

**Benchbook for consideration  
of the criminal offence  
of rape in the caselaw  
of Bosnia and Herzegovina**

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**Sarajevo, 2019**



# Contents

Acknowledgements .....	6
Foreword.....	7
<b>1. The legal framework: Legislation in BiH on the criminal offence of rape .....</b>	<b>11</b>
1.1. Proving facts and rules for sentencing .....	14
<b>2. Sentencing in rape cases and other crimes against sexual freedom: An analysis of the mitigating and aggravating factors applied by courts in BiH.....</b>	<b>19</b>
2.1. Methodology .....	19
2.2. Sentencing .....	20
2.2.1. Mitigating factors .....	20
2.2.2. Aggravating factors .....	23
2.2.3. The application of mitigating and aggravating factors in sentencing.....	25
2.3. Type and severity of imposed sanctions.....	30
2.4. Discussion and conclusions .....	31
<b>3. Qualified forms of the criminal offence of rape.....</b>	<b>37</b>
3.1. A juvenile victim .....	39
3.2. Perpetration in a particularly cruel or degrading manner.....	41
3.3. Perpetration resulting in grievous bodily injury .....	43
3.4. Multiple rapes committed on the same occasion by several perpetrators .....	44
3.5. Several qualifying circumstances in a case .....	45
3.5.1. Rape committed in a particularly degrading manner against a minor ....	46
3.5.2. Rape committed in a particularly cruel and degrading manner against a minor, by several perpetrators .....	47
3.5.3. Rape committed in a particularly degrading manner, resulting in a grievous bodily injury .....	47
3.6. Sentencing for the qualified form of the criminal offence of rape .....	48
3.7. Conclusion .....	56
<b>4. The psychological trauma of rape.....</b>	<b>59</b>
4.1. Post-traumatic stress disorder and Rape Trauma Syndrome .....	64
4.2. Male victims of rape .....	67
4.3. Child victims of rape .....	69
<b>5. The consequences of gender bias in sexual assault cases: victim selection, recantations, and false allegations.....</b>	<b>73</b>
5.1. Victim selection.....	74
5.2. Recantations by victims.....	78
5.3. False reports .....	79
5.4. Detecting deception .....	81
5.5. Conclusion .....	83



<b>6. Special vulnerabilities of rape victims.....</b>	<b>85</b>
6.1. Adults and children with disabilities.....	85
6.2. Roma women and girls.....	89
6.3. Refugees and migrants .....	91
<b>7. Panel recommendations: Mitigating and aggravating factors related to the criminal offence of rape .....</b>	<b>95</b>
7.1. Previous convictions of the defendant .....	96
7.2. The age of the perpetrator.....	97
7.3. The family status of the perpetrator.....	97
7.4. Expressions of remorse by the perpetrator .....	98
7.5. Confession .....	99
7.6. Diminished mental capacity of the perpetrator .....	100
7.7. The attitude of the victim .....	100
7.8. A perpetrator with a position of social power and authority .....	101
7.9. Drug and alcohol intoxication or addiction .....	103
7.10. The age of the victim .....	104
7.11. Other circumstances of the perpetration of the offence .....	106
<b>Additional literature:.....</b>	<b>109</b>
<b>Author biographies .....</b>	<b>111</b>
<b>Excerpts from reviews .....</b>	<b>113</b>

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## Foreword

Although rape constitutes the gravest criminal offence against sexual freedom and morale and is one of the most severe allegations in contemporary criminal legislation, an analysis of publicly available cases carried out by the Atlantic Initiative in late 2017 indicated a need to direct greater attention towards the crime of rape in justice systems in Bosnia and Herzegovina (BiH). The results of that analysis, presented in the second chapter of this text, revealed inconsistent practices in the evaluation of mitigating and aggravating factors, insufficient consideration of the mental health consequences for victims of rape, and the frequent reduction of sanctions or the imposition of minimum sanctions for this offence. It also uncovered evidence that stereotypes about the behaviour of victims and perpetrators impacts outcomes.

In response, the Atlantic Initiative facilitated the work of a panel of twelve judges from different courts in BiH through the “Gender and Justice Project in Bosnia and Herzegovina,” to consider existing court practices in cases of rape and develop recommendations and resources for work on these cases. The panel held monthly meetings from December 2017 to June 2018, developing this Benchbook through working groups, discussions with experts, and analysis of cases. The panel believes this Benchbook can help judges better understand the criminal offence of rape, as well as its short- and long-term effects on victims, and can play a role in helping them overcome dilemmas that arise in these cases.

During its work, the panel considered legislative solutions in BiH, focusing on the uniformity of provisions governing the criminal offence of rape and the sanctions prescribed by criminal codes; but also on sentencing, particularly legislation directly relating to “court sentencing.” The panel also analysed the application of mitigating and aggravating factors, which were observed to have an important if not a decisive influence on the specific type and severity of sanctions imposed by the courts. Further, the panel reviewed qualifying forms of rape and the consequences of gender bias in sexual assaults, and took an in-depth look at the psychological traumas experienced by victims of rape. In the context of discussions and presentations, the panel analysed the international practice and concept of “rape without consent” as well, which is promoted by the Istanbul Convention but has not yet found its place in BiH (other than as a crime against humanity).

Along with references to court practices and literature from BiH and beyond, this Benchbook offers the conclusions, recommendations, and key findings of the panel that developed it. The Benchbook is divided into seven chapters that can be used separately or together as a resource in work on criminal cases of rape.

- I. Chapter One considers legislation in BiH on the criminal offence of rape
- II. Chapter Two reflects on caselaw relating to the application of mitigating and aggravating factors
- III. Chapter Three reviews the qualifying framework of the criminal offence of rape
- IV. Chapter Four provides an overview of the psychological consequences of rape for victims
- V. Chapter Five addresses gender bias and socio-cultural specificities of the criminal offence of rape
- VI. Chapter Six presents an analysis of bias against disabled persons, minorities, and migrants with regard to the criminal offence of rape
- VII. Chapter Seven provides panel recommendations for the evaluation of mitigating and aggravating factors when determining sanctions for the criminal offence of rape









# 1. The legal framework: Legislation in BiH on the criminal offence of rape

Over the past decades, interpretations of what constitutes the criminal offence of rape have developed, and the existence of coercion (force or threat against the life or body of the victim or a person close to them) is no longer seen as necessary for qualification of this offence, given that the absence of consent can be proved through other factual circumstances. This interpretation is unequivocally enshrined in the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention),<sup>1</sup> which was ratified by BiH in 2013. In line with requirements set out in the Istanbul Convention, the Criminal Code of BiH (CC BiH)<sup>2</sup> was amended in 2015 and the qualifications of crimes against humanity (Article 172) and war crimes against the civilian population (Article 173) were changed, so that the use of force or the threat of direct attack against the life or limb of the victim or a person close to them<sup>3</sup> is not necessarily a constituent element of sexual violence crimes during armed conflict. Accordingly, the lack of consent by a victim can be proved through the existence of other decisive facts.

This may be viewed as extremely positive progress in adequately qualifying crimes of sexual violence, and thereby in more easily proving and prosecuting this type of criminal offence, as there are several specific problems with an over-reliance on coercion as one of the two acts of perpetration in the offence of rape. For example, what kind or degree of coercion consti-

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1 *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, 11 May 2011, *Council of Europe Treaty Series*, No. 210.

2 Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15 and 40/15); and see provisions of Articles 172 and 173 of the CC BiH before amendments that were published in the Official Gazette of BiH no. 40/15 for comparison.

3 Comparison of Articles 172 and 173 of CC BiH before amendments published in the Official Gazette of BiH no. 40/15

tutes commencement of perpetration in a case with no sexual intercourse or an equivalent act?

Rape is defined as a criminal offence at the entity/district level in BiH, by: the Criminal Code of the Federation of BiH (CC FBiH),<sup>4</sup> the Criminal Code of the Republika Srpska (CC RS),<sup>5</sup> and the Criminal Code of the Brčko District of BiH (CC BDBiH).<sup>6</sup> State-level provisions do not recognize the criminal offence of rape, in accordance with the division of competences in the domain of criminal legislation; but there is an exception when crimes of rape or sexual violence constitute the body of a crime against humanity or a war crime against the civilian population, which constitute offences in the CC BiH.

According to the CC FBiH (See Chapter XIX, Criminal Offences Against Sexual Freedom and Morale, Article 203),<sup>7</sup> the criminal offence of rape occurs when a perpetrator: *coerces another by force or by threat of immediate attack upon his life or limb, or the life or limb of someone close to that person, to sexual intercourse or an equivalent sexual act* (paragraph 1). The law prescribes one to ten years in prison for the basic form of this offence.

Article 203 also foresees more severe forms of this criminal offence, as follows:

- If the rape was perpetrated... *in a particularly cruel or humiliating manner or if on the same occasion a number of perpetrators perform a number of acts of sexual intercourse or equivalent sexual acts against the same victim*, the legally prescribed sanction is imprisonment for a term between three and fifteen years (paragraph 2).
- If by the offence... *the death of the raped person is caused, or serious bodily injury is inflicted on the raped person or their health is severely impaired, or the raped female is left pregnant...* the legally prescribed sanction is imprisonment for not less than three years (paragraph 3).

4 Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina nos. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 46/16 and 75/17).

5 Criminal Code of the Republika Srpska (Official Gazette of the Republika Srpska, 64/17).

6 Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of Brčko District of BiH, 10/03, 45/04, 06/05, 21/10 and 9/13).

7 Apart from the criminal offense of “Rape,” this chapter also catalogues the following criminal offences according to the provisions of CC FBiH: “Sexual Intercourse with a Helpless Person” (Article 204), “Sexual Intercourse by Abuse of Position” (Article 205), “Forced Sexual Intercourse” (Article 206), “Sexual Intercourse with a Child” (Article 207), “Lechery (Concupiscence)” (Article 208), “Satisfying Lust in the Presence of a Child or Juvenile” (Article 209).



- If the rape was perpetrated... *out of hatred...* the legally prescribed sanction is imprisonment for a term between three and fifteen years (paragraph 4).
- If the rape was perpetrated... *against a juvenile...* the legally prescribed sanction is imprisonment for a term of not less than three years (paragraph 5). If the criminal offence referred to in paragraphs 2, 3, and 4 was perpetrated against a juvenile, the law prescribes imprisonment for not less than five years (paragraph 6).
- If a rape perpetrated... *in a particularly cruel or humiliating manner or if on the same occasion a number of perpetrators performed a number of acts of sexual intercourse or equivalent sexual acts against the same victim... caused... death of the raped person, or serious bodily injury is inflicted on the raped person or their health is severely impaired, or the raped female is left pregnant...* the legally prescribed sanction is imprisonment of not less than five years (paragraph 7).

The CC RS defines the basic form of the criminal offence of rape in the same way as the CC FBiH (See Chapter XIV, Criminal Offences Against Sexual Integrity, Article 165(1)).<sup>8</sup> However, the minimum sanction in the RS is three years imprisonment (as opposed to one year in the FBiH), reflecting the viewpoint of legislators that perpetrators of this offence should be punished more stringently. Like the CC FBiH, the maximum sanction prescribed by the CC RS is ten years in prison.

The CC RS describes a qualified form of the offence of rape in paragraph 2, stipulating five to fifteen years imprisonment if a rape was perpetrated... *against a child above the age of fifteen, or in a particularly cruel or degrading manner, or by more than one perpetrator, or out of hatred, or if the criminal offence has resulted in grievous bodily injury or a serious impairment of health or pregnancy of the female victim.* Again, this minimum sanction exceeds that specified in the CC FBiH (of three years). The CC RS stipulates imprisonment for five to fifteen years for this severe form, again expressing the legislator's viewpoint that perpetrators of this criminal offence should be punished more stringently. Namely, the prison sentence laid down in CC FBiH for this form of the offence ranges from three to fifteen years. Exception is the case when a minor has been raped, when the minimum sanc-

<sup>8</sup> Apart from the offence of "Rape," this chapter of the CC RS defines the following criminal offences: "Sexual blackmail" (Article 166), "Sexual intercourse with a helpless person" (Article 167), "Sexual intercourse by abuse of position" (Article 168), "Pandering" (Article 169), "Sexual harassment" (Article 170), and "Lechery (Concupiscence)" (Article 171).

tion is three years in prison, whereas maximum sanction is not prescribed. Also, if the rape was perpetrated against a minor, in a particularly cruel or humiliating manner, or if on the same occasion a number of perpetrators performed a number of acts of sexual intercourse or equivalent sexual acts against the same victim, CC FBiH prescribes imprisonment of minimum five years without setting a maximum sanction, thus clearly indicating the need for more stringent punishing of perpetrators if the offence was perpetrated against a minor under particularly difficult circumstances.

Rape that *causes the death of the victim* is covered in paragraph 3 of Article 165 of the CC RS, which stipulates a minimum of ten years imprisonment for this form of the offence, without specifying maximum sentence. Compared to the CC FBiH, this limits the most stringent criminal sanctions only to rape that leads to the death of the raped person, whereas other outcomes, such as grievous bodily injury or a serious health impairment or pregnancy, are not sanctioned to the same degree.

The provisions of the CC BDBiH (See Chapter XIX, Criminal Offences Against Sexual Freedom and Morale, Article 200) are identical to those of the CC FBiH for criminal offences against sexual freedom and morale and for the offence of rape, and will not be analysed separately.

### ***1.1. Proving facts and rules for sentencing***

According to general sentencing rules, courts impose sanctions within legally-prescribed limits for any given criminal offence, bearing in mind the purpose of sanctioning and all the circumstances that contribute to a lesser or greater sanction.<sup>9</sup> These circumstances are known by facts proved in the case. In cases of rape, the proceedings for proving facts are no different than those in other criminal cases and are focused on establishing facts that constitute elements of the criminal offence, facts illuminating guilt and criminality, and other facts on which the application of both substantive and procedural criminal legislation depends.

One should note that, in accordance with the principle of free evaluation of evidence, when evaluating the existence or non-existence of a fact, courts and other bodies are not bound or limited by any special formal rules. The evaluation of evidence itself entails a logic and psychology that follows

<sup>9</sup> See: the CC BiH, Article 48(1); the CC FBiH, Article 49(1); the CC RS, Article 52(1); and the CC BDBiH, Article 49(1).



the rules of human judgement and experience.<sup>10</sup> With regard to criminal offences against sexual freedom, however, some special evidentiary rules have been implemented, and all bodies participating in the proving of facts are to abide by them. These include a prohibition against presentation of evidence related to the sexual life of the injured party (victim) before the alleged criminal offence was perpetrated. Any violation of these rules renders evidence obtained thereby unlawful. With regard to crimes against humanity and international law, the use of a victim's consent to support the defence of a perpetrator has been found inadmissible.

From a procedural standpoint, one should keep in mind that when a court is rendering a decision, its duty is to conscientiously evaluate every piece of evidence individually and in relation to other evidence, and to draw a conclusion as to whether a fact has been proved or not based on such an evaluation.<sup>11</sup> Circumstances relevant for court sentencing include those related to the form of the offence, to the perpetrator's degree of guilt, and to the perpetrator more generally.<sup>12</sup>

Provisions of the CC RS on sentencing, mitigation, sentence mitigation limits, and acquittal currently represent the most adequate framework for sentencing in criminal cases of rape, and are thus analysed here. Article 52(1) of the CC RS lists as mitigating and aggravating factors... *particularly: the degree of criminal liability, motives behind the offence, intensity of jeopardizing or injuring a protected good, circumstances of perpetration, perpetrator's earlier life, his personal circumstances and demeanour following the perpetration, and other circumstances relevant for sentencing.* Paragraph 2 of the same Article prohibits a factor that constitutes an element of a criminal offence from being valued as an aggravating or mitigating factor, unless it crosses the limit required for existence of a criminal offence or of a specific form of the criminal offence, or unless there are two or more such circumstances, and only one is sufficient to demonstrate the existence of a more severe or less severe form of the criminal offence. If the criminal offence was perpetrated out of hatred, the court will value this motivation as an aggravating factor, unless hatred constitutes a qualifying element of the criminal offence (paragraph 3). When the court is deciding a sentence against a perpetrator for a criminal offence in a case of recidivism, it shall

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10 H. Sijerčić-Čolić, *Krivično procesno pravo, Knjiga I: Krivičnoprocesni subjekti i krivičnoprocesne radnje*, 4th ed. (University of Sarajevo Faculty of Law, 2017), 105.

11 See: the CPC BiH, Article 281(2); the CPC FBiH, Article 296(2); the CPC RS, Article 295(2); and the CPC BDBiH, Article 281(2).

12 F. Bačić, *Kazneno pravo: opći dio*, 5th ed. (Zagreb: Informator, 1998), 412.

take into special consideration whether the most recent offence is of the same type as a previous one, whether it was perpetrated with the same motive, and what period of time has elapsed since any previous conviction or since punishment has been served or pardoned (paragraph 4). When deciding a sentence, the court shall particularly take into consideration the financial situation of the perpetrator (paragraph 5).

These general sentencing rules match provisions in the CC FBiH and the CC BDBiH. However, there is a significant difference in the CC RS as to the grounds prescribed for mitigation and sentence reduction limits. Pursuant to Article 53 of the CC RS, which includes provisions on the reduction of punishment, the court may mete out a punishment lesser than the limit prescribed by the Code or may apply a more lenient punishment *only when the Code explicitly provides such an option* (paragraph 1). The court may also impose a punishment below the limit prescribed by the Code when the Code stipulates that the perpetrator can be exonerated but the court fails to do so (paragraph 2). Another instance in which the court may deliver a punishment below the limit prescribed by the Code is when highly mitigating factors exist, especially if the perpetrator has fully or partially compensated for damage caused by a criminal offence or has eliminated the harmful consequences of the offence in another way, and if the court finds based on such factors that the sentencing purpose can be achieved with a more lenient sanction (paragraph 3). And paragraph 4 allows the court to impose a punishment below the limit prescribed by the Code in cases of plea agreement, but this must adhere to the rules and limits prescribed by the Code.

Importantly, *the CC RS explicitly stipulates that punishment reduction cannot be applied to the criminal offence of rape, even when the requirements specified above have been met* (Article 54(3)).<sup>13</sup> This is an extremely important step in further implementing adequate sentencing policy for this crime and other criminal offences in violation of sexual freedom. Unfortunately, there are no similar restrictions in the CC FBiH and the CC BDBiH, which will result in inconsistent caselaw and sentencing policies across the country unless provisions are harmonized; a problem of criminal legislation in BiH in general.

Regarding provisions on exoneration, Article 55(1) of the CC RS stipulates that the court may exonerate a perpetrator only when the Code ex-

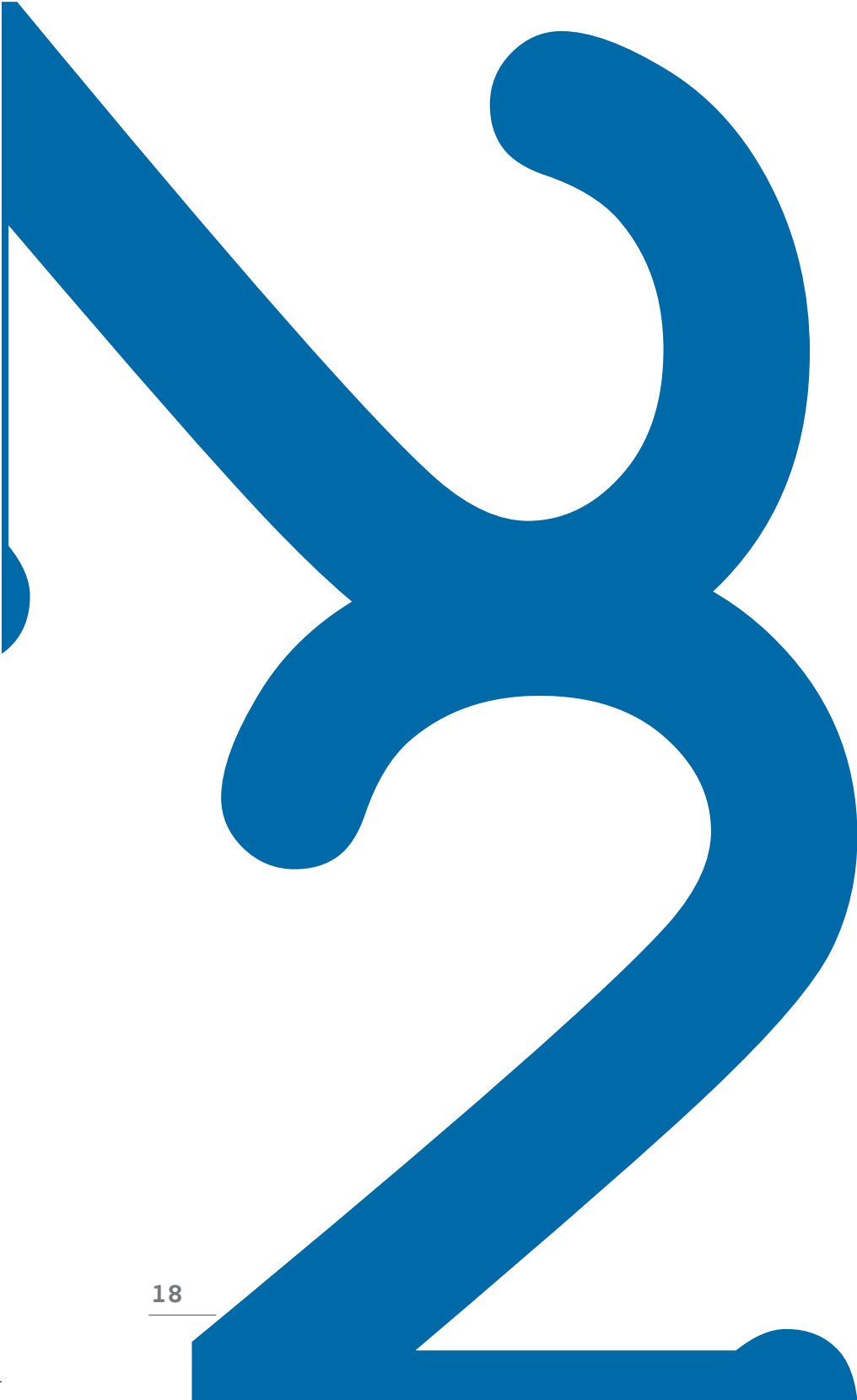
<sup>13</sup> Apart from rape, this also applies to other criminal offences, including: “Sexual intercourse with a helpless person” (Article 167), “Sexual intercourse with a child under the age of 15” (Article 172), “Terrorism” (Article 299), “Financing of terrorist activities” (Article 300). This stipulation is also applied when the perpetrator has two or more previous convictions for the same crime.





PLICITLY permits it. Pursuant to paragraph 2, the court may exonerate the perpetrator of a crime committed out of negligence when consequences of the offence affect the perpetrator so severely that no punishment can adequately serve the intended purpose of punishment. Finally, the court may exonerate a perpetrator of a criminal offence punishable by up to five years imprisonment if the perpetrator had already eliminated the consequences of the offence or compensated for the damage caused by it before learning the offence was discovered (paragraph 3).

Provisions on exoneration in the CC FBiH and the CC BDBiH are identical to those of the CC RS, except for this last option, to exonerate a perpetrator who had already eliminated the consequences of an offence or had compensated for damage before becoming aware that the offence had been discovered. Once again, legislation governing these issues must be harmonized so that the codes of the FBiH and Brčko District are aligned with these provisions of the CC RS.





## 2. Sentencing in rape cases and other crimes against sexual freedom: An analysis of the mitigating and aggravating factors applied by courts in BiH

### 2.1. Methodology

Preparations for this research included a focus on identifying problems that arise in the context of sentencing decisions for the offence of rape and other related crimes, especially when it comes to the evaluation of mitigating and aggravating factors. These factors have been observed to contribute directly to inadequate sentencing for rape and related offences, and therefore, this research examined the mitigating and aggravating factors applied by courts when deciding the type and severity of sanctions. A total of 34 convictions were analysed, among which 4 judgements were for the continued criminal offence of rape (including cases where a continued rape crime was perpetrated in concurrence with other crimes), 27 were for rape crimes (including cases where a rape crime was perpetrated in concurrence with other crimes), 2 were for the criminal offense of sexual intercourse with a child (in one of these cases, this offence was perpetrated in concurrence with the criminal offence of abuse of a child or juvenile for pornography, referred to in Article 211(1) of the CC FBiH), and 1 judgement for lechery. The parts of the country, subject matter, and jurisdictions encompassed by these judgements distributed cases across the following courts: the Supreme Court of FBiH; the Appellate Court of BDBiH; the District Courts in Doboј and Bijeljina; the Cantonal Courts in Bihać, Livno, Tuzla, and Zenica; the Municipal Courts in Livno, Travnik, Tuzla, Visoko, Velika Kladuša, and Živinice; and the Basic Courts in Trebinje, Bijeljina, Modriča, and the BDBiH.

This research does not analyse the entirety of caselaw in BiH on rape and related criminal offences over the research period, and is thus limited. But the sample of cases that was examined is believed to be sufficiently representative to generate credible conclusions about sentencing practices in cases involving these crimes.

## 2.2. Sentencing

In the context of provisions in the criminal codes of the FBiH, the RS, and the BDBiH, factors influencing sentencing were classified as mitigating or aggravating, and then divided into the following groups:

- a) factors relating to the degree of guilt
- b) factors relating to the motives behind the offence
- c) factors relating to the intensity of threat or violation
- d) circumstances of perpetration of the offence
- e) factors relating to the perpetrator's earlier life
- f) factors relating to the personal circumstances of the perpetrator and their behaviour following perpetration
- g) other factors relating to the perpetrator's personality

This classification takes into account that criminal codes do not stipulate what factors should be deemed mitigating or aggravating. In principle, factors in any group can be valued as mitigating *or* aggravating, depending on provable facts.

### 2.2.1. Mitigating factors

When deciding sanctions for all analysed cases of rape, the one case of lechery, and the two cases involving sexual intercourse with a child, courts in the research sample considered the following *mitigating* factors:

#### a) *factors relating to the degree of guilt*

In 2 judgements, the court valued the diminished and substantially diminished mental capacity of perpetrators.

#### b) *factors relating to the motives behind the offence*

The courts did not apply any mitigating factors from this group in any judgement.

#### c) *factors relating to the intensity of threat or violation*

In 2 judgements, the court valued the fact that the offence had only been attempted.



***d) circumstances of perpetration of the offence***

The courts valued the circumstances of the perpetration of offences as mitigating factors in 6 judgements. In 1 judgement, the court found that a mild form of force was used; in 1 judgement, the fact that the offence was evidently perpetrated under the strong influence of persons older than the perpetrator was valued; in 3 judgements, the court considered the lapse of time since perpetration; and in 1 judgement, the court valued the injured party's contribution to the offence (*"The court considered the fact that the injured party somewhat contributed to the incident with her behaviour, especially because, knowing that she had been in an emotional or romantic affair with him previously, and although she recognized him... she agreed to get in the car with him, and the defendant misinterpreted her actions as a consent to engage in sexual intercourse."*).

***e) factors relating to the perpetrator's earlier life***

In 1 judgement, the court valued the perpetrator's earlier life; in 9 judgements, a lack of prior criminal record was valued as mitigating.

***f) factors relating to the personal circumstances of the perpetrator and their behaviour following perpetration***

This was the group of factors valued by courts most frequently as mitigating when deciding on the type and severity of sanctions, using a very broad range of formulations:

- In 3 judgements, the personal and family circumstances of the defendant were considered, without particular explanation
- In 9 judgements, family circumstances were valued with minimal explanation (e.g., *"he grew up in a hostile family environment," "he is a family man," "the defendant is a victim of a very dysfunctional family himself," "the only breadwinner in the family"*)
- In 8 judgements, parenthood was considered (e.g., *"he is the father of one," "father of a minor," "a father of two children whom he supports and raises," "a father of three"*)
- In 9 judgements, the defendant's age was valued (e.g. *"a young person," "the court considered his age at the time of perpetration and at the time of the trial, because he started a family in the meantime," "a young adult who is barely 19"*)

- In 4 judgements, the court considered financial circumstances (e.g., *“difficult financial situation of the defendant,” “no property,” “poor financial status,” “lives at the edge of subsistence”*)
- Unemployment was considered in 3 judgements
- In 1 judgement, a medical diagnosis was valued (*“mild mental retardation”*)
- In 9 judgements, confessions and/or expressions of remorse were considered (e.g. *“despite the fact that the defendant did not confess earlier, the court valued the fact that he has since expressed remorse for the offence,” “the court valued the defendant’s confession and honest demeanour before the court”*)
- In 4 judgements, the conduct of the defendant was valued (e.g. *“the court had in mind his overall conduct before the authorities in this proceeding, which was very proper,” “both first and second defendants displayed proper behaviour during the proceeding,” “he did nothing to contribute to delays,” “honest demeanour”*)
- An apology to the injured party was considered in 5 judgements
- In 1 judgement, compensation to the injured party for damages was valued (*“which provided at least partial satisfaction to the victim”*)<sup>14</sup>

**g) other factors relating to the perpetrator’s personality**

In 1 judgement, the facts that the defendant was *“a very serious man”* who *“works on very demanding and expert assignments”* were valued as mitigating.

Some mitigating factors valued by the courts do not fit clearly into one of these groups. In one case, the court found it mitigating that the *“perpetration of the criminal offence did not result in severe impairment of the injured party’s mental or physical health.”* In another, the fact that *“the injured party did not suffer any bodily injuries”* was applied in this context. There is some question whether these factors can be treated as mitigating at all.

<sup>14</sup> In this instance, compensation for damages to the injured party is classified in this group of factors because it was viewed as the “perpetrator’s behaviour following perpetration.” In the case in question, the defendant signed a plea agreement, compliance to which required he compensate a damage claim to the injured party, which he did eventually (See Judgement No. 80 0 K 054911 15 K of 16 February 2016).



### 2.2.2. Aggravating factors

When deciding on the sanction for rape crimes, lechery, and 2 cases involving sexual intercourse with a child, courts considered the following *aggravating* factors:

#### **a) factors relating to the degree of guilt**

In 4 judgements, a general formulation was applied (*“the degree of guilt was considered”*); and in 1 judgement, the fact that the perpetrator was fully responsible at the time of perpetration was valued, because the defendant was aware of the absolute prohibition of the offence and all the implied consequences of that prohibition.

#### **b) factors relating to the motives behind the offence**

In only 1 judgement was the motive valued as aggravating (*“to satisfy his passion”*).

#### **c) factors relating to the intensity of threat or violation**

In 4 judgements, a general formulation was valued (*“considering the gravity of the offence”*); in 7 judgements, more specific formulations were applied (e.g., *“the offence was perpetrated against the injured party who is his close relative... continuously, for almost one year,” “he warned the injured party not to tell anyone what he did to her,” “the defendant perpetrated several acts against the injured party,” “the defendant perpetrated the offence against his daughter, exploiting and abusing the parental position,” “he perpetrated the offence against his own child, starting at early age and continuing for a long period of time”*); in 8 judgements, the court valued the physical and mental suffering of the injured party (e.g., *“permanent consequences for the injured party, both in physical and emotional terms,” “lasting consequences on the part of the injured parties... which marked them for life,” “[the injured party] demonstrates symptoms of depression... guilt... melancholy... loneliness... the presence of suicidal thoughts,” “the injured party left the country, obviously in order to avoid stigmatization and additional traumatization in the environment where she lived”*).

#### **d) circumstances of perpetration of the offence**

In 14 judgements, courts referred to circumstances related to the method of perpetration (e.g., *“the court valued as a particularly aggravating factor the circumstance of the rape perpetration by the defendant against a minor, a daughter of his very good friends, whom his wife had cared for when she*

*was small for at least a year,” “the defendant demonstrated particular perfidiousness when he decided to perpetrate the offence under such circumstances,” “the offence was perpetrated in a particularly degrading manner,” “several acts of sexual intercourse and equivalent sexual acts were committed by several perpetrators,” “the defendant’s persistence in his attempts to complete the criminal offence by holding and pulling the injured party’s arms,” “the court considered the method of crime perpetration, arrogance and ruthlessness demonstrated by the defendant during the perpetration, considering that he perpetrated the offence eight times over a three-month period, and that he abused the injured party’s confidence,” “the injured party was entrusted to him for education and professional development,” “he used the opportunity when nobody was at home,” “he demonstrated extreme persistence in perpetrating the crime”).*

***e) factors relating to the perpetrator’s earlier life***

Of these factors, only the previous criminal records of defendants were valued as aggravating, in 17 judgements; however, it is worth noting that courts did *not* value a prior criminal record as an aggravating factor in some cases.

***f) factors relating to the personal circumstances of the perpetrator and their behaviour following perpetration***

In 2 judgements, these factors were valued (“*no remorse and he still behaves as if he feels no responsibility,*” “*when detention was cancelled, he left the territory of BiH... and applying the same methods... perpetrated the same type of criminal offences*”).

***g) other factors relating to the perpetrator’s personality***

No factors from this group were considered as aggravating when courts decided on the type and severity of sanctions.

One “specific” aggravating factor valued in some cases was an expression of interest by the injured party in prosecuting and sanctioning the defendant. Considering that the criminal justice system in BiH prescribes *ex officio* prosecution for this type of criminal offence, irrespective of the will of injured parties, we believe it is unfounded to define such a position of the injured party as an aggravating factor.





### 2.2.3. The application of mitigating and aggravating factors in sentencing

Excerpts from a number of judgements analysed by researchers are provided below, as well as a current review of modalities used by the courts in consideration of aggravating and mitigating factors in the sentencing stage.

#### Judgement No. 03 0 K 015313 16 K of 2 September 2016

**Charges:** *Continued criminal offence of rape referred to in Article 203(2) in concurrence with the criminal offence of (attempted) murder referred to in Article 166(1), in conjunction with Article 28 of the CC FBiH.*

**Facts:** *On 25 February 2016, the defendant started beating [the injured party] with brass knuckles all over her body, and hitting her in the face and legs with an open palm, and then continued kicking her, and started pulling her hair and picked her up from the floor while she was bleeding from the nose, crying, and asking him not to beat her... he ordered her to take off her clothes... performed sexual intercourse and an equivalent sexual act... threatening to kill her the whole time... Late in the night on 8 March 2016... he threw her from the bed onto the floor several times, which made her pass out... then he obtained a knife and headed towards her... and when she tried to get up, he hit her with brass knuckles again on the back of her head, which caused her to... lose her balance... then he took a fork and stabbed her on her legs, and tried to stab her in the face... he made her take off her clothes and then, knowing that her resistance was broken... he demanded that she... pleasure him, which she had to do upon repeated request, and then he engaged in sexual intercourse with her... threatening to kill her the whole time... On 15 March 2016 around 10:30 p.m. ...after he hit her in the face with an open palm and then hit her head and back with brass knuckles... after he repeatedly threatened to kill her, he took an iron dog chain and swung it at her head, and when she blocked it with her hand, he hit her on the thigh, wrapped the chain around her neck and started tightening it, which resulted in the fracture of her 5th cervical vertebrae, which caused the injured party to lose her breath and begin suffocating...*

**Sentencing considerations:** *When deciding on the sentence against the defendant for the perpetrated criminal offences, the court valued the following mitigating factors: the defendant confessed and expressed remorse, his family circumstances related to the fact that he grew up in an extremely adverse family environment, because his father was serving a long-term prison sentence,*

*and his mother was mentally ill, as well as his young age and the fact that he is the father of a minor; as for aggravating factors, the court valued his prior criminal record, but the court also considered that previous convictions had been imposed for criminal offences against property. **Sentence imposed:** Single prison sentence of 4 years and 8 months.*

**Judgement No. 68 0 K 035384 16 K of 24 January 2017**

**Charges:** Rape referred to in Article 203(1) of the CC FBiH

**Facts:** *On 23 August 2015 around 6:30 p.m. ...driving her to that place by a motor vehicle... he then ordered her to take off her clothes and... when she refused... in order to break the injured party's resistance, he hit her in the stomach, which made her fall onto her back and, when she got up, he grabbed her hair, pulled her and pushed her onto the ground, then hit her head and inflicted contusions to her head and neck... [and] abrasions around the root of her nose... and then stripped off her clothes by force and, using force engaged in a sexual act... and after the offence... left the scene.*

**Sentencing considerations:** *Deciding on the type and level of sanction, the court evaluated all the circumstances which, within the meaning of Article 49 of the CC FBiH, affect the severity of the sentence. As mitigating factors, the court considered that the defendant did not contribute in any way to delays of the proceeding, that he is a family man and father of three, and his proper behaviour at the main trial; the court found no aggravating factors. **Sentence imposed:** One (1) year in prison.*

**Judgement No. 06 0 K 008091 15 K of 18 February 2016**

**Charges:** Rapes referred to in Article 203(1) of the CC FBiH in concurrence

**Facts:** *In the night between 24 and 25 December 2013... the defendant forced the injured party who is a minor to engage in sexual intercourse... when he and the injured party were left alone, he pushed her onto the couch... and warning her not to create noise and that he has good relations with the police, and threatening her that he had a gun in the car, and that he would use it to kill her and her parents, after which the injured party cried and said that*



*she had to go to the toilet, and she escaped to the bathroom, after which he followed her and pulled her out from the bathroom, despite the fact that the injured party tried to break away... she asked him to let her go, he slapped her, and pushed her onto the couch in the kitchen, and then... performed full sexual intercourse with her... In the morning on 15 February 2014... the defendant forced the injured party to engage in sexual intercourse... [and] when she tried to escape, he followed her, caught her and pulled her back into the car, and... lay on top of her and hit her on the head with a fist, telling her; "You better calm down, or things will get worse," after which he used force again, grabbed the injured party's hair, broke her resistance and... performed full sexual intercourse with her.*

**Sentencing considerations:** *When deciding on a criminal sanction, the court primarily considered the stipulated punishment for the criminal offence at issue, because the minimum punishment for that criminal offence is one year in prison, and the maximum sanction is ten years in prison. The fact that the defendant did not inflict any physical injuries upon the injured party during perpetration and that he is a father of two were valued as mitigating factors by the court. His prior criminal record was not valued as an aggravating factor, because the conviction was supposed to be deleted, and because it was a completely different type of the criminal offence (forest theft). The fact that both injured parties expressed interest in the prosecution and adequate punishment of the defendant was valued as an aggravating factor.* **Sentence imposed:** Single prison sentence of 2 years and 6 months.

**No. 06 0 K 005773 17 Kžk of 14 September 2017**

**Charges:** Rape referred to in Article 203(2) of the CC FBiH

**Facts:** *On 16/17 May 2013, the defendant... forced another to sexual intercourse, on which occasion several acts of sexual intercourse were performed with the same victim by several perpetrators... when she came to the gate, they approached her... and... he grabbed her arms and prevented her from leaving... he slapped her once... and then they pulled her inside to the ground by force... where they tied her... one of them grabbed her neck with one hand, and held her hands with the other... and then... he induced the defendant to perform sexual intercourse with the injured party, which the defendant did, but he did not beat the injured party...*

**Sentencing considerations:** *The court primarily had in mind that the defendant was a young adult, barely 19 at the time of perpetration, that he had no prior convictions, and that he evidently perpetrated the crime under the strong influence of people older than him... under circumstances he could not manage due to his young age and inexperience, where he was unable to react decisively, morally and responsibly... The Court found no aggravating circumstances. **Sentence imposed:** One (1) year in prison.*

### **Judgement No. 03 0 K 014974 16 K of 8 September 2016**

**Charges:** *Rape referred to in Article 203(3) in concurrence with the offence of Endangering one's safety referred to in Article 183(1) of the CC FBiH*

**Facts:** *...on 2 March 2016 around 9 p.m.... when he brought [the injured party] to his apartment... [the defendant] locked the entrance door, and after he ordered his common law wife to go to the other room, he lay down... and as [the injured party] was resisting and calling for help, he hit her several times with a fist on the left side of her face in order to break her resistance... thus inflicting serious bodily injuries upon her, after which he raped her... until... [another individual] interrupted him after hearing calls for help and broke the defendant's resistance and enabled the injured party to flee from the apartment; after that, knowing that he was endangering the safety of another person by posing a serious threat against the person's life, [the defendant] threatened [the individual] by saying that he would cut him with an axe, that he would kill his child in front of the school, and he repeated the same threats in the presence of police officers.*

**Sentencing considerations:** *When deciding on the type of criminal sanction against the defendant, the court valued the fact that the defendant is the father of a minor and that his mental capacity was diminished at the time of perpetration as mitigating factors, whereas multiple prior convictions, especially for the same type of the criminal offence, were valued as an aggravating factor. **Sentence imposed:** Single prison sentence of 4 years and 7 months.*

### **Judgement No. 80 0 K 054911 15 K of 16 February 2016**

**Charges:** *Rape referred to in Article 193(1) of the CC RS*



**Facts:** *On 27 January 2014, in the time period from 3:30 to 4 p.m.... [the defendant] offered money asking [the victim] for sexual intercourse in return, which the injured party refused, after which he started touching her... and pulling her closer to him, forcibly kissing her on the mouth, while she was pushing him away... she managed to open the door at one point... and tried to escape from the vehicle, but he grabbed her by the jacket... and started pushing her head towards his genitals... and then he forced the injured party to perform a sexual act... and while she was still trying to defend herself and raise her head, he continued forcing her... [until] she gathered her force, pushed him away and escaped from the vehicle... after which police authorities were informed about this event.*

**Sentencing considerations:** *The court valued the defendant's confession as a mitigating factor, and the injured party received partial satisfaction through damage compensation. The facts that the defendant is a very serious man who has a very demanding and highly professional job in his company were considered... as well as the fact that he is a father of two children whom he supports. In addition, the court considered the fact that the injured party somewhat contributed to the incident with her behaviour, especially because, knowing that she had been in an emotional or romantic affair with him earlier, and although she recognized him and introduced him as a taxi driver to her father, she agreed to get in the car with him on the occasion at issue, and the defendant misinterpreted her actions as consent to engage in sexual intercourse... Although the defendant refused to confess earlier, the fact that he expresses remorse was taken into account... and the court primarily considered his overall behaviour before competent bodies in this proceeding, which was very proper... On the other hand, the court considered the fact that the defendant had a prior criminal record, which was an aggravating factor in this case, considering that he had been convicted for the same offence within his family in the past. The court finds that, despite existence of this aggravating factor, the imposed sanction is still proportionate to the gravity of the perpetrated criminal offence and the degree of criminal liability. **Sentence imposed:** Six (6) months in prison (plea agreement concluded).*

### **Judgement No. 51 0 K 067876 15 K 2 of 9 November 2015**

**Charges:** *Continued criminal offence of rape referred to in Article 203(1) of the CC FBiH and rape referred to in Article 203(1) of the CC FBiH (two defendants)*

**Facts:** *On 20 May 2012 around 11:30 p.m.... [the defendants] arrived with the injured party and left the car... and entered the apartment, while [one defendant] stayed in the vehicle with the injured party and physically attacked her by hitting her on the head and face with his fists... then he entered the apartment with her... when the injured party cleaned the blood from her face, he ordered her to go back to the car and, when they got into the car, threatening that he would throw her into the lake and that he would not take her back home, he ordered her to take off her clothes... and raped her, after which he ordered the injured party to stay in the car and not come out; he entered the apartment, and then... [the other defendant] came out and got into the car... and raped the injured party, and then he took her into the apartment explaining that the car was too small a space...*

**Sentencing considerations:** *...when deciding on the punishment, the court valued the degree of physical and mental suffering of the injured party, prior convictions of the [first] defendant, and that the defendant is inclined to crime perpetration as aggravating factors, whereas the second defendant has no prior convictions, both first and second defendants behaved properly during the proceeding, and the lapse of time since perpetration of the crime was also valued, as well as the facts that the defendants are unemployed, and that the second defendant was serving a prison sentence. The court did not find any mitigating factors on the side of either defendant, and believes that imposing a prison sentence as described in the operative part of the judgement can achieve the sentencing purpose referred to in Article 42 of the CC FBiH for both defendants. As the first defendant was accused of a continued criminal offence, because he repeatedly used force and threats against the injured party in order to engage in sexual relations, the court imposed imprisonment of one year due to the fact that he had no prior convictions; the court imposed the same sanction against the second defendant, considering that his prior convictions mean that a more lenient sanction would not achieve the sanctioning purpose; the same applies to the first defendant, who has no prior criminal record. **Sentence imposed:** Each defendant received a sentence of 1 year in prison.*

### **2.3. Type and severity of imposed sanctions**

All the sanctions imposed in the cases analysed were prison sentences, except in one case involving a minor perpetrator, who was instead referred to a correctional institution for juveniles.



The sentences imposed in these cases ranged from 3 months in prison to 15 years and 6 months in prison. Sentences imposed for the basic form of the criminal offence of rape ranged from 6 months to 8 years in prison; whereas those for qualified forms of the offence ranged from 2 years and 2 months to 12 years in prison. Sentences ranging from 1 to 8 years in prison were imposed for the continued criminal offence of rape, including the qualified form. Sanctions ranging from 5 months to 3 years in prison were imposed for attempted criminal offences of this type.

Among the cases analysed, sanctions were imposed for the offence of sexual intercourse with a child in 2 judgements. In one, the defendant received a 1-year sentence for the basic form of this offence. In the other, a 15-year, 6-month sentence was handed down for the qualified form of this offence, for a severe form of sexual intercourse with a child in concurrence with the criminal offence of abuse of a child or juvenile for pornography; this was the longest prison sentence imposed in the cases that were analysed.

Finally, prison sentences were imposed for the criminal offence of lechery in two cases, one for 3 months, and the other for 2 years and 10 months in prison.

#### **2.4. Discussion and conclusions**

While some sentencing explanations align with the general sentencing rules outlined in the criminal codes in the FBiH, the RS and the BDBiH, the majority contain only superficial descriptions of mitigating and aggravating factors, and do not provide specific arguments as to why certain factors were valued by the court as mitigating or aggravating and how this influenced the type and severity of the imposed sentence. Therefore, particularly with regard to the evaluation of the personal circumstances of perpetrators, the court should not only note for example that a defendant's unemployment was considered in a particular case, but *why* unemployment was considered a relevant factor in sentencing.

Also, commonly cited mitigating factors were concentrated on the personality and personal circumstances of the perpetrator, and partly on the conduct of the perpetrator following perpetration. We understand that courts are obliged to individualize sentences, but it is very hard to overcome the impression, based on this analysis, that some mitigating factors are valued only to meet the legal requirement of individualization, and sometimes in a way that is so incoherent it raises questions about the independence and impartiality of the court, and even about the very underlying

logic of its deliberation. For example, when a court values the fact that the defendant is a “*very serious man... who has a very demanding and highly professional job*” as a mitigating factor in a rape case, a reasonable person may wonder why this isn’t valued as an *aggravating* factor. This was just one example in the cases that were analysed in which courts valued facts as mitigating though they could be interpreted as aggravating.

Moreover, there were instances in which neutral factors – which could be characterized as neither mitigating nor aggravating – were applied as mitigating. We believe that a difficult financial situation or the fact that a defendant is unemployed, both of which were valued by courts as mitigating factors at the sentencing stage in these cases, should be valued as mitigating primarily in cases involving criminal offences against property, in relation to the motives behind those offences. But when it comes to criminal offences against sexual freedoms, we see no legal or other reasonable grounds for such factors to significantly influence sentencing. In other words, there is no doubt that the fact that a defendant lives at the edge of subsistence will be considered a significant mitigating factor if they decide to steal in order to provide food to themselves or their family; however, the same factor should not be valued as mitigating if that same defendant attempts to rape another person using force or threats, or if it is valued, it should be weighted with only minor significance. This applies to other factors valued as mitigating, too, such as the fact that a defendant is a parent.

As for aggravating factors, the courts were most consistent in their consideration of the prior criminal records of perpetrators, and were mindful of whether prior convictions were related to different or similar types of crimes. We must note that in all cases, the courts emphasized and valued prior convictions for similar criminal offences. Still, we have objections to the application of this factor in two cases, one that ended in a plea agreement, in which the courts did value prior convictions for the same criminal offences at the sentencing stage but then imposed sanctions that were less than adequate in terms of severity or length.

The intensity of a violation and the circumstances of perpetration are also often considered as aggravating factors by courts at the sentencing stage, and in some cases are emphasized. These circumstances constitute a part of the evidentiary procedure in each case, and of the facts to be established in the proceeding. Surprisingly, though, when deciding a sentence, courts rarely specify the degree of guilt; and when they do, they often use brief descriptors such as “*the degree of guilt – premeditation.*”





A positive trend uncovered by this analysis was the tendency of courts to value the lasting consequences of rape for victims as an aggravating factor, which was observed in several judgements. In these cases, efforts were made to properly explain the physical and mental consequences suffered by the victims, and thus, this factor influenced sentencing. Unfortunately, these examples remain isolated, but we expect this consideration to become integral to every judgement in offences against sexual freedoms, given that victims carry the biggest burden in such cases and remain neglected as procedural subjects until the very end. Further, out of 34 cases, only one resulted in compensation to the injured party/victim (plea agreement), whereas injured parties/victims in the remaining 33 cases were referred to civil proceedings in order to seek compensation, or filed no claims whatsoever.

The sentences imposed in the cases that were analysed point to a lack of uniformity in courts in BiH when it comes to sentencing in rape cases and other crimes against sexual freedom. The caselaw not only varies among courts of different territorial and subject matter jurisdictions, but it is frequently inconsistent within a criminal department of the *same* court; meaning, the same court has imposed very dissimilar sentences in two very similar cases – in terms of legal qualifications of the offence, the degree of guilt, method of perpetration, intensity of violation, and other circumstances – with one sentence close to the legal minimum and the other set at nearly the legal maximum. We are aware of course that BiH belongs to the legal tradition that does not require courts to follow earlier decisions in cases involving the same or similar factual circumstances, but a failure to follow adequate sentencing standards from previous caselaw will certainly result in legal uncertainty and will jeopardize public confidence in the work of the judiciary.

Plea agreements pose a particular threat to the objective of adequately punishing perpetrators of these criminal offences in cases for which there is no appropriate control by the court to establish whether a proposed sanction complies with the criminal code. A plea agreement is an institution that should expedite criminal proceedings and contribute to their cost efficiency, but not in a way that is contrary to basic principles of the rule of law and the broader purpose of criminal legislation. Plea agreements were implemented in three cases that were analysed. A 5-year sentence was imposed in one, but in the others, 6-month sentences were imposed despite the fact that both involved criminal recidivists, one of whom had even been convicted of the same offence in the past. We do not wish to influence the

prosecutorial competences set out in criminal procedural codes in BiH or the criminal prosecution mechanisms present in developed countries, but we believe there should be more adequate control by courts in shaping plea agreements.

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### 3. Qualified forms of the criminal offence of rape

Like other criminal legislation around the world, that of BiH includes different qualified forms of the offence of rape. Although there are some differences in the legislative techniques used to define certain qualified forms in the CC RS,<sup>15</sup> the CC FBiH,<sup>16</sup> and the CC BDBiH, there are no substantial

<sup>15</sup> The CC RS, Article 165 (“Rape”):

(1) Whoever coerces another to sexual intercourse or an equivalent sexual act by force or by threat of immediate attack upon their life or limb, or the life or limb of someone close to that person, shall be punished by imprisonment for a term between three and ten years.

(2) If the criminal offence referred to in paragraph 1 of this Article was committed against a child above the age of fifteen, or in a particularly cruel or degrading manner, or by several perpetrators, or if the rape was perpetrated out of hatred, or if the criminal offence has resulted in grievous bodily injury or a serious impairment of health or pregnancy of the female victim, the perpetrator shall be punished by imprisonment for a term between five and fifteen years.

(3) If the criminal offence referred to in paragraphs 1 and 2 of this Article resulted in death of the victim, the perpetrator shall be punished by imprisonment for not less than ten years.

<sup>16</sup> the CC FBiH, Article 203 (“Rape”):

(1) Whoever coerces another to sexual intercourse or an equivalent sexual act by force or by threat of immediate attack upon their life or limb, or the life or limb of someone close to that person, shall be punished by imprisonment for a term between one and ten years.

(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article in a particularly cruel or humiliating manner or if on the same occasion a number of perpetrators perform a number of acts of sexual intercourse or equivalent sexual acts against the same victim, shall be punished by imprisonment for a term between three and fifteen years

(3) If, by the criminal offence referred to in paragraph 1 of this Article, the death of the raped person is caused, or serious bodily injury is inflicted on the raped person or their health is severely impaired, or the raped female is left pregnant, the perpetrator shall be punished by imprisonment for not less than three years.

(4) The punishment referred to in paragraph 2 of this Article shall be imposed on whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against the victim out of hatred (on the grounds of national or ethnic origin, race, religion or language - amendments from 2016).

(5) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against a juvenile, shall be punished by imprisonment for not less than three years.

(6) Whoever perpetrates the criminal offence referred to in paragraphs 2, 3 and 4 of this Article against a juvenile, shall be punished by imprisonment for not less than five years.

(7) If, by the criminal offence referred to in paragraph 2 of this Article, the consequences referred to in paragraph 3 of this Article are caused, the perpetrator shall be punished by imprisonment for not less than five years.

differences among them. All these laws, described earlier, establish the following qualifying circumstances: the age of the passive subject, the motives for and method of perpetration, and actions that result in serious bodily injury or health impairment to a victim, or their death. However, legislators in the Federation of BiH and the Brčko District stipulate different sanctions for the qualifying form of the offence perpetrated against an adult person versus a juvenile. For example, if a rape was perpetrated in a particularly cruel or degrading manner against an adult person, the punishment set out is 3 to 15 years in prison, and if the same offence was perpetrated against a minor, the minimum sanction is instead 5 years. The CC RS does not make this distinction. In all codes, the most severe form of the offence is defined as resulting in the death of the victim.

Examples of interpretations of individual qualifying circumstances and the application of the qualifying form of the criminal offence of rape follow. For this purpose, 29 cases involving indictments for this form of the offence were analysed, in 26 of which the qualifying form of the offence was established.<sup>17</sup> In two of the remaining cases, perpetrators were punished for

<sup>17</sup> The judgements analysed were mostly decided after 2010, and all the analysed cases from courts in the RS were decided before the entry into force of the most recent CC RS, which is why they are based on Article 193 (Official Gazette of RS nos. 49/03, 108/04, 37/06, 70/06, 73/10, 67/13):

(1) Whoever coerces another to sexual intercourse or another sexual act by force or by threat of immediate attack upon their life or limb, or the life or limb of someone close to that person, shall be punished by imprisonment for a term between (one - until 2010) two and ten years.

(2) If the criminal offence referred to in paragraph 1 of this Article was committed against a minor, or in a particularly cruel or degrading manner, or if on the same occasion the victim was raped by several perpetrators, or if the rape was perpetrated out of hatred (2013), or if the criminal offence has resulted in grievous bodily injury or a serious impairment of health or pregnancy of the female victim, the perpetrator shall be punished by imprisonment for a term (between three and fifteen years - until 2010) of minimum five years - after 2010 amendments, from three to fifteen years - since 2013 amendments.

(3) If the criminal offence referred to in paragraphs 1 and 2 of this Article resulted in death of the victim, the perpetrator shall be punished by imprisonment for not less than five years. Solution until 2010.

After 2010 amendments, paragraph 3 read as follows: "If the criminal offence referred to in paragraph 1 of this Article resulted in death of the victim, the perpetrator shall be punished by imprisonment for not less than five years. Paragraph 4 was added, as follows: "If the criminal offence referred to in paragraph 2 of this Article resulted in death of the victim, the perpetrator shall be punished by imprisonment for minimum ten years, or by long-term imprisonment.

(4) Whoever forces another person to a sexual intercourse or another sexual act by threatening to expose a matter regarding the victim or someone close to them of a nature likely



the basic form of the offence due to their false belief about the age of the passive subject, and in the last, the perpetrator was acquitted due to lack of evidence.

The most frequent qualifying circumstance observed in the judgements that were analysed was the age of the victim, with the qualifying form of the criminal offence of rape established in 15 cases perpetrated against juveniles. In 3 cases, it was found that the offence was perpetrated in a particularly cruel or degrading manner, and 2 involved several perpetrators. The victims received grievous bodily injuries in 3 cases.

### 3.1. A juvenile victim

To establish the criminal liability of the perpetrator for the qualified form of the offence of rape due to this circumstance, **the court must establish that the perpetrator knew the age of the victim.** This is not hard to do if a perpetrator is a close relative or acquaintance of the victim or of the victim's family.

#### Examples from caselaw

Excerpt from **Judgement No. 120K001535 11 K** of 14 February 2012

The court noted that the victim testified: *“He knew my age... we have known each other well for years, he often worked for my parents and stayed at our house. I think he is a distant relative, I don't know exactly, but I thought of him as a brother.”*

Excerpt from **Judgement No. 12 0 K 001055 10 K** of 12 November 2010

The court reasoned: *“Throughout the proceeding, the injured party claims that the defendant knew her age and that he forced her into her first act of sexual intercourse (he deflowered her), and stated at the main trial: ‘He knew I was attending elementary school, he asked me that night and I told him...’”*

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to injure their honour or reputation, or by threatening to do other serious harm, shall be punished by imprisonment for a term between six months and five years.

Amendments include the addition of Paragraph 5: “Whoever perpetrates the offence referred to in paragraph 1 of this Article out of hatred shall be punished with imprisonment for a term between three and fifteen years.” Paragraphs 3 and 4 were deleted.

**Determining whether the perpetrator knew the age of the victim may be problematic if the offence was perpetrated by a stranger.** In such a case, the victim must be asked if she told the perpetrator she was a minor or if the perpetrator asked about her age.

### **An example from caselaw**

Excerpt from **Judgement No. 13 0 K 002083 13 K** of 3 January 2013

The court notes the injured party said that: *“on the critical occasion, a white Golf 2 pulled over next to her while she was walking down the road, that she crossed to the other side of the street, that a gentleman came out of the car and started following her, that she started running and screaming, that he grabbed her hair and put his hand over her mouth so that she could not scream, and then pulled her into the car and drove her to near a church, where he pulled down the seat, **asked her about her age, and she told him that she was born in 1999, that he started kissing her, and that she was pushing him away and started screaming.**”*

However, **if the court is unable to establish that the perpetrator knew the age of the victim, the institute of false belief is applied**, which excludes criminal liability for the qualified form of the offence (if there are no other qualifying circumstances) and establishes liability for the basic form of the offence.

### **An example from caselaw**

Excerpt from **Judgement No. 12 0 K 001469 10 K** of 28 January 2011

*“The court could not accept the prosecution’s claim that the defendant knew the victim’s age and was aware that the victim was juvenile, because the prosecutor failed to provide a single piece of evidence to prove it. The court could not establish based on the injured party’s statement that the qualifying form of the offence was present, because the injured party confirmed in her statement that she saw the defendant for the first time, that he seemed drunk, that she had told him she was a virgin, that he was not from Bijeljina... **but she never told him that she was a child or that she was still in school, and the court finds that... at the time of perpetration, the defendant could not have known that the injured party was a juvenile.**”*





### 3.2. *Perpetration in a particularly cruel or degrading manner*

In the context of the criminal offence of rape, the crime is *particularly cruel or degrading* when *the victim is humiliated during the rape to an extent that significantly exceeds the degree of humiliation inherent in every rape crime*, either due to the perpetrator's behaviour or to other circumstances of perpetration. Cruelty includes an objective component, as to whether the victim was made to suffer by way of fear and other excruciating conditions that surpass what is common in perpetration of this offence, as well as a subjective component reflecting the awareness of the perpetrator that he is causing such suffering or it is possible he may cause such suffering, and in his willingness and agreement to such a consequence. For example, this would include perpetration of the crime of rape that involves putting out cigarettes on the victim's body or using excessive force when a significant imbalance of strength or age exists between the perpetrator and the victim.

Objectively, **a particularly degrading manner of perpetration must arise from concrete circumstances, and subjective elements must also be present, i.e. the awareness and intention of the perpetrator to humiliate the victim to an especially significant degree.** Such a method of perpetration exists for instance when rape is perpetrated in the presence of others, especially relatives (mother, child, etc.) of the victim, if the victim is of advanced age, or if the perpetrator tortures the victim in some way.<sup>18</sup>

#### Examples from caselaw

Excerpt from **Judgement No. 03 0 K 015313 16 K** of 2 September 2016

*“Late in the night, conscious and with the intention to use force and threats in order to attack the body of [the injured party], to force her into sexual intercourse and an equivalent sexual act, using excessive force and threatening to kill the victim, the defendant threw her from bed onto the floor several times, which made her pass out. He told her that she must not pass out, otherwise he would ‘sew up her pussy,’ then he obtained a knife and headed towards her; [the injured party] managed to grab the knife in order to prevent him from injuring her, and when she tried to get up, he hit her with his fists again on the back of her head, which caused her to... lose her balance; then he spat on her, and made her wash her face, threatening to kill her, and then he took a fork*

<sup>18</sup> M. Babić and I. Marković, *Krivično parvo: posebni dio* (Banja Luka, 2018), 122.

*and stabbed... her legs, and tried to stab her in the face; [the injured party] blocked it with her hand, and he stabbed her in the hand, made her take off her clothes and then, **knowing that her resistance was broken due to the use of excessive force, and that she was suffering significant pain and that he was causing her great suffering, which is what he wanted in the first place,** he demanded that she pleasure him orally, which she had to do upon repeated request, and then he engaged in sexual intercourse with her, by inserting his penis in her vagina and raping her, and then he forced her to have anal sex, threatening to kill her, while [the injured party] was begging him not to do it the whole time, and was telling him that she was in pain...”*

Excerpt from **Judgement No. 03 0 K 015254 16 K** of 26 September 2016

*“Around 2 a.m., when [the injured party] woke up intending to go to the toilet, the defendant came to her house, broke open the locked door with the physical force of his shoulder and entered the house; at that moment, the injured party headed towards the hallway because she heard a noise, and he immediately attacked her and grabbed her by the neck, threatening her with the following words: ‘Hush, if you say a word, I will shoot you,’ and then he took a pillow and put it over her mouth, and threw her on the floor between the couch and the stove; she was begging him to let her go and asking him what he wanted from her, after which he started hitting her on the head with an open palm and asking for money, and then he took off all his clothes and, **intentionally wanting to force another into sexual intercourse in a particularly cruel and degrading manner,** combining the use of threats and force, knowing that she was physically weak due to her age, he took off her pyjamas and underwear, spread her arms and pulled her legs up **in order to observe her nudity in a humiliating manner,** and then he repeatedly penetrated her vagina and anus with his penis for more than two hours, asking her if she was ‘fine’ with it, and then he spread his legs, sat on her stomach, pressing her on the chest and right leg with his hands and legs, thus inflicting injuries to her in the form of hematoma under her right breast and on her right outer thigh, demanding she kiss his penis, and when she refused, he continued slapping and choking her by grabbing her around the neck, threatening to kill her with the gun if she reported him and then, while masturbating, he ejaculated on her stomach...” (The victim was 84 years old.)*

**COMMENT:**

A particularly degrading manner of perpetration is mostly found in cases of forced vaginal and anal sex, regardless of the victim's age. However, among the cases analysed, this qualification of the offence was not applied in cases involving forced *oral* and vaginal sex, even when the victim was a juvenile. For example, the District Court in Bijeljina found in Judgement No. 12 0 K 001055 10 K of 12 November 2010 that forced oral and vaginal sex did not qualify as a particularly degrading manner of perpetration, despite the fact that the victim was a minor.

### **3.3. Perpetration resulting in grievous bodily injury**

A qualified form of the offence of rape exists in cases when the basic form of the offence results in *grievous bodily injury, severe impairment of health, or the pregnancy of the raped female*. It is thus **a criminal offence qualified by a severe consequence, and whether the perpetrator acted with negligence regarding that severe consequence should be established**. If the perpetrator acted with premeditation regarding this consequence, there is a concurrence between the basic form of the criminal offence and the qualified offence of inflicting a grievous bodily injury. A case in which a rape resulted in the pregnancy of a female victim is an exception, because the perpetrator will be charged for the qualified form of the offence both when he acted with premeditation and when he displayed negligence with respect to the pregnancy of the raped female victim. One should keep in mind that a severe bodily injury and serious impairment of health may occur during all acts of perpetration of the criminal offence of rape; that is, during the use of coercion as well as while perpetrating the sexual act.

This form of the offence also exists when a victim, trying to prevent a rape, inflicts a bodily injury on herself, for example by jumping out of a moving car or off a balcony. In that regard, the Supreme Court of Serbia noted in Judgement Kž. 1660/97 of 21 January 1999 that this qualified form of the criminal offence of rape existed in a case where the injured party, whom the defendant started beating in order to force her into sexual intercourse, jumped through the window of the defendant's apartment and suffered a grievous bodily injury.<sup>19</sup>

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<sup>19</sup> Ibid.

### An example from caselaw

Excerpt from **Judgement No. 12 0 K 003358 12 K** of 7 May 2013

The court notes that, in the context of forced sexual intercourse, the defendant caused *“bodily injuries, including: multiple fractures of the upper left jaw as a grievous bodily injury, and torn upper lip with a contusion, and hematoma on both eyes as light bodily injuries. Therefore, using force, he forced another [the victim] into sexual intercourse, inflicting grievous bodily injury.”*

### 3.4. Multiple rapes committed on the same occasion by several perpetrators

This form of the offence exists if several persons perpetrated several offences on the same occasion, i.e. if **at least two persons perpetrated the crime of rape using the same opportunity**. If one person completed the criminal offence of rape, and another person attempted to rape another person, they would be responsible for an attempt of the qualified form of rape (legal interpretation accepted in a session of the criminal department of the SC RC of 4 April 1991).

### An example from caselaw

Excerpt from **Judgement No. K-102/04** of 10 February 2006

The court found the defendants guilty of *“climbing on a balcony... and entering the injured party’s apartment through the open balcony door, while her mother was also inside... [the first defendant] took the injured party into the bathroom and hit her on the head and under the ribs several times; he demanded she take off her clothes, after which he left the bathroom, and [the second defendant] came in and, holding a knife in his hand, demanded that she take her clothes off, and when the injured party refused, he ripped her nightgown and panties and hit her several times, which made her fall into the bathtub, and he pulled her out and left the bathroom, and [the first defendant] came back and drew her closer and started kissing her, threatening to beat her up... then he put his penis in her... after which he went out, and [the second defendant] entered the bathroom and immediately put a knife under*



*the injured party's throat and cut her, demanding she have sex with him, to which she agreed out of fear... Therefore, using force and threats, they forced a female with whom they do not live in a marriage into sexual intercourse, and the offence was perpetrated by multiple persons, which constitutes the criminal offence of rape referred to in Article 183(2) in conjunction with paragraph 1 of the CC RS..."*

In the judgements analysed, another case in which this qualifying circumstance clearly existed was identified, but that crime was qualified as the basic form of the offence of rape.

### **An example from caselaw**

Excerpt from **Judgement No. K.339/99** of 15 March 2000

*The court found the defendants "guilty of forcing the injured party... into sexual intercourse on 26.09.1999 around 11 p.m. after they came to the [first] defendant's... house with the injured party, who was a minor at the time, using force and threatening to directly attack her; the [first] defendant... hit her in the face three times with an open palm, and took off her sweatshirt, ordering her to take off all her clothes, thus breaking her further resistance; the defendants then took off their clothes and raped the injured party alternately several times by penetrating their penises into the injured party's vagina, although the injured party was menstruating at the time, and after the defendants spent some time in the next room, they returned to the room where the injured party was and raped her again... by penetrating their penises in the injured party's vagina alternately, and she was forced to alternately pleasure them orally, and when the injured party was leaving the first defendant's house, he threatened her that she must not tell anyone about the incident; thereby, they perpetrated the criminal offence of rape referred to in Article 221(1) of the CC FBiH."*

### **3.5. Several qualifying circumstances in a case**

The caselaw includes cases in which several qualifying circumstances affected the legal qualification of the offence of rape. For example, in the Federation of BiH, if a rape was perpetrated in a particularly cruel or degrading manner, it constitutes the offence referred to in Article 203(2); if

a minor was raped, it constitutes the offence referred to in Article 203(5); and if a minor was raped in a particularly cruel or degrading manner, it constitutes the offence referred to in Article 203(6). However, in the CC RS, all these cases constitute the same offence, i.e. that referred to in Article 165(2).

### *3.5.1. Rape committed in a particularly degrading manner against a minor*

#### **An example from caselaw**

Excerpt from **Judgement No. 04 0 K 006951 16K2** of 17 June 2016

The court found the defendant guilty of *“**raping the injured party, his daughter who is a minor, three times in a particularly degrading manner, in his family house, in order to satisfy his sexual appetite... knowing that she is a minor... and physically and mentally unable to resist him due to the authority he enjoys as a father, by grabbing the injured party’s hair while they were alone in the house; he slapped her and ordered her to take off her trousers, and when the injured party refused, he slapped her strongly again, which made her fall down, and then he grabbed her hand, and pulled her up yelling ‘Go to your mother’s room!’ and when she refused, pushing him away, he grabbed her hand and dragged her to the bedroom, where he pushed her onto the bed, took off her clothes, lay on top of her and forced her to have vaginal sex, although the injured party was crying all the time and loudly calling for her mother, and tried to push him away; he slapped her again and ordered her to lie on her belly, and then he forced the injured party to have anal sex, and then he turned her over again and forced her to have vaginal sex, threatening her and warning her not to tell anyone about what happened... thus perpetrating the criminal offence of rape referred to in Article 203(6) in conjunction with paragraph (2) of the CC FBiH in conjunction with the criminal offence of incest referred to in Article 213(2) in conjunction with paragraph (1) of the CC FBiH.**”*

**COMMENT:**

A concurrence of the criminal offences of rape and incest was found in this case, whereas a concurrence of these criminal offences was *not* applied in 5 other analysed cases involving the fathers of juvenile victims as perpetrators.

*3.5.2. Rape committed in a particularly cruel and degrading manner against a minor, by several perpetrators*

**An example from caselaw**

Excerpt from **Judgement No. 030K** of 16 December 2016

*The court describes that the “co-perpetrator, using force and threatening to directly attack [the injured party’s] life or limb, forced another into sexual intercourse and an equivalent sexual act, and the offence was perpetrated against a minor in a particularly cruel and degrading manner, where the victim was forced into multiple acts of sexual intercourse and equivalent sexual acts by several perpetrators, which constitute the criminal offence of rape referred to in Article 203(6) in conjunction with paragraphs (2) and (1) of the CC FBiH, and with Article 31 of the same Law.”*

**COMMENT:**

Considering that co-perpetration occurred in this case, it is questionable whether reference to the provisions on co-perpetration is necessary. The positions of courts on this issue are not harmonized (See Judgement No. K-102/04 of 10 February 2006, section 1.4).

*3.5.3. Rape committed in a particularly degrading manner, resulting in a grievous bodily injury*

**An example from caselaw**

Excerpt from **Judgement No. 11 0 K 019519 16 K** of 16 January 2017

*“With the intention to satisfy his sexual appetite, the defendant came to the house of the injured party (born on 8.5.1952), knowing that she was of ad-*

vanced age and that she lived alone, broke into the house using a convenient object and physical force, broke the window on the eastern side of the house and entered the room where the injured party was sleeping, then he put out the light, took off his clothes and approached the injured party naked, took her hand and woke the injured party, then told her that he would rape her, broke her resistance with his physical strength, took off her clothes, pulled her legs up and penetrated his penis into the injured party's vagina, disregarding her screams and attempts to push him away, and then he alternately penetrated his penis into the injured party's anus and vagina, ordering the injured party to stop resisting, hitting her all over her body, squeezing her and telling her to calm down so that he can "cum," torturing the injured party for around two hours, **thus perpetrating rape in a particularly degrading manner**, and when he ejaculated in the injured party's vagina, he ended the intercourse and left the scene; **his acts resulted in grievous bodily injuries to the injured party** including a tear on the right vaginal wall up to 4 cm long, a perineum tear of around 1.5 cm, which caused extensive bleeding that was stopped by a surgical intervention... and small hematomas on the right temple, the nasal pyramid and right forearm, an abrasion on the fourth finger of her right hand, petechiae in the area of her left breast, and at least four hematomas on the inner side of her right thigh..."

### **3.6. Sentencing for the qualified form of the criminal offence of rape**

Apart from examining the interpretations of individual qualifying circumstances and the application of the qualified form of the offence, case analysis also focused on sentencing, especially the evaluation of aggravating and mitigating factors in deciding and imposing sanctions.

#### **An example from caselaw**

Excerpt from **Judgement No. 120K001469 10 K** of 28 January 2011

*"Deciding on the type and length of a sanction, the court valued all factors referred to in Article 37(1) of the CC RS that may influence the sentence. As for **aggravating factors, the court valued the degree of criminal liability of the defendant (direct premeditation) with regard to the decisive facts of the offence at issue, with slightly diminished mental capacity caused***





*by [alcohol intoxication]), the intensity of the threat to the public good, impulse, the method and motive behind perpetration of the offence, the fact that the injured party requested prosecution and damage compensation, the inevitability of negative emotional and other consequences for the injured party, and the fact that the defendant had prior convictions, whereas mitigating factors included the fact that the offence was perpetrated under the influence of alcohol, and the defendant's financial status, and the defendant was sentenced to 6 (six) years in prison, which is proportionate to the seriousness of the criminal offence and the degree of criminal liability of the defendant, and the court finds that only a sanction imposed in this way will achieve the full sentencing purpose referred to in Article 28 of the RS Criminal Code, and that only such a sentence will deter the defendant and other potential perpetrators from future crimes."*

**COMMENT:**

In this case, one and the same factor was valued both as aggravating, and as mitigating. The intoxication of the defendant was an aggravating factor in that it was linked to his "slightly diminished mental capacity," but at the same time, the fact that the defendant perpetrated the offence "under the influence of alcohol" was valued as mitigating.

**Examples from caselaw**

Excerpt from **Judgement No. 12 0 K 001055 10 K** of 12 November 2010

*"Deciding on the sentence to be imposed against the defendant, from the aspect of fulfilment of criminal justice protection objectives, at the sentencing stage, the court valued all circumstances of the incident and circumstances on the side of the defendant, and especially the degree of criminal liability (direct premeditation in relation to the decisive facts of the offence, in the state of slightly diminished mental capacity, caused by alcohololaemia), type, nature and motive behind the perpetrated criminal offence, apart from deflowering, imminent long-term negative emotional and other consequences of the offence for the injured party who is a minor, the defendant's attitude towards the offence and its consequences following perpetration and during the proceeding, the concrete circumstances of perpetration, age, personal and financial circumstances, and the lack of prior criminal record of the defendant. Having evaluated all the aforementioned circumstances, the court finds that the imposed prison sentence is*

*adequate for the perpetrated offence and the defendant as an individual, and that it will achieve special and general prevention objectives.*

Excerpt from **Judgement No. 12 0 K 001535 11 K** of 14 February 2012

*“Deciding on the sentence to be imposed against the defendant, from the aspect of fulfilment of criminal justice protection objectives, at the sentencing stage, the court valued all circumstances of the incident and circumstances on the side of the defendant, and especially the degree of criminal liability (direct premeditation in relation to the decisive facts of the offence, likely in the state of slightly diminished mental capacity, caused by alcohololaemia), type, nature and motive behind the perpetrated criminal offence, imminent long-term negative emotional and other consequences of the offence for the injured party who is a minor, defendant’s attitude towards the offence and consequences following the perpetration and during the proceeding, concrete circumstances of perpetration, age, personal and financial circumstances, and lack of prior criminal record of the defendant. Evaluating the above, the court finds particularly mitigating factors on the side of the defendant (age, confession of objective perpetration, likely diminished mental capacity and lack of prior convictions), which indicate that a more lenient sanction, which has been imposed, can achieve the general and special prevention purposes.”*

**COMMENT:**

These judgements clearly appear to use template explanations and fail to detail the reasoning of the court. For instance, what constitutes the defendant’s attitude towards the offence and its consequences following perpetration and during the proceeding; and, is this valued by the court as an aggravating or mitigating factor in the first case? In the second case, the court specifies that “confession of objective perpetration” is a particularly mitigating factor, which is the concretisation of the “defendant’s attitude towards the offence.”

It is interesting to note that in the second case, in which the court found a more lenient sanction was adequate based on “particularly mitigating factors,” one of those factors is the defendant’s *likely diminished mental capacity*. The fact that this circumstance is qualified as only *likely* reveals that this is a belief, not a known fact. In other words, this important decision related to the imposed sanction in this case (because it changes the legally-defined sentencing framework) is based on a circumstance that was not



established beyond doubt (in the degree of certainty), but is only assumed or seems probable to the court.

Here, we must emphasize and warn that reducing a penalty, especially based on particularly mitigating factors (a so-called penalty mitigation by the court), is an exception from regular sentencing practices and is therefore especially important to examine, as it constitutes a deviation from the penal framework defined by legislators for the offence at issue. In all such cases, it is necessary to apply a restrictive interpretation of circumstances, the existence of which must be established beyond doubt (to the level of certainty) and explained in detail. Assuming the existence of such circumstances as probable, as this court did, is wrong; and this is particularly true given that the court in this case simply recited all valued circumstances in general terms, without providing a special explanation of their nature and whether they were considered mitigating or aggravating. Indeed, the very nature of some of these circumstances could lead to the conclusion that they were valued as aggravating, which makes penalty mitigation in this case questionable. One should also keep in mind that the court valued the “slightly diminished mental capacity” caused by alcohol intoxication as a “particularly mitigating factor.” This is unacceptable in light of the fact that this circumstance is not valued as mitigating even in cases of complete mental incapacity attributed to the use of alcohol, for which full criminal liability can still be established. Therefore, the court’s conclusion that this should be valued as a *particularly* mitigating factor in this case is rather absurd.

Further analysis of the circumstances in the second case indicates just how wrong the conclusions and evaluations of the court were. These circumstances include the nature of the offence, the motives for perpetration, the age of the injured party, and the inevitability of negative consequences for the injured party – all of which are aggravating factors. The existence of these circumstances makes it especially improper that the circumstance of “*likely* diminished capacity” due to alcohol consumption was nonetheless valued as particularly mitigating to such a degree that the court found leniency adequate. It is worth remembering that our previous (socialist) caselaw took the position that, if there is at least one aggravating factor, there is no ground for the evaluation of any mitigating factors as particularly mitigating or for penalty mitigation. Finally, it is useful to note that, due to the nature of the criminal offence of rape, especially when perpetrated against minors, some criminal legislation passed recently has completely excluded the possibility for penalty mitigation on any grounds (e.g., see the CC of Serbia and the CC RS).

## An example from caselaw

Excerpt from **Judgement No. 13 0 K 002083 14 Kž** of 20 March 2014

*“In the appeal, the defence counsel neither provides any circumstances that would justify more lenient sanctioning or ruling of a different decision, nor a proposal for a different sanction with the appeal. **Deliberating on the decision on sanctions, this court finds that the first-instance court correctly established all circumstances, both mitigating (the defendant’s family circumstances, that he is married and has two minor children) and aggravating (the defendant’s persistence, intensity of threat on the protected good, consequences of the offence, earlier life and multiple (28) other convictions), to which it referred in the reasoning of the contested sentence, and valued them appropriately...**”*

### COMMENT:

If one keeps in mind that this case deals with the qualified form of the criminal offence of rape, it is hard to accept the position of the second-instance court that the fact that the defendant is married and a father of two was correctly valued as mitigating in the context of the specific crime, which involved forced sexual intercourse with a juvenile girl. This should instead be treated as an aggravating factor because it illustrates the attitude of the defendant, the father of underaged children, towards the rape of a girl who was barely 15.

## Examples from caselaw

Excerpt from **Judgement No. 06 0 K 005470 14 K** of 14 January 2015

*“Deciding on the punishment for the perpetrated criminal offence, the court had in mind that the foreseen sanction for this offence is a minimum three years in prison, and then valued all aggravating and mitigating factors, including a **particularly aggravating factor** reflected in the circumstance **that the defendant raped a minor, a daughter of his very good friends, whom his wife had cared for when she was small for at least a year; in the context of the intensity of threat and violation of protected good, such a crime against the injured party produces a high potential for traumatization, the consequences of which can be very far-reaching, on which the court expert... gave***



*her opinion; the fact that the injured party was in a very inferior position towards the defendant was valued as an aggravating factor, considering that she came to his apartment after he had invited her twice, therefore, she came to the apartment of a friend of her family, whom she had known all her life, and she certainly did not expect anything bad from him... at the time of the crime perpetration, the injured party was 15 years, 8 months, and 11 days old, and the defendant was 42 and had extensive life experience... the defendant perpetrated the offence with premeditation, only to satisfy his lust, and the motives behind the offence are unacceptable. The fact that the incident took place in a relatively small patriarchal town is not irrelevant, as the whole town knows the participants, and the injured party will certainly feel the consequences in her future social life; also, the injured parties expressed interest in proper sanctioning of the perpetrator... The only mitigating factor valued by the court was the fact that the defendant apologized to the injured party's parents at the main trial.*

*Due to the above reasons, the court could not apply the optional ground for penalty mitigation laid down in Article 36 (2) of CC FBiH, because it found no particularly mitigating factors on the side of the defendant, and because the court finds that the imposed sanction in the concrete case can achieve the sanctioning purpose in terms of general and special prevention."*

#### COMMENT:

Based on this explanation of aggravating factors, it would have been logical to impose a prison sentence much closer to the legal maximum of 20 years, and not a sentence only slightly above the 3-year prescribed minimum, of 3 years and 6 months in prison. Moreover, sentencing within the limits of the prescribed sanction is a rule, and imposing a less stringent penalty is the exception that requires explanation. In other words, it is not the duty of the court to explain why it did not mitigate a sentence that falls within the prescribed bounds, but to provide reasons when it imposes a reduced penalty. An explanation of reasons not to mitigate a penalty is redundant and slightly inappropriate, because it gives the impression that the court is apologizing for imposing a legally-prescribed sentence.

Excerpt from **Judgement No. 11 0 K 019519 16 K** of 16 January 2017

*"...as for mitigating factors, the court valued the facts that the defendant is a father of two, unemployed, of poor financial status, and that he confessed to the crime, and as for aggravating factors, the court valued*

*the defendant's tendency to perpetrate such criminal offences, that the defendant is a special recidivist, that he perpetrated a similar criminal offence to the crime for which he had already been convicted, during a probation period, over a short period of time... and the very method of crime perpetration. He knew the injured party, that she lived alone, he came to her house during the night and broke in through the basement window, using a wrench he brought with him, while she was asleep. Due to all this, the court concludes that the defendant perpetrated the offence in a perfidious way, demonstrating persistence in perpetration, **and that the offence was perpetrated in a highly degrading and ruthless manner, incurring serious bodily injuries to the victim.** At the main trial, the injured party requested prosecution and filed a compensation claim. In view of the degree of the defendant's criminal liability, expressed through **direct premeditation**, the demonstrated persistence in perpetrating the crime, ruthlessness, and that the offence was perpetrated in a highly degrading manner against the injured party, **that the injured party did not give rise to the offence in any way**, the intensity of violation of the protected good, and the incurred consequence, **the court sentenced the defendant to five years in prison...**"*

#### COMMENT:

The defendant in this case is a special recidivist who perpetrated the crime during a probationary period following completion of a prison sentence for the same criminal offence. Considering this, and further that two qualifying circumstances were established – that the crime was perpetrated in a particularly degrading and ruthless manner and that it caused serious bodily injury – we believe the imposed 5-year imprisonment is inadequate and does not match the severity of the crime and the level of danger posed by the perpetrator. The prescribed penalty for this form of the offence is 3 to 15 years in prison. It is also notable that the court mentioned **the injured party did not give rise to the offence in any way**, which implies a rape victim can give rise to such a criminal offence. *It must be emphasized here that contemporary justice systems have abandoned the concept that a "rape victim is to be blamed for their rape," because this diminishes the guilt of defendants as well as the level of social threat posed by the criminal offence of rape.*



## An example from caselaw

Excerpt from **Judgement No. 030K** of 16 December 2016

In deciding the penalty for **a case involving multiple perpetrators and a minor victim**, the court reasoned that “...*having valued all circumstances influencing the sentence, pursuant to article 49 of the CC FBiH, including the following mitigating factors: that the defendant is of a young age, that he confessed to the crime by concluding the plea agreement, and that he has no prior convictions, which this court valued as particularly mitigating, and **having found no aggravating factors**, the court accepted the sanction proposed by the plea agreement.*”

### COMMENT:

The co-perpetrator of this criminal offence of rape referred to in **Article 203(6) in conjunction with paragraphs (2) and (1) of the CC FBiH** received **a sentence of 5 years in prison**. But the court neglected the fact that Article 203(2) of the CC FBiH includes two alternatively set qualifying circumstances, i.e. that the rape was perpetrated in a particularly cruel or humiliating manner *or* was perpetrated on the same occasion by a number of perpetrators against the same victim. The criminal offence referred to in Article 203(6) of the CC FBiH exists if the offence referred to in paragraph (2) was perpetrated against a juvenile. Therefore, existence of this form of the offence is established by the presence of just *one* of the qualifying circumstances referred to in paragraph (2); and if two or more qualifying circumstances referred to in paragraph (2) are present, the level of social threat posed by the offence is greater as is violation of the protected good, and these circumstances can be considered aggravating factors when determining the penalty (see Article 52(2) of the CC RS).

Finally, in all the analysed cases in which penalties were mitigated, the reasoning of the court was either that a case involved *attempted* offences, or the court found “particularly mitigating factors” applied to the defendant.

## Examples from caselaw

Excerpt from **Judgement No. 13 0 K 001902 14 Kž 2** of 15 April 2014

*“This court finds that the **lack of prior convictions and the defendant’s age, the position of the injured party’s legal representatives, and circum-***

*stances of perpetration constitute particularly mitigating factors. When all this is considered in correlation with the intensity of violation of sexual integrity of the injured party and the extent of degrading the victim during the crime perpetration (contact between the victim's and perpetrator's primary sexual organs, without any form of perpetration), this court finds that it is justified to impose a lesser sanction than the one pronounced in the first-instance judgement."*

Excerpt from **Judgement No. 03 0 K 015313 16 K** of 2 September 2016

*"...the court valued the following mitigating factors: the defendant confessed and expressed remorse, his family circumstances related to the fact that he grew up in a extremely adverse family environment, because his father was serving a long-term prison sentence and his mother was mentally ill, as well as his young age and the fact that he is the father of a minor; as for aggravating factors, the court valued his prior criminal record, but the court also considered that previous convictions were imposed for criminal offences against property. In view of these circumstances influencing the penalty, and the degree of unlawfulness of the perpetrated criminal offences and the defendant's criminal liability as the perpetrator, **having valued the aforementioned mitigating factors as particularly mitigating**, the court mitigated the penalty for the continued criminal offence of rape referred to in Article 203(2) in conjunction with paragraph (1) of the CC FBiH... and **imposed the sentence of two years and two months in prison.**"*

### **3.7. Conclusion**

This analysis of 26 sentences for the qualified form of the criminal offence of rape found that penalties were mitigated in 7 cases (in 2, because they involved attempted offences, and in the 5 others, due to particularly mitigating factors). Sentences in other cases imposed a penalty slightly above the prescribed minimum, with 5 years in prison the most commonly imposed sanction. In cases involving a juvenile daughter as the victim, prison sentences of 11, 12, and 15 years were imposed. In a case involving an 84-year-old woman victim, in which the offence was perpetrated in a particularly degrading manner, a prison sentence of 9 years and 6 months was imposed.

Thus, in the majority of cases, courts imposed sanctions much closer to the prescribed minimum (if not below it). The question is what what circumstances should exist in a given case (apart from kinship between the





perpetrator and the victim) for the courts to impose a sanction nearer to the special maximum. It seems the caselaw is still under the influence of obsolete views and gender biases that minimize the level of social threat posed by the crime of rape, and this is reflected in the severity of the penalties imposed for the qualified form of the offence.





## 4. The psychological trauma of rape

Rape is in a category of highly intense traumatic events that so exceed the limits of common human experience as to be exceptionally horrific for all people, especially children.<sup>20</sup> According to the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5),<sup>21</sup> traumatic events include those involving direct and indirect exposure to death or threats of death, serious injury, or sexual violence. These events are extremely difficult and imminently result in the psychological condition called psychological trauma. These events may be isolated or recurring, and can so severely disturb the “life balance” of an individual that they have difficulty ever finding it again.<sup>22</sup>

The strength and intensity of any person’s response to trauma, as well as its duration, are determined by their individual cognitive assessment of the salient traumatic event(s).<sup>23</sup> Thus, for some people, the experience of trauma is more severe and longer-lasting than for others. *Rape, which is among the most traumatic events someone can experience, results in longer-term and broader consequences than other traumatic events.* Beyond the physical threats linked to an assault, and the potential health risks of sexually transmitted disease and unwanted pregnancy, *rape violates a victim’s intimate and psychological boundaries.*<sup>24</sup> Therefore, *the psychosocial consequences of rape are often graver and more far-reaching than the immediate physical injuries of this type of violence.*<sup>25</sup>

20 D. Begić, *Psihopatologija* (Zagreb: Medicinska naklada, 2016); *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed. (Arlington, VA: American Psychiatric Publishing, 2013); B. Profaca and L. Arambašić, “Traumatski događaji i trauma kod djece i mladih,” *Klinička psihologija* 2, vol. 1-2 (2009): 53-74.

21 *DSM-5*.

22 C. Sanderson, *Counselling skills for working with trauma* (London: Jessica Kingsley Publishers, 2013).

23 L. Arambašić, “Stresni i traumatski događaji i njihove posljedice,” in *Psihološke krizne intervencije* (Zagreb: Društvo za psihološku pomoć, 2000).

24 L. Kelly, *Preživjeti seksualno nasilje* (Zagreb: The Women’s Room – Centre for Sexual Rights, 2008); and M. Mamula, *Seksualno nasilje – teorija i praksa* (Zagreb: The Women’s Room – Centre for Sexual Rights, 2005).

25 B. Diken and C.B. Laustsen, “Becoming Abject: Rape as a Weapon of War,” *Body & Society* 11, no. 1 (2005): 111-128; and L. Shanks and M.J. Schull, “Rape in war: the humanitarian response,” *JAMC* 163, no. 9 (2000): 1152-1156.

Although some progress in the prosecution of sexual violence cases has been observed in the past decade, especially when it comes to the attitude of legal professionals towards victims, there is still evidence that myths and stereotypes about rape impact court procedures, and that shame and guilt are often transferred from the perpetrator to the victim. Judicial office holders often seem to view the behaviour of victims through the lens of their own expectations; meaning, *if a victim does not behave in accordance with expectations, she may be deemed inauthentic, or her testimony may not be viewed credible*. Such treatment exacerbates the trauma experienced by a victim, who may feel as if she is re-living the assault. *When victims are blamed or made to re-live traumatic experiences, this is called secondary victimization*. Research has shown that many victims feel blamed, and therefore become depressed and anxious when they come into contact with the justice system.<sup>26</sup> *The increased level of stress that occurs as a consequence of secondary victimization adversely impacts the testimony of witness-victims, and thereby, the effectiveness of court processes*. Judicial actors must be aware of the consequences for victims of the crime of rape, in order to safely facilitate their participation in criminal proceedings and improve the ability of the court to provide them justice.

Rape can lead to a number of long-term physical and psychological consequences for victims, who are predominantly women.<sup>27</sup> Some of the physical injuries and longer-term medical consequences of rape for women are shown in Table 1.

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26 R. Campbell, "The community response to rape: Victims' experiences with the legal, medical, and mental health systems," *American Journal of Community Psychology* 26, no. 3 (1998): 355-379.

27 K.T. Hagen and S.C. Yohani, "The Nature and psychosocial consequences of war rape for individuals and communities," *International journal of psychological studies* 2, no. 2 (2010): 14-25.



**Table 1. Physical injuries and medical consequences for women that result from rape**

PHYSICAL INJURIES <sup>9</sup>	LONG-TERM MEDICAL CONSEQUENCES <sup>29</sup>
<ul style="list-style-type: none"> <li>- contusions, bruising, and cuts</li> <li>- bleeding inside or near vaginal and rectal areas</li> <li>- scars</li> </ul>	<ul style="list-style-type: none"> <li>- sexually transmitted disease</li> <li>- sexual dysfunction</li> <li>- pelvic pain</li> <li>- unwanted pregnancy</li> <li>- reproductive disorders</li> <li>- hormonal dysfunction</li> <li>- vaginal discharge</li> <li>- chronic infections</li> <li>- eating disorders</li> <li>- digestive conditions</li> <li>- sleep disorders</li> <li>- neurological symptoms (headaches, weakness, vertigo, dizziness)</li> </ul>

The psychological consequences of rape are complex, and they are incredibly difficult to tease apart from the social consequences of rape, given that the crime both inflicts physical injury and also undermines the sense of security and confidence in a victim.<sup>30</sup> According to Mollica, et al. (1999), women victims do not only experience a loss of control over their own body when they experience rape, but also over other spheres of their life.<sup>31</sup> Any sense a woman once held of invulnerability, personal safety, and the safety of their social environment is destroyed. This can lead women victims of this kind of violence to develop extreme distrust and fear in interpersonal relations, a desire to withdrawal from others, and a persistent feeling that they lack security even in familiar environments.

28 M. Mamula, *Seksualno nasilje u Hrvatskoj 2000. – 2010* (Zagreb: The Women’s Room, 2013).

29 M. Vlachova and L. BIASON, eds., *Women in an insecure world: Violence against women, facts, figures, and analysis* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005); Hagen and Yohani, “The Nature and psychosocial consequences of war rape...”

30 Mamula, *Seksualno nasilje u Hrvatskoj 2000. – 2010*.

31 R.F. Mollica, et al., “Disability associated with psychiatric comorbidity and health status in Bosnian refugees living in Croatia,” *JAMA*, no. 281 (1999): 433-439.

This disruption of a victim's fundamental beliefs is additionally complicated by cultural taboos related to sexuality, as well as stigmatization and labelling, which make it daunting to talk openly about the traumatic experience of rape and to seek assistance in dealing with the associated trauma.<sup>32</sup> In the post-traumatic period, the generalized distrust a victim feels can be intensified by negative attitudes within her family and community, and victims are sometimes dismissed or rejected by these support systems. In this way, a rape victim suffers twice: first, when the rape occurs, and second, through the condemnation of her community. Communities that revere patriarchal constructs such as order, hierarchy, and respect for status often view victims as undignified, worthless, and shameful. This scorn is due to the anxiety victims cause in others who view them as a threat to "normality."<sup>33</sup>

In this way, the lives of women can be completely destroyed by chronic uncertainty and continual re-victimization, causing victims to blame themselves for the traumatic event they experienced, to no longer feel welcome in their communities, or even to feel they don't belong in the world at all.<sup>34</sup> Rape victims often view themselves in the language of stigma; as worthless, "filthy," and morally inferior.<sup>35</sup> And their internalization of these feelings is mostly a result of adverse attitudes they face in their community.<sup>36</sup>

Survivors of rape also often display symptoms of post-traumatic stress disorder (PTSD), such as generalized anxiety, specific phobias, insomnia, somatoform and emotional disorders, flashbacks, nightmares, grief, and depression.<sup>37</sup> Symptoms of depression that are common in victims include a lack of interest in their surroundings and in social interaction, a complete loss of self-respect, and strong feelings of helplessness and despair. In some victims, a disgust and revulsion that develops for their own body can lead to self-injurious behaviours and suicidal ideation. In order to cope with the devastating psychological consequences of rape, victims often activate psychological defence mechanisms as well, such as denial, suppression, depersonalization, distancing, and dissociation; the latter of which

32 Mamula, *Seksualno nasilje u Hrvatskoj 2000. – 2010.*

33 Diken & Laustsen, "Becoming Abject: Rape as a Weapon of War."

34 Hagen and Yohani, "The Nature and psychosocial consequences of war rape..."

35 Diken & Laustsen, "Becoming Abject: Rape as a Weapon of War."

36 J. Herman, *Trauma and recovery* (New York: Basic Books, 1997).

37 Mollica, et al., "Disability associated with psychiatric comorbidity and health status in Bosnian refugees..."; and M. Van Ommeren, et al., "Psychiatric Disorders Among Tortured Bhutanese Refugees in Nepal," *Arch Gen Psychiatry*, no. 58 (2001): 475-484.



may occur both in the midst of an assault and in its aftermath.<sup>38</sup> Some of the psychological and social consequences of rape for women victims are shown in Table 2.

**Table 2. Psychological and social consequences for women that result from rape**

PSYCHOLOGICAL	SOCIAL
<ul style="list-style-type: none"> <li>- loss of sense of security and confidence in others</li> <li>- loss of self-confidence and self-respect</li> <li>- feeling of loss of control over one's own body</li> <li>- distrust in interpersonal relations, fear of and withdrawal from others</li> <li>- uncertain sense of belonging</li> <li>- feeling of lack of safety in familiar environments</li> <li>- self-blame and guilt</li> <li>- helplessness and despair</li> <li>- disgust and revulsion in response to own body</li> <li>- development of phobias nightmares</li> <li>- depression</li> <li>- anxiety</li> <li>- chronic psychological and physical disorders</li> <li>- sexual problems</li> <li>- self-harming and suicidal thoughts</li> <li>- post-traumatic stress disorder (PTSD)</li> </ul>	<ul style="list-style-type: none"> <li>- blame from the community for the traumatic experience</li> <li>- lack of support or outright rejection by family and community</li> <li>- labelling and stigmatisation as shameful, worthless, and dirty</li> <li>- scorn from the community for posing a threat to "normality"</li> </ul>

According to data from the World Health Organization, rape is likely to cause PTSD in 49% of cases (WHO, 2002). In the opinion of many authors, post-traumatic stress is at the root of the other psychological consequences victims experience, which together constitute *a constellation of symptoms specific to the intensely traumatic crime of rape, known as Rape Trauma Syndrome*.<sup>39</sup>

38 Vlachova & BIASON, *Women in an insecure world*.

39 A.W. Burgess and L.L. Holmstorm, "Rape trauma syndrome," *The American Journal of Psychiatry*, no. 131 (1974): 981-986.

### 4.1. Post-traumatic stress disorder and Rape Trauma Syndrome

PTSD is considered an anxiety disorder.<sup>40</sup> It is among the rare psychiatric disorders of well-known cause – exposure to an extremely traumatic or life-threatening experience. Some survivors of such experiences successfully process and integrate them once they begin to regain a sense of familiar routine and their initially heightened feelings in response to the trauma subside somewhat. Their helplessness is replaced by the need for activity and social connection, and feelings of fear and horror fade increasingly into a memory of the traumatic event that can sometimes even be reframed by victims in an empowering way, as a living reminder that “what doesn’t kill me makes me stronger.”<sup>41</sup>

But not all victims experience this kind of successful integration of a traumatic experience; and *unfortunately, for some, the event is engraved into their memory in a way that is disempowering and undermines their ability to function over the long term.* These victims experience profound changes in their perceptions, feelings, and reactions to everyday life situations.<sup>42</sup> Many re-live the traumatic event over and over again, and thus try to avoid anything that may trigger a memory of it. The symptoms of PTSD vary in duration, but in some victims they remain present several decades after a traumatic event.<sup>43</sup>

Therefore, PTSD is a disorder which occurs when one is exposed to extreme psychotraumatic events, and rape is one of their most extreme forms.<sup>44</sup>

The symptoms of PTSD include:

1. Re-living a traumatic experience in dreams and/or waking thoughts, or in the form of *flashbacks*<sup>45</sup>, i.e. re-experiencing the event as if it were

40 Begić, *Psihopatologija*; DSM-5; and Profaca and Arambašić, “Traumatski događaji i trauma kod djece i mladih.”

41 Ibid.

42 Cruz, R. D. Post Traumatic Stress Disorder associated with war veterans and victims (Web paper). (2008). Downloaded from <http://serendipstudio.org>

43 R. Gregurek, “Povijest psihotraume,” in *Posttraumatski stresni poremećaj – hrvatska iskustva*, edited by R. Gregurek and E. Klain (Zagreb: Medicinska naklada, 2000).

44 Begić, D. (2016). *Psihopatologija*. Zagreb: Medicinska naklada. Diagnostic and Statistical Manual of Mental disorders, fifth edition; Profaca, B. i Arambašić, L. (2009). *Traumatski događaji i trauma kod djece i mladih*. *Klinička psihologija 2*, vol. 1-2, 53-74

45 Cruz, R. D., 2008.





happening again. A sound, click, movement, smell, or anything related to the past traumatic experience can be a trigger for flashbacks.

2. *Avoidance* of all reminders of the traumatic event, withdrawal from life activities, and an emotional numbness, as well as a sense of being deprived of a “normal” life or future.
3. The presence of what clinicians refer to as “*arousal symptoms*,” meaning, victims feel emotions more intensely and often experience a constant sense of being in danger that arouses their sympathetic nervous system, leading to insomnia, irritability, outbursts of anger, and problems concentrating.

*Rape Trauma Syndrome is a specific form of post-traumatic stress that occurs in rape victims and is linked to their experience of rape within the context of their socio-cultural environment and family.*<sup>46</sup> Rape Trauma Syndrome involves a broader set of symptoms than PTSD, including *additional physical and psychological changes, including significant behavioural changes*. Burgess and Holmstorm, who conducted research on women rape victims for years, found that these victims experienced significant levels of emotional *and* physical pain during their rapes, immediately afterward, and over long periods of time. And the consequences of sexual violence can compound; as the pronounced psychological and physical symptoms associated with trauma result in other vulnerabilities, for example economic insecurity if victims leave their job, school, or places of residence, as many do. Altogether, these outcomes have long-term consequences for a victim, her self-image, her sexuality, her ability to trust, her family life, and her professional development.

Three stages of Rape Trauma Syndrome – acute, reorganization, and final – have been identified and are shown in Table 3.

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46 Burgess and Holmstorm, “Rape trauma syndrome.”

**Table 3. The three stages of Rape Trauma Syndrome**

STAGE	CHARACTERISTICS
<p><b>Acute</b> <i>This occurs immediately after a rape and may last for hours, days, and even weeks</i></p>	<p>a) <i>physical</i> symptoms: nausea and vomiting, sense of suffocation, vertigo/dizziness, pressure and pain in the chest, tachycardia (fast heart rate), unsteady gait, headache, fatigue, insomnia</p> <p>b) <i>emotional</i> symptoms: shock, numbness, disbelief, uncontrollable crying, fear, shame, feelings of guilt, anger, horror, feelings of helplessness and powerlessness</p> <p>c) <i>behavioural</i> changes: inability to feel calm or to relax, urge to be constantly active, extreme restlessness, the sense of wanting to step out of one's own skin, the urge to escape, obsessive washing, an increased need for sedation, use of cigarettes and alcohol, lack of appetite, sleep disorders, a desire to be alone<sup>47</sup></p>
<p><b>Reorganization</b> <i>The victim tries to incorporate the traumatic event into a framework she can understand and accept</i></p>	<p>a) <i>lifestyle</i> changes: the victim withdraws, shuts down, and avoids situations and places that remind her of the traumatic event, and as she withdraws more, she feels imprisoned</p> <p>b) <i>sleep</i> symptoms: flashback dreams, in which events identical to the traumatic event are re-experienced; and <i>mastery dreams</i>, which include events similar to the traumatic event, but in which the victim gains power over her attacker and successfully defends herself</p> <p>c) <i>phobias</i>: fears develop specific to the circumstances of each rape</p> <p>d) <i>silence</i>: victims may deeply suppress some traumas for life</p> <p>e) <i>sexual</i> dysfunction: victims may experience disgust for sexual intercourse and a long-term loss of sexual desire</p> <p>f) <i>complex reactions</i>: when victims have no support system and no financial resources, nor a reliable person on which to depend, their suffering may especially remain untold, unprocessed, and may thus impact their life more profoundly<sup>48</sup></p>
<p><b>Final</b> <i>The rape no longer occupies a central place in the victim's life</i></p>	<p>The victim:</p> <p>a) accepts sexual violence as among her worst life experiences;</p> <p>b) understands she will never forget the traumatic event(s), but tries to develop adequate mechanisms to adapt to the experience, which allows her to successfully cope with the traumatic memory;</p> <p>c) stops being "the victim" and becomes a "survivor."</p>

47 Kelly, Preživjeti seksualno nasilje.

48 Ibid.



The psychosocial development of child rape victims is distorted.<sup>49</sup>

It is not an exaggeration to say that *sexual violence destroys the lives of victims*. It changes their lifestyle, behaviour, and sense of self, as well as undermining their routine, often for months and years as they work to recover.<sup>50</sup> Indeed, sometimes, the consequences of rape are felt deeply for a victim's entire lifetime. Victims of sexual violence may lose faith in their own strength, and stop believing there is any meaning, order, or justice in the world. And as victims are in most cases daughters, wives, and mothers, their trauma causes secondary trauma for other family members, especially children; and this is even true for offspring born after the traumatic event, through transgenerational transfer.

However, *the crime of rape is not only directed at female victims*. Both males and females, ranging from children to the elderly, can be victims of rape. The literature focuses mostly on rape as a crime against women and girls, but the consequences of this traumatic experience are very similar for all victims, regardless of sex and age.<sup>51</sup> Still, there are some specific outcomes for men and for children who experience sexual violence, described in the next sections.

#### **4.2. Male victims of rape**

While we know nowadays that men can be victims of rape, the prevalence of the crime against men is largely unknown because it so often goes unreported.<sup>52</sup> *There are many reasons male victims of rape choose not to report criminal sexual violence*, and most frequently cited are: a combination of shame, confusion, guilt, and fear; the incompatibility of the experience with the social role for men (masculinity); and fear of accusations of homosexuality.<sup>53</sup> Men find it hard to talk about this form of victimization because they believe it is inconsistent with notions of what it means to “be a man,” in that a man should be able to protect himself. Men can especially feel shame and guilt if they experienced an unwanted physical response during a rape (such as an erection and/or ejaculation, which does not result from enjoyment of the sexual act but from a physiological reflex).

49 Radetić-Lovrić & Ninković, 2017

50 Gregurek, “Povijest psihotraume.”

51 Burgess & Holmstorm, “Rape trauma syndrome.”

52 S. Vearnals and T. Campbell, “Male victims of male sexual assault: A review of psychological consequences and treatment,” *Sexual and Relationship Therapy* 16, no. 3 (2010): 279-286.

53 Ibid.

Men may experience gender-specific fears during and after the traumatic experience of rape, including that their wife will leave them, they will be labelled a homosexual, and they will be seen as potential child abusers.<sup>54</sup>

For these reasons, and for fear of being rejected by family or friends, victims choose silence. But this isolation deepens the sense of many men that their experience is unique and would not be believed or understood by anyone else. Some of the consequences of rape that are specific to male victims are shown in Table 4.

**Table 4. Gender-specific consequences experienced by male victims of rape**

CONSEQUENCES	CHARACTERISTICS/SYMPTOMS
<b>Physical/Medical</b>	<ul style="list-style-type: none"> <li>- rupture of the rectum</li> <li>- injuries on the penis and testicles</li> <li>- pain in the penis, testicles, anus, and rectum</li> <li>- HIV and other sexually transmitted diseases</li> <li>- genital infections, ulcers</li> <li>- damage to reproductive organs and mechanical sexual dysfunction</li> <li>- various physical manifestations or somatizations of emotional trauma: chronic headache; pain in the back, stomach, ankles, or chest; problems with urination and defecation; high blood pressure; general weakness; loss of appetite and weight; exhaustion; insomnia; sexual dysfunction, including impotence or premature ejaculation</li> </ul>
<b>Psychological</b>	<ul style="list-style-type: none"> <li>- overwhelming feelings of shame, humiliation, anger, fear, and powerlessness</li> <li>- disruption of gender identity or confusion about sexual orientation<sup>55</sup></li> <li>- irritability</li> <li>- emotional detachment</li> <li>- loss of self-confidence</li> <li>- withdrawal</li> <li>- anger and outbursts of aggression</li> <li>- compulsive sexual behaviour</li> <li>- drug and alcohol abuse</li> </ul>

54 G. Mezey and M. King, "The effects of sexual assault on men: a survey of 22 victims," *Psychological Medicine* 19 (1989): 205-209.

55 A.W. Coxell, M.B. King, G.C. Mezey, and P. Kell, "Sexual molestation of men: interviews with 224 men attending a genitourinary medicine service," *International Journal*



### 4.3. Child victims of rape

Sexual abuse, which includes the crime of rape, is an extremely traumatic experience for children.<sup>56</sup> Recovery from this trauma does not “just happen,” but requires considerable help and support. If this support is not provided, the consequences of childhood sexual abuse can be very severe, and can have both short- and long-term effects on a child’s overall development, as shown in Table 5.<sup>57</sup>

**Table 5. Consequences of sexual abuse among children**

SHORT-TERM	LONG-TERM
a) Health: sexually transmitted diseases, unwanted pregnancy, and physical injuries	- low self-esteem - depression - anxiety - irritability, isolation - regressive behaviours
b) Behaviour: aggressiveness, delinquency, sleep and eating disorders, withdrawal, autoaggressive behaviour (self-harming)	- dissociation - nightmares - flashback memories and dreams - problems with concentration - feeling of insecurity/lack of safety - sexual dysfunction, promiscuity, and/or prostitution
c) Emotional: anger, guilt, sadness, hostility, anxiety, fear/phobias, shame, low self-confidence	- early pregnancy - drug and alcohol abuse - self-harming - eating disorders - problems in interpersonal relations
d) Educational: problems with functioning at school, absenteeism, dropping out	- running away from home - PTSD (Rape Trauma Syndrome) - self-harming and suicidal ideation or attempts - susceptibility to the cycle of abuse, wherein abused children become abusers or enter relationships with abusive or violent partners

of STD & AIDS 11 (2000): 574-578; and Vearnals & Campbell, “Male victims of male sexual assault...”

56 V. Čorić, G. Buljan Flander, and D. Štimac, “Seksualno zlostavljanje djece: dijagnostička obrada i čimbenici koji utječu na razotkrivanje,” *Paediatrica Croatica* 52 (2008): 263-267.

57 Ibid; and G. Buljan Flander and I. Ćosić, “Prepoznavanje i simptomatologija zlostavljanja i zanemarivanja djece,” *Medix* 9, no. 51 (2003).

*The psychosocial development of child rape victims is significantly impacted, and the trauma of rape always causes damage or suffering in children, regardless of their psychophysical condition and capacities for resilience.*<sup>58</sup> Normal behavioural patterns change in child victims and they may for example start using alcohol and other psychoactive substances as a way to numb and ease their pain. This can be the first step towards long-term addiction. They may also develop controlling and aroused behaviours, such as expecting perfection from others, maintaining an intense awareness of the environment, and operating with constant caution and frequently evaluating the safety of spaces and the people in them. Moreover, child victims of rape may view themselves as capable only of being good at or successful in sexually-related activities.

Just as in adults, the traumatic memories of children can be deeply engraved, never forgotten, and susceptible to suppression through defence mechanisms. It is these defence mechanisms that can make it difficult to recognize abused children based solely on their behaviour, relations with peers, success in school, etc. *On the outside, abused children may appear as if everything is fine, and some consequences of the trauma they've experienced – such as irritability, introversion, and low self-confidence – may be wrongly attributed to developmental phases or their personality.*<sup>59</sup> In other words, there is a significant incongruence between an abused child's inner and outer (manifest) worlds.<sup>60</sup>

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58 Ibid.

59 Ibid.

60 Ibid.

On the outside, abused children may appear as if everything is fine, and some consequences of the trauma they've experienced such as irritability, introversion and low self-confidence – wrongly attributed to mental phases or their personality. In other words, there is a significant incongruence between an abused child's inner (manifest) world







## 5. The consequences of gender bias in sexual assault cases: victim selection, recantations, and false allegations

Gender bias affects our understanding and opinion of the world around us, particularly concerning social behavior. Specifically, gender bias refers to negative or positive judgements and/or behaviours associated with women, men, girls, and boys and extending from prevailing stereotypes in a given socio-cultural context. Gender bias can be explicit or implicit; and implicit bias develops automatically and unconsciously in a process we are all affected by, in which we assign a stereotype and/or associate a negative or positive attitude with a particular group, or with an individual associated with a group.<sup>61</sup>

Thus, implicit biases operate automatically, without intent or conscious control. And because they are automatic, working behind-the-scenes, they can influence decisions and behaviors, both positively and negatively, without an individual's awareness. This means that *even judicial professionals who are consciously dedicated to the principles of fair justice may, at times, make decisions and act in ways that are unintentionally biased.*<sup>62</sup>

Gender bias can pose a special challenge for judges when it comes to the impartial adjudication and sentencing of rape and sexual assault cases. It can also influence the thinking and behavior of other criminal justice actors as well as perpetrators, victims, and society at large. Indeed, sexual behavior represents one of the areas of social norms most significantly differentiated by gender, with specific and distinct behavioral expectations for men and boys in contrast to women and girls. If individuals do not conform to these expectations, they can face socio-cultural consequences. Sexual behavior is also deeply associated with morality and whether a person is deemed *good* or not. The perceived morality of an individual can therefore be based on an implicit assessment of whether that individual has conformed to socio-cultural expectations related to sexual behavior. Morality is intrinsically linked to credibility as well, which is a resounding consideration in criminal cases. As a result, how we understand gendered expectations of sexual behavior, whether explicitly or implicitly, plays a

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61 J. Kang, *Implicit Bias: A Primer for Courts* (Williamsburg, VA: National Center for State Courts, 2009).

62 P. Casey, R. Warren, F. Cheeseman, and J. Elek, *Helping Courts Address Implicit Bias: Resources for Education* (Williamsburg, VA: National Center for State Courts, 2012), 2.

significant role in how rape and sexual assault cases are investigated and adjudicated. Gender bias can especially intersect with the perpetrator's selection of a victim, later recantations by the victim, and how false allegations are assessed.

### 5.1. *Victim selection*

Criminal perpetration involves both opportunity and assessment. Opportunity is assessed by would-be perpetrators on the basis of a number of factors, in a process of target or victim selection. This can involve significant planning and foresight, or merely a quick on-the-spot evaluation of whether an opportunity exists.

In the case of rape and sexual assault, would-be perpetrators assess the perceived vulnerability, accessibility, and credibility of a victim.

**Vulnerability** is not a general state of being, but rather the result of circumstances and context. ...the concept of vulnerability is shaped and informed both by objective facts (e.g., whether someone is unconscious), as well as more subjective assessments of a particular situation (e.g., whether someone who is unconscious would be seen as a ... credible witness).

It should be emphasized... that [vulnerability] to sexual assault is first and foremost the result of being around someone who is motivated, or at least willing, to commit sexual assault. However, there must also be a perception by the perpetrator that the situation is somehow conducive to successfully committing a sexual assault and not being held accountable for it.

H. Huhtanen, K. Lonsway, and J. Archambault, *Gender Bias in Sexual Assault Response and Investigation*, Training Bulletin Series: Part 2 (End Violence Against Women International, 2017), 4.

By understanding the concept of vulnerability, judges and other criminal justice actors can identify the factors commonly associated with it and better appreciate how and why an individual might be selected as a victim. These include, for example:

- the use of alcohol/drugs
- being very young or very old



- having a cognitive or physical disability
- being undocumented
- coming from an ethnic minority (e.g., Roma)

In addition, the vulnerability of a victim can be evaluated against the presence of gender bias, or more specifically, gender-based expectations and norms. This evaluative process can help judges uncover where gender bias may be present and help them to avoid reinforcing biased attitudes and stereotypes in the process of adjudication and sentencing.

### **Example of Perceived Vulnerability: Alcohol and/or Drug Use**

Victims of sexual assault who have used drugs or alcohol at the time of the assault, or who have a history of using drugs and alcohol, have historically been doubted, blamed, and/or not taken seriously when they report the crime. They have also frequently been viewed as unable to give an accurate account of what happened, and there is truth in this perception because drugs and alcohol do interfere with memory encoding and recall. However, judgments of women victims can be particularly punitive, because the attitude toward women who use drugs or alcohol is often: “She should have known better,” or “What did she think would happen?” Other stereotypes associate women who drink or use drugs with being “loose” or promiscuous – meaning, they are generally ready and willing to engage in sexual relations [and they lack morals]. These types of stereotypes can [influence] our decision-making [about whether someone is a legitimate victim or credible witness].

H. Huhtanen, K. Lonsway, and J. Archambault, *Gender Bias in Sexual Assault Response and Investigation, Training Bulletin Series: Part 2 (End Violence Against Women International, 2017)*, 4-5.

Thus, the concept of vulnerability provides two useful areas of evaluation, helping identify:

- how and why an individual might be perceived as a ‘good target’ or opportunity; and
- how gender-based attitudes and expectations inform our analysis of who is behaving in an acceptable manner and whether or not they are credible.

**Accessibility**, while often defined as an objective concept, is also influenced by the socio-cultural context, most notably the subjective dynamics of power and position. Objective accessibility can be defined as simply the legitimate contact with, or access, to another person. This could include a taxi driver and client, doctor and patient, teacher and student, etc. Yet, these relationships of access can also be influenced by the subjective power or position of the individuals involved, and these are deeply informed by socio-cultural stereotypes and attitudes.

H. Huhtanen, K. Lonsway, and J. Archambault, *Gender Bias in Sexual Assault Response and Investigation, Training Bulletin Series: Part 2 (End Violence Against Women International, 2017)*, 6.

Accessibility has an important relationship to opportunity. Indeed, access can be and often does result in creating an opportunity to engage in wrongdoing or commit a crime. The concept of accessibility can help judges and other criminal justice actors identify and understand:

- the nature of contact between a victim and perpetrator; i.e., how did they know each other and why were they in contact?
- the relationship of power and status in the context of that contact; i.e. who had power and status, and who did not?

This analysis can help judges better understand and analyse the context and circumstances in which a rape or sexual assault took place. For example, did the perpetrator take on a specific job or function in order to create access? There are countless examples of child sexual abusers, for example, who have purposefully sought employment with children in order to gain access to them. In such a case, the adult perpetrator has access as well as power and status.

Power and status can also change the dynamics of access. Take for example a taxi driver and passenger. While we might generally believe that a passenger has more power and status, this can change drastically if the passenger is drunk or drugged, and their incapacity becomes a function of perceived vulnerability. Because the credibility of the drunk or drugged passenger-victim is diminished, the taxi driver's relative position of power and status increases.



**Credibility...** is an opinion, not a fact. As a result, credibility is powerfully influenced by prevailing stereotypes and attitudes, including those regarding gender, race/ethnicity, and age.

In cases of sexual assault, gender-based stereotypes and attitudes often become particularly relevant to the determination of credibility, when evaluating who is believable and why. For example, early research demonstrated that the credibility of a woman victim will be called into question if she operated outside of accepted gender role norms, by hitchhiking, drinking alcohol, going to a bar alone, engaging in sex outside of marriage, accepting a ride from the suspect, going to the suspect's home, etc. (LaFree 1981). This finding has remained consistent for decades, with more recent research showing that "victim behavior [or risk taking] at the time of victimization and victim moral character [are] important factors when evaluating victim credibility" and moreover, are decisive considerations in cases without corroborating evidence (Campbell et al, 2015, p. 29).

H. Huhtanen, K. Lonsway, and J. Archambault, *Gender Bias in Sexual Assault Response and Investigation*, Training Bulletin Series: Part 2 (End Violence Against Women International, 2017), 7.

Credibility is an unquestionable consideration in rape and sexual assault cases, but there is a risk of making decisions, and charging decisions in particular, solely on the basis of the *perceived* credibility of the victim (and of the perpetrator). Unfortunately, credibility is both subjective and, in the context of rape and sexual assault, largely determined by gender-based attitudes and expectations. This can lead to a different conclusion regarding the credibility of men and boys in contrast to women and girls, even when they have been engaged in the exact same behavior. Take alcohol use for example: a man or adolescent boy who has been drinking heavily may very well be able to use his drinking as an excuse for bad behavior on the premise that he didn't know what he was doing because he was drunk; whereas women and adolescent girls will very likely be seen as having misbehaved and even having 'asked for it' if they are victimized while under the influence of alcohol.

In order to overcome the influence of gender bias, judges and other criminal justice actors must be able to identify how and why a victim

would be perceived as vulnerable, accessible, and lacking in credibility. This evaluative process can help judges identify the presence of gender bias and thereby mitigate its influence in judicial processes.

## 5.2. Recantations by victims

There are cases in which a victim reports a rape or sexual assault and then recants by telling authorities that the incident did not actually take place. *While one might assume that a victim recantation is indicative of a false report, research and professional experience reveal that it is more likely to be evidence of how much the victim wishes to put a stop to criminal justice system intervention, whether by law enforcement officers, prosecutors, or the court system.* Understanding why victims might wish to bring the criminal justice system response to an end, even after initiating it themselves, is critical for understanding how to keep victims engaged. Below is a framework that outlines why victims may be reluctant to participate in a criminal case and why they may recant after reporting. Importantly, it illustrates the extent to which *victims are also influenced by gender bias.*

**Internal influences:** Victims may feel embarrassed, ashamed and even uncertain about what happened to them. Victims may believe they are partly responsible for the assault, particularly if they engaged in prior consensual sex [with the perpetrator] or the use of alcohol or drugs. Victims may also fear they will not be believed... especially if their assault does not match society's [expectations].

**External influences:** Victims may feel pressure from their friends, family or community to report or not report. Victims may feel pressure to hide information about certain behaviors (e.g., drug use, sexual history) or their personal history (e.g., medical records)... In addition, victims may fear losing the support and/or care of a family member or other care provider, as a result of the report.

**System influences:** Victims may withdraw their participation, or recant their report, due to lengthy investigative delays, slow court dockets, or other setbacks in the process. Victims may also experience doubt, blame, or other forms of non-support by professionals working inside or outside the justice system, leaving them with tangible concerns about their [safety] and perceived credibility.



Socio-cultural influences: ...victims may feel very uncomfortable about specific acts involved in the assault (e.g., oral copulation, sodomy). Victims may also be subject to isolation from their community (e.g., high school peer group, cultural or ethnic group), particularly if the offender is well liked and respected within that community. Victims may experience disapproval from family, co-workers, and other typical support groups (e.g., the faith community). Victims from certain cultural or ethnic groups (e.g., Roma) may be especially reluctant to participate in the criminal justice process, if they believe their community has historically experienced mistreatment or injustice...

H. Huhtanen, K. Lonsway, and J. Archambault, *Gender Bias in Sexual Assault Response and Investigation*, Training Bulletin Series: Part 2 (End Violence Against Women International, 2017), 4-5.

### 5.3. False reports

A false report is a reported case of rape or another form of sexual assault that was neither attempted nor completed. Claims of a false report signal the need to meet a criminal burden of proof standard; in other words, there must be evidence to establish that the rape or sexual assault did *not* happen. Just as in the case of a reported rape, the report alone is not sufficient evidence to prove the crime was attempted or completed.

In a 2014 study, reflections by attorneys and members of the judiciary in BiH suggested a widely held belief that victims commonly falsify reports of rape and sexual assault.<sup>63</sup> This is consistent with findings from the US and the UK. In fact, *one study of 428 police officers found that they believed approximately one in three sexual assault reports (on average) were false.*<sup>64</sup> *And another study with 891 police officers found that over half believed up to 50% of victims lied about being raped; an additional 10% thought that 51-100% were lying.*<sup>65</sup> Yet, these beliefs are not consistent with research-based

63 M. Halilović and H. Huhtanen, *Gender and the Judiciary: The Implications of Gender within the Judiciary of Bosnia and Herzegovina* (Sarajevo: DCAF/Atlantic Initiative, 2014), 80-82.

64 Martin D. Schwartz, *Police Investigation of Rape – Roadblocks and Solutions* (US Department of Justice, 2010).

65 Amy Dellinger Page, “Gateway to Reform? Policy Implications of Police Officers’ Attitudes toward Rape,” *American Journal of Criminal Justice* 33, no. 1 (2008): 44-58.

estimates of false reporting (from the US) that range between 2% and 8%.<sup>66</sup> As one researcher noted:

*[w]hile false [reports] do occur, approximately three-quarters of the incidents concluded by the police to be false appeared to have been judged, to some extent at least, on the basis of stereotypes regarding the [victims] behavior, attitude, demeanor, or possible motive. Suspicious file comments were made by the detectives regarding a woman who laughed while being interviewed, others... were seen as 'attention seeking,' and some... were said to be 'crying rape' for revenge or guilt motives.*<sup>67</sup>

Clearly, false reports are made sometimes, and someone making a false report may in fact be driven by a need for attention or out of revenge. But, while investigative procedures may not relate specifically to a judicial response, beliefs concerning the likelihood of false reports will undoubtedly influence charging decisions as well as adjudication and sentencing in cases of rape and sexual assault. Indeed, the very same standards for credibility that are used to assess the truthfulness and authenticity of victims during an investigation are used in a criminal court case. Even in this context, the social norms and expectations that outline appropriate and acceptable behavior for men and boys in contrast to women and girls influence choice making. Thus, gender-based attitudes and stereotypes pose a risk to judicial impartiality so long as judges and other criminal justice actors do not take them into account.

Social norms also relate to expectations regarding the behaviour of victims following an assault. For example, research conducted with police detectives found that investigators tend to assess the sincerity of victims on the basis of their emotional presentation; in some cases, even looking for

66 See: D. Lisak, L. Gardinier, S.C. Nicksa, and A.M. Cote, "False allegations of sexual assault: An analysis of ten years of cases," *Violence Against Women* 16, no. 2 (2010): 1318-1334; C. Spohn, C. White, and K. Tellis, "Unfounding sexual assault: Examining the decision to unfound and identifying false reports," *Law & Society Review* 48, no. 1 (2014): 161-192; L. Kelly, J. Lovett, and L. Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases*, Home Office Research Study 293 (London: Home Office Research, Development and Statistics Directorate, 2005); K.A. Lonsway, J. Archambault, and D. Lisak, "False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault," *The Voice* 3, no. 1 (2009): 1-11; and Newsletter for the National Center for the Prosecution of Violence Against Women at the National District Attorneys Association, Reprinted in *The Prosecutor* 42, no. 4 (November/December 2008).

67 J. Jordan, "Beyond belief: Police, rape and women's credibility," *Criminal Justice* 4, no. 1 (2004): 29-59.





'fake tears'.<sup>68</sup> One investigator explained to researchers that he evaluated the credibility of victims based on his opinion of how victims should behave when reporting a rape or sexual assault:

*"...the other thing we look for is over-dramatization. True victims have a very flat affect, whereas someone that is trying to cover for her own sexual activity will put on a show. Sobbing, yelling and covering their face."<sup>69</sup>*

Yet, no research suggests there is a 'typical' response to the experience of being subjected to sexual violence.<sup>70</sup> Therefore, *assessing the credibility and truthfulness of a victim as a function of their behaviour is not evidence-based*, but is informed by gender-biased opinions related to how victims of rape and sexual assault should behave.

#### **5.4. Detecting deception**

Notably, research does suggest that our ability to detect deception in others (i.e., to identify when someone is lying) is at best 60% accurate. Ironically, included among the groups of professionals which are not the most skilled in detecting deception are psychiatrists, police officers, and judges.<sup>71</sup>

The reasons it can be so hard to identify when someone is lying are varied, but there are specific explanations for why it is so difficult in cases of rape and sexual assault. Primarily, this has to do with the fact that people's assumptions about the unconscious behaviours of liars – which do not actually apply to most adults and adolescents – reflect behaviours that may be displayed by victims of rape. Indeed, the two most common behaviours associated with lying are gaze aversion (looking away and avoiding eye contact) and fidgeting (a manifestation of nervousness in the body).<sup>72</sup> But, in

68 B.A. Campbell, and T.A. Menaker, and W.R. King, "The determination of victim credibility by adult and juvenile sexual assault investigators," *Journal of Criminal Justice*, 43 (2015): 29-39.

69 *Ibid.*, 34

70 See: R. Campbell, "The Neurobiology of Sexual Assault: Implications for First Responders in Law Enforcement, Prosecution and Victim Advocacy," Recorded webinar for the National Institute of Justice Seminar, "Research for the Real World," 3 December 2012; and K.A. Lonsway, S. Welch, and L.F. Fitzgerald, "Police training in sexual assault response: Process, outcomes, and elements of change" *Criminal Justice and Behavior*, no. 28 (2001): 695-730.

71 P. Ekman and M. O'Sullivan, "Who can catch a liar?" *American Psychologist* 46, no. 9 (1991), 913.

72 A. Salter, *Predators, Pedophiles, Rapists, and Other Sex Offenders* (New York: Basic

truth, “even the guilty liar probably will not avert his gaze much, since liars know that everyone expects to be able to detect deception in this way...”<sup>73</sup> In other words, by adolescence, most people know the stereotypes associated with deception; and because everyone lies, even if only trivially, we have all practiced doing so successfully. For this reason, it is neither useful nor research-based to evaluate behaviours like gaze aversion or nervousness as evidence of lying, and in the case of rape and sexual assault, may result in improper assessment of the truthfulness of victims.

It is worth considering the feelings one might experience in the context of deception, versus those associated with a traumatic victimization such as that of a rape or sexual assault, as shown in Table 6 below.<sup>74</sup>

**Table 6. Feelings linked to deception and to the experience of sexual violence**

DECEPTION	SEXUAL VIOLENCE
<b>Guilt</b> about lying	Self-blame & <b>shame</b> about what happened
<b>Fear</b> of being caught	<b>Fear</b> of not being believed & self-doubt
A desire to get away with lying (i.e., not being caught)	Embarrassment in talking about details of the crime (which includes sexual acts)

As this relates to perpetrators and victims, consider as well that: “...a liar may feel guilt and fear, but they may also be more aware of these emotional reactions and better able to control them. Thus, **a person who has committed a sexual assault, and is being interviewed by law enforcement, will know that the stakes are high, and also know that they need to appear truthful.** This gives them an advantage for controlling their responses and demeanor, to avoid the appearance of deception. Also, prior research has shown that many sexual assault

Books, 2003).

73 P. Ekman, “An argument for basic emotions,” *Cognition and Emotion* 6, no. 3-4 (1992), 171.

74 Adapted from: H. Huhtanen, K. Lonsway, and J. Archambault, *Gender Bias in Sexual Assault Investigation and Response*, Training Bulletin Series: Part 3, End Violence Against Women International, January 2018, 12.



*perpetrators are serial offenders (e.g., Lisak & Miller, 2002; McWhorter et al., 2009), so they may be well-practiced at planning and executing an assault, and then subsequently lying about it.*

*In contrast, victims do not have a plan nor are they practiced, and they typically feel confused, ashamed, and uncertain about how to respond. They may fear that police officers, family members, friends, and other members of their community will doubt or blame them. As a result, they do not generally approach an interview with a goal of appearing believable. Rather, they exhibit manifestations of their fear and uncertainty, and this is layered on top of the guilt and shame that are often associated with sexual assault.*<sup>75</sup>

### 5.5. Conclusion

In the case of rape and sexual assault, the fair and impartial delivery of justice requires consideration of the consequences of gender bias at all levels and all stages of the criminal justice system response. Judges represent the last stage of that response, meaning that judges are responsible for the final oversight of the cases that come before them. This includes referring cases back to prosecutors when the evidence is insufficient for the charge; or in contrast, when the evidence suggests a more serious crime or even additional criminal elements. Judges are thus uniquely positioned to provide guidance and support to law enforcement professionals and prosecutors and to exercise a leadership function, and judges empowered with knowledge about gender bias and other forms of implicit bias have the opportunity to make real and meaningful improvements in how fairly and impartially justice is dispensed.

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<sup>75</sup> Huhtanen, Lonsway, and Archambault, *Gender Bias in Sexual Assault Investigation and Response*, 13.





## 6. Special vulnerabilities of rape victims

In order to best deliver justice to victims of rape and sexual violence, judges must understand their real vulnerabilities, as well as perceptions of vulnerability that arise from a combination of gender inequality and other social and personal characteristics of a victim and make them targets of perpetrators. These factors lead perpetrators to believe they will have easy access to the victim, or that the victim will not have the capacity to report the assault or will be prevented from reporting. Among the groups discussed in this context below are some of the people most frequently exposed to multiple layers of discrimination – because they are women, disabled, members of a minority community, refugees, and/or migrants. Even when they report a rape, these individuals are often exposed to additional review, double prejudice, and distrust.

Members of these groups are often socially excluded generally. This means more than facing poverty and unemployment and involves several factors that add to a person's vulnerability, such as a lack of equal access to education and employment, and various obstacles that stand in the way of their free exercise of rights. Though many groups face exclusion and thus similar vulnerabilities, this text focuses on the three groups most frequently recognized as excluded in BiH: persons with disabilities, members of the Roma community, and refugees and migrants.

### ***6.1. Adults and children with disabilities***

People with disabilities experience domestic and sexual assault at higher rates than other people. The United Nations Convention on the Rights of Persons with Disabilities, which was ratified by BiH in March 2010, is based on the social model – which explains disability not only through impairment but also through the obstacles a maladjusted society creates to people with disabilities. The Convention recognizes multiple discriminations against women and children with disabilities (Articles 6 and 7).

Statistics indicate that:

- 83% of women with disabilities will be sexually assaulted in their lifetimes;
- 3% of cases of sexual abuse involving people with developmental disabilities are ever reported;
- 50% of girls with deafness have been sexually abused (twice the rate of hearing girls), and 54% of boys with deafness have been sexually abused (over five times the rate of hearing boys);
- 20% of women with a disability have a history of undesired sex with an intimate partner (compared to 8% of women without a disability); and
- 80% of women and 30% of men with a form of intellectual disability have been sexually assaulted, and half of these women have been assaulted *more than ten times*.<sup>76</sup>

Children with disabilities are particularly susceptible to abuse by carers. Their childhoods are often marked by many series of medical treatments and schooling in special institutions. They face prejudice in all aspects of their life. The following quotes from disabled women who were abused as children clearly show why resistance and reporting are both so difficult for these victims:

- *“We are sometimes dependant on abusers as carers. How are you supposed to get anyone to believe you if everybody thinks he is a ‘Saint’ because of how he helps you?”*
- *“The men who abused me I was supposed to trust... they knew I couldn’t run away they knew I was stuck there... it felt like my fault.”*
- *“As a disabled child you had no privacy. We were dressed, undressed, bathed, and washed. There were times when this didn’t feel right. We all knew it wasn’t right but not one of us would say anything.”*
- *“My mum was always tired and he (step-dad) gave her breaks. It happened every time. I was 8. I don’t talk well and I didn’t know the words to say what he did...”*
- *“For most of my youth I was treated like a piece of meat. My body wasn’t mine, it belonged to the NHS. The only way to deal with it is to shut down. That played right into the hands of the man who sexually abused me.”<sup>77</sup>*

Some of the specific prejudices and factors that can impact persons with disabilities in reporting sexual crimes include:

<sup>76</sup> Disabled World, “People with Disabilities and Sexual Assault,” 20 November , <https://www.disabled-world.com/disability/sexuality/assaults.php>

<sup>77</sup> The Daisy Project, “Violence Against Disabled Women Survey,” Wise Women, n.d.



- Perceptions that women with *physical* disabilities are sexually unappealing or unable to engage in sexual acts;
- Perceptions that women with *intellectual* disabilities are promiscuous;
- A reluctance by agencies that provide services to people with disabilities to harm their reputation by reporting an employee for a sexual assault; and
- A lack of specialized support to persons with disabilities who have survived sexual assault.

Cases of sexual violence that are reported by persons with disabilities are frequently brought to an end in the investigation stage due to lack of forensic evidence, the uncertainty of the victim as to the identity of the perpetrator, the inability of the victim to remember details, or communication challenges. Also a factor is concern over whether the disabled victim can emotionally withstand a trial, especially a hostile cross examination by the defence. It is not uncommon that the judicial process is suspended by the victim and their family because they do not want to continue for these reasons. In some cases, victims may also recant; and when this occurs in a case involving family members reported as perpetrators, there is inevitable suspicion that a victim may be doing so under pressure.<sup>78</sup>

Persons with disabilities are accustomed to facing discrimination and being underestimated, and the reasons many avoid reporting sexual violence reflect this more generalized experience of bias, including:

- Fear of not being believed;
- Fear of losing housing, freedom, and relationships with family and friends;
- Fear of abandonment by a caretaker, and thus the absence of a carer to provide food or medications;
- A lack of sexual education, and thus difficulty understanding what is appropriate and what is criminal;
- The imbalance of power between a person with disabilities and their carer(s); and

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Available at: <http://www.wisewomen.org.uk/docs/Daisie%20Report%20PDF.pdf>

78 For more on this, see: Jennifer Keilty and Georgina Connelly, "Making a Statement: An exploratory study of barriers facing women with an intellectual disability when making a statement about sexual assault to police," *Disability & Society* 16, no. 2 (2001): 273-291.

– Challenges communicating generally, or describing the traumatic experience in a way that is understood by investigators.<sup>79</sup>

People with intellectual difficulties are especially vulnerable to sexual assault and rape. They are often not believed when they make serious accusations, and their claims are written off as invention or fantasy. Indeed, there is a commonly held belief that people with intellectual disabilities are simply not credible.<sup>80</sup> Perpetrators are aware of this, and they abuse the particularly vulnerable position of people with disabilities.

It is not unusual to hear people with intellectual disabilities described as “40 years old, but with the ‘developmental age’ of a child,” or for them to be treated as if they are children. This is wrong and offensive. *Adults with disabilities are not children*. They have a lifetime of experiences, and want the things other adults want: jobs, community, friendships, romantic relationships, sex, and marriage. Yet, they may face significant limits when it comes to learning, problem solving, and everyday social skills. This is why prosecutors are often reluctant to take on rape cases involving persons with intellectual disabilities as victims, because these victims may have problems recalling details, or describing the incident concisely and chronologically.<sup>81</sup>

In *I. C. vs. Romania* (no. 36934/08), tried before the European Court of Human Rights, the court found that Article 3 (prohibiting inhuman or degrading treatment) had been violated by an inadequate investigation in the case of a fourteen-year-old girl with mild intellectual disabilities who reported rape. The court concluded that neither the prosecutor nor the judge had considered the context of the case or the applicant’s age, her mild intellectual disability, or the fact that three men participated in the assault, and that the alleged rape occurred at night in cold weather, all of which were factors that increased her vulnerability. The court also noted that international literature indicates a much higher percentage of rape among persons with disabilities compared to the general population. It acknowledged that, due to the nature of the attack, adequate identification and reporting were necessary to apply criminal codes and obtain legal protection, but said these issues were additionally aggravated by the fact that the lower

79 Angela Browne, Ari Agha, Ashley Demyan, and Elizabeth Beatriz, *Examining Criminal Justice Responses To and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* (U.S. Department of Justice, 2016).

80 Keilty and Connelly, “Making a Statement...”

81 Joseph Shapiro, “The Sexual Assault Epidemic No One Talks About,” *National Public Radio* (transcript), 8 January 2018, <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>





court had not requested a psychological examination to contextualize the applicant's response nor had it considered her medical records related to the symptoms of trauma she experienced following the incident.<sup>82</sup>

In light of the vulnerabilities of persons with disabilities, and the discrimination they regularly confront, the relevance of recommendations made in 2017 by the Committee on the Rights of Persons with Disabilities regarding the justice system in BiH is clear. It recommended that the Bosnian judiciary:

*"...ensure transparent, barrier-free and non-discriminatory access to justice based on the free choice and preference of persons with disabilities.... that the State party strengthen efforts to provide adequate training on the rights of persons with disabilities to judicial and law enforcement personnel.... [and] that the State party ensure availability of non-discriminatory access to assistive technologies and ensure registered and qualified sign language interpreters, and the provision of Braille and other alternative formats, in judicial proceedings."<sup>83</sup>*

## 6.2. Roma women and girls

Roma women in BiH face social exclusion, poverty, and discrimination, and many members of the Roma community distrust the police.<sup>84</sup> Isabel Foneseca attributes a lack of confidence among Roma in the judiciary and the police to near constant hostility and the draconian measures taken in Central and Eastern Europe to assimilate Roma communities.<sup>85</sup> This has made it common for Roma to solve problems of violence without any outside intervention.

This can be problematic for Roma women, who are often exposed to violence in their families or communities, but lack support due to bias and discrimination. At home, they are marginalized within their families because they are women; and in the community at large, they are marginal-

82 European Court of Human Rights, "Factsheet: Persons with disabilities and the European Convention on Human Rights," July 2018.

83 United Nations Convention on the Rights of Persons with Disabilities Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Bosnia and Herzegovina*, 12 April 2017. Available at: <http://fbihvlada.gov.ba/file/Konvencija%20o%20pravima%20osoba%20sa%20invaliditetom.pdf>

84 M. Halilović, M. Čehajić, and E. Bećirević, *Security Needs and Problems of the Roma population in Bosnia and Herzegovina* (Sarajevo: Atlantic Initiative, 2015).

85 Isabel Fonseca, *Bury me standing: The Gypsies and their journey* (New York: Vintage Books, 1996).

ized as members of the Roma minority. This makes Roma women especially vulnerable to sexual violence. As one woman explained:

*“On the one hand, within the family, we feel a lack of understanding and support. On the other hand, we suffer from the prejudices of the wider society. If Romani women seek help from relevant authorities, they meet bias and a lack of understanding. There is no help from anyone...”*<sup>86</sup>

In Croatia, Bogdanić looked at a case of rape involving a 13-year-old Roma girl from Rijeka, and determined that it clearly illustrated a evaluation by the court of factors within the Roma community in a way that was inconsistent with their assessment of the elements of the crime of sexual intercourse with a child or criminal rape when it involved members of the majority population.<sup>87</sup> The case involved a 28-year-old man who had a sexual intercourse with his adolescent sister-in-law. The defendant denied nothing, and said he knew the victim was 13, but explained that such relationships were normal in their culture. The defence asked that the judges consider all the nuances of Romani culture and customs, claiming the defendant made a mistake of law, thinking such a relationship was permissible. Although the common minimum punishment for sexual intercourse with a child is one year in prison, judges in Rijeka instead sentenced the defendant to only 8 months.

Bogdanić cautions that sometimes, by defending minority cultures, we may harm individual members of those minorities. And because minority cultures may be relatively more patriarchal than the majority of a society, women can be most vulnerable to this advocacy, which is a barrier to their rights. It is important that members of the judiciary understand this when defence counsel attempts to legitimize a rape or an act of sexual intercourse with a child by framing it as “normal” for a minority group. Women from these groups do not accept this normalization of violence in their communities.<sup>88</sup>

Notably, Bogdanić claims that the case in Croatia “clearly shows that the public sphere (court in Rijeka) accepts inequalities of the private sphere,”

86 European Roma Rights Centre, “Romani Women in Romani and Majority Societies,” <http://www.errc.org/roma-rights-journal/romani-women-in-romani-and-majority-societies>

87 A. Bogdanić, “Multikulturalno građanstvo i Romkinje u Hrvatskoj,” *Migracijske i etničke teme* 20, no. 4 (2004): 339-365.

88 Ibid.



in its application of inconsistent evaluation, and thus bias.<sup>89</sup> In the legal context, there is no room for culture and custom that violates existing law as well as the rights and safety of women, and if these factors are considered mitigating, this raises questions about the ways we view multiculturalism. For example, the Centre for Roma Initiatives in Montenegro highlights that child marriage is still practiced in many Roma communities, with 72% of women who participated in their research reporting having been married between 12 and 17 years of age.<sup>90</sup> Societies often accept such traditions in Roma communities even when they jeopardize the rights of girls and women and increase their vulnerability to sexual and domestic violence.

### **6.3. Refugees and migrants**

Women and girls who are refugees and migrants also have specific vulnerabilities that must be considered. These women and girls are often traumatized by war and conflict in their home countries, before enduring uncertain and dangerous journeys that expose them to any number of dangers, including sexual abuse and rape.<sup>91</sup> Moreover, research shows that women and children may flee from their countries in the first place due to exposure to sexual violence. When this violence continues during their migrant journey, a fear of arrest and/or deportation prevents them from reporting it to authorities.<sup>92</sup> These circumstances increase their vulnerabilities because abusers view them as without rights or status, enabling perpetrators to sexually exploit these women and girls without consequence.

Women refugees usually have inadequate access to healthcare as well and do not speak the language of the host country they arrive in, or know how to navigate its legal system and customs. And again, they face unique vulnerabilities associated with life in camps, where conditions are poor and infrastructure is deficient. These women often have an unresolved visa sta-

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89 Ibid.

90 European Roma Rights Centre, “List of Critical Issues... For Consideration by the Committee on the Elimination of Discrimination Against Women at its 67th Pre-Sessional Working Group (21 to 25 November 2016),” [http://www.errc.org/uploads/upload\\_en/file/montenegro-submission-7-november-2016.pdf](http://www.errc.org/uploads/upload_en/file/montenegro-submission-7-november-2016.pdf)

91 Médecins Sans Frontières, *Dying to Reach Europe: Eritreans in Search of Safety* (Amsterdam, 2017).

92 Kids in Need of Defense, “Executive Summary – Childhood Cut Short: Sexual And Gender-based Violence Against Central American Migrant and Refugee Children,” June 2017. Available at: <https://supportkind.org/wp-content/uploads/2017/06/ExecutiveSummary-Childhood-Cut-Short-KIND-SGBV-Report.pdf>

tus as well, which additionally contributes to their vulnerability and may make women who have migrated illegally to a country hesitate to report instances of rape, for fear of being arrested. Such a case occurred in 2017 in London, when an immigrant woman was arrested by police at a centre for rape victims because she had entered the country illegally.<sup>93</sup>

In BiH, a case of rape against a migrant man has been reported in Velika Kladuša, but at the time of writing, little information about this case has been released. It can be assumed that specific challenges and cultural barriers may confront both the individual who reported the case and those who process it, given that the victim is male and a migrant. A series of assumptions may need to be overcome by judicial professional in order to ensure equal treatment of both the victim and the perpetrators.

In delivering justice to migrants and refugees, the implicit influence of media that highlights violence perpetrated by migrants must be appreciated. While police mostly deny news stories that frame migrants in excessively violent terms, this nonetheless creates stereotypes of migrants that generate fear about and bias towards this population. Of course, this also affects the attitudes of migrants towards authorities and contributes to their uncertainty about reporting violence committed within their communities or against themselves.

It is important for members of the judiciary, in their effort to ensure the equal, fair, impartial, and informed treatment of individuals from uniquely vulnerable groups, to have sufficient knowledge of the obstacles they face in exercising their rights.

*“True equal treatment may not always mean treating everyone in the same way... Treating people fairly requires awareness and understanding of their different circumstances, so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage.”<sup>94</sup>*

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93 L. Dearden, “Woman who reported rape to police arrested over her immigration status,” *The Independent*, 28 November 2017, <https://www.independent.co.uk/news/uk/crime/london-rape-woman-arrest-immigration-police-metropolitan-victim-home-office-germany-a8081016.html>

94 Judicial College, *Equal Treatment Bench Book* (UK, 2018).

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## 7. Panel recommendations: Mitigating and aggravating factors related to the criminal offence of rape

Unlike the sentencing policy of the legislature for certain criminal offences, which is mostly known only to legal professionals, the sentencing policies of courts are known to the general public and serve as the basis for their impressions about how effectively the public good is being protected. Therefore, it is extremely important for judges to recognize not only special prevention requirements but also general prevention requirements at the sentencing stage in crimes of sexual violence, so that the imposed sanctions affect not only the perpetrators and act as a deterrent from future criminal acts but send a message to all other potential perpetrators of sexual offences, too. Such an approach to the purpose of sentencing requires maximum engagement by courts in the sentencing process, in order to determine optimal sanctions based on existing aggravating and mitigating factors. Any imposed sanction should fulfil both justice and fairness requirements and should adequately satisfy the victim.

In view of the fact that the legislature does not create a framework for valuating aggravating and mitigating factors (except for defining recidivism and hate as circumstances that can be valued only as aggravating), the courts must establish which circumstances in any given offence can be valued as mitigating or aggravating, pursuant to legal provisions governing the circumstances that can be considered when deciding on sanctions. In other words, it is unacceptable that the same circumstances are mentioned as mitigating in all criminal offences, regardless of their nature or character, even when those circumstances are not functionally associated with the perpetrated criminal offence (e.g. financial status or family circumstances in the case of rape crimes).

Template explanations that offer no judicial innovation or legal perspective were used in a large number of the judgements that were examined by this panel. *For this reason, panel participants believe it is necessary to change court practice in this area, to bring **much greater focus to the explanation of a sentence** so that any reader, not only the victim, has a clear idea about the circumstances that a court considered in deciding on a sanction. Primarily, this requires that courts **specify the context for each mitigating and aggra-***

**vating factor** (instead of just listing them generically as, for example, “family circumstances,” without specifying what about the family circumstances is mitigating or aggravating), and **explain in detail why such circumstances were valued as mitigating or aggravating in the context of the criminal offence of rape.**

The following sections outline some circumstances that may influence the severity of a sanction, within the limits of the legally foreseen punishment, for the criminal offence of rape, and recommendations of the panel for consideration of these circumstances.

### **7.1. Previous convictions of the defendant**

**Recommendation:** *Previous convictions of the defendant should be valued as an aggravating factor.*

Previous convictions of the perpetrator in cases involving the criminal offence of rape should be valued as an aggravating factor, especially if the perpetrator is a special recidivist or if the offences belong to the same criminal field, e.g. crimes against sexual integrity, marriage and family, or those including elements of violence. An exception may exist if a defendant’s one prior offence or even multiple prior offences were perpetrated in other categories, such as property crime. Still, in that instance, previous convictions should be assessed in the context of other circumstances of the case at hand.

Regarding the evaluation of this aggravating factor in sentencing decisions for the criminal offence of rape, the following is recommended:

- Prior convictions for the same criminal offence (special recidivism) are valued as an aggravating factor in any case
- Prior convictions in general, for any criminal offence, are mostly valued as an aggravating factor; at the same time, if the criminal offences belong to the same category, it is fully justified to value this circumstance as aggravating
- Although, pursuant to the law, a prior record of minor offences is not weighed as aggravating, these offences could be considered in a given case if they included demonstrated violence

During a proceeding, the court should have access to information regarding the prior criminal record of the defendant, and should consider based on that whether the defendant may be inclined to the perpetration of the type of criminal offence in the case at hand. However, the court must





exert caution in cases of legal rehabilitation following prior conviction, because then, the defendant is treated as though they have no prior criminal record, and this circumstance *cannot* be valued as aggravating.

## 7.2. The age of the perpetrator

**Recommendation:** *The age of a perpetrator of the criminal offence of rape is often over-valued as a mitigating factor; it is necessary to **first consider the consequences of perpetration of the crime for the victim**, which are often permanent, and the method of perpetration before valuing the age of the perpetrator.*

The age of perpetrators is valued inconsistently when courts decide on sanctions, but this factor is often valued as mitigating, resulting in more lenient sentencing.

In principle, the age of the perpetrator should not influence the criminal sanction in cases of rape. The phrase “of a younger age” – frequently cited as a mitigating factor – should not be used in isolation, without a detailed explanation as to why it is valued as mitigating. If explained properly and in detail, younger age *can* influence decisions on sanctions, for example if the criminal offence was perpetrated by a very young adult or if the age difference between the defendant and the injured party is small (in this latter case, a perpetrator may commit the offence at the age of 18 against a victim of 16, for instance, and be charged with the qualified form of the criminal offence of rape perpetrated against a juvenile).

Other age categories, i.e. above 21, should not be used as mitigating factors but could be valued as aggravating, especially when the age difference between the defendant and the injured party is particularly large, on the order of decades (e.g., the victim is a minor or just 18 years old, and perpetrator is over 50), although each case should be solved *in concreto*. The same is true when the perpetrator is much younger than the victim.

## 7.3. The family status of the perpetrator

**Recommendation:** *The “family status” of perpetrators in rape cases **should not be automatically valued as mitigating.***

In practice, judges specify a perpetrator’s “family status” (i.e., using the term “family man” or referring to the fact that a perpetrator is the father/mother of children and is married) as a mitigating factor; or they note it as a consideration in deciding and imposing a sanction, without specifying if it is mitigating or aggravating, but in the context of an explanation of miti-

gating factors.<sup>95</sup> Given the nature of the criminal offence of rape, the “family status” of a perpetrator should instead be valued as an aggravating factor in deciding and imposing criminal sanctions, especially in cases involving an offence against a child or a family member, i.e. in cases when there is a relationship of confidence between the perpetrator and the injured party arising from friendly or family relations.

Any mention of “family status” in judgements should be contextualized by a precise explanation of the facts and should then be linked with the criminal offence at hand, for the purposes of imposing the sanction, and why it is valued as aggravating or mitigating in any given case must be laid out. Further, it should be emphasized that if the family status of a perpetrator is valued as mitigating, applying the legal phrases *personal circumstances* and *earlier life*, all negative consequences of the perpetration of the offence for the family of the perpetrator should be simultaneously valued as aggravating factors; these include the shame with which family members must live, the abuse of a spouse’s trust, the disruption of family harmony, etc. Only through such a thorough and balanced evaluation can the courts fulfil their legal obligation to consider *all circumstances that influence the sanction*.

#### 7.4. Expressions of remorse by the perpetrator

**Recommendation:** *A statement expressing remorse and apology by a perpetrator should not be valued as a mitigating factor if it is impossible to establish the components of that remorse. For remorse to constitute a mitigating factor, the defendant should demonstrate genuine, not only verbal, remorse in response to committing the criminal offence.*<sup>96</sup> *Depending on the facts of the criminal offence of rape in a given case, the court may value the “defendant’s remorse” as both mitigating and aggravating.*

Remorse is the *attitude* of the perpetrator towards their perpetration of the criminal offence, and is considered a circumstance of “the perpetrator’s demeanour following perpetration of the crime.” In practice, a “defendant’s remorse” is almost always valued as mitigating, and the explanations offered in judgements often equate confessions by perpetrators to expressions of remorse. In most cases, though, judgements mention only

<sup>95</sup> See: Judgement No. 80 0 K 0549 K of 16 February 2016, p. 3: “*The fact that the defendant... is a father of two children whom he supports and provides for their education was taken into account.*”

<sup>96</sup> Decision of the Supreme Court of the Federation of BiH No. 070-0-KŽ-07-000224 of 16 August 2007.



that the “defendant expressed remorse,” without specifying how this remorse was expressed or providing a basis for the conclusion that the perpetrator indeed feels remorse.

For example, in Judgement No. 80 0 K 0549\_\_K, the explanation of the sanctioning decision in a case in which the perpetrator signed a plea agreement (which was valued as a mitigating factor), notes that “*despite* the fact that he had not confessed earlier, the defendant now expresses remorse for the perpetrated criminal offence.” This explanation does not specify the nature of how remorse was expressed by the perpetrator and one can conclude that the court interpreted the defendant’s eventual confession as remorse.

The “defendant’s remorse” can be valued as a mitigating factor when objective circumstances and facts point to the conclusion that the perpetrator in a given case expressed true remorse, thus valuing his attitude towards perpetration of the crime. However, *confession itself should not be equated with “expressed remorse.”*

## 7.5. Confession

***Recommendation:*** *A defendant’s confession should be valued with extreme caution; the manner, and especially the time (i.e., the stage of the criminal proceeding), when a confession is given must be considered.*

Also, the reasons and motives behind a confession must be assessed thoroughly, so that the court can attribute the appropriate significance to it in deciding the type and seriousness of the sanction.

Confessions must include a certain substance in order to be considered a mitigating factor, and must have some repercussion on the presentation of evidence in the criminal proceeding. In other words, if the defendant confessed but there are also several eyewitnesses, or the perpetrator was found in the act of committing the offence, such a confession is not particularly important to sentencing. In the case of the criminal offence of rape, the stage at which a confession is given should be particularly considered, primarily in relation to when or whether the injured party gave a statement. If a confession is given during the investigation or at the plea hearing, or even at the main hearing before examination of the victim, such a confession can constitute a mitigating factor.

## 7.6. *Diminished mental capacity of the perpetrator*

**Recommendation:** *In all cases in which it is found (based on expert evaluation) that the ability of a perpetrator to understand the consequence of their act or to control their actions was diminished (due to mental illness, temporary mental disorder, developmental disability, or other severe mental condition), this should be valued as a **mitigating factor**.*

At the sentencing stage, the court first determines the degree of criminal liability/guilt of a perpetrator, and it particularly values mental capacity, which can be graded from full, to diminished and significantly diminished, to incapacity.

The institution of diminished mental capacity must be differentiated from significantly diminished mental capacity, which can also be a mitigating factor in sentencing unless the court decides to treat it as the basis for penalty mitigation.

Expert psychiatric findings often assess that a defendant perpetrated a criminal offence in a state of “diminished mental capacity, but not significantly diminished,” and explain the contributory reasons for such a state. A state of “diminished mental capacity” exists when the ability of a person to understand the consequence of their act or to control their actions is reduced as the result of mental illness, temporary mental disorder, developmental disability, or other severe mental disorder. The diminished mental capacity of a perpetrator decreases their degree of criminal liability (compared to perpetrators with full mental capacity), but *only if that state was not self-induced*. For example, if a perpetrator used alcohol, drugs, or other intoxicants and thus became unable to control their actions, it is unacceptable to treat this as a mitigating instance of diminished mental capacity.

## 7.7. *The attitude of the victim*

**Recommendation:** *The attitude of the victim **should not be relevant** when deciding sanctions for the criminal offence of rape.*

The attitude of a victim should not influence the court when deciding on sanctions for rape, as the sentencing right belongs to the court and it is a legal principle to impose a sanction proportionate to the gravity of the offence and in line with general sentencing rules. The nature of the criminal offence of rape is not such that the “victim’s attitude,” including a lack of desire for punishment of the perpetrator or an appeal to impose a stringent sanction, increases or decreases the social danger of the crime.



*It is especially important that a victim does not feel responsible for the sanction imposed.* It is not the victim who is responsible for establishing rape as an unacceptable social behaviour, but the rule of law, the criminal justice system, and the judiciary. Therefore, the burden of applying the law should lie fully with competent institutions, and not individuals, especially victims.

Criminal codes in BiH do not specify the “victim’s attitude” as a circumstance that should be considered by the court at the sentencing stage, unlike, for example the “degree of criminal liability,” the motive behind the offence, and more, as itemized in Article 52(1) of the CC RS.

In the context of the criminal offence of rape, the “victim’s attitude” should also not be classified under “other circumstances relevant for sentencing.” Given that the general sentencing purpose is to prevent offences that violate or jeopardize values such as “basic human rights and freedoms and other basic individual and general values established in the constitution and international regulations,” it is justified to ask if the “victim’s attitude” is relevant in that regard. In other words, can victims determine the importance of the protected object that was jeopardized through perpetration of the offence of rape and to what extent the perpetrator’s actions violated the protected object?

It should be emphasized as well that the “victim’s attitude” is determined much later, after the crime has been perpetrated. The responsibility of the perpetrator at the time of perpetration of a rape has nothing to do with the “victim’s attitude” (towards the perpetrator and the offence) later; and therefore, the “victim’s attitude” cannot influence the degree to which the protected good is violated through the criminal offence of rape, nor decisions on the type and seriousness of criminal sanctions against the perpetrator.

### **7.8. A perpetrator with a position of social power and authority**

**Recommendation:** *A position of social power and authority on the part of a defendant is valued as an **aggravating factor**.*

Holding positions of social power and authority can lead to the abuse of this power, which is why the assessment of these circumstances should begin by defining a defendant’s social power and authority. The social position of a person in a society determines their influence in that society; and a distinguished status, offering someone social prominence in a given community, affords that person great social power and the opportunity to influence certain social developments.

This kind of social position or status gives rise to an authority derived from social significance. In the eyes of many, such a person may be sacrosanct, a role model who is always believed and for whom all is forgiven. This is true of everyone from famous sportspeople to politicians. If such a person commits the criminal offence of rape, abusing their position of social power, this behaviour indicates a lack of moral and ethical principles.

The impact of the social power and authority of a perpetrator extends from the very moment the crime is perpetrated to the sanctioning stage. Thus, in every case, it is crucial to assess the extent to which a perpetrator has influence over a victim, and if this influence was used to intimidate or control the victim, as well as whether the social power of a perpetrator has impacted the procedures initiated against him. There is no doubt that such power creates inequities, which is why perpetrators mostly chose victims who can be intimidated or are dependent or unable to resist.

Due to the specific nature of the crime of rape, which may include the use of force, if the power or authority of a perpetrator had any influence over the victim during perpetration of the crime, it should be valued as an aggravating factor at the sentencing stage.

During the proceeding in a case of rape, the court should not only establish if the defendant used their social position to establish power and control over the victim in order to perpetrate the offence, meaning before and during the offence, but also whether this authority was exerted against the victim following perpetration of the crime. Indeed, situations in which a position of power and authority is used to create an opportunity for the perpetration of sexual violence against a victim are common, and this position may also be used afterwards to intimidate and threaten a victim to prevent her from reporting. In itself, this constitutes a prohibited behaviour, and when used to enable the perpetration of a crime, is certainly an aggravating factor.

Victims are often discredited when they allege a crime against a perpetrator with social status, as their truthfulness is put into question even by public opinion. Considering that rape is an offence usually perpetrated outside the view of eyewitnesses, the denials of perpetrators with social status are frequently believed, and the statements and injuries of victims are thus dismissed. Generally, society is more inclined to believe such a perpetrator than the victim.

For these reasons, we believe that a position of power and authority on the part of a perpetrator impedes the reporting of a crime of rape, because victims are aware of how the social position and positive public reputation



of a perpetrator can impact a case, including in the prosecution stages. If distrust is expressed by prosecution authorities towards a victim during the very first contact, this can generate questions about a victim's credibility, and can affect her self-confidence and lead to depression.

Importantly, when judicial institutions respond inadequately to cases involving alleged perpetrators with social power, they convey a message to the public that such people are untouchable and that their social position allows them to behave in ways others cannot. And yet, if we keep in mind that the level of social power and authority these individuals enjoy means that others view them as role models, an adequate response is *especially* necessary. In the context of sentencing for the criminal offence of rape, this means that the social position of a perpetrator should be valued as an aggravating factor, in view of the general prevention purposes of sanctions. The proper assessment of these circumstances as aggravating and the imposition of an appropriate sanction is as necessary as the punishment of the perpetrator, because it sends a clear message that even people in power are subject to criminal justice.

### **7.9. Drug and alcohol intoxication or addiction**

**Recommendation:** *The circumstance of drug and alcohol abuse by a perpetrator can be viewed through two lenses in the context of sentencing in cases of the crime of rape; first, in the context of the perpetrator's earlier life (as in an addiction extending from or ending before perpetration), or second, in the context of intoxication during perpetration of the crime. We believe that in either case, **this circumstance can only be valued as an aggravating factor.***

It is quite possible that a crime of rape may be committed by a perpetrator who was under the influence of alcohol and/or drugs at the time of perpetration but has no previous or long-term addiction problems. In such cases, this intoxication should be valued within the scope of the *circumstances of perpetration of the crime*. Although addiction issues in a perpetrator's earlier life would be considered under a different category per legislation, the difference between intoxication during the act and longer-term addiction issues should not be evident in sentencing, because the fact that a perpetrator is not or was not an addict but, under the influence of drugs and/or alcohol, forced another person into sexual intercourse, cannot be a positive predictor of future behaviour.

While it is true that persons under the influence of alcohol and/or drugs may have a somewhat limited comprehension of or control over their actions, and fewer inhibitions, this analysis is not focusing on the use of intoxicants resulting in such reduced awareness that it constitutes diminished mental capacity. However, even then, this is a self-induced state that is not caused by the activities of another person or by the victim; it would be logically unsustainable and socially unacceptable to value this circumstance as mitigating. Also, this is not an element of risk about which a perpetrator is believably unaware, because it is rather common knowledge nowadays that the influence of alcohol and drugs makes a person's behaviour unpredictable and difficult to control, and thus it seems unacceptable to value such circumstance in any way but as aggravating. Moreover, if a person perpetrated a criminal offence under the influence of drugs and/or alcohol and there is a danger they may repeat the same behaviour, and thus perpetrate another offence, the security measure of compulsory addiction treatment should be imposed.

### **7.10. The age of the victim**

When it comes to the age of victims<sup>97</sup>, in the context of the crime of rape, we must make a distinction between the basic form of the offence involving adult victims and the qualified form of the offence involving minor victims and children above the age of 15. Forced sexual intercourse with a child under the age of 15 is covered by another incrimination, and we will not deal with it here.

*Very young or very old age makes victims of rape more vulnerable*, and if a perpetrator exploits such a vulnerability, it is justified to value this factor as aggravating.

97 Article 46 of the Istanbul Convention defines the aggravating circumstances: Parties shall take the necessary legislative or other measures to ensure that the following circumstances, insofar as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sentence in relation to the offences established in accordance with this Convention:

- a. the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
- b. the offence, or related offences, were committed repeatedly;
- c. the offence was committed against a person made vulnerable by particular circumstances;
- d. the offence was committed against or in the presence of a child;
- e. the offence was committed by two or more people acting together;
- f. the offence was preceded or accompanied by extreme levels of violence;





In Judgement No. 06 0 K 005470 14 K 2 of 14 January 2015, in a case involving the qualified form of the criminal offence of rape of a juvenile, the Cantonal Court in Novi Travnik noted among other things that, *“the court then considered all aggravating and mitigating factors, including the perpetration of the crime of rape by the defendant against an underage girl, as particularly aggravating... Therefore, in this qualified form of the criminal offence where the victim’s age is a factor, the victim’s age can be valued as an aggravating factor, and a more stringent sanction can be imposed on the perpetrator within the legally prescribed limits of punishment for this qualified form of the offence.”*

We often value a “victim’s age” as a function of the *difference* in age between the perpetrator and the victim. One example from caselaw involves a 15-year-old victim who was 11 years younger than the 26-year-old perpetrator: *“For the criminal offence of rape referred to in Article 79(1) of the CC RS, the fact that the defendant perpetrated the offence against a girl who was only fifteen and a half, whereas the defendant was 26, i.e. 11 years older, constitutes a significant aggravating factor. Therefore, considering the fact that the offence was perpetrated in a small town, where the requirements of a general preventive effect are significant, the second-instance court finds that the sentencing purpose will not be fulfilled with the minimum period of imprisonment prescribed for this offence, and it has modified the sentence and imposed a longer prison sentence.”*

Cases involving a perpetrator who is much younger than the victim are frequent in practice as well (e.g., a case in which the perpetrator was 28 and the victim was 70 – Judgement No. 12 0 K 003358 12 of 7 May 2013; and a case in which the perpetrator was 33 and the victim was 64 – Judgement No. 11 0 K 01951916 K of 16 November 2017). This points to the motives behind the offence, in that the perpetrator took advantage of the vulnerability of an elderly victim. This, and circumstances in which the victim lives (whether they are disabled, live alone, or are related or known to the perpetrator, etc.) should be linked with the “victim’s age” and explained in the judgement. At the same time, *the victim’s age should be valued as an aggravating factor if the victim is elderly.*

We find cases in the caselaw of courts in BiH that are not harmonized regarding this issue. In some, the operative part of a judgement notes that the offence was perpetrated against a person of advanced age, but at the

g. the offence was committed with the use or threat of a weapon;

h. the offence resulted in severe physical or psychological harm for the victim;

i. the perpetrator had previously been convicted of offences of a similar nature.

sentencing stage, this fact is not sufficiently valued as an aggravating factor (e.g. Judgement No. 03 0 K 015254 16 K of 26 September 2016; the victim was 84). Yet, in others (e.g. Judgement No. 56... of 21 January 2016), the fact that “the defendant perpetrated the offence against an old woman in her eighties” is valued as an aggravating circumstance; and thus, the victim’s older age is explicitly specified as an aggravating factor.

### **7.11. Other circumstances of the perpetration of the offence**

These are circumstances beyond the elements constituting the body of the crime, including a wide range of very different circumstances, which is why they are difficult to foresee and determine in advance. These comprise the various conditions that accompanied perpetration of the crime but are not covered by other subjective and objective circumstances foreseen in sentencing provisions. In other words, what characterizes these circumstances is their heterogeneity, which arises from the defined legislative contour of *other circumstances*. This analysis is more or less based on the most frequent and common circumstances that can be classified in this group.

One should at least try to overcome difficulties with accurately systematizing these circumstances by acknowledging the details of the method of perpetration, time of perpetration, place of perpetration, and other accompanying circumstances of perpetration, both those that immediately preceded perpetration and those that existed at the time of perpetration.

In terms of the **method of perpetration** of the criminal offence of rape, caselaw (*which is present in decisions more than half a century old*) consistently includes in these “other circumstances” the perpetration of this crime in the context of **increased persistence of the perpetrator**, which has regularly and accurately been valued as an *aggravating factor*.

In Judgement No. 11 0 K 019519 16 K of 16 January 2017, the District Court in Banja Luka, valued as aggravating, among other things, the fact that the defendant “knew the injured party, that she lived alone, that he came to her house during the night and broke in through the basement window, using a wrench he brought with him, while she was asleep. Due to all this, the court concludes that the defendant perpetrated the offence in a perfidious way, *demonstrating persistence* in perpetration...”

The use of force or threat as an objective manifestation of the defendant’s behaviour is not valued as aggravating in these cases, but increased



persistence and focus on fulfilling the objective are, as subjective elements that exceed behaviour common to the method of perpetration. This is due to the simple fact that this increased persistence during perpetration of the crime points to an increased social threat posed by the perpetrator, and does not serve as a positive predictor of future behaviour.

Although closely related and often found to accompany increased persistence, the circumstance of **ruthless and cold-blooded behaviour** of the perpetrator does not necessarily occur together with the previous circumstance, and may also constitute an aggravating factor on its own in the context of perpetration of the crime of rape. The use of *persistence* points to a perpetrator's perseverance and determination; meaning, the perpetrator acts despite the victim's resistance. On the other hand, a perpetrator who is *ruthless* acts negligently, with no consideration for others, and this circumstance can be present independent of a perpetrator's persistence, because the body of the crime exists even without the victim's resistance. Such cases include instances when victims experience a severe emotional reaction in the midst of the crime being perpetrated, crying, pleading, and screaming, yet perpetrators cold-bloodedly proceed with commission of the offence nonetheless. It is justified to value this circumstance as an *aggravating factor* when deciding on a sanction, because such perpetrators pose a significant threat to the community.

Another circumstance related to the method of perpetration of the crime of rape, which has been valued as aggravating by courts, is **premeditation**, characterized in older court decisions as acting *after mature thinking*. This circumstance is also correctly *valued as aggravating*, because it indicates the strong criminal will of the perpetrator, who has prepared for the offence for a long time, carefully designing a precise action plan and selecting a victim. Such perpetrators have exit strategies, or plans of what to do if things go wrong, and they engage in perpetration of the offence with a higher level of determination, readiness, and desire to fulfil their goal.

The **place and time of perpetration of the offence** are usually linked inseparably, and both legal theory and court practice have consistently valued spatial and temporal circumstances that facilitated a perpetrator's plan as *aggravating*; often, crimes are committed at night, in closed and small spaces, such as a car, where it is hard to break free, or after driving to neglected, hardly accessible, and unpopulated areas such as forests.

In addition, legal theory itemizes the following aggravating circumstances: perpetration of crime during natural disasters, during war, in a cruel and arrogant way, etc. This is also a correct evaluation, because these situations

facilitate the perpetration of crime and indicate the strong perfidiousness of perpetrators, who pose an increased threat to the community.

While the circumstances mentioned here could be seen as more or less the usual components of the method of perpetration, along with the time and place, a range of other circumstances could be listed as “other circumstances,” too. For instance, **the perpetration of crime in the presence of family members or other persons** can be valued as aggravating. This is quite justified because it significantly increases the emotional consequences for victims. When interpreting these circumstances, it should first be established whether they can be classified as a qualifying factor of the offence of rape, such as perpetration of rape in a particularly cruel manner, or in a particularly degrading manner. *It is only if such circumstances cannot be classified as qualifying that should they be interpreted as aggravating.*



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## Excerpts from reviews

The Panel participants share the view that it is unacceptable that the same circumstances are mentioned as mitigating in all criminal offences, regardless of their nature or character of the protected good, although those circumstances are not functionally associated with the perpetrated criminal offence (e.g. financial status or family circumstances in case of rape crimes). Template explanations, without judicial creativity or daring based on the law, are present in a large number of judgements that were examined by this Panel. Therefore, Panel participants believe that it is necessary to change the court practice in this field, in order to pay much more attention to the explanation of the sentence, so that any reader, not only the victim, has a clear idea about circumstances that made the court decide on the concrete sanction. In that sense, it is emphasized that it is necessary to specify contents of each aggravating and mitigating factor when valuing them (instead of just listing them, e.g. family circumstances, without a specific analysis of this factor and evaluation of its importance and correlation with the offence and sentencing. In view of the above, I think that this Handbook will be significant resource for court practice in Bosnia and Herzegovina which, when used in court proceedings involving the criminal offence of rape, can provide insight not only in case law of other courts, but also in all potential psychosocial consequences of rape for the victim and her future life. Such a comprehensive approach to this issue will result in a more acceptable evaluation of all circumstances relevant for reviewing of severity of the rape crime and the degree of perpetrator's criminal liability, which will eventually result in a more adequate sentencing policy of courts for the criminal offence of rape.

*Prof Dr Miloš Babić, judge of the Court of Bosnia and Herzegovina*

In view of the severity and complexity of the rape crime and other criminal offences against sexual freedom from the perspectives of theory, national legislative activity, international human rights law and law practice, this Handbook is of particular value because it brings current theory viewpoints, discussions, opinions, recommendations and case law examples involving rape crimes, its perpetrators, victims, the community and criminal justice system. The authors' intention to cover "all important issues" for consideration of the rape crime in case law in Bosnia and Herzegovina in one place was a success, which is why the publication of this Handbook

represents a new step and contribution to the recognition and understanding of the rape crime and other criminal offences against sexual freedom, sentencing of perpetrated criminal offences, medical treatment of psychological trauma after rape, and especially to bringing closer of these and other related issues to the scientific and professional public. But these are not the only advantages offered to the Handbook reader. The deepened scientific and professional research of the rape crime, and multidisciplinary ways of shedding light on the related complex issues are coloured by authors' aspiration to review requirements with regard to prosecution of this criminal offense and the related sentencing policy of courts, each author from their own aspect.

*Prof. Dr Hajrija Sijerčić-Čolić, Dean, Faculty of Law of the University of Sarajevo*







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