions (which were not for domestic violence offenses).

The reasoning of the court as to how it reached a conclusion on aggravating factors is not well elaborated in the judgment, which clearly indicates other aggravating factors the court failed to consider. For one, the judgment fails to address the factor of *continuous violence*, as reported by the injured party in her statement that her son (the accused) had perpetrated psychological and verbal violence against her and her husband “over the last few years.” She also stated that she had reported him to the police two years prior, but nothing had come of it. It is apparent that a pattern of violence spanned over a period

105 This paragraph refers to the criminal offense in paragraph 1 of the same Article, committed against a family member who cohabites in the same household as the perpetrator.

106 Z. Tomić, *Krivično pravo II, Posebni dio* (University of Sarajevo Faculty of Law, 2007), 141.

of time in this case – and was repeated and continuous – and the court should have treated this as an *aggravating factor*.¹⁰⁷

Furthermore, the statement of the injured party indicated that the defendant had abused her several times previously by threatening to kill her and cut her throat, and that she had reported one of these incidents to the police but was not aware of their actions thereafter. In other words, this is a case of domestic violence in which the victim had *previously reported* similar behavior to the police, and the court could have valued this factor as aggravating. Proof of previous reports by a victim to institutions such as the police can illustrate continuity in a defendant's perpetration of violence as well as the active role of the victim in seeking protection from competent authorities.

The court's failure to assess the continuity of violence in this case as an aggravating factor suggests that no special importance was given to the portions of the victim's statement that discussed previous abuse, which may indicate the court's insufficient consideration of the consequences of this offense for the victim. This implies that standards and considerations laid out in the *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina* have been only partially applied in judicial practice in BiH. Indeed, an analysis of court judgments in domestic violence cases across the country reveals a pattern of defendants denying any continuity of violence and claiming that charged incidents are isolated, irrespective of whether the proceedings are led for a single or continuous criminal offense. Yet continuity of domestic violence can be proved by establishing *psychological*¹⁰⁸ and *physical*

107 See: Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*, 17.

108 *Psychological consequences* are more common than physical, albeit more difficult to link to their root cause. But, several symptoms that often emerge as a consequence of violence fall under the umbrella of posttraumatic stress disorder. Long-term abuse can especially be a cause of such consequences; and these emotional consequences can be even more destructive for women than physical injuries. One common indicator that emotional consequences of abuse exist for a victim is regular suicidal ideation. Beyond this, the most common emotional responses and psychological signs of domestic violence are: fear; restlessness; tension; feelings of guilt and shame; intense feeling of loneliness, sadness, and depression; neurotic responses (such as panic attacks); impaired self-confidence and self-esteem; anxiety; sleep disorders (insomnia, nightmares); eating disorders (anorexia, bulimia, malnutrition, dehydration); a sense of worthlessness and the feeling that one is unable to do anything "right"; a sense of infirmity; problems focusing, and a feeling of

consequences¹⁰⁹ for the victim; and relevant to this case in particular are studies showing that elderly people who are exposed to violence suffer negative mental health impacts, and further, that exposure to verbal violence is one of the most reliable predictors of psychological stress in the elderly.¹¹⁰

To establish the existence of continuous violence as well as the psychological injuries of the victim, it is necessary to obtain relevant evidence, such as the opinions of court appointed experts. In addition, with the aim of preventing continuous domestic violence, expert evaluations of perpetrators should also be conducted, to assess their psychological state and, if necessary, impose the security measure of mandatory psychiatric treatment.¹¹¹ The elderly victim in this case was particularly vulnerable; and therefore, the court could have valued this as an aggravating factor.

Violence against the elderly is increasingly present in our society as general economic conditions worsen, and yet elderly victims face specific obstacles to seeking assistance. Several studies show that various factors contribute to violence against the elderly, including: caregiver stress and frustrations about an elderly victim's cognitive impairment or functional disability, substance abuse or addiction, the mental health of the abuser, poverty, and weak social networks. In fact, researchers have concluded that violence causes such significant interpersonal stress in elderly people that it constitutes an additional

distractedness; a lack of tolerance and patience; and sexual problems. Thus, continued and long-term domestic violence severely impacts a victim's psychological and physical health. See: Sigurno Mjesto [Safe Zone], "Posljedice nasilja," [http:// www.sigurnomjesto.hr/savjetovanje/posljedice-nasilja/](http://www.sigurnomjesto.hr/savjetovanje/posljedice-nasilja/) (accessed 1 February 2020).

109 *Physical consequences* of domestic violence can range from hematomas and abrasions to significantly more severe forms of injury, including permanent disability, or death. The most common physical consequences resulting from domestic violence are abrasions, hematomas, various superficial injuries, eye injuries, or fractures. These injuries can all temporarily or permanently impair the health of the victim. The severity of bodily injuries is a judicial-medical classification; and from a medical perspective, there are three types of severe injuries: severe bodily injury, particularly severe bodily injury, and severe bodily injury resulting in death. For more, see: M. Singer, *Kriminologija delikata nasilja, Nasilje nad djecom i ženama, maloljetničko nasilje* (Zagreb, Nakladni zavod Globus, 2005).

110 M. Ajduković, S. Rusac, and J. Ogresta, "Izloženost starijih osoba nasilju u obitelji," *Revija za socijalnu politiku* 15 (2008), 5–8.

111 Galić, and Huhtanen, *Judicial Benchbook: Considerations of Domestic Violence Case Evaluation in Bosnia and Herzegovina*, 18.

risk of death. A study carried out in the US, monitoring a sample of 2,812 elderly people over the course of nine years, showed that 40 percent of respondents in the non-abused group were still alive, whereas only 9 percent had survived in the group exposed to violence.

Violence against the elderly is under-researched, making it harder to combat and prevent.¹¹² This form of domestic violence is thus known as a *hidden crime*; meaning, reports and thus judgments related to violence against the elderly are rare, and the actual number of cases occurring in the community is unknown. Often, these crimes are disclosed only when the most severe forms of the offense take place, such as domestic violence resulting in murder. Among criminologists, the prevailing opinion is that violence against the elderly is the most neglected of all types of domestic violence, alongside cases of parent victims of their children. Even researchers who have studied criminal behavior by youth directed at the elderly have mostly failed to address the issue of children's violence against their parents.

The most common perpetrators of violence against the elderly are related caretakers.¹¹³ Hence, in many cases, the unwillingness of parents and the elderly to report violence is linked to a fear of rejection by their family, a sense of loyalty to their children, or functional dependence on their caregivers. This makes violence against the elderly very difficult to identify, even compared to violence against children, since their increased social isolation can increase their risk of abuse but is also more likely to be seen as a function of old age.

Challenges to collecting data on the exposure of elderly people to domestic violence can be categorized generally as those arising from the lack of willingness of victims to speak about their experiences of violence, and those arising from the design of the research.¹¹⁴ Often, elderly parents are ashamed to admit that their children abuse them, or that they are afraid of their children.

112 See: M. Žilić and J. Janković, "Nasilje," *Socijalne Teme* (2016), 80.

113 See: Đ. Ignjatović, *Kriminologija* (Beograd: Pravni fakultet, 2010), 109.

114 Research design issues relate to how the research problem is defined, the manner in which the intensity and scope of violence is recorded, the way causes are characterized, and how mediators and moderators of violence are approached. See Ajduković, Rusac, and Ogresta, "Izloženost starijih osoba nasilju u obitelji," 5.

Additionally, some elderly people say they have trouble finding information online and some say they are unwilling to report violence because they think they will be misunderstood or won't be believed.¹¹⁵ This means that only the most egregious cases end up being prosecuted.

Researchers of violence mostly presume that youth are victims of their parents, and are not perpetrators.¹¹⁶ But in the Netherlands, the Domestic Violence Support Center (SHG) carried out a study on the characteristics of families in which abuse of parents takes place, and found from a sample of 249 cases that the perpetrators were boys in 87 percent of cases, and that violence increased after the age of 14 for boys while it decreased at the same for girls. The same study found that in 72 percent of cases, the victim was the biological mother; and that 82 percent of perpetrators lived with their parent victims and 32 percent lived with both biological parents. In a majority of these cases, physical (78 percent) and/or psychological (70 percent) violence was perpetrated, and in 11 percent of cases, financial violence was perpetrated. Almost all the perpetrators in these cases exhibited other behavioral or social problems, including 41 percent who had documented psychiatric conditions, 25 percent with addiction issues, and 10 percent facing debt. To prevent violence against parents in the earliest stage, more efforts are needed to raise awareness about this problem. This should include national media campaigns on domestic violence against parents and the elderly, as well as regional and municipal initiatives.

Key risk factors for perpetrators of domestic violence include: the divorce of their biological parents, prior exposure to domestic violence, psychiatric disorders (especially adjustment disorders), substance and alcohol abuse, a lack of social support, patriarchal attitudes regarding gender roles, delinquency in the public sphere, and disruptive behavior in school.¹¹⁷ In this case, as the

115 Research carried out in Zagreb, Croatia sampled 303 persons ages 65 to 97, and found that 51.5 percent believed older people are exposed to violence, and 57.3 percent believed older people rarely or never report this violence. For more, see: Ajduković, Rusac, and Ogresta, "Izloženost starijih osoba nasilju u obitelji."

116 R. Vink, F. Pannebakker, A. Goes, and N. Doornik, "Family violence of adolescents and young adults against their parents: Core findings from exploratory research," *Movisie/TNO*, 2014, 3.

117 *Ibid.*, 3–5.

judgment stated that the defendant suffered from an addiction to heroin and other opiates for which he was being treated, the court had both the legal and factual basis to impose *a security measure of mandatory addiction treatment*. Article 71 of the CC FBiH stipulates that a security measure of mandatory treatment can be imposed by the court on a defendant, once it has obtained the finding and opinion of a court-appointed expert. This expert should address treatment options for the defendant.¹¹⁸ Measures such as this are designed to prevent further violence and protect the victim by eliminating conditions that may contribute to perpetration by the defendant.¹¹⁹

Still, in the case analyzed here, it must be noted as positive that the court did not attribute the defendant's perpetration of the offense to his addiction, finding that the defendant acted with intent. Furthermore, the court did not value his addiction as a mitigating factor when decided on punishment. This is important, because understanding the causes of domestic violence requires distinguishing between *risk factors for* and *causes of* violence. Some factors increase the risk of domestic violence but do not represent its causes; and they are sometimes used to justify violence.

For example, several *risk factors* for violence that have been used in the past to justify violence in families are drug and alcohol abuse, economic stress and poverty, and mental illness. In fact, *drug and alcohol abuse* is associated with an increased risk for both domestic violence perpetration and victimization. But drug or alcohol addiction does not *cause* domestic violence. If it did, everyone who consumed alcohol or used drugs would commit violence. In reality, not all perpetrators drink alcohol or use drugs, and most people who do so do not perpetrate domestic violence or any other kind of violence. A study of 200 perpetrators of domestic violence actually found that a substantial proportion did *not* abuse alcohol or drugs.¹²⁰ However, addiction can be a risk factor for violence because addicts often have a hard time with impulse

118 See Article 411 of the CPC FBiH (Official Gazette of the FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, 59/14).

119 See Article 72 of the CC FBiH (Official Gazette of the FBiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16).

120 N. Jakobson and J. Gottman, *When Men Batter Women* (New York: Simon & Schuster, 1998). Also see: Galić, *Practice Guide: Domestic Violence*.

and behavior control and may in some cases be more prone to violence (usually due to co-morbid diagnoses or other social factors).

Finally, the *urgency requirement* was not met in this case, as the indictment was filed on 10 November 2014 and the trial did not take place until 12 May 2016 – 18 months later – in contravention of obligations set out in the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), which stipulates that parties should ensure criminal proceedings in domestic violence cases are carried out without delay and finalized promptly.¹²¹ The 1979 UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) also obliges signatory states to establish legal protections of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination, including through efficient criminal proceedings in domestic violence cases.¹²²

A POSITIVE CRITIQUE OF THE JUDGMENT

The attitude expressed by the court toward violence in this judgment, based on the type and magnitude of the criminal sanction, positions it within current court practice in BiH as a *relatively* good example of judicial practice. Choosing between a fine and imprisonment, the court opted for imprisonment, and the

121 BiH ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) on 7 November 2013, making it the sixth CoE member state to do so. The text of the Convention was published in the Official Gazette of BiH – International Agreements (19/13). With this, BiH committed to taking legislative and other measures to ensure a legal, institutional, and organizational framework for the prevention of violence against women, the protection of victims of violence, the sanctioning of perpetrators, and the prevention of its repetition. Article 49 of the Convention stipulates that parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of the Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of criminal proceedings.

122 The Convention was adopted by the General Assembly in Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981. BiH accepted and ratified it in 1993. See Kovaček-Stanić and Samardžić, *Novine koje donosi Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici*, 96.

sentence of three months for the basic form of the offense is a good example of appropriate sanctioning in light of current standards. Several international documents should be considered in this respect, though, especially the Council of Europe Recommendation on the protection of women against violence (Rec (2002)5), which urges member states *to revise and/or increase penalties*, particularly for deliberate assault and battery committed within the family.¹²³

In deciding on the type and measure of a sanction, a court starts from the degree of guilt and the purpose of punishment, then assesses all the relevant factors that impact the magnitude of punishment in a given case and evaluates all the mitigating and aggravating factors in order to individualize that punishment. The purpose of punishment is to express *social condemnation* for the perpetrated offense, in order to deter a perpetrator from committing future offenses and encourage their rehabilitation, produce a general deterrence effect, and raise awareness among citizens about the danger of criminal behavior and that justice will be served. Yet, despite the international condemnation of violence against women in multiple texts,¹²⁴ studies indicate that criminal sanctions for domestic violence remain inadequate. A tendency to impose lenient sentences in these cases is simply socially unfounded.

A second positive aspect of the judgment in this case is that it clearly and unambiguously condemns domestic violence; stating that domestic violence is a harsh reality in our society that has been long neglected, that it is not marginal or incidental, and that it constitutes the most direct violation of human rights and a ground for discrimination of women, demanding a response from society as a whole. By laying out the purpose of punishment prescribed by the CC FBiH and imposing a prison sentence, the court sent a message to the perpetrator and the public that domestic violence is a

123 Council of Europe Recommendation on the protection of women against violence, Rec (2002)5, 30 April 2002.

124 For example, the 1993 UN Declaration on the Elimination of Violence against Women was adopted by the General Assembly on 20 December 1993 in Resolution 48/104. Especially important is Article 4(d), which stipulates that signatory states shall condemn violence and pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, develop penal, civil, labor, and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.

dangerous criminal offense that can have social impacts and long-term consequences for victims.¹²⁵

CONCLUSION

The criminal sanction for the offense in this case, and the court's assessment of aggravating and mitigating factors, indicates that discourses still exist within the judiciary that domestic violence results in a relatively low level of social harm. In part, this is due to insufficient training for judicial office holders. Therefore, it is necessary to adopt a new approach, to change the discourse on violence among judges, primarily by educating them in the dynamics of domestic violence as recommended in several international documents on the topic.

Moreover, domestic violence *is* a serious social problem, and this must be reflected in the sentencing policy of the court. Appropriate criminal sanctions for perpetrators of these offenses should aim to deconstruct the deeply rooted biases and conditioning of professionals that leads many to see domestic violence as a crime of minimal severity and social danger. The response of judicial office holders to domestic violence must be founded on a deep understanding of its consequences, the capacity to confront perpetrators with those consequences, and an eye to preventing future offenses.

The judgment analyzed here represents a partially positive example of adequate sanctioning, but does contain several significant omissions, both in terms of meeting the legal requirements of drafting a judgment and in terms of assessing aggravating and mitigating factors. Still, it is apparent that more intensive training in handling domestic violence cases is necessary for relevant professionals (police, prosecutors, and judges) to ensure efficiency and avoid later objections to the proceedings. In cases of domestic violence, a judgment should send a clear message about special and general prevention, and that domestic violence constitutes unacceptable behavior. Additionally, a judgment should support the victim and her safety.

125 The purpose of punishment is stipulated in Article 42 of the CC FBiH (Official Gazette of the FBiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16).



5.

A LONG-TERM ABUSER: INADEQUATE SENTENCING

*Drena Marin**

INTRODUCTION

This analysis reveals that the judicial community lacks sufficient awareness of the dynamics of the criminal offense of domestic violence. For the purposes of providing optimal protection to victims of domestic violence, and to further its prevention, all judicial office holders should therefore receive additional training on this subject. To that end, this judgment was subject to both a legal and qualitative analysis, including of the court's evaluation of mitigating and aggravating factors, the sanctions and security measures imposed, and the right of the injured party to damage compensation.

GENERAL INFORMATION ABOUT THE CASE

The defendant is a 40-year old locksmith who was unemployed at the time he perpetrated the offense. On 10 July 2013, around 3 o'clock in the afternoon,

* Judge of the District Court in Prijedor.

the defendant arrived at his sister's family house and began threatening his sister and her minor daughter, and telling them that they better not stay to see what would happen when the sister's husband (the father of the underage niece) arrived; and while saying these things, he punched the balcony fence. The defendant's sister and niece left the house crying. Then, the defendant went to the room where his elderly parents were, punched the doorjamb, and threatened them that he would not come emptyhanded next time. His parents went down to the basement, fearing for their lives, and stayed there until their son-in-law arrived.

The description of facts and the course of the proceeding indicate that the defendant's parents had shared the same household with the defendant at an earlier time, but were forced to leave due to previous violence and other arrogant and cruel behavior directed toward them by the defendant. The judgment relates that a suspended sentence of three months in prison had been imposed on the defendant in 2011 by the Municipal Court, with two-year probationary period; and that he was sentenced again in 2012, to three months and 15 days in prison for the criminal offense of domestic violence in conjunction with threats, and spent 30 days in prison.

In other words, the defendant was found guilty in earlier proceedings for the same criminal offense that he perpetrated on 10 July 2013 – domestic violence as referred to in Article 222(1) of the Criminal Code of the FBiH (CC FBiH).¹²⁷ During the proceeding analyzed here, the defendant claimed he had not perpetrated the offense of which he was accused, but his father, mother, sister, and brother-in-law were all heard as witnesses to the incident. An expert witness, a neuropsychiatrist, also testified, noting that the defendant displayed indifference toward others, was unable to learn from experiences, tended toward impulsive reactions, and did not accept his guilt. This expert also said that the defendant had a diminished, but not significantly diminished, mental capacity at the time of perpetration of the criminal offense, and recommended compulsory psychiatric treatment.

127 Official Gazette of the FBiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14 and 46/16.

At the sentencing stage, the court valued the unemployment and poor economic status of the defendant as mitigating factors. His prior convictions for the same criminal offense and the fact that earlier sanctions did not have a preventive effect were valued as aggravating factors.

NORMATIVE ANALYSIS OF THE JUDGMENT

On 5 August 2013, the cantonal prosecutor's office initiated a criminal proceeding against the defendant for the offense of domestic violence referred to in Article 222(2) of the CC FBiH. However, the description of facts indicates that the defendant perpetrated the criminal offense referred to in Article 222(1). When confirming the indictment, the preliminary hearing judge had the opportunity to return the indictment to the prosecutor in order to properly qualify the offense, but failed to do so.

Thus, it was only after the presentation and analysis of evidence at the main trial that the court established the facts accurately; i.e., that the defendant's actions constituted elements of the domestic violence offense referred to in Article 222(1) of CC FBiH (and not in Article 222(2)). This is because violence was perpetrated against family members who no longer shared the same household with the defendant. In recognizing this, the court found the defendant guilty and convicted him in accordance with the proper law. Still, based on the accurately established facts in this case, the sanction imposed on the defendant was inadequate to positively effect the ordered security measure or constitute an appropriate community response to the unacceptable behavior of the defendant.

THE DURATION OF THE PROCEEDINGS

Three years and five months lapsed from the time the criminal offense was perpetrated in this case to the imposition of the first-instance judgment, despite that fact that the indictment was issued in an emergency procedure within one month of perpetration. Indeed, the indictment was confirmed by the first-instance court on 12 August 2013, but the defendant did not have a

plea hearing until 7 September 2016, three years and one month later. The judgment does not provide a reason as to why the defendant failed to enter a plea for so long time (presumably, he was not available to the court).¹²⁸ Following the plea hearing, in which the defendant pled not guilty, the case was processed in just over four months and the first-instance judgment was issued on 16 January 2017.

Assuming the defendant was unavailable before September 2016, the court did respect the emergency requirement in this case, in accordance with the provisions transposed from the Istanbul Convention.¹²⁹ Although, as a rule, courts resolve criminal cases in the chronological order they are submitted, when a domestic violence case comes before a court, it should take urgent steps, to the extent possible and without undue delay, to establish the potential responsibility of the perpetrator in the most efficient way possible, and to mitigate the negative effects of the proceeding on the victim as much as possible.¹³⁰

CONTENT ANALYSIS

A qualitative content analysis of the judgment in this case offers a view into the court's attitude toward the injured parties, as reflected in the valuation of mitigating and aggravating factors, the sanction and security measures that were imposed, and the court's decision on the compensation claim of the

128 This assumption is based on the fact that, if the defendant was actively avoiding the service of a court summons, this behavior should have constituted an aggravating factor when the sanction was imposed, because this prevents efficient access to justice for the injured party.

129 Namely, court proceedings in domestic violence cases are to be conducted without undue delay. Article 7(1) of the Istanbul Convention stipulates that "Parties shall take the necessary legislative and other measures to adopt and implement State-wide effective, comprehensive and co-ordinated policies encompassing all relevant measures to prevent and combat all forms of violence covered by the scope of this Convention," and Article 7(2) stipulates that "Parties shall ensure that policies referred to in paragraph 1 place the rights of the victim at the centre of all measures and are implemented by way of effective co-operation among all relevant agencies, institutions and organisations. Also, Article 5(2) puts forth that "Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention."

130 Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*.

injured parties. In this case, the court did not adequately center the needs of the victims in the punishment it imposed; it also did not deliberate on a compensation claim, and never explained why.¹³¹ In fact, the judgment lacks information about whether the injured parties were informed about their right to a compensation claim, or if they waived that right during the proceeding. This represents an omission, and the court should have provided an explanation in the judgment as to the status of this compensation claim and should have paid this issue more attention generally.

The security measure imposed by the court, of compulsory psychiatric treatment – referred to in Article 74 of the CC FBiH – which is imposed against a defendant who has perpetrated a criminal offense with diminished or significantly diminished mental capacity if there is a danger that the causes of such condition may induce them to perpetrate another offense, is one more place where the court could have acted more proactively. As the defendant was sentenced to three months in prison and the court-ordered treatment could last only until the reasons for its imposition ceased to exist, but not later than the expiry of the prison sentence, it was a necessarily short-term intervention. Yet, the court's explanation in the judgment indicates that the defendant continuously perpetrated violence against family members for many years, primarily against his parents, suggesting a need for long-term professional medical care to address psychological conditions that cannot be cured in two months; which was the effective duration of treatment for this defendant.

The sanctions imposed by the court in this case failed to reflect the degree of criminal liability of the defendant, or sufficiently prioritize the protection and safety of the victims. To protect the injured parties as victims of violence in this family, and to provide the defendant with appropriate treatment, the

131 Article 207 of the CPC FBiH (Official Gazette of the FBiH, 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 09/09, 12/10, 08/13, 59/14) sets out that a compensation claim which has arisen because of the commission of a criminal offense shall be deliberated on the motion of an authorized person in the criminal proceedings, if this will not considerably prolong such proceedings; and Article 209(1) and (2) of the same Code lays down that a motion to pursue a compensation claim in criminal proceedings shall be filed with the court, and may be submitted no later than the end of the main trial or sentencing hearing before the court.

court should have imposed a longer prison sentence attuned to the consequences of this criminal offense – which involved the exposure of two elderly persons and one minor child to violence – and to the severity of the defendant’s psychological disorder. Moreover, the judgment should have emphasized the purpose of the security measure, to ensure the adequate and continuous long-term treatment of the defendant until his full recovery or until he has demonstrated the capacity to control his disorder with therapy.

ANALYSIS OF MITIGATING AND AGGRAVATING FACTORS

The judgment in this case lacks reasoning related to decisive facts, listing mitigating and aggravating factors only superficially and making it difficult to establish why and how the court associated those factors with this criminal offense. For example, the court valued the defendant’s unemployment and poor economic status as mitigating, but did not explain their causal link to the crime that was perpetrated. Further, in this case, this factor should not be considered mitigating, because it was established through the statements of the injured parties that the defendant had the opportunity to work and attend school in Germany, but dropped out of school and quit his job. Thus, he willingly brought such conditions upon himself, which do not justify his abusive behavior anyway; meaning, there should have been no mitigating factors in favor of the defendant.

As for aggravating factors, the court considered the prior convictions of the defendant for the same offense. It did not identify any other aggravating factors, though there were more. The fact that the defendant is a special recidivist of this criminal offense, for instance, reveals that he is prone to violence and that prior sanctions – both a suspended sentence and a short prison sentence – did not achieve their purpose. In fact, statements of the defendant’s father, mother, sister, and brother-in-law, referred to in the judgment, all indicated that the defendant had perpetrated violence against his parents for several years, as well as against his sister and her family (her husband and minor daughter). These witness statements indicate that the family lived in Germany for a while, where the defendant had also maltreated them, because he did

not want to attend school or language courses or to go to work, but wanted money. This continued when the family returned to BiH and, one night when the defendant's parents were sleeping, he broke their door down and they fled to a neighbors' in their pajamas. It was due to this aggressive behavior that the two of them abandoned their home in February 2012 and moved in with their daughter's family.

In other words, the injured parties were exposed to continuous violence and experienced a high level of threat, and the personality of the defendant tended toward aggression, selfishness, and a lack of emotion that led his parents to feel unsafe and vulnerable in his presence. The court certainly should have valued these as aggravating factors. The court was also obliged to consider the attitude of the defendant toward the perpetrated criminal offense, about which he expressed no remorse. Indeed, he denied the crime throughout the proceeding in order to diminish his criminal liability.

The defendant's parents were retired and of advanced age, putting them in a particularly vulnerable category because it may have been hard or even impossible for them to protect themselves from an abuser, which is why this factor should have been valued as aggravating as well. In fact, Article 49 of the CC FBiH stipulates that the court shall mete out punishment for a perpetrator within the limits prescribed by law for the relevant criminal offense, having in mind the purpose of punishment and taking into account all the circumstances affecting the sanction, and in particular: the degree of criminal liability, the motives for perpetrating the offense, the degree of danger or injury to the protected good, the circumstances under which the offense was perpetrated, the personal history of the perpetrator, the conduct of the perpetrator after perpetration of the criminal offense, as well as other circumstances related to the perpetrator's personality.¹³² None of these elements have been accounted for in this case.

On top of this, the defendant had a restraining order preventing him from visiting his sister's family house, and yet entered the home without permission,

132 Official Gazette of the Federation of BiH, 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, and 46/16.

punched the doorjamb, and punched the balcony fence. This is an indication of the defendant's abusiveness and ruthlessness. He also engaged both his sister and their minor daughter, warning the daughter that she should leave "so you don't have to see what will happen when your father comes home." This scared her, and she ran from the house, crying. The daughter then she called her father, who returned home and pushed the defendant out of the house, at which point the defendant threatened all of them that he would not come back empty handed next time. Clearly, the defendant perpetrated violence in the presence of a minor child and, by threatening her father, perpetrated violence against the minor. This generated a fear in the defendant's niece that may have lasting consequences, which should have been valued as an aggravating factor. However, the court did not account for the presence of a minor during the perpetration of violence, even though this is required by the UN Convention on the Rights of the Child, which came into force on 2 September 1999.

Children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protections. States Parties to the Convention on the Rights of the Child undertake to ensure such protections and care to children, as necessary for their wellbeing, considering the rights and duties of their parents, legal guardians, or other legally responsible individuals and, to this end, shall take all appropriate legislative and administrative measures. Article 16 of the Convention lays down that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, nor to unlawful attacks on his or her honor and reputation. All children have the right to protection of the law against such interference or attacks.

In view of the aggravating factors established here but not listed in the judgment in this case, the logical conclusion is that the sanction imposed was inadequate for the severity of the offense or the level of threat posed by the perpetrator.

PERPETRATION OF AN OFFENSE IN A STATE OF DIMINISHED MENTAL CAPACITY

The judgment in this case notes that the defendant perpetrated the offense in a state of diminished mental capacity, leading to the imposition of a security measure. On the advice of a psychiatric expert, the court ordered compulsory psychiatric treatment for the defendant, in accordance with Article 74 of the CC FBiH. The expert witness, a neuropsychiatrist, wrote in his findings and testified at the main trial that the defendant displayed elements of retarded or halted mental development, but no symptoms of organic brain damage. However, the expert determined that the capacity of the defendant to understand and control his will were limited, though not significantly, and recommended compulsory treatment in an outpatient psychiatric department, supervised by the Social Work Center.

Based on the findings and opinion of this expert, the court ordered compulsory treatment of the defendant, to last at most until the end of the imposed sanction, in this case up to two months. The court explained in the judgment that this security measure was imposed due to the danger that the perpetrator may commit the criminal offense again, given his indifference toward others, inability to learn from earlier experiences, tendency to react impulsively, failure to accept guilt, and because he perpetrated the offense in a state of diminished mental capacity.

The established facts and information provided regarding the defendant indicate that his aggressive behavior is linked to his halted mental development, reiterating his need for professional assistance and justifying the imposition of the security measure. However, the report of the expert witness was insufficient and inconclusive or was inadequately described in the judgment. For example, the court noted that the expert found elements of retarded mental development without organic damage or mental disease, but it is unclear how the expert witness concluded that the defendant perpetrated the offense in a state of diminished mental capacity. It also remains unexplained as to why the ability of the defendant to *understand* was considered diminished. Based on what is depicted in the judgment, the expert report appears

to have been vague, adding to questions about the adequacy of the two-to-three-month treatment time that was recommended.

The defendant is a longstanding abuser who likely needs more intensive treatment to successfully change his behavior. For example, in Finland, one of the models used with abusers comprises 15 treatments in small groups, followed by a supervision period of up to two years.¹³³ Ajduković also provides an overview of different approaches to working with perpetrators of violence, and confirms the need for an average of six months of treatment, or intense two-hour treatments over a duration of three months.¹³⁴ Ajduković emphasizes that therapy with abusers who use violence against women in their family includes a series of challenges, often including poor cooperation on the part of the abuser, irregular attendance, and dropouts. She cites research findings showing that 50 percent of abusers who complete treatment perpetrate violence within one year of completion.

As most abusers come to treatment on the basis of a court order, their determination and willingness to change is generally in question, such as in the case under analysis, in which the perpetrator did not express remorse. Against this backdrop, the treatment mandated by the court's security measure should have been imposed over a longer period of time, along with the introduction of more intensive treatment that would sufficiently support the defendant in understanding the severity of the crimes perpetrated and in assuming responsibility for his actions.

THE SANCTION

Article 45 of the Istanbul Convention stipulates that "Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness." Given that

133 Terhi Partanen, *Interaction and therapeutic interventions in treatment groups for intimately violent men* (University of Jyväskylä, 2008).

134 M. Ajduković, "Psihosocijalne intervencije sa počiniteljima nasilja u obitelji," *Croatian Annals of Criminal Law and Practice* 11, no. 1 (2004): 171–199.

BiH is a signatory to the Convention, courts are to impose a criminal sanction for the offense of violence in a family or domestic unit that meets those requirements, pursuant to international human rights protection standards. Indeed, the punishment of domestic violence should be proportional to the severity of the crime.

In the case analyzed here, the defendant was aggressive toward his family over a long period of time, extorting money from them, threatening them physically, and destroying their property. The court had the obligation to seek the opinion of an expert witness, in this case a neuropsychiatrist, about the duration of treatment appropriate for the defendant; and based on this opinion, the court could have imposed a prison sentence that would have enabled the implementation of this measure over a longer period of time. Only a security measure of compulsory psychiatric treatment imposed in that manner is likely to have a preventive effect on the defendant and act as a deterrent from further perpetration. In this way, the injured parties are protected and receive satisfaction.

It is unclear, therefore, whether the findings of the expert witness regarding the defendant's personality and his need for treatment were valued sufficiently and with sufficient care in this case. The security measure of compulsory psychiatric treatment is intended to address factors that increase the risk of violence perpetration, indirectly contributing to victim protection, and the prison sentence of three months that was imposed on the defendant did not provide such protection. One could argue that a judgment delivering such a sanction sends the wrong message, and that by failing to value aggravating factors that would have resulted in a longer prison sentence, even encourages a defendant to continue perpetrating the same criminal offense.

Criminal sanctions are prescribed and pronounced to suppress unlawful acts that threaten or violate values protected under criminal legislation. This is the general prevention described in Article 5(3) of the Criminal Code of the RS (CC RS). Article 28 of the CC RS also stipulates that the purpose of criminal sanctions is: "to deter the perpetrator from perpetrating criminal offenses and to reform him, to deter others from perpetrating criminal offenses, and to

develop and promote the community's responsibility by expressing public condemnation of a criminal offense and the necessity to obey the law." This is special prevention. Similarly, Article 42 of the CC FBiH sets out the following purposes of punishment: "to express social condemnation of the perpetrated criminal offense, to deter the perpetrator from perpetrating criminal offenses in the future, to deter others from perpetrating criminal offenses, and to increase the awareness of citizens of the danger of criminal offenses and of the fairness of punishing the perpetrators."

Yet, in BiH, research conducted by the OSCE established that inadequate sanctions were imposed in almost 74 percent of the domestic violence cases it examined, largely because the courts inappropriately valued mitigating factors that should not be valued as such for this type of criminal offense – including that a defendant was a "family man," had pled guilty, had expressed remorse, and had exhibited proper conduct in the courtroom – or because a victim's attitude toward the punishment of the defendant was valued or a victim was viewed as having contributed to the offense.¹³⁵ These findings indicate that domestic violence has not been attributed adequate importance in Bosnian courts, due to lack of understanding of the nature and severity of the criminal offense, and due to social attitudes and a bias toward "traditional" relationships.

Greater weight must be attributed to this offense within the judiciary, requiring that all the professionals who work to resolve these cases receive training that is focused on raising awareness about how the sanctions imposed in cases of domestic violence must be proportional to the severity of the offense and its impact on society. Sanctions below the statutory minimum should be used only in *exceptional* cases, and the court must provide a clear explanation thereof. And in particularly violent cases, punishment should reflect additional social disapproval of the offense through a sanction even more stringent than the one prescribed by law.

In the case analyzed here, the judge does not appear to have sufficiently understood the danger posed by perpetration of this criminal offense, despite the fact

135 OSCE, *Ensuring Accountability for Domestic Violence*.

that five members of the defendant's family were continuously exposed to violence, directly or indirectly. The defendant perpetrated the offense in question with premeditation, aware of his actions and able to manage them even in a state of diminished (but not substantially diminished) mental capacity. Also, a minor child was exposed to violence, as were the defendant's parents, who are of advanced age and thus in a vulnerable category requiring special protection. Had the judge analyzed the aggravating factors in this case thusly, a longer effective prison sentence would have been imposed as proportional to the severity of the offense and its consequences, and to convey the social attitude that abusive behavior and endangering others is unacceptable.

If a longer sentence had been imposed, the security measure imposed by the court would have made more sense, because the defendant would have been subject to treatment for a longer period of time, giving this treatment a better chance to yield positive results. Meaning, this measure could have had a more likely preventive effect on the defendant that would deter him from future perpetration. A criminal sanction must communicate that domestic violence is socially inadmissible, and judges must protect the safety of victims by applying existing laws and by treating domestic violence as the serious criminal offense it is.

Judges are leaders in establishing and implementing social order, and they occupy an important and respected position in the community. They have the power to set standards of professional conduct in courts that will be respected by all, and in this way, can enable efforts to improve responses to domestic violence and reduce its frequency in BiH. Domestic violence is a serious social problem and it is only by adequately sanctioning perpetrators that deeply rooted biases can be broken and the view of domestic violence as a harmless or justified crime can be changed. The courts must be clear that it is a severe and socially dangerous criminal offense.

The judgment analyzed here illustrates the necessity that all competent authorities dealing with domestic violence – court professionals, the prosecutor's office, and other agencies or institutions participating in the procedure – are trained to use a coordinated multidisciplinary approach that will more

adequately and more efficiently resolve these cases. This will prevent later legal objections to the efficiency of court proceedings, lenient sentencing, or inadequate victim protection.

THE RIGHT TO DAMAGE COMPENSATION

The judgment in this case did not mention the right of the victims to damage compensation. The prosecutor's office and the court both had a legal obligation to inform the injured parties about their right to receive compensation for damages caused to them by the defendant, for which they could file a compensation claim. Based on the judgment, this right of the injured parties appears to have been neglected by the court. The court was bound to ask the victims whether they wanted to file a compensation claim, and should have recounted their response in the judgment and awarded compensation if there was sufficient evidence; or if there wasn't, it should have instructed them to file a compensation claim in a civil proceeding. Otherwise, the court should have acknowledged in the judgment that the injured parties chose not to file a compensation claim, which is often true in cases involving domestic violence offenses. Indeed, in such cases, injured parties generally want one thing: an end to the violence.

CONCLUSION

Domestic violence is a grave social problem and it must be viewed through this lens in the context of sanctioning perpetrators. Adequate criminal sanctioning must confront any entrenched bias among judicial professionals that domestic violence is a mild form of crime. Thus, the position of the prosecutor's office and the court should be made clear not only through the punishment of the perpetrator, but also through the treatment of injured parties, in order to convey to the public that the behavior of perpetrators is unacceptable and that victims will be supported. If victims feel safe and protected before the court, they are more likely to report cases of violence.

The judgment in this case indicates the essential need for additional training for all competent authorities dealing with domestic violence, so that they are able to make full use of a coordinated approach that will facilitate more adequate and more efficient prevention of domestic violence, and more efficient resolution of court proceedings in this type of case, thereby precluding future objections on the basis of inefficiency in the court proceedings. It is also recommended that these cases should be processed as a *priority*, in order to bring perpetrators to justice as quickly and efficiently as possible, and so that victims are provided with satisfaction, safety, and protection. In other words, judges and prosecutors must take swift, efficient, and effective action against perpetrators of this criminal offense, through prescribed sanctions; and in order for this to happen, training is necessary to raise awareness and knowledge about the severity and complexity of domestic violence, both as it relates to perpetrators and victims of violence. It is only through swift action grounded in awareness that society will be able to exert a preventive influence on perpetrators and deter them from perpetrating this offense.



6.

STRANGULATION OF A COMMON LAW WIFE: A JUSTIFICATION OF VIOLENCE, AND ACQUITTAL

*Svetozar Bajić**

INFORMATION FROM THE JUDGMENT

In the case at hand, the Cantonal Prosecutor's Office charged the defendant with committing the criminal offense of domestic violence under paragraph 2 of Article 222, as read in conjunction with paragraph 1, of the Criminal Code of the FBiH (CC FBiH), in an indictment filed 26 December 2012.¹³⁷ Allegedly, the defendant verbally insulted his common law wife on 29 of August 2012 in the apartment he shared with her, following a fight about unpaid fines and the obstacle this posed to registering their passenger vehicle, before assaulting her by grabbing her neck as she held their child in her arms. He gripped her neck in such a way that she started losing consciousness, and thus inflicted minor bodily injuries of contusion/hematoma and

* Judge of the Basic Court in Banja Luka.

137 Official Gazette of the FBiH, no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, and 46/16.

abrasions on both sides of her neck. During the assault, he threatened to cut the throats of the victim and their child if she reported him to the police.

The first-instance court delivered a judgment on 6 April 2016, acquitting the defendant. Following an appeal by the Cantonal Prosecutor's Office, the second-instance Cantonal Court revoked the first-instance judgment. Yet, the second-instance court once again acquitted the defendant on 26 May 2016 and, given the fact that no party appealed, this decision became final.

The defendant is a man with a secondary education degree, who has worked as a mechanical technician but was unemployed at the time of the proceedings. He is the father of six children, and of medium financial means. The injured party was the defendant's common law wife and the mother of their child, who cohabited with the defendant in a common law domestic unit. No other information about the injured party is included in the judgment; and similarly, there is no indication in the judgment as to whether the defendant had any prior convictions. Furthermore, the name, sex, and age of the child are not recorded.

The defendant was charged with committing a criminal offense against the injured party, a family member with whom he was cohabiting in a common household; i.e., he perpetrated a qualified criminal offense of domestic violence under Article 222 paragraph 2, as read in conjunction with paragraph 1, of the CC FBiH, punishable by a fine or imprisonment of a term not exceeding three years. It should be underlined that the Criminal Code of the FBiH, unlike that of the Republika Srpska, does not define domestic violence committed in the presence of a minor child, as in this case, as a qualified offence.¹³⁸ Thus, in the FBiH, the presence of a minor during perpetration of the offense is only considered if the defendant is convicted, and is weighed as an aggravating factor in deciding on sanctions.

138 Article 208(3) of the CC RS stipulates a prison sentence of two to ten years as a sanction in such cases. See: Official Gazette of the RS, 64/17.


NORMATIVE ANALYSIS

The criminal proceedings in this case ended with an acquittal, but the defendant should have been convicted given the quality of evidence, including an expert opinion on the injuries to the victim, medical documentation corroborated by photographic proof of these injuries, and a statement by the welfare authority. In order to revoke the first-instance court's judgment of acquittal, the second-instance court must have referred to this in their decision. Indeed, that decision reinforces the fact that the judgment analyzed here was an insufficiently sensitive response to domestic violence, and failed to account for the specificity of this criminal offense in several ways.

First, the judgment is the result of court proceedings that were not finalized until almost four years after the offense was perpetrated. This is simply not an example of efficient court practice. Handling cases of domestic violence with urgency is vitally important in order to prevent further violence; and this is true from the moment police are called to a crime scene following a victim's report, through all investigative actions, to the filing and confirming of the indictment, to the court decision, to enforcement of the sanctions imposed on perpetrators. If efficiency is lacking, some victims simply cannot receive sufficient protection from a perpetrator (especially if that perpetrator has access to a weapon). Therefore, courts should strive to avoid any delays in domestic violence cases and should in fact establish mechanisms to expedite their resolution.

International legal standards, most importantly the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) – which BiH was among the first countries to ratify – prescribe that court proceedings in domestic violence cases be carried out without undue delay.¹³⁹ Article 50 of the Convention, obliges states to ensure immediate response, prevention, and protection from domestic violence by taking the necessary legislative or other measures to support and enable

139 Council of Europe, *Convention on preventing and combating violence against women and domestic violence*.



responsible law enforcement agencies to engage promptly and appropriately against all forms of violence covered by the scope of the Convention. This includes using preventive operational and procedural measures. However, the courts often handle criminal cases in chronological order, and this occurred erroneously in the case analyzed here. Courts must instead act with urgency, to the extent possible, so that the responsibility of perpetrators is established efficiently, in order to mitigate negative consequences for the victim.

It is also problematic that the judgment in this case is incomprehensible and contradictory in many places, and the evidence is not well assessed or cross-referenced. This is especially relevant given that such a judgment is written for the parties and for citizens, who are not lawyers and who might find this judgment particularly confusing. In addition, the judgment contains grammatical and spelling mistakes that make it incomplete and unclear, and (in the original language) the grammatical person is inconsistent. All in all, the judgment fails to serve as a lesson on domestic violence for the parties and the public.

In pronouncing a judgment, a clear and strong warning should be addressed to the perpetrator of domestic violence about the unlawfulness of their violent behavior. Judges should, for educative purposes, use their social authority and position of leadership to transmit a clear moral and legal message to the parties about the reasons for their decision. This did not happen in this case or in this judgment.

The introductory part of the judgment fails to specify whether and when the main trial took place, and who was present (e.g., was it only the defendant and the defense council, or the injured party as well?). Given that procedural law clearly regulates the inclusion of this information, such an omission is baffling. Another significant deficiency is the failure to address whether or not the defendant has any previous convictions or any misdemeanor record related to any form of violent offense. The court's explanation also neglects to specify that the injured party is a woman, and fails to note her age, the number of children she has, or the duration of the common law marriage between she and the defendant.

Nonetheless, it is possible to discern two types of violence in this case, as set out by the Istanbul Convention: *violence against women*, “understood as a violation of human rights and a form of discrimination against women and including all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;” and *domestic violence*, meaning “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.”¹⁴⁰

As to the way in which the injured party as a victim of violence is portrayed in the judgment, the court fails to state whether the injured party filed a compensation claim, despite the fact that the operative part of the judgment contains an instruction of the court referring the injured party to civil proceedings with respect to such a claim. The final part of the court’s explanation contains an identical formulation, which merely echoes a legal provision, but offers no further detail. This lack of facts relevant to the provision applied here is unacceptable.

CONTENT ANALYSIS

In domestic violence cases (as in all cases), courts should provide clear explanations of their decisions and detail all the factors they valued in passing their judgment. Given the importance of this explanation by the court, as the integral part of a judgment, it is especially important that it offers comprehensive reasoning for specific elements of the decision, including thorough reasoning (with arguments) related to how certain facts or pieces of evidence were evaluated as relevant or decisive. This is especially important for the purpose, *inter alia*, of clarifying any possible misunderstandings of the parties to the proceedings, reducing the likelihood of associated arguments in a possible appeal procedure.¹⁴¹

140 See Article 3 of the Convention.

141 Miodrag Simović, *Pravo na obrazloženu krivičnu presudu kao element prava na pravično suđenje* (Sarajevo, 2018).

In the judgment analyzed here, the court's explanation regarding its assessment of the evidence noted up front that *the injured party refused to testify as a privileged witness*. However, the judgment reads further that *the court accepted the statement of the injured party to testify in the criminal proceedings*, making it unclear as to whether the injured party did explicitly refuse to testify as the common law wife of the defendant or whether the court sufficiently explained this right to her. Still, her testimony was not obtained, meaning that the description of the injured party, her injuries, and her behavior were presented indirectly through the statements of a witness (an employee of the Social Work Center), a court appointed medical expert, and the defendant, without the court specifically establishing the actions, injuries, or behavior of the victim.

This should be underlined, as the factual description of the charges state that the defendant assaulted her *by grabbing her neck as she held their child in her arms. He gripped her neck in such a way that she started losing consciousness, and thus inflicted minor bodily injuries of contusion/hematoma and abrasions on both sides of her neck*. The behavior described on the part of the defendant constitutes the most brutal form of domestic violence – *strangulation*. Yet, the court acquitted the defendant, so this aggravating factor could not have been valued.

STRANGULATION

Strangulation as a form of domestic violence should be assessed as an aggravating factor. It threatens and undermines physical integrity and causes psychological trauma.¹⁴² Incidents of strangulation should be considered serious assault, with a high risk of negative consequences for the health of the victim, including potential death – which can occur up to several days *later* as the result of complications, including blood clots that form when oxygen to the brain is interrupted. Thus, strangulation can be viewed as the ultimate form of dominance and control, in which the perpetrator literally controls the next breath of the victim.

142 Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*.

The use of strangulation by a perpetrator can serve as a predictor of lethal violence; and strangulation itself clearly constitutes one of the most lethal forms of domestic violence. It can lead to a loss of consciousness within five to ten seconds, and death within four to five minutes. For this reason, strangulation is among the best indicators that a perpetrator will subsequently murder their victims in the context of domestic violence.

Despite the danger of strangulation, only half of victims will exhibit external evidence of injury. But strangulation can still significantly impact a victim's health. Its consequences may include:

- i. Physical injuries such as unconsciousness, fractured trachea/larynx, internal bleeding, arterial damage, dizziness, nausea, sore throat, changes in the voice, throat and lung injuries, and swelling of the neck.
- ii. Neurological injuries such as facial or eyelid droop (palsies), paralysis of one side of the body (hemiplegia), loss of sensation (feeling), and loss of memory.
- iii. Delayed fatality, where death can occur days or even weeks after the attack due to a tear in one of the neck arteries, respiratory complications such as pneumonia, acute respiratory distress syndrome (ARDS), and the result of blood clots travelling to the brain (embolization).
- iv. Psychological injuries such as PTSD, depression, suicidal ideation, memory problems, nightmares, anxiety, severe stress reaction, amnesia, and psychosis.¹⁴³

Even though fatal harm is associated with strangulation, police and prosecutorial authorities often misunderstand or misidentify attempted strangulation as something far less serious. This is partly because, when recounting an incident of strangulation, many victims minimize the experience. As a result, investigators may not fully investigate an incident or may not view it as severe. The effects of strangulation can also be minimized or missed by other

143 Emma Williamson, *Domestic Violence and Health: The Response of the Medical Profession* (Bristol: The Policy Press, 2000).

professionals, such as doctors and social workers, because of a lack of awareness of the signs and symptoms.

In order to properly assess the legal standards necessary for charging and conviction, it is essential that all aspects of incidents of strangulation are fully documented. In the case at hand, the prosecutor and competent investigative authority presented medical reports proving strangulation occurred, stating that the injured party *had bruises and abrasions on both sides of her neck*. But the court failed to take this into account, and hence failed to act in line with established court practice.

STATEMENT OF THE INJURED PARTY

In the judgment for the case analyzed here, the court's explanation does not indicate how the court instructed the victim of her right not to testify, and the resulting consequences. The choice of the injured party to refuse to testify thus renders her essentially invisible in this part of the judgment. No information about her personal or family status is provided, and yet the court made conclusions related to these issues without the injured party's statement; another failing of this judgment. The court should have been more sensitive in taking a statement from the injured party, caring for her privacy, and recognizing the impact of trauma on her behavior.¹⁴⁴

Courts should avoid acquittals based solely on the refusal of a victim to testify or take part in the trial. If a victim refuses to testify in a case where there is grounded suspicion that the defendant perpetrated domestic violence, the court is encouraged to advise the prosecutor's office not to drop the charges automatically for lack of other evidence (in addition to victim's statement), but to use all available means (e.g. seeking an expert opinion) to facilitate the presentation of new evidence. In the proceedings in this case, the prosecutor insisted on the accusation despite the refusal of the injured party to testify, but the court acquitted the defendant of the charge of violence despite

144 Ljiljana Filipović, "Položaj oštećenog u krivičnom postupku" in *Pravilo o zabrani reformatio in peius u praktičnoj primjeni* (2010).

grounds for conviction. The court failed to consider that perpetrators of domestic violence are often in the position to pressure their victims, or use emotional or psychological violence against them, even during court proceedings, potentially compromising the autonomy of victims in making a decision to testify.¹⁴⁵

It is a common view that the state of human rights and freedoms in criminal proceedings is best reflected in the position of the defendant. Only recently, mostly in the context of efforts to combat organized crime, has the position of witnesses and parties injured by criminal offenses been viewed through the lens of their rights. The idea that the duty of a witness to testify is absolute and unquestionable, even when they risk becoming victims of further criminal offenses due to their testimony, has proved unsustainable. If the state wants to obtain witness statements, it must guarantee the right of witnesses to testify freely and without fear of possible negative consequences.¹⁴⁶

Only a witness who has confidence – due to appropriately imposed measures – in their personal safety, as well as that of their closest family members from secondary victimization, can be motivated to cooperate with criminal justice authorities.¹⁴⁷ To that end, various forms of witness protection have been introduced, from those aiming to provide adequate psychological support and preparation for the act of testifying, to those extending to the period following the proceedings and aiming to physically protect witnesses and their family members. As a general rule, the type, nature, and level of witness protection depends on the type of criminal offense in question, the category of the witness (i.e., children, elderly people, victims, undercover investigators, repentant witnesses, etc.), the form of danger, and the legal and factual possibility of applying certain protection measures. Procedural protection measures for sensitive witnesses include those taken by criminal justice authorities during the course of criminal proceedings with the aim of enabling their

145 Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*; Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*.

146 Filipović, “Položaj oštećenog u krivičnom postupku.”

147 Cathy Humphreys, Nicky Stanley, *Domestic Violence and Child Protection: Directions for Good Practice* (London: Jessica Kingsley Publishers, 2006).

uninterrupted performance of duty, and represent a special way of participating in criminal proceedings or a special way of conducting an examination. The duration of such measures is limited, lasting for a given period during the proceedings, at most until the judgment is final.

Victims of domestic violence demonstrate a high lack of trust in authorities, due to the many past failures by police, social workers, prosecutor's offices, and courts to provide victims with adequate protection. Therefore, all available efforts should be undertaken to protect victims and create favorable conditions for them to give full and credible statements.¹⁴⁸ At the same time, judicial professionals must be aware that perpetrators of violence against women, children, or other family members will attempt in any way to preserve the marriage and family because that is where they derive their power and dominance.¹⁴⁹ Moreover, perpetrators of domestic violence are often not prone to other types of crime and do not give the outward impression that they are violent; meaning that society often fails to recognize them as violent people, additionally complicating the process of evidence collection.

KEY PROSECUTION EVIDENCE

The court's dismissal of the severity of the violence perpetrated against the injured party is apparent in the judgment in this case, where it baselessly rejected evidence such as statements by the police officers who transported the injured party from the crime scene to a healthcare facility. These officers could have testified directly about their observations of the physical injuries and psychological distress of the injured party, but the court concluded that because they did not perform investigative actions they could not add to what was already established by other evidence. This worked to the advantage of the defendant.

148 Ibid.

149 Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*.

Other witness statements were also at least partially dismissed as irrelevant, including that of an employee of the Social Work Center, which the court's explanation minimized by noting she had "only" been informed that domestic violence occurred and that the victim had contacted the Center to obtain further care. The judgment emphasizes that the employee of the Center did not personally see any injuries to the victim, and claims the victim made no reports of physical violence, just reports of disturbed marital relations. The court's explanation itself constitutes a partial adjudication in favor of the defendant, especially because the statement of the Social Work Center employee was not quoted but was paraphrased, allowing the court to interpret it to the detriment of the injured party by shrugging off her reports to this authority as related to merely disturbed marital relations; as if this was a case of divorce litigation and not the deliberation in a criminal offense featuring several aggravating factors (the presence of the child in her arms at the time of perpetration, strangulation, grave bodily injuries, threats to kill the victim and child, etc.).

The statement of the employee of the Social Work Center is also presented in a manner that contradicts other claims in the judgment. The victim contacted the Center to obtain care after the incident in question, during which the court acknowledged that she sustained injuries to her neck, and yet the court asserts that she made no report of physical violence. Indeed, the judgment states that the critical event resulted in mechanical injuries to the victim most likely inflicted by the defendant gripping her around the neck with his hand, which left abrasions and bruises on both sides of her neck that visually indicated the pressure of his fingers and nails; but this evidence was not enough for the judge to convict.

Instead, in assessing this evidence in the judgment, the judge briefly presents the opinion of the expert witness, then notes that the victim's injuries were only temporary and constituted a minor bodily injury, thereby minimizing their severity and justifying the acquittal. The judge concludes that, on the basis of this evidence, the court is left "not knowing who inflicted the injuries." However, expert witnesses do not make such conclusions in their opinions. To avoid exceeding the scope of their professions or the bounds of

the request from the court, and so as not to affect the outcome of proceedings, this is not decided by court-appointed experts but by the court.

Notably, in the court's explanation, which follows the closing statements of the parties in the judgment, the court accepts the evidence of the expert witness in its entirety but decides to acquit the defendant anyway, in yet another contradiction. The court could not have ignored the strength of this evidence, as the findings and opinion of the expert witness complies with supporting medical documentation from the emergency service of the healthcare center where the victim was examined on 1 September 2012, with photo documentation showing redness and abrasions on both sides of her neck. Yet, there is no further mention of this key evidence; and the final part of the court's explanation notes that the prosecution failed to prove the criminal offense with which the defendant was charged through the evidence presented, as that evidence did not constitute a sufficient "quantum" for the court to convict. The court appears to have rejected this evidence by comparing it to the defendant's statement, giving this subjective evidence more relevance and, yet again, aiding the defendant. In other words, the court accepted the defendant's statement as true, citing it consistently as fact, despite the lack of any material or subjective evidence to confirm it, such as witness testimonies.

While the court first asserted in the judgment in this case that it accepted the expert's finding and opinion in its entirety, it then departed from this by refusing to examine authorities who had seen the victim's injuries at the time of perpetration, as proposed by the prosecution, because it claimed this had been sufficiently described in the expert report. This was wrong, given that the testimony of these police officers would have reinforced the prosecution's evidence; evidence that was then dismissed. This leads to a reasonable conclusion that the court was biased in favor of the defendant in the conduct of these proceedings.

THE DEFENDANT'S STATEMENT AS DEFENSE EVIDENCE

In the judgment in this case, the deciding judge deflected from key prosecution evidence by turning regularly to the statement of the defendant as a witness. The defendant characterized the charges against him as a fabrication and said the event never took place, claiming he left the apartment in the morning and had gone to fix a car. By quoting this statement immediately after presenting the expert opinion, the court reduces the relevance of the material evidence. The judgement then reads: "When he returned, he did not find the injured party or his son at home, although there had been no conflict between him and the injured party before that, or any physical or psychological abuse; he had left the apartment in harmony, leaving the injured party and the child in it." This sentence is singled out here because the claim that he did not find them at home upon returning is accompanied by the extraneous qualification that "there had been no conflict between him and the injured party before that, or any physical or psychological abuse" and when combined with the statement that "he left the apartment in harmony," it appears the judge is explicitly attempting to portray the defendant in a positive light in order to justify acquittal.

In the next part of the judgment, the court acknowledges that "the defendant pointed out that the injured party left him several times, merely for her private reasons, but they kept in touch by phone." In the context of a domestic violence case, this should clearly raise questions as to whether the injured party left the defendant to escape repeated violence used as a control mechanism. This should especially be scrutinized when this violence may have been perpetrated in the presence of a child. Indeed, in this case, a child was present during the incident for which the defendant was charged.

Growing up with domestic violence can have serious effects on the developmental progress and personal coping capacities of children, and its impacts can extend until and through adulthood and can contribute to longer-term cycles of psychosocial troubles and violence – as children often model the

(bad) behavior of their parents.¹⁵⁰ Contemporary research has shown unambiguously that exposure to domestic violence undermines both the mental and physical health of children, compromising their social and emotional development and their interpersonal relationships.¹⁵¹ In addition, studies have confirmed that domestic violence is an intergenerational phenomenon; meaning that exposure during childhood increases the risk of becoming a perpetrator *or a victim* in adolescence or adulthood.¹⁵² With this in mind, *the most important thing a judge can do to protect a child is end their exposure to domestic violence* and support the child's relationship with the non-abuser parent or a safe non-parental guardian.

Domestic violence can be difficult to detect, as it tends to occur in the privacy of a home and within the confines of marriage (or equivalent), a legally protected entity. Even when violence is disclosed and criminal proceedings are initiated against a perpetrator, the result is rarely a conviction. There are a number of difficulties when it comes to collecting evidence against perpetrators of violence, as direct evidence is scarce and often comprises only the statement of a victim (or victims). Judges must not forget that victims may fear retaliation from perpetrators for testifying, especially mothers who worry that their testimony may put not only them but their children in more danger; and this may mean victims are not willing to truthfully and thoroughly testify about the violence perpetrated against them and their children. Indeed, some victims see no way out and believe they have no choice but to continue enduring violence.¹⁵³

It is also not uncommon for victims of domestic violence to withdraw their testimony after some time, often because a perpetrator promises not to commit the offense again. Some mothers who have suffered abuse may hesitate to

150 Charlotte Kinstlinger-Bruhn, *Everything You Need to Know About Breaking the Cycle of Domestic Violence* (Rosen, 1997).

151 Marianne Hester et al., *Making an Impact: Children and Domestic Violence: A Reader* (London and Philadelphia: Jessica Kingsley Publishers, 2007).

152 Einat Peled, Peter G. Jaffe, Jeffrey L. Edleson, *Ending the Cycle of Violence: Community Responses to Children of Battered Women* (London: SAGE Publications, 1995).

153 Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*.

testify out of a fear of public condemnation for the violence that has occurred in their families, for which they believe they will be blamed. This can make it harder to detect and prove incidents of violence and serves to reduce the responsibility of a perpetrator.¹⁵⁴ Further obscuring family violence in some cases is the fact that children exposed to violence, who are emotionally and financially dependent on a perpetrator, cannot always distance themselves from their abuser, which can make them particularly susceptible to intimidation and pressure.

In the case analyzed here, the judge demonstrates an insensitivity to the dynamics of domestic violence, including by giving so much more space to the defendant's statement than that of the injured party. The defendant was quoted not only to characterize his own demeanor, such as that "he left the apartment in harmony" with the victim, but also to portray the injured party – who is described through his words as emotionally inconsistent and unsure of herself; for instance asserting that "every time she reported him, she would contact him five minutes later to ask for his forgiveness, saying that she was distressed, angry, and anxious." This is yet another indication of the lack of objectivity in this judgment, reflecting a lack of understanding by the judge regarding domestic violence. This is especially evident where the judge takes as fact the defendant's contention that the offense did not occur at all, that he inflicted no injuries on the victim, and that he was completely unaware of how she received the injuries that were confirmed by the expert witness. The acceptance of this statement of one party to the proceedings, in the absence of an explanation as to why other evidence confirming the injuries of victim was not similarly accepted, appears to be arbitrary and points to a clear preference for the defendant – the perpetrator of violence – by the judge.

Additionally, the part of the defendant's statement quoted above actually suggests that a pattern of *continuous* violence occurred ("every time she reported him..."), and yet the judge fails to recognize this and instead repeats the framing of the defendant that "every time she reported him, she would contact him five minutes later... [and say] she made it all up and beg him to take her back." The judge also notes that the victim "made a statement on

154 Ibid.

recantation.” But what the defendant described in his statement reflects a dynamic seen commonly among perpetrators of domestic violence, wherein he plays the role of a *saint* or *sovereign* from whom his victim seeks forgiveness. By acting as the gatekeeper in his relationship, a perpetrator such as this defendant underscores his dominance, with which he controls the injured party and their child.

Neuroscience has established that children who are exposed to persistent domestic violence live in an ongoing state of alarm (“fight or flight”), leading to elevated levels of powerful stress hormones, particularly cortisol. This has many negative consequences, including for brain development. In fact, chronic exposure to domestic violence results in physical changes to the brains of children that can impair brain function and lead to long-term physical and mental health issues over a lifetime. In other words, toxic stress of this severity literally changes the architecture of a child’s brain, making it no less dangerous than successive concussions.¹⁵⁵

OTHER PROSECUTION EVIDENCE

After the statement of the defendant is presented in the judgment, important material evidence – including medical documentation and photographic proof of the victim’s injuries – is not assessed at all. These items are simply listed without additional explanation; again suggesting a lack of objectivity in favor of the defendant. Still, following the closing statements of the parties and defense counsel, the finding and opinion of the medical expert is assessed as evidence and accepted in its entirety, and photo documentation of the victim’s injuries is described. But the court then explains why it rejected the examinations of the police officers who “allegedly” observed the victim’s injuries and introduces a new assessment of the testimony of the Social Work Center employee, stating that “she did not see any injuries on the injured party,” related to the critical incident, “although the injuries would have been visible.” Whether the victim’s injuries would have in fact been observable to

155 Galić, *Practice Guide: Domestic Violence*, 18–21.

this witness is unclear, as it is not stated precisely when she reported to the Social Work Center; immediately after the event or later.

The court concludes its assessment of the evidence with a statement that was certified by a public notary and given by the injured party, withdrawing her report and stating she fabricated the story about getting into a fight with the defendant on the day in question, that he did not grab her neck or abuse her, and that he helps her financially. The judgment also states here that the defendant often visits the house of a woman with whom he has six children, and that this is the main reason that the victim behaves as the defendant reports. There is no previous mention of this, and the party who presented it is unknown, signaling yet another lack of objectivity in this judgment.

It is also notable that the background information offered in the judgment states that the defendant has only six children in total. Apparently the court is not counting the child of the injured party with the defendant. Considering that this child is an indirect victim of violence in this case and was exposed to psychological trauma, the court should especially acknowledge, instead of neglecting, this child. The court cannot ensure that domestic violence offenses are punished by effective, proportional, and appropriate measures when the presence of a child during the perpetration of an offence is not taken into account.

The court's conclusion that there was sufficient evidence to acquit the defendant was linked to the refusal of the key witness of the prosecution to testify, as well as the assessment by the court that other evidence failed to confirm the offense given that the defendant denied his guilt. Wishing to underline the alleged instability of the victim, the judge writes that "the injured party, due to her health and some sort of psychological disorder" – an assertion based on no evidence – "gets angry or anxious and reports the defendant and then apologizes and asks him to come back to the apartment, which is corroborated by the fact that she is still in a common law marriage with the defendant." The defendant is clearly favored, compared to the injured party.

Ultimately, the court determined that no evidence was presented to prove the defendant “really” committed domestic violence, despite his previous final conviction for the same criminal offense. This earlier conviction is mentioned only at the very end of the judgment, even though it is a practice of the courts to list information on convictions at the beginning of a judgment as part of defendant’s background information, and to elaborate on the offenses underlying these convictions in the decision on punishment, whether they are the same as in the case in question or not. In an acquittal, the mention of information on convictions at the end of the judgment makes no sense and adds in this case to the inconsistencies that abound in the judgment.

CLOSING STATEMENTS OF THE PARTIES

In the closing statements that are paraphrased in this judgment, the prosecutor’s statement highlights that the defendant has been previously convicted for the same criminal offense and that this suggests the defendant is prone to violence against his family members. To prove this, the prosecutor presented the defendant’s criminal record, along with medical records and photo documentation of the victim’s injuries. However, the court failed to note in either the operative part of the judgement or in its later explanation that the defendant had prior convictions – very important information that impacts sentencing. The closing statement of the prosecutor also challenged the court for rejecting a proposal to directly examine the officers who transported the injured party from the crime scene to medical assistance.

The prosecutor proposed that the defendant should be found guilty due to his obvious propensity to repeat the offense and his persistence and determination in perpetrating domestic violence, which the prosecutor described as “a social phenomenon that the prosecution and the court should bring an end to, to the largest possible extent.” The way this is presented in the judgment makes the message of the prosecutor unclear, and is a further indication of a lack of care or the presence of bias in the judge in this case.

On the other hand, the closing statement of the defense counsel is summarized in such a way that the evidence presented by the prosecutor, especially witness testimonies, are framed as having made it difficult for the defendant to live a normal life with the people he loves. It is uncertain what point the defense counsel intended to make by noting that “the legislator did not foresee the benefits for a common law partner with the aim to facilitate the defendant, but to facilitate the common law partner in protecting their right and the right of the person they live with, love and have a family with, in this specific case, a child” but the court included this in the judgment. At any rate, the defendant is again portrayed positively, as a loving husband, while the injured party is presented as someone who was forced to testify for the prosecution with the sole aim to make the position of the defendant, a role model citizen and family man, more difficult. The defense counsel of course proposed that the defendant be acquitted and that the court make its decision based only on evidence presented in the proceedings. The defendant endorsed the arguments of his defense fully.

COMPLIANCE WITH INTERNATIONAL STANDARDS

Based on this analysis, the court in this case permitted and encouraged gender-based violence by issuing this judgment. This can be seen in: the way in which the defendant was portrayed in the judgment (as a “family man” who generously forgave his wife, and who strives to maintain harmony in his family) compared to the characterization of the injured party (as suffering from poor mental health and some sort of “psychological disorder” that makes her anxious and likely to falsely accuse the defendant of violence); the greater space given to the statement of the defendant in the judgment; and the assessment of the prosecution evidence versus the statement of the defendant, the latter of which is conveyed in much more detail than other evidence. Gender-based violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately,” and by failing to protect the victim in this case, the judge acted in contravention of the Istanbul Convention, a legally binding international instrument designed to protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women and domestic violence. In this context, special

attention should have been paid both to the fact that the judge exonerated the defendant, a special repeat offender, and that the proceedings were prolonged in a process that lasted four years.

The judge does not appear to understand that violence against women, including domestic violence, is among the most severe gender-based human rights violations. In these criminal proceedings, the court failed to offer protection to women from violence or a prevention of violence, or to contribute to combating all forms of discrimination against women and promoting the full equality of women and men. The court thus acted contrary to positive national and international legislation, and to the Istanbul Convention. As a signatory to this Convention, BiH is committed to take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and private spheres, and to ensure that these measures are based on a gendered understanding of violence against women and domestic violence and a focus on the human rights and safety of victims. Importantly, these measures may not depend on the willingness of victims to press charges or testify against perpetrators.

Article 55 of the Istanbul Convention clearly stipulates that parties must ensure investigations into alleged offenses, that prosecutions are not wholly dependent upon the report or complaint of a victim, and that proceedings may continue even if a victim withdraws her or his statement or complaint. In the case analyzed here, the prosecutor collected sufficient evidence to convict the perpetrator, irrespective of the victim's choice to withdrawal her testimony, yet the court failed to properly take that evidence into account. By acquitting the defendant, no necessary measures were imposed to meet the standard of the Convention that perpetrators of this type of domestic violence are punished by efficient, proportionate, and appropriate sanctions. In particular, the court should have considered the that the criminal offense was committed in the presence of a child, was preceded by earlier violence, and caused bodily or psychological trauma.

WAIVING THE RIGHT TO AN APPEAL

The prosecutor also contributed to a poor outcome for the injured party as a victim, by failing to file an appeal against this disputable judgment. This cleared the way for proceedings to conclude in the defendant's favor. Had the prosecutor filed an appeal, the second-instance court would have had to hold a new main trial under the applicable procedural laws, to reassess the evidence, which would have likely resulted in a judgment that more properly sanctioned the perpetrator.

In this way, and through the undue delays and incompetence of the first-instance court, the rights of the victim were neglected during this phase of criminal proceedings. She was not given the opportunity to be heard or to express her perspective, needs, and challenges, directly or indirectly, and the evidence she provided was not duly considered. Furthermore, the victim was not provided with appropriate support during the proceedings, to ensure that her rights and interests were adequately presented and considered. For example, as it was mandatory to prevent contact between the victim and perpetrator, accommodating her testimony through means that allowed her to avoid being present in court, or to at least to avoid the presence of the perpetrator, would have been necessary. This could have precluded the need for second-instance proceedings altogether.

IMPLICIT BIAS

This analysis shows that elements of the decision in this case were not wholly objective, most probably due to gender bias on the part of the judge.¹⁵⁶ Such biases are deeply rooted in almost everyone, very often without our awareness, and extend from our indirect and direct environmental influences going back to childhood, which impose and subconsciously frame our perceptions of socially shaped roles, behaviors, and activities, and the characteristics that are acceptable in women and men. The judge in this case appears to view the

156 Halilović and Huhtanen, *Gender and the Judiciary*.

parties through a stereotypical lens, describing the victim as a woman who “often gets angry and... reports the defendant” while portraying the defendant as a pillar of his family who must endure the victim’s unstable behavior, but who, following an apology, is the force who restores normalcy and harmony to the home. The judge apparently believes that this defendant is actually a victim; and in this case, this subjectivity resulted in a tragic outcome for the injured party, and arguably, for society at large. Indeed, this judgment is the consequence of an inconsistent and arbitrary approach by the judge.

When adjudicating a case, a judge should not base their decision on their own social, political, or philosophical beliefs, but on the facts presented in the case and the positive substantive law (which includes the Istanbul Convention in cases of domestic violence). However, judicial office holders may be unaware of their own preconceptions or may deem stereotypes as facts. The judgment in this case shows just how important it is that judges become aware of their own biases and stereotypes, in order to make the most just decisions. Otherwise, personal beliefs can influence judicial decision making, as in this judgment; and while every judgment inevitably carries the personal stamp of the issuing judge, with care and objectivity, the appropriate outcome can be achieved, even given the usual limitations of judicial analysis.

The sentencing process, especially in difficult cases such as this one, is also limited by the traditional frame of patriarchy. This process often demands a choice between various legally justifiable conclusions, for which a judge’s motivation may extend from a much deeper level than they recognize, affecting their ideas of what constitutes a just result. This is not to say that justness, independence, and impartiality demand a judge become a *tabula rasa* with every new case, and it is only realistic to expect that the personal, religious, or political beliefs of a judge – including traditionalism – will impact judicial decision making, but this impact should never be of such scope that decisions appear to be preconceived or impartial with respect to the parties or arguments in a given case.

In the case at hand, the judge used judicial discretion to grant credence to some evidence. Yet that discretion is not unlimited, as there are restrictions set

by the law and the general principles of justness, impartiality, and consistency. If the judge had operated within clear legislative provisions and with these three principles in mind, she almost certainly would not have made the disputable decision for acquittal in this case, to the detriment of the injured party. Almost none of the opinions or arguments conveyed by the judge in the judgment are irrefutable or acceptable because they are based on the extreme premise that the narrative of the defendant and the perspective it portrayed was factual, without any sound or valid reasoning. In this way, the judgment breached judicial norms.

Ensuring justness and impartiality requires that courts give equal importance to the arguments of both parties to a proceeding. Yet, it is clear in this case that the strong, grounded arguments of the prosecutor were not granted equal value as the statement of the defendant, which was inconclusive, imprecise and, contrary to the court's conclusions, suggested a pattern of long-term violence that exposed the victim to repeat abuse even before the critical event. In the judgment, prosecutorial arguments with which the judge disagreed were ignored or dismissed; or if they were *prima facie* accepted, they were later omitted, implying a degree of partiality. Additionally, the judgment fails to acknowledge or offer reasoning for why the court dismissed arguments opposing the defendant's claim of innocence.

On top of all this, the judge in this case failed to apply a gender sensitive lens. The judgment contains many negative and stereotypical comments about the injured party as a woman, finally concluding based on little evidence that the victim suffers from "some sort of psychological disorder" that has led her to repeatedly report the defendant for incidents of violence. Labeling the victim as "anxious" and "angry" plays into the stereotype of a "hysterical woman" and serves to silence or at least marginalize a woman's voice. It also centers the case around an anxious woman, and not around the violent man who has prior convictions for the same offense.

Several earlier reports of violence by the defendant, made by the injured party, were rejected by the court because she withdrew them. Yet, victims of domestic violence can behave in ways that are incomprehensible to people who are

unaware of the dynamics of abuse. This appears to be what happened in this case, as the judge failed to appropriately interpret the victim's choice to withdraw these reports. Victims commonly deny charges they have made, in a desperate attempt to navigate the abuser's control, which can impact every decision a victim makes.¹⁵⁷

Significantly, the judge in this case failed to acknowledge that domestic violence is a crime of the perpetrator, never of the victim. Indeed, perpetrators of this offense must take full responsibility for their violent behavior, which rarely ends without a response or intervention by the community. The first step in terminating a violent relationship is identifying it as one.

Still, many victims have a hard time identifying themselves as abuse victims, and many people believe that victims of abuse must play a role in causing and encouraging the violence they experience, or that they even get some satisfaction from it. No victim wants to be abused. However, domestic violence victims often have complex feelings about their abuse and their abusers, and may use denial, rationalization, and minimization to cope on a daily basis with the reality and severity of violence they face. In this case, the fact that a child was exposed to violence and witnessed its consequences added a devastating layer that should have been assessed by the judge as a special factor. The learning difficulties and behavioral problems that can arise in a child as a result of this exposure may worsen over time, and there is a high risk that children from violent homes will become victims or abusers in adulthood.

Unsurprisingly, men who commit domestic violence often refute any report that they have behaved inappropriately by belittling, negating, and rationalizing incidents of abuse. The statement of the defendant in this case reflects this, and the behavior of the injured party indicates that a specific pattern of control exists between the parties to the proceedings. But the judge failed to recognize this.

157 Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*.

The key deficiency in the judgment in this case, though, is that the court failed to treat the parties equally, providing them with equal opportunities to access and present evidence during the main trial. Further, the court did not devote equal attention to examining and determining the facts, which worked in the defendant's favor. The principle of equality in treatment is stipulated by the CPC RS and was not adhered to by the adjudicating judge during these proceedings, resulting in an unjust decision, to the detriment of domestic violence victims.

Analysis of this judgment leaves one with the impression that the court appreciated neither that achieving *de jure* and *de facto* equality for women and men is a key to preventing violence against women, nor that violence against women is a manifestation of historically unequal relations between women and men that led to men's dominance over and discrimination against women. Without acknowledging this, a judge cannot recognize the structural nature of violence against women as gender-based violence or that violence has been a primary social mechanism used to forcefully place women in a subordinate position to men. And unfortunately, while the judge should have been particularly sensitive to the interests of the child in this case, in order to protect the interests and rights of that child, the court failed to identify the child as a victim of or witness to domestic violence.

The judge failed in this case to fulfill the responsibility of the court to society by taking all the necessary measures to promote change in gendered social and cultural patterns with the aim of rooting out prejudice, customs, traditions, and practices that are based on the idea that a woman has lesser value than a man. Thus, the judge failed to ensure the protection of victim's rights free from discrimination on any ground.



7.

VIOLENCE AGAINST A MINOR: A “FAMILY MAN” OR AN ABUSER?

*Dragoslav Erdelić**

INTRODUCTION

For many years, domestic violence was considered a private matter that should not be interfered with by anyone outside a family. The prevailing viewpoint now is that any form of violence against another cannot be deemed a private matter. Research on the harm caused by violence in families, showing its long-term consequences from one generation to another, has contributed to this new perspective.

Domestic violence includes violence against children and minors, but often, this is still tolerated as an acceptable method of discipline.¹⁵⁹ In 1979, Sweden became the first country to specifically prohibit violence against children within a family.¹⁶⁰ Since then, experts trying to prevent violence have been

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159 David G. Gil, “Violence against children,” *Journal of Marriage and Family* 33, no. 4 (1971): 637–648.

160 L. Vidović, “Tjelesno kažnjavanje djece u obitelji,” *Croatian Annals of Criminal Law and Practice* (Zagreb) 15, no. 1 (2008): 303–320.

working to explain how physical punishment or violence can negatively impact minors.

In the judiciary, contradictions in how family violence is viewed are frequently reflected in how mitigating and aggravating factors are evaluated.¹⁶¹ For example, the fact that a defendant is a “family man” is often valued as a mitigating factor, even in domestic violence cases in which the alleged criminal offense directly disturbs the peace, bodily integrity, or psychological health of a family member. In that context, this analysis endeavors to illustrate the importance of appropriately sanctioning perpetrators who commit domestic violence against minors.

INFORMATION FROM THE JUDGMENT

The defendant is a 59-year old male who completed his secondary education and is employed as the owner of a private business. He is of middle class economic status and is a father of two. He has a prior criminal record, making him a recidivist in perpetrating domestic violence. The victim of domestic violence in this case is a minor male, the defendant’s son. No other information about the injured party is provided, including his age. During the investigatory phase of this case, the defendant was neither assigned to detention nor restricted by any protective measures pursuant to the Law on Protection from Domestic Violence.¹⁶²

The offense in this case was perpetrated on 19 January 2015, with the indictment issued on 29 January and confirmed on 6 November 2015 (though the judgment inaccurately cites the year as 2012). The court ruled on 5 February 2016, when the defendant was sentenced to six months in prison and ordered to pay the costs of the court proceedings (amounting to BAM 200). While the urgency of procedure principle was respected by the prosecutor, it was not honored by the judge given that confirmation of the indictment was delayed by

161 Galić and Huhtanen, *Judicial Benchbook: Considerations of Domestic Violence Case Evaluation in Bosnia and Herzegovina*.

162 Official Gazette of the FBiH, 20/13.

11 months. Further, a compensation claim was not considered, as it was never filed, and there is no information about whether the court provided guidance about the right to file such a claim.

As for the circumstances of the criminal incident in this case, on the evening on 19 January 2015, following a verbal argument in the family home and intending to violate the serenity and bodily integrity of a family member in the same household, the defendant attacked his minor son by hitting him twice on the head, before the injured party fought back. The injured party developed visible redness on his head. This constitutes the criminal offense of domestic violence referred to in Article 222(2), in conjunction with paragraph 1, of the Criminal Code of the FBiH (CC FBiH). The defendant was convicted pursuant to Article 202(1) of the Criminal Procedure Code of the FBiH (CPC FBiH).

In the court's explanation, it acknowledges the prosecution evidence that was presented, including the testimony of two witnesses – an employee of the Social Work Center who received a report from and interviewed the injured party's mother, and a law enforcement official who interviewed both the minor and his mother – and two items of material evidence (the report of the Social Work Center on domestic violence and the official note from the interview with the minor), along with the defendant's prior criminal record. The record of the defendant showed that he had been sentenced on 19 May 2014 for the criminal offense of domestic violence referred to in Article 222(2) of the CC FBiH; for which a suspended sentence of six months in prison was imposed, with a supervision period of one year, meaning that the defendant repeated the offense *during this period*.

The court found indisputably that the critical event in this case constituted perpetration by the defendant of the offense referred to in Article 222(2), in conjunction with paragraph 1, of the CC FBiH, and the judgment provided a short explanation of this qualified form of domestic violence. Following the court's evaluation of the evidence and the objections of the defense, the judgment notes that the court partially altered the description of facts by omitting a portion of the operative part of the indictment relating to the ruthlessness

of the defendant's behavior, because this was not proved. However, the court does not fully explain why it was not proved, commenting only that the "verbal conflict between the defendant and the injured party does not automatically constitute ruthless behavior." In the context of the criminal offense of domestic violence, the prevailing interpretation is that ruthlessness is primarily reflected in behaviors that stand in a sharp contrast to the accepted norms of behavior in a family or domestic unit. The fact that the victim in this case is still a minor and that parents are obligated to take care of their children thus indicates ruthless behavior on the part of the defendant, who was grossly negligent toward his child.

The judgment reads that the court did not rule on a compensation claim, because the injured party did not file one during the proceeding and refused to testify. The evidentiary procedure is presented clearly, and the evidence was evaluated in accordance with the law and existing caselaw.

NORMATIVE ANALYSIS

Formally and legally, this judgment contains all the elements (an introduction, an operative part, and the court's explanation) prescribed pursuant to Article 304 of the Criminal Procedure Code of the Republika Srpska (CPC RS)¹⁶³ and Article 63 of the Rulebook on Internal Court Operations¹⁶⁴ – which stipulate how court decisions should be drafted¹⁶⁵ – as well as Articles

163 Official Gazette of the RS, 53/12 and 91/17.

164 The Rulebook on Internal Court Operations (Official Gazette of the RS, 9/14 and 71/17), Decision of the RS Constitutional Court no. 34/16, and the Rulebook on Internal Court Operations (Official Gazette of BiH, 66/12, 44/14, 54/17 and 60/17) lay down the way in which court decisions should be drafted.

165 Court decisions must be written clearly and concisely. Written decisions should adhere to legal terminology, avoiding the excessive use of foreign words and any other words not used in regular communication at the court. The court's explanation must be clear and understandable, and expressed in a way that upholds the court's reputation. The duration of a sentence, amount of a fine, and details of any compensation claim amounts in civil proceedings are denoted with numbers and letters in the operative part of the decision. In both the operative part and in the court's explanation, parties are referred to using their names and surnames, and not based on the order in which they are mentioned (the first plaintiff, the second defendant etc.). Abbreviations can be used in the text only if they are generally accepted and easily understood, and if they do not bring about any doubts about their legal meaning. The full names of laws and other regulations

300 and 305 of the CPC FBiH and Article 299 of the CPC RS related to convictions. However, the judgment uses abbreviations to refer to laws, without introducing their full name and the number of the official gazette in which they were published. Additionally, the names of the prosecutor, defendant, and injured party are not specified.

The criminal offense charged in this case was the qualified form of domestic violence referred to in Article 222(2), in conjunction with paragraph 1, of the CC FBiH.¹⁶⁶ Yet, in view of the description of facts provided in the judgment, this offense is not qualified properly, as the crime not only contains the elements referred to in paragraphs 1 and 2 of Article 222, but also elements

mentioned in the text should be used, along with the number and year of the official gazette in which they were published. If the use of a form is an option for certain types of decisions, originals and transcripts can be made by completing that form. Other details concerning the technical editing of the text of court decisions are: a) in the upper left corner of a court decision, the state of BiH, the entity, canton, name and seat of the court, case number, and date of the decision should be noted; and decisions of courts from the Brčko District should name of the state of BiH and the name of the court; b) below the introduction, and above the text of the operative part, a separate line should read (in capital letters), "JUDGMENT OR DECISION", c) below the operative part, and before the beginning of the explanation, the title: "Explanation" is written with the first letter capitalized, without spaces, and d) in the lower right corner on the second page and following the court decision, the ordinal page number should be noted.

166 Article 222 of the CC FBiH reads as follows:

- (1) Whoever by violence, insolent or arrogant behavior violates the peace, physical integrity or mental health of a member of his family, shall be punished by a fine or imprisonment for a term not exceeding one year.
- (2) Whoever perpetrates the criminal offense referred to in paragraph 1 of this Article against a family member who shares the same household with him, shall be punished by a fine or imprisonment for up to three years.
- (3) If in the course of the perpetration of the criminal offenses referred to in paragraphs 1 and 2 of this Article, a weapon, dangerous object, or other instrument suitable to inflict grave bodily injury or impair health has been used, the perpetrator shall be punished by imprisonment for a term between three months and three years.
- (4) If, by the criminal offenses referred to in paragraph 1 through 3 of this Article, a serious bodily injury was inflicted on a family member or his health is severely impaired; or if the criminal offense referred to in paragraphs 1 through 3 of this Article is perpetrated against a child or juvenile, the perpetrator shall be punished by imprisonment for a term between one and five years.
- (5) If, by the criminal offense referred to in paragraphs 1 through 4 of this Article, a death of a family member is caused, the perpetrator shall be punished by imprisonment for a term between two and fifteen years. Whoever abuses a family member thereby causing his/her death, shall be punished by imprisonment for a term of no less than ten years or by a long-term imprisonment.

referred to in paragraph 4, because it was perpetrated against a minor (the defendant's son).¹⁶⁷ Therefore, the appropriate legal qualification would be the criminal offense of domestic violence referred to in Article 222(4), in conjunction with paragraphs 2 and 1, of the CC FBiH.

The legal qualification of an offense directly influences the type and severity of the sanction in a given case, and inadequate legal qualification thus results in the imposition of inadequately effective or severe punishment. In the case at hand, the criminal offense referred to in Article 222(4) of the CC FBiH is punishable by imprisonment of one to five years, and the offense referred to in Article 222(2) by imprisonment of up to three years. Had the proper legal qualification been applied, a prison sentence of at least one year would have been imposed on the defendant, especially considering that no conditions for sentence mitigation existed.

Also, the criminal offense in this case was perpetrated during the probationary period that followed the defendant's earlier suspended sentence. This suspended sentence could have been revoked, and sentencing rules for the criminal offenses in concurrence could have been applied. The previously suspended sentence of six months in prison would then have been viewed as an already established sanction, and a prison sentence of one to five years would have been imposed for the new criminal offense, meaning that the cumulative sentence would certainly have amounted to more than the six months imposed in this case.

LENGTH OF THE PROCEEDINGS

Based on the fact that the criminal offense in this case was perpetrated on 19 January 2015, the indictment was issued on 29 January 2015, and the court

167 Pursuant to Article 1 of the Convention on the Rights of the Child, to which BiH is a signatory, a child constitutes any person below the age of eighteen years, and Convention signatories assume the obligation to protect all children from all forms of punishment. BiH also signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), which defines the perpetration of the domestic violence against a child or in presence of a child as an aggravating factor that must be considered.

confirmed it on 6 November 2015, it seems the prosecutor's office acted with urgency by conducting the investigation and issuing an indictment before the competent court within ten days, whereas the court failed to confirm the indictment on the timeline referred to in Article 243 of the CPC FBiH.¹⁶⁸ And, given that the offense was not fully qualified in this case, the question is whether the preliminary procedure judge could have or should have returned the indictment for further elaboration. Arguably, the indictment should have been returned because the preliminary hearing judge is obligated, among other things, to establish whether the description of facts in the indictment matches the established legal qualification.

The chronology of the proceedings suggests that the court did not respect the principle of urgency in the prosecution of domestic violence cases laid down in the Law on Protection from Domestic Violence,¹⁶⁹ and it did not follow relevant procedural provisions of the CPC FBiH that prescribe indictment confirmation deadlines. The court took almost ten months to confirm the indictment, and almost three to adjudicate the case, so that the court proceeding lasted more than one year. Considering the importance of timely judicial action in domestic violence cases, courts must try to avoid such delays. In fact, international legal standards require that court proceedings in these cases be conducted without undue delay.

Provisions in the Law on Protection from Domestic Violence also require the court to prioritize domestic violence cases. This urgency contributes to more efficiently establishing the potential responsibility of defendants, in order to mitigate the negative consequences of court proceedings on victims, as much as possible. Subjecting victims to proceedings of an overly long duration may jeopardize the general and special prevention purposes, and makes the protection and satisfaction of victims uncertain.

168 Article 243 of the CPC FBiH sets out that the preliminary hearing judge can confirm or reject all or some counts of the indictment within eight days, and in complex cases, within 15 days of receipt of the indictment.

169 Article 4 stipulates the emergency resolution of domestic violence cases. See: Official Gazette of FBiH, 20/13.

This is especially true if a victim continues to live in a domestic unit with a defendant; which can facilitate repeat and increasing violence, leading victims to change their statements or make use of their right as a family member not to testify, sometimes resulting in dropped prosecutions because the only direct evidence of the offense has been lost. The consequences of a lack of urgency in the proceeding in this case are reflected in the fact that the minor victim shared the same household with the defendant for more than a year after the crime was perpetrated, until the court judgment was issued. This exposed the victim to the risk of further violence at the hand of a proven special recidivist of domestic violence.

CONTENT ANALYSIS

A qualitative content analysis of the judgment in this case offers insight into: the way the criminal offense was legally qualified, the influence of this legal qualification on the adequacy of the criminal sanction imposed and the handling of the previous suspended sentence, how the court explained its reasoning regarding sanctions and what mitigating and aggravating factors it considered, and how the domestic violence victim is protected by the prison sentence that was imposed.

The valuation of mitigating factors was inadequate in this case, though aggravating factors were valued adequately. As mitigating, the court valued the facts that the defendant is of advanced age and displayed proper conduct before the court. As aggravating factors, the court valued the multiple prior convictions of the defendant for the same criminal offense, as well as the fact that the offense in this case was perpetrated during the probationary period associated with a previous suspended sentence imposed for the same criminal offense. However, the court did not revoke the suspended sentence, only classifying it as an aggravating factor. This is a problematic choice by the court.

A prison sentence is an appropriate sanction in this case, in order to clearly convey to the public that domestic violence will be punished with imprisonment, and to achieve general prevention. However, the length of the sentence

was inadequate, especially because the offense was perpetrated during the probationary period that followed an earlier suspended sentence for the same offense. The six-month prison sentence that was imposed did not achieve the purpose of special prevention, nor did it provide sufficient protection to the victim of domestic violence, especially considering the length of the criminal proceeding.

In this context, certain irregularities were identified in the judgment. The judgment's introduction mostly meets the prescribed requirements, but there were a few omissions.¹⁷⁰ For example, the hearing date of 5 February 2016 is noted in the introduction, but the fact that this was the pronouncement of the judgment is not specified. The names of the cantonal prosecutor, defendant, and defense counsel were not indicated. And, there is no mention of whether the defendant was present or absent for the pronouncement of the judgment.

Likewise, the operative part of the judgment meets the prescribed requirements, except for several irregularities.¹⁷¹ For one, the judge unnecessarily lists the prior convictions of the defendant in this part of the judgment. The

170 The introduction of a judgment serves to identify parties to the main trial and those attending the pronouncement of the judgment, specifying their names and roles/function in the proceeding, as well as the legal name of the criminal offense with cited provisions of the criminal code from the confirmed indictment or the indictment which was altered at the main trial. The date and duration of the main trial should also be specified, as well as when the judgment was pronounced, along with whether the main trial was public or held behind closed doors.

171 The operative part of every judgment should contain the defendant's personal data, resolving issues of subjective identity between the judgment and the charges. This is followed by the court decision regarding the criminal motion in the indicting document. The next part includes the description of the criminal offense (i.e., of the objective and subjective elements of the offense, the facts and circumstances that constitute elements of the offense, and those on which the application of the specific criminal legal provision depends). The operative part of the judgment also contains the legal name of the criminal offense and explains which provisions of the criminal code were applied. The judgment can apply only to the offense which is described in the confirmed indictment or the indictment altered at the main trial. The operative part of the judgment details the type and severity of the imposed sanction, or an acquittal, any decision on a suspended sentence, a decision on security measures, a decision on the seizure of criminal proceeds and any decision to remand the case, any decision accounting for days of detention already served, a decision on criminal procedure costs, and any decision on a compensation claim. If the defendant was fined, the judgment will determine the time limit for payment, as well as the alternatives to the fine, in case the defendant fails to pay it. In case of a concurrence of criminal offenses, the court will include in the operative part of the judgment the sanctions for each criminal offense, and a unified sanction imposed for all offenses in concurrence.

defendant's criminal record should in fact be specified in the court's explanation as an aggravating factor, given that it clearly indicates an inclination to violence in the defendant (as well as his attitude toward his family life and family, considering a previous conviction for non-payment of alimony). Indeed, the operative part of the judgment states that, at the time the criminal offense in this case was perpetrated, the defendant was already under supervision following a previous suspended sentence, issued on 19 May 2014 for the same offense, for which a six-month term of imprisonment was imposed with a one-year probationary period. But the court's explanation does not account for why this suspended sentence was not revoked.

The description of facts in this case plainly points to the legal qualification referred to paragraph 4, not paragraph 2, of Article 222 of the CC FBiH; and the court's failure to revoke the defendant's suspended sentence is linked to the prosecutor's failure to include this qualification in the indictment or propose revoking the suspended sentence in the indictment. Such omissions are rarely corrected during a proceeding (meaning, the indictment is not supplemented), which means that courts often do not revoke suspended sentences unless a prosecutor initiates it. This is in accordance with court practice, wherein a previously imposed suspended sentence is revoked in a separate procedure that is initiated by the prosecutor or by the court that originally imposed the suspended sentence; while the court adjudicating the case involving the new criminal offense can revoke the suspended sentence only if a motion is filed, i.e. through inclusion in the indictment. The effect is that few suspended sentences are revoked. No matter where omissions are made (in the prosecutor's office or the court), this practice conveys the wrong message to the public that a suspended sentence is effectively a conviction lacking a sanction.

The court's explanation in the judgment is also formally accurate, but it is incomplete. Here, the court must provide reasoning for each point in the judgment and must explain which facts are considered proven or unproven, and why, with a particular focus on evaluating the credibility of contradictory evidence. The court should specify why it did not accept certain motions by the parties, for example, or why it decided not to directly examine a witness

or an expert witness whose statement was read in court. This part of the judgment must also set out what guided the court in the resolution of legal matters, especially when establishing the existence of the criminal offense and the criminal liability of the defendant. If a punishment has been pronounced against the defendant, the court's explanation shall state the circumstances considered in determining this punishment, and must offer reasoning regarding decisions on secondary motions (for instance, on a compensation claim, if it was filed).

In the judgment in this case, the court's explanation contains errors including citing the wrong dates in reference to when the indictment was confirmed and the defendant's plea hearing was held. The court mostly discusses the defendant, hardly mentioning the injured party, implying that the position of the minor as a domestic violence victim was not valued. In explaining the criminal sanction it imposed, the court valued the defendant's advanced age and proper conduct as mitigating factors, even though these are *not* actually mitigating factors. Further, in justifying the sanction, the judge uses common phrases and does not provide reasoning for the duration of the prison sentence. The victim's position and satisfaction, and protection through the imposed sanction, are not concretely valued; hence, the court fails to address special prevention.

The court does effectively explain the evidence in the judgment, basing its decision exclusively on circumstantial evidence and managing to contextualize the fact that no direct evidence was presented in this case. Still, while it is commendable that the prosecutor's office took emergency action and issued the indictment against the defendant within ten days, the court pronounced its judgment more than a year later; meaning, despite explaining the evidence well, valuing it adequately, and outlining the need for a criminal sanction of imprisonment in this case, the court did not ensure that the proceedings were of an adequately limited duration. The judgment also does not specify whether the injured party was informed about his right to file a compensation claim. Nonetheless, the court did convict the defendant in this case without direct examination of the injured party, with several pieces of circumstantial evidence, and facing objections against such actions, and its explanation of the

evidence surpasses the shortfalls in the evidentiary material itself in a situation where adequate evidence is lacking. In this way, the court found a way to justify the prison sentence it imposed, and to base it on the law.

DISCOURSE ANALYSIS

While the judgment in this case lacks the victim's voice, story, or position, and therefore fails to provide fully adequate protection to the minor victim, this judgment and sanction do send a message to the community that achieves general prevention. Neither the prosecutor's office nor the court put any particular effort into ensuring that the duration of the sentence imposed in this case was sufficient, however. Indeed, when issuing the indictment, the prosecutor's office neglected the fact that the criminal offense was perpetrated during the probationary period that followed a suspended sentence, and does not appear to have proposed a more stringent sanction on the basis that the defendant is a recidivist; the court did not apply a special law protecting minors affected by domestic violence, and in fact conducted the proceedings with disregard for the minor status of the injured party; and the court treated the criminal offense in this case as a physical fight between two equal persons, and not in the context of a parent's obligation to protect their child.

The judgment focuses more on the conviction and punishment of the defendant than on the specificity of the criminal offense that was perpetrated, why it should be characterized as domestic violence, and what special considerations apply given that the injured party is a minor. It is also unclear from the judgment what kind of protection was provided to the injured party, who not only shared the same household with the defendant at the time the offense was perpetrated, but during the trial as well. It is likely that, after completing his prison sentence, the defendant returned to the victim's household again. Yet, an accounting of these facts was not reflected in the judgment.

Importantly, the defendant denied his guilt throughout the proceeding, showing no signs of remorse or any awareness of the inappropriateness of his actions, which increases the likelihood that he will repeat the offense, as he

already had. The choice of the injured party to exercise his right to refuse to testify must be understood in this context; but in this case, it influenced the course of the proceeding. The judgment deals predominantly with the defendant, barely mentioning the victim or the consequences he suffered as a result of the offense. In fact, the victim is effectively marginalized in this judgment, which does not discuss the impact of the defendant's behavior on his family and family relations, the fact that the injured party fought back, or that the defendant and injured party shared a household.

Based on the established facts, the court's explanation demonstrated that the defendant was prone to violence and abusive behavior to such an extent that the victim was pushed to defend himself with violence, resulting in permanently disturbed family relations within which peaceful resolution had become impossible. The fact that the defendant's abuse caused the victim to react violently should have constituted an aggravating factor and should have prompted the imposition of additional security measures to protect the victim. One such security measure stipulated by the CC RS is "removal from the shared household;"¹⁷² but a similar measure is not set out in the CC FBiH. Considering the need for such measures, it is recommended that this security measure be stipulated in the CC FBiH as well.

172 Article 81 (Official Gazette of the RS, 64/17) lays down the security measure of "removal from the shared household", as follows:

- (1) The court may pronounce the security measure of removal from the shared household against a perpetrator of a criminal offense with elements of violence against the person with whom he/she shares the same household, if the perpetrator is likely to repeat the violence against the member of the shared household, and his/her removal from the shared household is necessary in order to eliminate such threat.
- (2) The court shall order this security measure for the duration of no less than six months, but no longer than two years, and the time served in prison, or in an institution designated for medical care and treatment, shall not be included in the duration of this measure.
- (3) If the perpetrator fails to comply with the security measure or violates this measure, parole (conditional release) shall be revoked.
- (4) The perpetrator of the criminal offense against whom this security measure has been pronounced shall, in the presence of a police officer, leave the apartment, house, or other residential area which constitutes the shared household with the victim immediately after the judgment becomes final.
- (5) The person removed from the household shall contribute to the sustenance of persons who remained in the household, in a manner determined by the court.

THE VICTIM OF VIOLENCE

The victim of violence in this case is the underage son of the defendant, though the judgment does not specify his exact age. The victim lived with the defendant at the time of the critical event and was expected to continue living in a shared household with the defendant upon the defendant's return from prison, at least until he turns 18 (the date of which is unknown, as his age is unknown). Because of his assumed dependence on his father, financially and for housing, the injured party is in a disadvantaged position relative to the defendant. Yet, despite these and other indications that this minor lived in a perpetually abusive environment produced by his father, the court did not address these circumstances in the context of a continuity of domestic violence, despite its relevance in this case. In other words, the dependence of the victim of violence on the perpetrator in this case constitutes an aggravating factor that was not considered or explained in the judgment.

Moreover, the choice of the injured party to refuse to testify in the proceeding was an exercise of his legal rights;¹⁷³ but the court does not even describe the impressions or reactions of the victim. The portion of the judgment that tells the story of the victim closes by acknowledging that he refused to testify, treating the victim as a mere witness, and neglecting his rights. The Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings was also not applied in this case.¹⁷⁴ Article 185 of this Law clearly puts forth the obligation of the court to apply special law to criminal offenses of domestic violence involving minors as injured parties.¹⁷⁵ This provides

173 See: Article 97(1)(b) of the CPC FBiH.

174 Official Gazette of the Federation of BiH, 7/14.

175 Article 185 of the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings stipulates:

- (1) The judge for juveniles or a panel presided by the judge for juveniles or a judge who possesses special knowledge about rights of the child shall also try adult perpetrators of criminal offenses laid down in the Criminal Code, when a child or a minor appears as the injured party in the criminal proceeding, such as the following criminal offenses: (...)
- (22) domestic violence, (...)

The prosecutor shall also initiate a proceeding against adult perpetrators of other criminal offenses laid down in the Criminal Code, pursuant to the provisions of this part of the law, if he decides that it is necessary for the purposes of special protection of personalities of children and minors as injured parties participating in criminal proceedings.

adequate criminal and legal protection to minor victims by imposing certain legal standards in the criminal proceeding, and provides these special victims with additional rights. In view of this, it is clear that by not implementing the special law on juveniles, the position and rights of minor victims of domestic violence is negatively impacted, as they are protected only through the application of general provisions on the position and rights of any injured party in a criminal proceeding.

The court's explanation mentions the protection and satisfaction of the victim of the criminal offense, but only formally, in the context of the imposed prison sentence. How the victim will be protected by the defendant serving the prison sentence is not specified, especially considering that the defendant walked free for one year from the date of perpetration until his sentencing. The court also fails to explain that the sentence imposed could be replaced by a fine according to existing legislation, meaning that there is a chance the defendant could avoid prison after all.

MITIGATING AND AGGRAVATING FACTORS

The court particularly valued the multiple prior convictions of the defendant for the same criminal offense as aggravating, noting that the defendant had already been punished for the offense of domestic violence referred to in Article 222(2), in conjunction with paragraph 1, of the CC FBiH as well as for an offense of the same nature, of "avoiding maintenance," referred to in Article 223(1) of the CC FBiH. This makes the defendant a special recidivist, which was appropriately valued by the court.¹⁷⁶ Another aggravating factor valued by

176 Article 49 of the CPC FBiH lays down general sentencing rules, as follows: The court shall mete out the punishment for the perpetrator of a criminal offense within the limits prescribed by law for that criminal offense, having in mind the purpose of punishment and taking into account all the circumstances affecting the sanction (mitigating and aggravating factors), and in particular: the degree of criminal liability, the motives for perpetrating the offense, the degree of danger or injury to the protected good, the circumstances under which the offense was perpetrated, the personal history of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offense, as well as other circumstances related to the perpetrator's personality. When the court is deciding a sentence against a perpetrator for a criminal offense in recidivism, it shall take into special consideration whether the most recent offense is of the same type as a previous one, whether both offenses were perpetrated with the same motive, as well as the period

the court was the fact that the criminal offense was perpetrated in this case before the expiry of the probationary period in a previous case, for perpetration of the same criminal offense, for which the defendant received a suspended sentence (of six months imprisonment and a one-year period of supervision). The court correctly concluded that the prior suspended sentence did not have a preventive effect on the defendant, but failed to explain why this sentence was not revoked, particularly given that perpetration of the offense during the probationary period was valued as aggravating and was used to justify the imposition of a more stringent sanction (imprisonment) as necessary to fulfill the sanctioning purpose. Beyond this, the victim's dependence on the abuser, along with the fact that the defendant denied guilt and expressed no remorse throughout the proceeding, could have been valued as aggravating factors.

The defendant's advanced age and his proper conduct before the court were valued as mitigating factors in this case, but the court did not explain why it considered these factors mitigating. Characterizing the defendant as advanced in age, although he was 59 at the time the judgment was pronounced, obliged the court to offer additional reasoning given the defendant's age compared to that of the victim and the fact that the defendant's continued violence at his age may indicate a propensity for violence. Further, the valuation of proper conduct before the court as a mitigating factor has become a norm, in order to avoid potential appeals on the argument that the court insufficiently valued the defendant's conduct; but proper conduct before the court is expected from any defendant and should not be valued as mitigating. It is thus advised that judges explicitly emphasize in the court's explanation that this factor is not considered mitigating in the context of deciding on the type and severity of sanctions. Contempt of court must also be noted in the court's explanation, although it should not be explicitly valued as a separate aggravating factor.¹⁷⁷

In this case, it would have been appropriate for the court to identify no mitigating factors. Instead, the judgment noted that "there was no room for a

of time which has elapsed since the previous conviction, or since the punishment has been served or pardoned. When deciding on a fine, the court shall consider the perpetrator's economic status, the amount of his salary, other income, his property, and family obligations.

177 Halilović, *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*.

more lenient punishment,” as if the court was trying to justify that it did not impose a *lesser* sanction. This is contradictory to sentencing rules, which stipulate that the court define a sanction within the limits prescribed by law and explain only why it is mitigated if applicable (as opposed to explaining why it is *not* mitigated).

THE IMPOSED SANCTION

The criminal offense referred to in Article 222(2) of the CC FBiH is punishable by a fine or imprisonment up to three years. Thus, on the face of it, an adequate criminal sanction appears to have been selected, given that a prison sentence was imposed. In this way, the judgment conveyed a clear message to the public that domestic violence will be punished with imprisonment, and general prevention was achieved. However, keeping in mind that the perpetrator in this case is a special recidivist who perpetrated domestic violence during the probationary period following a suspended sentence for the same offense, the question is whether the imposed six-month prison sentence was in fact an adequate response to this specific criminal offense and this specific perpetrator.

If the appropriate legal qualification had been applied to the offense in this case, carrying a more severe sanction, the prison sentence imposed would have been longer. A longer sentence would also have been imposed if the court had revoked the defendant’s previous suspended sentence because he repeated the same offense. By failing to engage these legal possibilities, the court missed the chance to achieve special prevention in this case, through a truly adequate criminal sanction. This would have conveyed an even stronger message to the community that domestic violence is a serious criminal offense and that all options provided by the legislature should be used to prevent it. Imposing lenient sanctions does not convey this message clearly.

COMPENSATION

The injured party has the right to file a compensation claim and hear a decision on any such claim within the criminal proceeding, as guaranteed by the CPC FBiH.¹⁷⁸ When a court issues its decision on compensation within a criminal proceeding, the injured party receives a writ of execution that can be submitted to initiate a forced collection without the submission of a civil action. In the case analyzed here, it is unclear from the judgment whether the victim was informed about his right to file a compensation claim, which is mentioned only where the judgment notes that the court did not decide on a claim because the injured party did not file one, having refused to testify.

This raises questions about the approach of the court in this case, because the role and rights of the injured party *as such* are substantially different than those of the injured party *as a witness*. The court could and should have informed the injured party about the option to file a compensation claim, because this was his right as a victim, regardless of his decision to testify in the proceeding or not. Witnesses and injured parties are afforded different rights in a proceeding, and when an individual is both a witness and the injured party, the court must inform them of their rights in each of these capacities.

The judgment in this case does not include information about continuous violence in this family, even though the defendant is a special recidivist in perpetrating domestic violence. Indeed, one would not conclude from the judgment that the defendant had previously committed the same criminal offense against a family member. This should have been considered and explained by the court, especially given that the victim of domestic violence is a minor who will continue sharing a household with the defendant, since a past pattern of violence increases the likelihood that violence may be repeated after the imposed sanction is fulfilled by the defendant.

178 See: Articles 207–209 of the CPC FBiH.

THE MESSAGE OF THE JUDGMENT

The judgment in this case sends a message only regarding general, not special, prevention.¹⁷⁹ Between a fine and imprisonment, the court did appropriately opt for the more stringent sanction; however, the six-month length of the sentence does not seem sufficient in this case to achieve the purpose of preventing the defendant from perpetrating the criminal offense again, and thus cannot provide the victim with adequate protection and satisfaction. The status of the defendant as a special recidivist who is prone to violence makes it unlikely that a short prison sentence will have a preventive effect, and in fact if a repeat offender expects to receive a more stringent sanction, a light sentence may have no preventive effect at all if they feel they “got away with it.” The court’s explanation in this case noted in general terms that special and general prevention were both fulfilled simply due to the fact that a prison sentence was imposed, but failed to clarify *how* the sanction would achieve this by influencing the defendant and the public in specific ways.

CONCLUSION

Based on this analysis, the judge in this case did impose a criminal sanction pursuant to the law, but did not adequately adjust it to the circumstances and evidence. In that way, the essence and specificity of the criminal offense of domestic violence does not appear to have been fully considered by the judge, who valued only common and general aggravating factors in deciding on a sentence, thereby failing to attribute sufficient importance to the consequences for and behavior of the victim or to the circumstances of perpetration. Thus, the judgment in this case gives the impression that the court does not

179 Article 7 of the CC FBiH sets out the purpose of criminal sanctions as: the protection of society from crime perpetration through a preventive influence on others to honor the legal system and to refrain from criminal offenses, the prevention of perpetration of criminal offenses by perpetrators and the encouragement of their rehabilitation, and protection and satisfaction for crime victims. Similarly, Article 42 of the CC FBiH stipulates that the purposes of sanction are as follows: a) to express social condemnation of the perpetrated criminal offense; b) to deter the perpetrator from perpetrating criminal offenses in the future and encourage his rehabilitation; c) to deter others from perpetrating criminal offenses; and d) to increase the awareness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators.

view domestic violence as a truly serious criminal offense, for several reasons: the way in which the offense was qualified and the criminal sanction that was imposed (which are linked, as the errant qualification informed the sanction), the way the court explained its reasoning regarding the criminal sanction and its valuation of aggravating and mitigating factors, and the degree to which the victim was protected. A longer prison sentence should have been imposed in this case, adapted to the age of the minor victim, for example so that the defendant was imprisoned until the victim turned 18 (if the victim was already an older juvenile) or until he reached another threshold age (if the victim was a younger child).

Still, since this qualified form of the offense is punishable by a fine and imprisonment of up to three years, the judgment imposed here was appropriate, despite the inadequacy of its duration; and the imposition of prison sentences for domestic violence offenses does contribute to more stringent sentencing policy overall for these offenses and conveys the proper message to the public that domestic violence is unacceptable. What's more, when courts impose fines in these cases, the defendant's family is usually impacted as well, when they lose financial resources used by the defendant to pay the fine. And suspended sentences have almost no effect on perpetrators of domestic violence, especially repeat offenders of this criminal offense, and especially if suspended sentences are not revoked upon further perpetration, as in this case.

The inadequate duration of the prison sentence imposed in this case was due primarily to the improper legal qualification. If the court had qualified the criminal offense correctly, applying paragraph 4 instead of paragraph 2 of Article 222 of the CC FBiH, the *minimum* appropriate prison sentence would have been one year. But this also could have been facilitated by the prosecutor, by issuing an adequate indictment in accordance with the concrete circumstances that the offense was perpetrated during the probationary period of a previous suspended sentence, so that the defendant would have faced a cumulative sanction that certainly would have amounted to more than six months.

The quality of this judgment is also impacted by the fact that, following the evidentiary procedure, the defendant was convicted based only on circumstantial evidence, because the minor injured party, the only eyewitness, refused to testify. The judgment stands out for its explanation of the evidentiary strength of this circumstantial evidence, yet is based on very few pieces of evidence that were valued adequately, both separately and from the perspective of their mutual correlation. The lack of focus in the judgment on the specificities of domestic violence reflects an apparent lack of awareness on the part of the judge and the prosecutor in this case regarding this type of criminal offense, and suggests that continuing education on domestic violence case adjudication could contribute to increasing relevant knowledge and sensitivity among judicial office holders.



8.

CONFESSION: ANOTHER MITIGATING FACTOR

*Slavica Tadić**

INTRODUCTION

The criminal offense of violence in a family or domestic unit was defined by Article 208 of the former Criminal Code of the Republika Srpska (CC RS) at the time of the case analyzed here; this Code was replaced by the 2017 Code, where the offence is laid out in Article 190. The sanctions foreseen in the previous Code for the basic offense were a fine or a term of imprisonment of three months to three years. The new Code stipulates a fine or imprisonment for a term not exceeding three years.

INFORMATION FROM THE JUDGMENT

The first-instance judgment in this case was issued by a Basic Court in the RS in relation to a case of criminal domestic violence. In the early evening on 4

* President of the Basic Court in Zvornik.

August 2015, the defendant, following a brief quarrel with his wife in the front yard of the family house, grabbed her hair using one hand and dragged her, with the intent to inflict bodily injury, hitting her on the head with his other hand, so that she fell to the ground. The judgment describes the defendant then continuing to hit the victim on the head and elsewhere on her body, *as he had done many times before*, thus inflicting the minor bodily injuries of contusions on her head and body as well as a concussion. In this way, the defendant committed the criminal offense of violence in a family or domestic unit referred to in Article 208(1) of the CC RS.

At the plea hearing, the defendant confessed to committing the offense. The court, applying provisions of Articles 5, 28, 33(1), 37(1), 46(1), and 47(1) of the CC RS, pronounced a suspended sentence of 90 days imprisonment.¹⁸¹ It was decided that the sanction would not be enforced unless the defendant perpetrated another criminal offense in the subsequent two years. The injured party was instructed to file a compensation claim in civil proceedings, while the defendant was informed of his obligation to cover the costs of those proceedings.

181 Article 5, “Criminal sanctions and their purpose,” notes that criminal sanctions are punishments, warning sentences, security measures, and correctional measures. Article 28 notes that, within the purpose of criminal sanctions, the purpose of punishment is to: 1) deter the perpetrator from perpetrating criminal offenses in the future, and his rehabilitation, 2) deter others from perpetrating criminal offenses, and 3) develop and reinforce social responsibility by expressing the community’s condemnation of a perpetrated criminal offense and the necessity to respect the law. Article 33(1), “Pronouncing the sentence of imprisonment,” sets out that: 1) Imprisonment shall be pronounced in full years and months; however, the punishment of imprisonment for a term not exceeding six months shall be pronounced in full days. Article 37(1), “General principles of meting out punishments,” puts forth that: 1) The court shall mete out the punishment within the limits provided by law for that particular offense, having in mind the purpose of punishment and taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular the degree of criminal responsibility, the motives for perpetrating the offense, the degree of danger or damage to the protected object, the circumstances in which the offense was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offense, as well as other circumstances related to the character of the perpetrator. Article 46(1), on suspended sentences, notes: 1) By a suspended sentence, the court shall impose a punishment on the perpetrator of a criminal offense, but at the same time it shall order that the sentence shall not be executed if the convicted person does not perpetrate another criminal offense over a period of time established by the court that may not be shorter than one or longer than five years (probationary period). Art 47(1): Requirements for pronouncement of the suspended sentence: 1) A suspended sentence may be pronounced on a perpetrator only for an imprisonment term not exceeding two years or for a fine.

In the judgment, the court's explanation notes that the prosecutor's office filed the indictment in this case on 14 January 2015, citing the criminal offense stipulated in Article 208(1) of the CC RS, and that the defendant pleaded guilty on 29 January 2016. Listing the evidence presented by the prosecution and valuing it in conjunction with the defendant's confession, the court concluded that the actions of the defendant constituted all the elements of domestic violence referred to in Article 208(1). Furthermore, the court found that the defendant perpetrated the offense with intent, and that no facts were established to exonerate his guilt.

Deciding on the type and magnitude of the sanction in this case, the court assessed the factors stipulated in Article 37 of the CC RS; meaning, it valued the defendant's proper behavior, confession, and lack of prior convictions as mitigating. In the opinion of the court, a suspended sentence was proportional to the gravity of the offense, its consequences, and the degree of social danger it represented. The judgment also noted that the injured party was referred to civil proceedings to address a compensation claim.

CONTENT ANALYSIS

The legal qualification of the offense in this case is appropriate, as the description of the critical event presented in the operative part of the judgment unambiguously confirms the occurrence of domestic violence given that the defendant and victim are married. The insolent and reckless behavior of the defendant was intended to and did undermine the physical and psychological integrity of the victim. What the factual description does not make clear is whether anyone else was present during perpetration of this offense by the defendant, or whether the victim belongs to a vulnerable group (as a person with disabilities, a woman who is pregnant, or due to advanced age, etc.).

Article 37 of the CC RS sets out what the court must consider in deciding on punishment, taking into account the purpose of sanctions and all the factors that influence their magnitude. Article 38 provides that the court may decide on a sanction below the statutory minimum or may impose a more lenient

type of sanction when particularly mitigating factors are established and the court deems that a lesser sanction can still achieve the purpose of punishment. The requirements for pronouncement of a suspended sentence – which can be thought of as a warning – are stipulated under Articles 46 and 47.

Importantly, a suspended sentence is not a punishment; it merely puts a defendant on notice. Yet, research has shown that suspended sentences are the most common sanction for perpetrators of domestic violence in BiH.¹⁸² A suspended sentence is only enforced, however, if a defendant commits another criminal offense during a probationary period determined by the court, of one to five years.

In theory, when a defendant receives a suspended sentence, they are being warned to behave according to certain standards, and are not punished if they manage to correct their behavior. If a defendant fails to do so, the suspension is be revoked and the defendant is supposed to serve their sentence. In this case, a suspended sentence of 90 days (three months) imprisonment was imposed on the defendant with a two-year probationary period. This sentence and probationary period are adequate in the sense that the court acted in harmony with the relevant legal provisions, as the legal requirements for a suspended sentence were met by the existence of particularly mitigating factors.

Still, every criminal offense is distinct and must be viewed as such; and it is not necessarily appropriate to pronounce a suspended sentence every time the law allows it. In making such a decision, a court must present appropriate and thoroughly elaborated reasoning. In this case, the factual description of the offense offered in the operative part of the judgment reveals that the defendant had previously committed violence, meaning that the critical event in question was not an isolated first instance of violence in this family. On the contrary, this indicates a pattern of recidivism that should be viewed as an aggravating factor.¹⁸³

182 OSCE, *Ensuring Accountability for Domestic Violence*; and Petrić and Radončić, *Izveštaj i analiza praćenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj*.

183 Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*, 17.

In other words, violence in this family was continuous. Moreover, the defendant perpetrated violence against his wife in their front yard in the early evening, when it was still daylight, so that other family members, neighbors, and any passer-by could have witnessed the critical event. Violence in public involves additional degradation and humiliation for the victim, which should have been valued as aggravating.¹⁸⁴

The act of violence in this case also contains an element of pronounced persistence. The defendant demonstrated this persistence by first dragging the victim by her hair with one hand while hitting her with the other hand, and then when she fell, continuing to hit her head and body as she lay on the ground. This behavior by the defendant clearly suggests a rather typical case of continuous domestic violence in which the goal of the abuser is to establish dominance by demonstrating power and control over the victim.¹⁸⁵ By exerting this power, a perpetrator seeks to subordinate a victim in every possible way. It is thus likely that other forms of violence, beyond physical abuse, were perpetrated against the injured party by the defendant in this case, however no evidence was presented in this respect and the court failed to assess the frequency, dynamics, duration, or types of violence in this family.

The judgment in this case lacks any information about the victim of domestic violence – the defendant’s wife. Her age, economic status and possible financial dependence on the defendant, housing prospects, health or vulnerabilities (a disability, pregnancy, etc.), and the like are simply not provided. Moreover, the judgment offers no information about the relationship between the victim and defendant before or after perpetration of the offense, such as whether the injured party returned to the family home and continued living with the defendant following perpetration or left the marital unit, the status of the marriage, or the victim’s condition in general after being subject to domestic violence.

In the judgment, neither the factual description nor the court’s explanation mentioned other persons present during the event in question. If there had

184 *Ibid.*, 21.

185 *Ibid.*, 10.

been anyone present, their relationship to the defendant and the injured party should have been noted, particularly if any children were witness to the event, in which case their age and whether they directly witnessed the violence is important to clarify. Establishing whether underage children were present during the perpetration of domestic violence is crucial because this constitutes a qualified form of the offense.¹⁸⁶ As the judgment in this case does not contain any information indicating that other people, including children, were present during the critical event, the legal qualification corresponds with the factual description of the offense.

As far as the length of the proceedings, the legally prescribed obligation for urgency was not wholly fulfilled in this case.¹⁸⁷ According to the judgment, the offense was perpetrated on 4 August 2015 and the indictment was filed on 14 October 2015, and while there is no indication as to when the court decided on the indictment and confirmed it, the defendant confessed and pleaded guilty on 29 January 2016. But the plea hearing wasn't held until September 2016, eight months later. Given that this hearing included only the prosecutor, the defendant, and the defense counsel and exclusively addressed the legality of the guilty plea, there is no reason it should have been scheduled so long after the defendant confessed.

The prosecution presented the following evidence in this case: the written findings and opinion of a court-appointed medical expert, from 8 October 2015; minutes of the defendant's interrogation on 4 August 2015; minutes of the injured party's questioning on 6 August 2015; minutes of witness questioning on 5 August 2015; medical documentation from the healthcare center that treated the victim, specifically related to a referral to a specialist, on 4 August 2015; a doctor's report and findings, and discharge letter, from the hospital where the injured party was treated from 4 to 6 August 2015; a police report regarding an alcohol test administered to the defendant on 4 August 2015; criminal records; and list of costs. Though a medical forensic

186 Article 208(4) of the CC RS foresees imprisonment for a term between two and ten years.

187 Article 11 of the Law states: "Subjects of protection shall promptly provide immediate solving of issue of domestic violence, taking into account that interest and welfare of victims are the priority in these proceedings, especially if the victim is a child, elderly person, disabled person, or a person under guardianship."

analysis was carried out, the judgment fails to mention it. Medical documentation reveals, however, that the injured party was admitted to the hospital for three days due to the injuries she suffered; meaning, her bodily injuries were not minor but required serious medical treatment and observation.

For this reason, the prosecution should have carefully considered the type and magnitude of the non-pecuniary damage suffered by the injured party. Such analysis would have helped the injured party to resolve her compensation claim in a timely and efficient manner, but would also have helped the court in assessing the gravity of the criminal offense and deciding on the appropriate sanction.¹⁸⁸ It is not clear from the judgment or from the evidence presented whether the prosecution informed the injured party about her rights regarding a compensation claim. Whether they collected evidence pertaining to the damage she suffered, as prescribed by Articles 43 and 107 of the CPC RS, is also not indicated. Prosecutors appear to have failed to gather this evidence, as the court referred the injured party to civil proceedings to pursue compensation.

Article 108 of the CPC RS stipulates that the court will decide on a compensation claim and may propose to the injured party and the defendant that they enter a mediation procedure, led by a mediator, should they find it useful. A proposal for mediation can also be presented by the injured party at any point before completion of the main trial. The court may grant compensation to the injured party as well, in whole or in part, in its judgment; and may still refer the injured party to civil proceedings. When the facts presented during criminal proceedings fail to provide a reliable basis for a full or partial judgment, the court can refer a party to civil proceedings to pursue a compensation claim; and when the court passes a judgment acquitting the defendant or rejecting the charges, or a ruling suspending criminal proceedings, the injured party will be referred to civil proceedings to pursue compensation.

188 Article 43(2)(e) of the CPC RS notes that the prosecutor shall have the right and duty to establish facts necessary for deciding on a compensation claim, in accordance with Article 107, which states: “the prosecutor shall have a duty to gather evidence about the compensation claim in relation to the criminal offence”.

In this case, the court acted pursuant to Article 108 of the CPC RS, given that it had insufficient information to decide on a compensation claim. Yet, the judgment itself does not indicate whether the injured party was duly informed of her rights. In other words, it is important to note whether this information was given to her only in writing, as she did not appear in court and in fact had no direct contact with the court because the judgment was issued on the basis of the defendant's confession.

Further, the court mentions in the judgment that a police report was obtained regarding an alcohol test administered to the defendant, but does not clearly state whether he was intoxicated at the time he perpetrated the offense, or to what extent. This is key information, because if the perpetrator is prone to alcohol consumption and has previously or has always perpetrated domestic violence under the influence, this factor should have been considered in the context of imposing security measures. For example, treatment for alcohol addiction may have been warranted.

The perpetration of domestic violence under the influence of alcohol should also be assessed as an aggravating factor. A perpetrator who consciously consumes alcohol may eliminate their inhibitions to perpetrate family violence, but does so with intent; hence, according to relevant criminal codes, this does not constitute the legal qualification of self-inflicted mental incapacity and cannot be used to reduce a sanction.¹⁸⁹ In this case, the prosecution should have focused more attention on the question of the defendant's alcohol consumption along with additionally examining other facts that would have contributed to painting a more complete picture of the dynamics in this family. This would have provided the court with more material with which to accurately assess the case, including the causes and consequences of violence for both the defendant and victim.

Absent this more detailed assessment of the evidence collected by the prosecution, the court found only mitigating factors when deciding on the appropriate sanction in this case: the proper behavior of the defendant before the

189 Galić and Huhtanen, *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*, 23.

court, his confession, and his lack of prior convictions. The court offered no explanation as to *why* these factors were assessed as mitigating, though. And while proper behavior before the court is often assessed as a mitigating factor, such behavior is a standard of conduct, and judges should rethink why it is considered mitigating.¹⁹⁰ Indeed, the behavior of a defendant in court is not related to their perpetration of a criminal offense, and to be valued as mitigating, the conduct of a defendant must be so exceptional that the court views it as a clear signal that the defendant has learned a lesson and truly desires to avoid appearing again before the court.

Also, while a confession may be deemed a mitigating factor, the reasons it is valued as such must be elaborated. In other words, not every confession should be valued as mitigating. In this case, it was positive that, by confessing to the offense, the accused shortened the adjudication process and enabled its efficient completion. But, for a confession to serve as a mitigating factor, a defendant must clearly demonstrate a recognition that their behavior harmed and endangered the physical or psychological integrity of another person, an understanding that such behavior is unacceptable and intolerable, and a commitment to never repeat it. A lack of prior convictions can also be a mitigating factor, but not a *particularly* mitigating factor. This is because a lack of convictions is the norm for most people in society and it reasonable to assume that someone does not have prior convictions. In court decisions, the practice is thus that this is deemed mitigating, but never particularly mitigating.

The judgment in this case offers not a single sentence explaining *how* the court assessed these factors as mitigating and why it imposed a warning – a suspended sentence – instead of a more stringent sanction. Yet, in deciding on a suspended sentence in lieu of the legally stipulated sanction, the court was obligated to establish *particularly* mitigating factors. Because the mitigating factors listed in the judgment cannot serve as particularly mitigating, the question arises as to whether the sanction imposed in this case was appropriate.

190 Stephen P. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?" *Columbia Law Review* 98, no. 6 (1998): 1538–1576.

Moreover, the court found no aggravating factors, although they were clearly present in this case. The continuity of violence, persistence of violence, degrading and humiliating behavior, and alcohol intoxication during perpetration of the crime should all have been valued by the court as aggravating factors. The court also failed to address the specific consequences of domestic violence in this case and the fact that the injured party was hospitalized after the critical event. Still, this judgment reflects a general leniency in the sentencing policy applied across the judiciary in domestic violence cases, for which the sanctions imposed are regularly below the statutory minimum.¹⁹¹

NORMATIVE ANALYSIS

One of the findings of this analysis is that the position of the victim, and the victim herself, is not central enough to the judgment. To fully understand the criminal offense in question, it is important to have knowledge of the position, attitude, and status of the victim, as well as all the options that were available to her to claim her rights. It is just as important to establish the relationships between all procedural subjects as it is to pursue evidence against the perpetrator.

In this context, it is worth noting that victims must be protected and informed of their rights by police officers, social workers, and the prosecutor's office, but also by the court. According to the RS Law on Protection from Domestic Violence, an obligation rests with the police, the prosecutor's office, social work centers, healthcare and educational institutions, and the competent court to provide protection, assistance, and support to victims of domestic violence.¹⁹² Article 10 stipulates that victims of violence must be informed

191 OSCE, *Ensuring Accountability for Domestic Violence*; and Petrić and Radončić, *Izveštaj i analiza praćenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj*.

192 Article 9 of the Law states: "Members of the Ministry of the Interior (hereinafter: police), prosecution, centers for social work, i.e. service for social protection, medical and educational institutions, and competent courts (hereinafter: subjects of protection), shall provide protection, aid and support to the victims of domestic violence. Subjects of protection shall comply with the provisions of this law and provide protection, support, and aid to the victims of domestic violence and prevent the repetition of crimes, regardless of whether there is a criminal or minor offense

about how to access all forms of protection, as well as about exemptions from paying costs and their right to free legal aid. According to provisions of the CC RS, injured parties must also be informed of their rights and roles in the proceedings. Both the prosecution and the court must inform an injured party about the right to claim compensation, for example.

In the case at hand, given the confession of the defendant, the plea hearing was held as per Article 244(2) of the CPC RS, which instructs the court that, if an accused enters a plea of guilty, the preliminary hearing judge shall refer the case to the court for the scheduling of a plea hearing to determine whether the conditions referred to in Article 245 of the Code exist. Article 245 stipulates that:

- i. In the course of deliberating the statement on the guilty plea from the accused, the court must ensure the following: a) the plea of guilty was entered voluntarily, consciously, and with understanding, b) the accused was informed that by entering a guilty plea, the right to trial is waived, c) there is enough evidence proving the guilt of the suspect or the accused, d) the accused was informed of and understands the possible consequences related to a claim under property law, and e) the accused was informed of the decision on reimbursement of the expenses of the criminal proceedings and that the accused may be relieved of the duty to reimburse as referred to in Article 99(4) of this Code.
- ii. If the court accepts the statement on the plea of guilty, the statement of the accused shall be entered in the record and the court shall continue with the hearing for the pronouncement of the sentence.
- iii. If the court rejects the statement on the guilty plea, the court shall inform the parties and the defense attorney to the proceeding about the rejection and state this in the record. This statement on the admission of guilt is inadmissible as evidence in the further course of the criminal proceeding.

procedure against the perpetrator.”

Therefore, when a defendant confesses, the court does not hold a main trial in which the prosecution presents all its evidence, instead establishing and imposing an appropriate sanction by assessing mostly material evidence submitted by the prosecution. This means that the injured party, any witnesses, and court appointed experts are not summoned and the court has no direct contact with the injured party. This can narrow the perception of the court about the circumstances surrounding an offense, as the court interacts only with the evidence collected by the prosecution and with the defendant, drawing partial conclusions from this direct contact.

In the case analyzed here, the court established that the confession was given in accordance with the law – as corroborated by material evidence – before deciding on the sanction. There was no main trial, no testimony by the injured party, and no personal statement made before the court. Indeed, in accordance with the CPC RS, the role of the injured party is significantly diminished in such cases. Despite this legal limitation, the judge did obtain the statement of the victim given during the investigation, from which the court established the position of the victim about the criminal offense, her relationship with the defendant, whether she sought criminal prosecution, and whether she was informed about her right to request damages and file a compensation claim (as well as whether she made such a request in her statement).

Having no other evidence from which to discern the type and scope of damages, and no opportunity to hear the injured party directly, the judge in this case made the only possible decision on this matter by referring the injured party to civil proceedings to pursue compensation. However, the judge failed to specify the time limit on filing the compensation claim, and could have offered reasoning as to why the compensation claim was not decided in this judgment. The court's explanation could have noted, for instance, that the court did not have sufficient evidence to decide on the compensation claim because the prosecutor's office failed to collect it as part of the investigation and the injured party did not request it from the court through a separate motion.

CONCLUSION

While the judgment in this case did meet the legally prescribed structure – containing introductory and operative parts, and an explanation – and is grammatically, technically, and linguistically sound; the court failed to include all the elements prescribed by Article 299 of the CPC RS, related to the finding that the defendant was guilty. The judgment lacks information about facts and circumstances that constituted elements of the criminal offense, and offers no explanation of the substantial elements that constitute the criminal offense of domestic violence generally, in order to link these elements to the actions of the defendant. On top of this, the court does not provide the reasoning for its assessment of mitigating factors in this case, which are listed without any explanation, despite the fact that only *particularly* mitigating factors could justify the imposition of a suspended sentence instead of the stipulated sanction. The court also failed to clearly state its rationale in resolving matters of law, such as the existence of the criminal offense and the criminal liability of the defendant. And, as the defendant confessed, the court did not elaborate on whether the evidence was proven or unproven, or set out the evidence that demonstrated the defendant’s culpability for the criminal offense; yet, this is necessary irrespective of the confession.

Finally, in analyzing this and other domestic violence judgments in BiH, one cannot help but notice that decisions such as this are common. Specifically, judgments passed after the confession of a defendant tend to address only the evidence weighed by the court in deciding on the sanction. Often, this means that judges fail to clarify the reasoning that governed them in resolving matters of law in a case, and do not separate and thoroughly explain mitigating and aggravating factors. Many judges also fail to lay out the evidence of a defendant’s guilt, although they are obliged to do so even when the defendant confesses.

Also, as in this judgment, suspended sentences prevail across the BiH judiciary as the sanction applied in this type of criminal offense. In that sense, the judgment analyzed here is rather typical. It is clear that many judges view the criminal offense of domestic violence as one of minimal social concern. Their

attitude toward the offense itself – during the proceedings and in the decision making process – is reflected in an insufficient urgency for victims and an excessive leniency for defendants. Quite often, judges fail to explain the substance of the problem, examine all the evidence and its interconnections, or properly address the question of protection for the injured party in domestic violence cases.

By analyzing judgments issued in cases of criminal domestic violence, the deficiencies in these cases can be highlighted in order to help judicial professionals better appreciate the importance of taking a more detailed and complex approach to this, and every, criminal offense. Indeed, it is vital that judges continually broaden their understanding of the law and its application. The court's sentencing policy, for instance, should change along with society.

When it comes to domestic violence, this means that as social norms shift and society no longer accepts that men, husbands, and fathers have a right to dominate and control their families, it can no longer be viewed as appropriate when people exhibit dominating and controlling behaviors within their families. This is especially true because Bosnian law regulates that spouses are equal in marriage and in decision-making, and that children are to be particularly protected from neglect, abuse, or violence. Judges must be knowledgeable and flexible, and must use all legally available procedures and methods to best respond to each individual case of domestic violence, in order to make the most appropriate decision given the facts and circumstances.

CONCLUSION

A judgment provides a final and merit-based decision on the motion of the parties to a proceeding; it must therefore be of high quality, as it represents the crown of the entire judicial process. Conclusions of the court that arise from proceedings must be articulated in a clear, precise, and logical manner. It is not enough for a judgment to be legally accurate, it must also be linguistically and grammatically sound, as well as easy to read and understand. In other words, what the court says, and how, is just as important as the decision itself, and a quality judgment deftly combines legal writing skills and legal knowledge.

A court's decision is a very important legal act that sublimates the proceedings and the conclusions reached by the court. Ensuring that judgments are of a high quality reduces the chance that they can be undermined later due to errors, irregularities, or inconsistencies. Indeed, judgments must be compliant in both material and formal terms, as unsatisfied parties will search thoroughly for the smallest reason to contest them.¹⁹³ This is why the court must convincingly argue to any person reading a judgment, by force of clarity, presentation, and logic, that the court's reasoning is sound, leaving little space for criticism of the judgment even if one does not accept its conclusions.¹⁹⁴

193 Chapter XXII of the CPC FBiH, Articles 294–306, contains provisions on judgments.

194 D. Randelović, “Veština pisanja pravnih akata – prvostepena presuda u parničnom postupku,” *Pravne Teme* (Belgrade), no. 5 (2016): 21–36.

According to legal theory, a well-reasoned decision should also guarantee the following principles of criminal law: 1) the intent of the court presented in a judgment should be harmonized with the intent of relevant legal norms, 2) the court's explanation should enable verification of procedure and of the decision-making process, and 3) the decision should enable an evaluation of the logic and argumentation of the decisions of lower-instance courts.¹⁹⁵

This analysis of seven diverse judgments in domestic violence cases provided a multitude of insights. For example, it clarified that the courts continue to treat this criminal offense as a relatively trivial problem, and address it inadequately, and that the gender bias of judicial professionals benefits perpetrators and disadvantages victims – with male perpetrators frequently portrayed as “decent” or as “a family man,” with no regard for how the violence in question contextualizes this determination, and often giving no attention to the continuity of violence in a family. As Buckingham notes, domestic violence is too often viewed through a “romantic lens” and is not seen accurately as the imposition of power and control over a victim.¹⁹⁶

Further, this analysis indicates that the safety of children is sometimes disregarded by the courts, and that there is an insufficient focus on the involvement of children in domestic violence as witnesses (either as direct victims of violence or due to their presence during a violent incident). There was also evidence of victim blaming in these judgments. Meaning, women victims were portrayed as instigators who tend to lose emotional control, while their abusers were depicted as reliable hard workers and breadwinners for their families.

The fact that few suspended sentences for domestic violence are ever revoked is partly due to a lack of understanding among the judiciary regarding the nature and forms of family violence; but also to a strict legal condition pertaining to the newly perpetrated criminal offense, that it should be punished

195 T. Bubalović, “Pravo optuženika na obrazloženu sudsku odluku,” *Zbornik radova Pravnog fakulteta u Zenici* 2014, no. 64, 992.

196 Judith Buckingham, “Romantic and ‘Real Life’ Relationships in Criminal Law: Reconstructing Red Flags for Dangerousness/Lethality,” *New Zealand Law Review* (2010): 93–150.

by imprisonment of two or more years. The failure to impose a suspended sentence with protective guardianship has no sound justification, however. It is only if a suspended sentence is followed by a measure of protective guardianship that it can meet its purpose and be socially justified, even in cases where perpetrators have never before broken the law. There should be more focus among judicial professionals on the text of the law, in order to be better informed about the requirements of protective guardianship, which judges should opt to apply as everyday court practice.

Finally, it should be underlined that:

“If the accused has received a sentence, the explanation shall state the circumstances the court considered in determining the level of punishment. The court shall specifically present the reasons that guided the court when it decided on a more severe punishment than that prescribed, or when it decided that the punishment should be more lenient or the accused should be released from the punishment, or when the court has pronounced a suspended sentence or has pronounced a security measures or forfeiture of the proceeds of the crime.”

Decisions on ancillary motions (on the costs of the proceedings or a compensation claim) must also be explained.

In any case, assessing the evidence entails a conscientious analysis and evaluation of every piece presented, individually and in conjunction with other evidence, to draw a conclusion as to whether the decisive fact was established or not. This includes a logical and psychologically-based assessment of contradictory statements, witnesses themselves, the findings and opinions of expert witnesses, the confessions of defendants, any reasons for departing from the principle of directness, any reasons for failing to accept the motions of parties, and the presentation of evidence and the facts established.

The quality of a court’s decision depends on the quality of its explanation. It is crucial, therefore, that the court’s explanation is comprehensive, in the interest of justice. This requires that judges devote ample time to preparing

their decisions, and that their explanations are consistent, clear, and unambiguous, and are not contradictory. Through the court's explanation, a reader should be able to follow the train of thought that brought a judge to a decision. Explanations in judgments do not necessarily need to be exceptionally lengthy, but should reflect the awareness and understanding behind the decision; though, judges should address only relevant arguments that impact resolution of the matter at hand.

This publication, which provides a qualitative analysis of judgments related to the criminal offense of domestic violence, revealed significant deficiencies in these judgments, explained here in detail. These include the inappropriate and incomplete assessment of mitigating and aggravating factors, which affects decisions on the type and magnitude of sanctions, so that the sentences imposed by judges in BiH fail to achieve their purpose, and the most commonly pronounced sanction is a suspended sentence. Neither the special nor general prevention purpose is achieved in this way. When it comes to compensation claims, judges are also negligent; meaning that the aim of protecting and satisfying victims remains largely unmet.

Importantly, though, this analysis has raised awareness in a way that could not have been achieved through a simple review of the types of decisions and sanctions issued in cases of domestic violence. This thorough and critical reading of these judgments and the analysis this facilitated, particularly from a feminist perspective, should contribute to greater knowledge among judicial office holders about how to improve their work on domestic violence cases, and the recognition that this demands specialized training. Judges must be encouraged to undertake fully adequate assessments of mitigating and aggravating factors, to impose sanctions that are proportionate to the gravity of the criminal offense, and to provide clear and complete explanations of all the relevant factors in every case. This will send a strong message to the public that domestic violence will not be accepted.

REFERENCES

- Ajduković, M., S. Rusac, and J. Ogresta. “Izloženost starijih osoba nasilju u obitelji.” *Revija za socijalnu politiku* 15 (2008).
- Bubalović, T. “Pravo optuženika na obrazloženu sudsku odluku.” Zborniku radova Pravnog fakulteta u Zenici, no. 64 (2014).
- Čehajić-Čampara, Maida and Nejra Veljan. *Analiza sudskih presuda nasilja u porodici*. Sarajevo: Atlantska inicijativa, 2018.
- Duhaček, D. *Ženski sud feministički nepristup pravdi*. Belgrade: Ženski sud proces organizovanja, Žene u crnom i Centar za ženske studije Beograd, 2015.
- Galić, Nenad and Heather Huhtanen. *Judicial Benchbook: Considerations for Domestic Violence Case Evaluation in Bosnia and Herzegovina*. DCAF, 2014.
- Gomien, Donna. “Short Guide to the European Convention on Human Rights.” Council of Europe, 2000.
- Halilović, Majda. *Survivors Speak: Reflections on Criminal Justice System Responses to Domestic Violence in Bosnia and Herzegovina*. Sarajevo: Atlantic Initiative and DCAF, 2015.
- Halilović, Majda and Heather Huhtanen. *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina*. Geneva: DCAF, 2014.
- Hecht Schafran, Lynn. “Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience.” *The Judges Journal* 53, no. 3 (2014).

- Hester Marianne, et al. *Making an Impact: Children and Domestic Violence: A Reader*. London and Philadelphia: Jessica Kingsley Publishers, 2007.
- Humphreys, Cathy and Nicky Stanley. *Domestic Violence and Child Protection: Directions for Good Practice*. London: Jessica Kingsley Publishers, 2006.
- Hunter, Rosemary. "Analysing Judgments from a Feminist Perspective." Paper presented at the conference National training day on Law, Gender and Sexuality: Sources and Methods in Socio-Legal Research, 2014.
- Hunter, Rosemary, Clare McGlynn, and Erika Rackley. *Feminist judgments – From Theory to Practice*. Oxford: Hart Publishing, 2010.
- Ignjatović, Đ. *Kriminologija*. Beograd: Pravni fakultet, 2010.
- Janković, S. "Greške i propusti pri izradi prvostepene krivične presude." *Bilten Vrhovnog suda Srbije*, no. 2 (2006).
- Kinstlinger-Bruhn, Charlotte. *Everything You Need to Know About Breaking the Cycle of Domestic Violence*. Rosen, 1997.
- Kovaček-Stanić, G. and S. Samardžić. "Novine koje donosi Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici." Zborniku radova Pravnog fakulteta u Novom Sadu, 2, 2014.
- Macmillan Ross and Catherine Kruttschnitt. *Patterns of Violence Against Women: Risk Factors and Consequences*, no. NCJ 20836. Washington DC: US Department of Justice, 2005.
- Majić, M. *Prvostepena krivična presuda – veština pisanja*. Beograd: Paragraf, 2014.
- Marković, I. "Nasilje u porodici kao specifičan oblik kriminaliteta u uslovima globalne ekonomske krize." Belgrade: Tara, 2011.
- Niemi-Kiesiläinen, Johanna, Päivi Honkatukia, and Minna Ruuskanen. Legal texts as discourse. In *Exploiting the Limits of Law*, edited by Svensson, Gunnarsson, and Davies. Ashgate, 2007.
- OSCE, *Ensuring Accountability for Domestic Violence: An analysis of sentencing in domestic violence criminal proceedings in Bosnia and Herzegovina, with recommendations*. Sarajevo: OSCE Mission, 2011.

- Peled, Einat, Peter G. Jaffe, and Jeffrey L. Edleson. *Ending the Cycle of Violence: Community Responses to Children of Battered Women*. London: SAGE Publications, 1995.
- Petrić, Aleksandra and Dženana Radončić. *Izveštaj i analiza pracenja krivičnih postupaka u oblasti rodno zasnovanog nasilja u Federaciji Bosne i Hercegovine i Republici Srpskoj*. Banja Luka: Legal Aid Centre for Women and the Associated Women Foundation, 2014.
- Randelović, D. “Veština pisanja pravnih akata – prvostepena presuda u parničnom postupku.” *Pravne teme*, no. 5 (2016).
- Simović, Miodrag. *Pravo na obrazloženu krivičnu presudu kao element prava na pravično suđenje*. Sarajevo, 2018.
- Singer, M. *Kriminologija delikata nasilja: Nasilje nad djecom i ženama, maloljetničko nasilje*. Zagreb: Nakladni zavod Globus, 2005.
- Tomić, Z. *Krivično pravo II, Posebni dio*. University of Sarajevo Faculty of Law, 2007.
- Vink, R., F. Pannebakker, A. Goes, and N. Doornik. *Family violence of adolescents and young adults against their parents: Core findings from exploratory research*. Movisie/TNO, 2014.
- Williamson, Emma. *Domestic Violence and Health: The Response of the Medical Profession*. Bristol: The Policy Press, 2000.

