



IUS LAW JOURNAL

Journal of the Faculty of Law of the
International University of Sarajevo

Volume III, Issue II

2024



Volume III

Issue 1I

2024

IUS Law Journal

Journal of the Faculty of Law of the International University of Sarajevo

Special Issue

e-ISSN 2831-0039

PUBLISHER

International University of Sarajevo

EDITOR IN CHIEF

Assoc. Prof. Dr Ena Kazić - Çakar

EDITOR

Assist. Prof. Dr. Kenan Ademović

MANAGING EDITOR

Assist. Prof. Dr. Hana Šarkinović-Köse

ENGLISH LANGUAGE CONSULTANT

Assist. Prof. Dr Vesna Suljić

DESKTOP PUBLISHING ADVISER

Assist. Prof. Abdulhamid Bolat

DESKTOP PUBLISHING

Muhemmed Hüzeyfe Küçükaytekin, MA

EDITORIAL BOARD

Prof. Emeritus Opoku Agyeman, Department of Political Science, Montclair State University, NJ, United States

Prof. Dr. Mahmut Yavaşı, Faculty of Law, Social Sciences University of Ankara, Turkey, Turkey

Prof. Dr. Aleksandra Vasilj, Faculty of Law, Josip Juraj Strossmayer University of Osijek, Croatia

Prof. Dr. María Del Mar Martín Aragón, Faculty of Law, University of Cadiz, Spain

Prof. Dr. Mohamed Elewa Badar, Northumbria Law School, Northumbria University, United Kingdom

Prof. Dr. Zoran Pavlović, Faculty of Law for Economy and Justice in Novi Sad, Serbia

Prof. Dr. Yvette M. Alex-Assensoh, University of Oregon School of Law, Eugene, OR, United States

Prof. Dr. Joseph A. Balogun, School of Health Sciences, Chicago State University, Chicago, Nigeria

Prof. Dr. John Mukum Mbaku, Department of Economics, Weber State University, United States

Prof. Dr. Zarije Seizovic, Faculty of Political Sciences, University of Sarajevo, Bosnia and Herzegovina

Prof. Dr. Aliye Fatma Mataraci, School of Social Sciences Arts and Humanities, Al Akhawayn University, Morocco

Prof. Dr. Emir Sudžuka, Faculty of Law, University of Vitez, Bosnia and Herzegovina

Prof. Dr. Robert Tabaszewski, Faculty of Law, John Paul II Catholic University of Lublin, Poland

Prof. Dr. Ena Kazić-Čakar, Faculty of Law, International University of Sarajevo, Bosnia and Herzegovina

Prof. Dr. Emir Kaya, Social Sciences University of Ankara, Turkey

Prof. Dr. Wasiq Abbas Dar, Jindal Global Law School, O.P. Jindal Global University, India

Prof. Dr. Ajla Škrbić, Free University Berlin, Germany

Assist. Prof. Dr. Kenan Ademović, Faculty of Law, International University of Sarajevo, Bosnia and Herzegovina

Prof. Dr. Boris Praštalo, Law School, Brunel University, London, United Kingdom

Assist. Prof. Dr. Mohd Wazid Khan, Glocal Law School, Glocal University, Uttar Pradesh, India

Dr. Anna Matczak, Hague University of Applied Science, Netherlands

Dr. Tareq Hamid Al-Fahdawi, Macquarie University, Sydney, Australia

ABOUT JOURNAL

The IUS Law Journal (e-ISSN 2831-0039) is a scholarly legal publication of the Faculty of Law at the International University of Sarajevo (IUS). It serves as a platform targeting largely legal scholars, legal practitioners, FLW students (specifically graduate students in the last leg of their studies), and non-lawyers. It is a robustly blind, open-access, peer-review journal published biannually in English, the language of instruction at IUS. The journal is designed to explore issues relating to Bosnian public and private laws along with lessons for other jurisdictions, irrespective of legal tradition (civil or common law) or democratic status (young or established), in a contemporary world marked by the migration of legal ideas and concepts.

CORRESPONDENCE IUS LAW JOURNAL

Faculty of Law International University of Sarajevo

Hrasnička Cesta 15, 71210 Ilidža, Sarajevo Bosnia and Herzegovina

Email: iuslawjournal@ius.edu.ba

IMPRESSUM IUS LAW JOURNAL

Publisher: International University of Sarajevo

Editor-in-Chief: Assoc. Prof. Dr. Ena Kazić - Çakar

e-ISSN 2831-0039

Copyright © 2024 by International University of Sarajevo All rights reserved. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means without the prior written permission of the Publisher. Opinions, interpretations, and ideas expressed in this book belong exclusively to its authors, not to the editors and their institutions.

Note from the Editor in Chief

Dear Reader,

This Special Issue of the Journal is presented to you following the successful Master Conference held in May 2024 at the Faculty of Law of the International University of Sarajevo, named „Challenges and Perspectives of the Contemporary Law“. The conference featured insightful presentations, and the presenters were subsequently invited to submit papers for inclusion in this Journal. These papers underwent a rigorous double-blind peer review process to ensure their academic integrity and quality. The first section of this issue showcases scientific contributions from the Master Conference. A diverse array of thought-provoking topics were addressed, and the papers offer promising recommendations in various areas of law. As Editor-in-Chief, I sincerely hope that the findings and insights presented in this section will further benefit society and contribute to the resolution of legal challenges across different legal domains.

The second section of the Journal comprises papers submitted through the regular admission process, independent of the Master Conference. These papers, distinguished by their quality and the significance of the topics they explore, are also expected to make a substantial contribution to the academic discourse and have a meaningful impact on the field of law.

Enjoy reading!

Sincerely,

Prof. dr. Ena Kazić Čakar,

Editor in Chief.

CONTENTS

SECTION I

Sara Abdülkerim-Osmanović	
REHABILITATION OF CONVICTS IN CRIMINAL LAW	9
Emina Dizdarević	
DIASPORA AS A GENERATOR OF FOREIGN DIRECT INVESTMENT	25
Amra Karadža	
JUDICIAL INDIVIDUALIZATION DURING JUVENILE PRISON SENTENCE	36
Lejla Softić	
PROTECTED WITNESSES	52
Elif Tanrıverdi	
BUSINESS ENVIRONMENT AND ITS IMPACT ON ATTRACTING FOREIGN DIRECT INVESTMENT	63
Salora Turkmanović	
TRANSITIONAL JUSTICE AND GENDER	73

SECTION II

Kenan Ademović	
EUROPOL'S FUNCTION IN BOSNIA & HERZEGOVINA AND ITS ROLE IN THE EUROPEAN UNION	89
Asim Jusić	
THE BLOCKCHAIN DATA GATEKEEPERS LIMITED LIABILITY FOR VIOLATIONS OF THE GDPR	103
Emir Sudžuka, Irfan Osmanović	
EXTENDING THE SCOPE OF CONSUMER PROTECTION TO LEGAL ENTITIES: PROSPECTS FOR THE EU CONSUMER <i>ACQUIS</i> AND CONSUMER LAW IN BOSNIA AND HERZEGOVINA	118

REHABILITATION OF CONVICTS IN CRIMINAL LAW

*Sara Abdülkerim-Osmanović**

Abstract

Rehabilitation plays a crucial part in order to serve the criminal justice. Without a doubt it is very important dimension for Human rights. Unlike punitive justice, it aims to address the root reasons of crime and giving chance of personal development and social reintegration for the convicts. Rehabilitation as a approach doesn't believe that the punishment is the only measure in criminal law for serving justice and preventing the future crimes. It is a long-term plan for the safer society. It has its advantages and disadvantages when it comes to criminal law. Even though it is a part of the criminal justice system, it might be also crashing with it. This manuscript will present how rehabilitation works and it may help the convicts and the society with lowering the recidivism. Moreover, its methods and steps and legal practices will be analyzed in this manuscript.

Keywords: Recidivism, criminal justice, integration, convict

* Sara Abdülkerim-Osmanović, Master of Law, PhD Candidate at University of Vitez, Legal advisor and translator at EUFOR, Bosnia and Herzegovina. Contact: saraabdulkerim01@gmail.com.

1. INTRODUCTION

The process of re-educating and preparing persons who have committed a crime to re-enter society is known as rehabilitation. (Elisha, 2021) The legal meaning of rehabilitation is “the use of rehabilitative approaches rather than punishment to handle criminals in the prison system. Rehabilitation criminal justice focuses on assisting offenders in understanding their mistakes and preparing them to re-enter society as rehabilitated individual” (Elisha,2021).

According to the Panel on Research on Rehabilitative Techniques, “*Rehabilitation is the result of any planned intervent, on that reduces an offender’s further criminal activity, whether that reduction is mediated by personality, behavior, abilities, attitudes, values, or other factors. The effects of maturation and the effects Summary 5 associated with fear or intimidation are excluded, the results of the latter having traditionally been labeled as specific deterrence.* Moreover, Duff (2005) divides rehabilitation in two categories: Therapeutic Rehabilitation and Moral Rehabilitation. First one, Therapeutic Rehabilitation basically refers to restoring a condition of well-being that an individual has been deprived of. It implies that the individual has lost particular capacities such as physical, psychological or social. In that case rehabilitation aims to restore it. Secondly, as some other researches he argues that rehabilitation is a moral education for the convicts(Duff, 2005).

From all these approaches we can say that rehabilitation, rather than the punitive justice, aims to address the root causes of crime, reintegrate perpetrators into society, and mainly prevent future crimes. This approach is grounded in the belief that merely imposing punishment is insufficient (Diego, 2023). Instead, rehabilitation programs emphasize a more enduring and preventative approach, aiming to deter future criminal behavior by addressing underlying issues and with that lower the recidivism. Instead of just locking people up in crowded prisons, we should focus more on helping them change for the better. This means using programs that actually work, like treating drug addiction, providing mental health support, offering job training, and education. By dealing with the real reasons behind criminal behavior, we can give individuals a chance to get back into society as productive members (Diego, 2023).

As proposed in the holistic approach to criminal justice reform, rehabilitation is a critical pillar in shifting the system away from punitive tactics and toward proactive alternatives. The emphasis is on offering real possibilities for personal growth to individuals as well as addressing the underlying conditions that contribute to criminal behavior (Diego, 2023). By emphasizing rehabilitation over incarceration, the emphasis moves to evidence-based services such as drug treatment, mental health counseling, job training, and education. These projects seek to provide persons with the necessary skills and support networks to successfully reintegrate into society as productive citizens. Rather than just locking people up, the method emphasizes the necessity of creating a rehabilitative environment that

promotes personal development, healing, and addressing the underlying causes of criminal behavior.

Rehabilitation in the criminal justice system focuses on reintegrating offenders into society and avoiding recidivism and also understanding that incarceration does not address the root reasons of crimes. Aims of Rehabilitation of Convicts section outlines the goals of rehabilitation, with a focus on programs such as education, job training, and psychological assistance to improve prisoners' social and economic reintegration process. The Concept of Rehabilitation section covers history of rehabilitation, illustrating its growth from reform to a process aimed at behavioral change that does not rely on punitive deterrence. International standards acknowledge rehabilitation as a human right and stressing respectful treatment for inmates and their reintegration into society. However, ex-convicts often face with stigma, which challenges their reintegration and access to rights like as employment, housing and etc. Successful Rehabilitation and Programs examines rehabilitation programs which its international standards by emphasizing three essential principles: evidence-based techniques, cost-effectiveness, and a focus on high-risk offenders, all of which enhance the possibility of recidivism reduction.

Normative method which analysis of positive law provision, descriptive method which used to describe main terminology and institutes and comparative method used in this article.

2. AIMS OF REHABILITATION OF CONVICTS

One of the purposes of the criminal justice system is to reintegrate released convicts into society. Furthermore, the jail population is growing as a result of rising recidivism rates(Gideon, 2011). That's why it is necessary to find and apply other preventive functions in order to prevent the crime. Imprisonment itself is not enough to do it, because recidivism rate is still high as mentioned previously, and not even enough capacity for all the convicts.

So, rehabilitation programs such as education, teaching job skills, financial and psychological support once they are released and etc. are intended to minimize recidivism among incarcerated individuals by improving their habits, abilities, mental health, social functioning, and access to education and jobs. They may get involved in rehabilitation programs at various stages throughout their interaction with the criminal justice system, and programs are often administered in connection with some type of sanctions (Cheah, 2020).

Treatment strategies based on behavioral and social learning theories of change are commonly used in effective rehabilitation programs. Rehabilitation also attempts to educate and support people. To avoid recidivism, the program should be constructed in such a manner that the well-being of the convicts after serving a term in jail is taken into account. Inmates' perceptions of what is normal change as a result of rehabilitation. Drug and substance misuse crimes are among them (Cheah, 2020).

3. CONCEPT OF REHABILITATION

Rehabilitation of convicts has a long history which started in eighteenth century (Robinson & Iain Crow, 2009). However, defining rehabilitation is difficult due to various interpretations. It can be viewed as a general objective as well as a set of practices. Complicating matters are several related concepts, such as 'reform' and 'redemption,' some of which have historical roots and others that are more recent, such as 'reintegration' and 'resettlement.' What we see as in these terms is the 're' prefix is shared by these phrases, suggesting a return to a prior state. A broad definition associates rehabilitation with 'restoration,' implying a return to a desired previous state. In medical terms, rehabilitation is the process of returning a person to normalcy following physical damage (Robinson & Iain Crow, 2009). So, from this understanding when we look from the law perspective, this also the healing process for convicts. Only difference is, the rehabilitation of convicts doesn't try to fix physical damages but it is trying to remove the harm as physiological and sociological (Duff, 2005). To facilitate the rehabilitation of a broken arm, it must undergo treatment, and the underlying causes of the fracture need to be addressed. Similarly, for the convicts to undergo radical healing, it is essential to eliminate the factors that drive them to commit crimes, implement necessary programs, in order to prevent future crimes, and foster a peaceful societal environment.

In the concept of rehabilitation, there is no place for fear or intimidation even though it is very necessary for deterrence (Sechrest et al., 1979). Fear has an important role over the crimes in order to prevent it. Criminal law aims to spread fear for the criminals by giving punishment in so they won't commit a crime. Even though some research and results actually prove it otherwise (Omorieg,2018). In that point, concept of rehabilitation rises up different from the deterrence a traditionally fear and crime method. This exclusion suggests a deliberate focus on interventions that go beyond punitive measures, aiming for a more holistic transformation in the offender (Omorieg,2018). So, the whole idea is that rehabilitation is a purposeful and planned process especially for long-results with the overarching goal of diminishing an offender's inclination toward further criminal activities. By addressing and modifying various aspects of the individual, rehabilitation main goal is the reduction of recidivism as the preventive functions in criminal law (Sechrest et al., 1979).

3.1. Rehabilitation vs. Retribution

Retributivism is a philosophy of criminal punishment that holds that wrongdoers should be punished in proportion to the severity of their crime, rather than to discourage future crime or to rehabilitate them (Cornell Law School, Retributivism).Retribution discourages future criminal behavior by reducing the desire for personal vengeance against the convict (eLearning Support Initiative, 2015). Not only the vengeance but it can be sometimes an apology. When victims or society learn that a convict has been sufficiently punished for a crime, they gain a sense of satisfaction that our criminal justice system is functioning properly, which increases trust in law enforcement and our government.

Rehabilitation alters a convict's conduct, so preventing future crime. Educational and vocational programs, placement in treatment centers, and counseling are all examples of rehabilitation (eLearning Support Initiative, 2015).

When we look at the definitions which mentioned previous paragraph, both rehabilitation and retribution are part of criminal justice system. They have the same goal as the prevent future crimes with their own methods and approaches.

There are different approaches which scholars discuss in this regard. First one how rehabilitation should move to the retribution (Fennell, 1982). Because the legal system is preoccupied with rehabilitation, there is a lack of punishment for criminals, which contributes to the expanding crimes. To successfully handle the issue of crime, the criminal justice system should prioritize punishment and retribution is the best way to do it. Victims have a right to see perpetrators punished, and failing to do so is a terrible injustice. The notion of changing the cost-benefit ratio of crime is introduced, with the suggestion that increasing the perceived cost of illegal behaviors by rapid and severe punishment may dissuade future crimes (Fennell, 1982).

On the other it is important to discuss that how rehabilitation and retribution works together (Harrison, 2020). The combination of retribution and rehabilitation may be the most successful approach in order to reduce the crimes and help for convicts and the victims. As part of a holistic approach to controlling criminals, restorative justice might be included with retribution and rehabilitation. In short terms, retribution entails the punishment of criminals as a sort of society payback or moral retribution. In contrast, rehabilitation focuses on changing convicts in order to avoid future criminal activity. With that way criminal justice system can serve its purposes from the victims and the convicts side (Harrison, 2020).

3.2. Social Defence Motion

Depending on the context, the phrase "social defense" can have a variety of connotations. In general, social defense refers to a method or collection of actions used by a community to protect itself against external dangers (Ancel, 1965). In the context of criminal law, social defense might refer to societal techniques and procedures for preventing or responding to criminal activity. The protection of society from crime achieved by the forceful repression of crimes committed is referred to as social defense. This viewpoint resulted in extremely harsh punishment. This perspective establishes an opposition between collective defense and individual freedom or rights. According to this viewpoint, if social defense tries to provide ultimate safety for society, it may do so at the price of individual rights (Ancel, 1965).

Social defense is a modern and comprehensive view of how society confronts actions and persons that threaten the reasonable dynamics of the community. Laws are seen necessary under this framework for identifying the qualities and restrictions of conduct that endanger people's lives, property, and rational use of freedom. The goal of these legislation is

not punitive, but rather to use restrictions over infringing conduct based on the intrinsic threat to society. Rehabilitation is important to the approach to offenders, emphasizing the need to assist persons in reintegrating into society while providing proper restrictions to prevent hazardous activities from being repeated (Ancel, 1965).

4. REHABILITATION AND HUMAN RIGHTS

There are many international sources which ground for the international standards for the rehabilitation as a part of human rights. These sourced as following: Basic Principles for the Treatment for Prisoners of United Nation of Human Rights , the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, European Prison Rules (Luyt & Preez, 2006). UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (UN Bangkok Rules) , International Covenant on Civil and Political Rights are also example of the international sources which are dealing with the rehabilitation and convicts reintegration process (Rehabilitation and Reintegration: International Standards, n.d.).

According to the Basic Principles for the Treatment for Prisoners of United Nation of Human Rights office of the High Commissioner¹: “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings” and “All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.” (United Nations, 1990). We understand from the first statement that it emphasizes the concept that regardless of a person's conduct or legal circumstances, they have intrinsic human dignity that must be recognized and protected.

Respecting prisoners entails ensuring that they are not subjected to harsh or humiliating treatment and that their fundamental human rights are respected. This policy seeks to avoid abuse or mistreatment of those in custody. Second statement emphasizes the necessity of giving chances for personal and intellectual growth to convicts while they are incarcerated. Cultural activities are chances for inmates to participate in activities that are relevant to them, such as artistic or religious activities. This helps them stay connected to their ethnic identity. The right to education stresses that convicts should have access to educational programs that help them develop as individuals. This might involve intellectual, vocational, or rehabilitative education geared on reintegrating individuals into society (United Nations, 1990).

¹ Basic Principles for the Treatment of Prisoners : resolution / adopted by the General Assembly. Desiring to reflect the perspective noted by the 7th Congress on the Prevention of Crime and the Treatment of Offenders, namely that the function of the criminal justice system is to contribute to safeguarding the basic values and norms of society; recognizing the usefulness of drafting a declaration on the human rights of prisoners; affirms the Basic Principles for the Treatment of Prisoners, contained in the annex to the present resolution, and requests the Secretary-General to bring it to the attention of Member States.

Overall, these principles are represented in a number of international human rights agreements, notably the UN Standard Minimum Rules for the Treatment of Prisoners. The purpose is to guarantee that persons are treated with kindness even when incarcerated, supporting their rehabilitation and reintegration into society while preserving their basic human rights and dignity (United Nations Office on Drugs and Crime, 2016).

When we observe at Rule 25, 59, 88, 90, 96, 102, 107, 122 of Mandela Rules which known as UN Standard Minimum Rules for the Treatment of Prisoners, cover the importance rights of rehabilitation for convicts. Not only when they are in prison but also after they released (United Nations Office on Drugs and Crime, 2016). As we understand from all these international standards for the convicts, the rehabilitation is a part of fair treatment and human right. Convicts are also human and they have a right be treated as human. That might be the one of the most efficient way of healing process and it can save them from wrongdoing.

Ideas about rehabilitation of convicts have often been inspired by humanitarian concerns: that is, with the goal of humanizing the criminal justice system and making the experience of criminal punishment more positive and productive for the offender (Robinson & Iain Crow, 2009).

It is necessary to ask how persons within the retributive method, who complete their term and repay their responsibility to society after being acquitted, have difficulty achieving their human rights. Unfortunately, even though retribution and rehabilitative approach gives a chance for convicts to be part of society and use their human right, it is not always that simple. One of the biggest challenges they face with is a stigma which effects to find a job, regain their place in society and etc. As every individual, ex convicts have all these rights yet it is not easy to achieve it (Palgan & Apolinario, 2022). We can look this approach differently, one from the convict's side and the other is from the society. From the, criminology and penology approach it is clear that after they serve their time, ex offender should enjoy all the rights as much as every other individual when they back to the society. But, it is hard to change people's perspective and stigmas over the convicts which won't allow them easily to reenter back to the society and live the normal life they may imagine.

5. EFFECTIVE REHABILITATION AND PROGRAMS

If a rehabilitation program follows three key principles, it is more likely to reduce recidivism. Firstly, the program should be "evidence-based," which means it should be modeled after a proven program that reduces recidivism and operate in the same way. Second, the program's cost effectiveness should be assessed. Third, the program should prioritize high risk and high need inmates because they have the greatest potential to reduce recidivism (Legislative Analyst's Office, 2017).

The effective programs are those that match the intervention to the needs, circumstances, and learning styles of individuals. Successful rehabilitation is dependent not

only on the type of treatment provided, but also on the conditions under which it is provided (Howells et al., 1999).

Moreover, selection of offender, skills oriented, engagement and motivation and evaluation have big places in order to provide efficient rehabilitative programs for convicts (Lipton et al., 2000).

5.1. Sexual Offender Programs

There are different types of crimes and convicts. That's why there are varieties of rehabilitation programs. Even though the key elements are mostly the same, as mentioned previous part, for the effective programs there should be different methods and outcomes for each single crime and offender. There are punishments such as retribution, detention and etc. for sexual offender in criminal law. As the other methods rehabilitation is one of the main preventive functions (Coghlan, 2003).

When we look from the rehabilitation theorist's perspective, we see that they support incapacitation of convicts in order to address their mental problems, diseases, or proclivity for criminal action. The goal of rehabilitation is to change the offender's beliefs and tendencies toward criminal activity. They believed that the danger connected with sex offences can be reduced with an effective diagnosis and the adoption of therapeutic and clinical measures. In other words, rehabilitation theorists claim that sex offenders may be effectively treated and changed with focused treatments that address the underlying issues that contribute to their criminal behavior (Coghlan, 2003).

Polaschek examines three prominent theories of sexual offending. Malamuth and colleagues' initial hypothesis highlights the confluence of motivational, inhibitory, and opportunistic elements for sexual aggressiveness. According to this approach, treatment entails addressing individual motivational factors in order to lessen desire in abusive sexual conduct. Another theory of Marshall and Barbaree's, putting importance of the function of empathy and intimate connection challenges in generating sexual misconduct. The main emphasizes of this model is the impact of adversity on man, which leads to a lack of confidence, empathy, and relationship skills. So, this theory tries to increase empathy and accountability. It is essential for convicts to understand consequences of sexual assault on victims. The third theory which is very important comes from Hall and Hirschman. They mainly focus on physiological arousal, cognitions justifying aggression, affective decontrol, and developmentally deprived personality problems which also helps for convicts to understand his misbehavior with the therapy in order to give them the realization and responsibility of their crime (Day & Howells, 2000).

Overall, the outcome of all these theories is the necessity of considering motivational, developmental, and psychological elements when developing effective treatment programs for sexual offenders. To reduce the recidivism, these may include

improving social and interpersonal skills, changing aberrant arousal patterns, and cultivating empathy.

According to evaluations of sex offender treatments, programs help for the reducing the recidivism (Day & Howells, 2000). For example, cognitive behavioral therapy and community based treatment programs lower the sexual offence which committed by high-risk sexual offenders. (Newhouse, 2023)

5.2. Drug Abuse and Addictions Programs

The link between drugs and crime has a long history, is frequently documented in media reports, and is the subject of much scientific research. Drugs can be linked to crime if they induce a mental or physical condition favorable to lawbreaking, create a perceived need that motivates people to steal, or result in a decrease in access to formal mediation and an increase in predatory and retaliatory crimes (Wright & Jacques, 2017).

Addiction has a cure and it is a disorder which can be treatable. But, unfortunately most people who is addict, do not get the treatment. As it mentioned previously, there is a strong link between drugs and the crime. That's why it is very important to search this link and give the essential treatment for the convicts who commit crimes because of their addiction. Involvement in the criminal justice system is frequently the outcome of illicit drug-seeking behavior and engagement in illegal actions, both of which reflect disordered behavior caused by brain alterations caused by recurrent drug use. Treatment of drug-addicted criminals offers a unique chance to minimize substance usage and related criminal conduct (Chandler et al., 2019).

Statistics show that jail alone is ineffective in managing drug misuse or addiction. A study of recidivism in 15 states discovered that one-quarter of those released returned to jail within three years for technical offenses such as testing positive for drug usage, among other things. Despite their highly organized, controlled environments, illicit substances are used in jails and prisons, but even enforced abstinence might lead criminal justice professionals and addicted individuals to underestimate the vulnerability to relapse post incarceration. On the other hand, over the last two decades, research has repeatedly demonstrated the positive impacts of drug misuse treatment in the criminal justice system. Therapeutic alternatives to incarceration, therapy combined with judicial monitoring in drug courts, prison- and jail-based therapies, and reentry programs designed to assist offenders in transitioning from incarceration back into the community are among the interventions available (Chandler et al., 2019). In short term, imprisonment itself is not enough in order to prevent future crimes for the addicts. It might be the solution for the current time, since they cannot use the drugs while serving their time in prison but for long-term solution, rehabilitation is essential. Because, rehabilitation programs can help to move the core reason of using the drugs and treat the addicts. With that the convict can have healthier life and become a law-abiding citizen. This is not help for only the individuals but also very important for the safe and secure society.

5.3. Rehabilitation of Juveniles

May be the one of the most important category and programs for rehabilitation is for juveniles. Their jurisdiction is different than the adults because they are still a child who under the age of 18 by law. That's why its more sensitive and important. Rehabilitating juveniles are very essential and critic. On the other hand, for the public safety and accountability, they should be also under the criminal justice. In short words, Juveniles who break the law face consequences for their behavior and in order to guarantee public safety, they are placed in juvenile homes or penal facilities. The approach to juvenile offenders that emphasizes rehabilitation rather than harsh punishment (Dhingra, 2019). The purpose of the juvenile justice system is to offer a separate and distinct system of justice for juveniles, where young offenders can get the assistance and support they need to become productive members of society (Juvenile Offenders and the Ability for Rehabilitation: Understanding the Issues and Challenges, 2023). So, the main goal under this approach is not just to punish juveniles but actually rehabilitate them. This is a multifaceted approach that takes into account psychological variables, therapeutic treatments, skill development, and participation in positive activities. The participation of social workers and non-profit groups aids in overcoming budgetary limits, ensuring that rehabilitation programs are both accessible and successful (Dhingra, 2019).

There are challenges as much as the benefits when it comes to the rehabilitation of juveniles. The main challenges are lack of sources and support, stigmas, discrimination, effective methods and programs and etc. Rehabilitation programs need to have a good resource and strong funds in order to provide effective services for the juveniles. Education, psychological support and treatment are essential for juveniles rehabilitation and in order to make it effective funds in this programs by the state and organizations are very much needed. After proper rehabilitation programs unfortunately like the any other convicts, juveniles are also facing the stigma and discrimination by the society. This might be the biggest challenge for them. This stigma, discrimination and lack of support once they released can affect whole their life. It can start from school to working place once they start working. Because, they were in the criminal justice system, their teachers, bosses, other students or colleagues can be prejudiced and discriminatory. This is a big wound in our society not only for juveniles but for also any other convicts. Unfortunately, rehabilitation of convicts doesn't also rehabilitate the other people in order to help for convicts to reenter back to the society (Juvenile Offenders and the Ability for Rehabilitation: Understanding the Issues and Challenges, 2023). Changing people's perspective is harder than the splitting an atom. Because, it is based on many years of experience, religion, culture and individuals' morals. But, it doesn't mean that we shouldn't try to change this. For a strong and effective educations and programs for the society, it might me change at least on some people and by the time these efforts can actually answer back.

5.3.1. The Beijing Rules

Many countries have expressed worry about the increased prevalence and severity of juvenile delinquency. It is critical not only to avoid delinquency by judicial measures, but also to defend the well-being and rights of all adolescents who are in dispute with the law. Under the auspices of the United Nations, the approach to juvenile delinquency, administration of juvenile justice, and protection of the young has experienced a progressive development of thinking and action (Juvenile Justice, 1985).

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) were adopted on 1985 by the General Assembly. They offer advice on the administration of juvenile justice, highlighting the importance of a juvenile justice system centered on the rehabilitation and reintegration of young offenders (Juvenile Justice, 1985).

Article 5 of The Beijing Rules refers to two of the most significant goals of juvenile justice. The first goal is to promote the well-being of juveniles. This is the primary focus of legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the juvenile's well-being should also be emphasized in legal systems that follow the criminal court model, helping to avoid merely punitive sanctions. "The principle of proportionality" is the second goal. This theory is well-known as a tool for reducing punitive punishments, which are typically articulated in terms of fair desserts in relation to the degree of the offense. The reaction to juvenile offenders should take into account not just the seriousness of the offense but also the offender's personal circumstances (United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules") , 1985).

5.3.2. Riyadh Rules

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) is one of the most important legal sources in order to provide international standards for the juveniles within the scope of criminal justice. Declares that the rules should be understood within the context of human rights, particularly declarations and covenants concerning the rights and well-being of children and young people (General Assembly, 1990).

The goal of these recommendations is to provide a comprehensive and integrated strategy to preventing juvenile delinquency by addressing fundamental causes, encouraging positive development, and protecting young people's well-being. The recommendations seek to establish a supportive environment that fosters the effective socialization and integration of all children and young people by stressing a child-centered approach and incorporating families, communities, and educational institutions. The emphasis is on prevention, rehabilitation, and general development of young people in order to create a peaceful and crime-free community (General Assembly, 1990).

5.3.3. Tokyo Rules

United Nations Standard Minimum Rules for Non-custodial Measures which also known as Tokyo Rules adopted by United Nations on 1990 (United Nations, 1990). They are a significant worldwide standard for encouraging the use of non-custodial remedies and punishments, with the ultimate goal of reducing the harmful effects of incarceration on both offenders and society. The regulations specify minimal safeguards for persons subjected to alternatives to incarceration and give a set of core principles and guidelines for their application. The Tokyo Rules are based on the premise that alternatives to jail can be successful in addressing criminal conduct while limiting the negative repercussions of incarceration. The guidelines' principles provide forth a framework for legal and criminal justice systems to adopt procedures that emphasize the best interests of both offenders and society. The Tokyo Rules aim to promote a more balanced and compassionate approach to criminal justice by emphasizing the prudent use of pre-trial detention, the creation of non-custodial alternatives, the tailored selection of measures, and the professional training and fair remuneration of people (United Nations, 1990).

According to the United Nations (1990), Tokyo Rules article 4 states as “*Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment or any other human rights instruments and standards recognized by the international community and relating to the treatment of offenders and the protection of their basic human rights.*” Which means that The Tokyo Rules should not be construed in such a way that it precludes the implementation of other international human rights agreements and standards. In essence, it highlights the need of treating criminals holistically and comprehensively, ensuring that fundamental human rights are maintained throughout all parts of the criminal justice system, including juveniles. So, the other international standards for the juveniles which previously mentioned is also part of the Tokyo rules and they all work together as harmonized principles.

6. CONCLUSION

Rehabilitation helps convicts to understand their crime, empathize with the victims, remove the core reasons which trigger make them to commit a crime and also helps for their process of reentering the society in order to regain their place and statue.

Rehabilitation has many advantages and positive outcomes when we compare with punishment. As it mentioned previously in the chapters, punishment itself is not enough in order to lower the recidivism. New approach is more focus on combination of preventive justice such as rehabilitation and retribution with the restorative justice.

The effective programs especially for the juveniles are essential. Recent studies emphasize numerous critical discoveries and solutions for improving existing procedures in

the quest of successful offender treatment and rehabilitation. The literature on 'what works' shows that various measures, such as Systems Thinking, Controlled Evaluations of Routine Practice, Systematic Process Evaluation, Integration of Natural Protective Factors, Emphasis on Relationship Issues, Differentiation and Individualization, Direct Comparisons of Custodial and Community Measures, Attention to Cost-Benefit Issues, and Consideration of National and Cultural Differences (Maguire et al., 2012).

Punishment is merely a means of making an offender pay for the offense they committed; it will not change the offender's conduct. Rehabilitation guarantees that the criminal learns from his or her mistakes and becomes a productive member of society. Punishment seeks to serve justice, whereas rehabilitation seeks to enhance the general status of society by rehabilitating offenders (Criminal Justice Journal, 2020). On the other hand, rehabilitation also has its challenges and limitation. Lack of resources, effective programs and methods, lack of support and other factors can make it hard to serve its purposes in order to achieve the main goal of rehabilitation which is lowering the recidivism and helping convicts to reenter to society for the safe and secure society.

It is clear that rehabilitation of ex-convicts in criminal law, address the root reason of the crime and with that way it support the ex-convicts reintegration process into society. In order to achieve the goals of rehabilitation of ex-convicts, a structured framework could be proposed, emphasizing the importance of standardized rehabilitation policies, increased investment in mental health, education, and vocational training, and fostering partnerships with community organizations to support post-release reintegration. Furthermore, ongoing evaluation of rehabilitation activities is critical to ensuring effectiveness and adaptability. To address the underlying causes of crime and facilitate successful reintegration, governments and appropriate agencies must engage in rehabilitation programs ranging from mental health care to education and vocational training for inmates.

Establishing systems for routinely analyzing the effectiveness of rehabilitation initiatives on recidivism rates and societal safety will guarantee that these programs continue to be effective and adapt to changing demands. By applying such a framework, criminal justice systems can promote a more balanced approach to dealing with criminal cases—one that not only punishes but also seeks change, ultimately contributing to a safer and more just society.

We shouldn't forget that at the end of the day convicts are human and they also have rights. As a part of human rights, rehabilitation programs, fair and respectful approach is necessary. Only with that way we can save them, protect the society from crimes, and gain the law-abiding citizens.

LIST OF REFERENCES

- Berndtson, A., (1970) "The Meaning of Power" 31(1) *Philosophy and Phenomenological Research*. 73-84. Ancel, M. (1965). *Social defence : a modern approach to criminal problems* (Vol. 250). Rautledge-Kegan Paul.
- Chandler, R. K., Fletcher, B. W., & Volkow, N. D. (2019). Treating Drug Abuse and Addiction in the Criminal Justice System. *JAMA*, 301(2), 183. <https://doi.org/10.1001/jama.2008.976>
- Cheah, P. K., Unnithan, N. P., & Raran, A. M. S. (2020). *Rehabilitation programs for incarcerated drug offenders in Malaysia: Experience based perspectives on reintegration and recidivism*. The Prison Journal, pp. 201-223.
- Coghlan, M. A. (2003). *Sex offenders and the criminal justice system: An exploration of public opinion*. (pp. 4–5) [Dissertation]. <https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=4440&context=etd>
- Cornell Law School (no date) *Retributivism*, Legal Information Institute. Available at: <https://www.law.cornell.edu/wex/retributivism> (Accessed: 14 November 2024).
- Criminal Justice Journal. (2020, July 7). *Punishment VS Rehabilitation In The Criminal Justice System Pros & Cons*. CJ US JOBS. <https://cjusjobs.com/punishment-vs-rehabilitation-in-the-criminal-justice-system/>
- Day, A., Howells, K. (2000) *Applying Theory and Research to Offender Rehabilitation - What Should Practitioners Know?*. The British Journal of Forensic Practice. Vol. 2 Iss 3 pp. 10 – 18
- Dhingra, A. (2019, June 24). *Rehabilitation of juveniles*. Ipleaders. <https://blog.ipleaders.in/rehabilitation-of-juveniles/>
- Diego, V. (2023). *Building Bridges, Not Walls: A Holistic Approach to Criminal Justice Reform*. Department of public health, Stanford University . https://www.researchgate.net/publication/372776298_Building_Bridges_Not_Walls_A_Holistic_Approach_to_Criminal_Justice_Reform
- Duff, A. (2005). *Punishment and Rehabilitation – or punishment as rehabilitation*, *Criminal Justice Matters*. Routledge. 60:1, 18-19, DOI: 10.1080/09627250508553608
- Elisha, M. (November 18, 2021). *Criminal Rehabilitation: Programs, Statistics & Definition*. Study.com. Retrieved April 25, 2023.

- Fennell, J. T. (1982). Just Retribution: The Alternative to Rehabilitation. *Probation Journal*, 1(0264-5505), 15–18. DOI: 10.1177/026455058202900105
- General Assembly. (1990). *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*. OHCHR. <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh>
- Gideon, L. and Sung, H.-E. (2011) *Rethinking corrections: Rehabilitation, reentry, and reintegration*. Los Angeles Calif.: SAGE.
- Harrison, K. (2020). *Penology : theory, policy and practice*. Red Globe Press.
- Howells, K., Day, A., & Australian Institute Of Criminology. (1999). *The Rehabilitation of offenders : International perspectives applied to Australian correctional systems*. Australian Institute Of Criminology.
- Juvenile Justice*. (1985). UNODC; 96th plenary meeting. <https://www.unodc.org/pdf/crime/uncjin/standards/Compendium/pt1e.pdf>
- Juvenile Offenders and the Ability for Rehabilitation: Understanding the Issues and Challenges*. (2023, June 4). Law Offices of John D. Rogers. <https://johndrogerslaw.com/juvenile-offenders-and-the-ability-for-rehabilitation-understanding-the-issues-and-challenges/>
- Legislative Analyst's Office. (2017, December 6). *Improving In-Prison Rehabilitation Programs*. Ca.gov. <https://lao.ca.gov/Publications/Report/3720>
- Lipton, D.S., Thornton, D.M., McGuire, J. et al. (2000) *Program accreditation and correctional treatment. Substance Use and Misuse*, 35, 1705–1734.
- Luyt, W., & Preez, N. du . (2006). International and Other Standards That Influence the Rehabilitation and Education of Offenders. *Corrections Compendium*, 31(2), 8, 9, 36, 38.
- Maguire, M., Morgan, R., & Reiner, R. (2012). *The Oxford Handbook of Criminology* (5th ed.). Oxford University Press.
- Newhouse, K.M. (2023), Sex Offender Treatment and Recidivism Reduction Strategies. Culminating Projects in Criminal Justice. 19. https://repository.stcloudstate.edu/cjs_etds/19
- Omoregie J. (2018) *The Role of Neighbourhood Condition and Ethnicity on Fear of Crime*.
Available at SSRN: <https://ssrn.com/abstract=3135478> or <http://dx.doi.org/10.2139/ssrn.3135478>

- Palgan, M. D., & Apolinario, R. C. (2022). Walking a New Beginning: A Case Study on the Chronicles of Ex-Offenders in Surpassing the Challenges of Living Outside the Bars. *American Journal of Qualitative Research*, 6(1), 178–187. <https://doi.org/10.29333/ajqr/11963>
- Publisher, A. removed at request of original. (2015, December 17). *1.5 The Purposes of Punishment*. Open.lib.umn.edu; University of Minnesota Libraries Publishing edition, 2015. This edition adapted from a work originally produced in 2010 by a publisher who has requested that it not receive attribution. <https://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/#:~:text=Rehabilitation%20prevents%20crime%20by%20altering>
- Rehabilitation and reintegration: international standards*. (n.d.). Penal Reform International. Retrieved December 2, 2023, from <https://www.penalreform.org/issues/reintegration-and-rehabilitation/international-standards/>
- Robinson, G., & Iain Crow. (2009). *Offender rehabilitation in context : Theory, policy and practice*. Sage.
- Sechrest, L., White, S. O., & Brown, E. D. (Eds.). (1979). *The Rehabilitation of Criminal Offenders: Problems and Prospects* . National Research Council.
- United Nations Office on Drugs and Crime. (2016). *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*. *International Legal Materials*, 55(6), 1180–1205. <https://doi.org/10.1017/s0020782900030898>
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)* . (1985). General Assembly resolution 40/33.
- United Nations. (1990, December 14). *Basic Principles for the Treatment of Prisoners*. OHCHR. <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-treatment-prisoners>
- United Nations. (1990). *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*. <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf>
- Wright, R., & Jacques, S. (2017). *Drugs and Crime*. Obo. <https://www.oxfordbibliographies.com/display/document/obo-9780195396607/obo-9780195396607-0061.xml#:~:text=In%20short%2C%20drugs%20can%20be>

DIASPORA AS A GENERATOR OF FOREIGN DIRECT INVESTMENT

*Emina Dizdarević**

Abstract

Focusing on Bosnia and Herzegovina, this study examines how diasporas contribute to the creation of foreign direct investment (FDI) in developing countries. It defines FDI as the acquirement over assets in a foreign nation and highlights how diaspora populations support investment flows. It also examines diaspora investment strategies, such as diaspora portfolio investment (DPI) and diaspora direct investment (DDI), and offers a historical overview of diaspora FDI patterns and how Bosnia and Herzegovina's policies are changing to engage its diaspora more.

One case study illustrates the impact of diaspora-led FDI by highlighting the success of Senad Šantić, a Bosnian entrepreneur who returned to his home country to start a tech company. While these investments support development and economic growth, there are still issues, like the possibility of putting one's own interests ahead of the interests of the economy as a whole. Particularly in Bosnia and Herzegovina, where diaspora participation has historically been low, the implementation of effective policies and procedures is crucial, especially from a regulation perspective.

The study also looks at the future of FDI, emphasizing the part that digital technology and new investment patterns will play. Opportunities for developing nations can be found in digital FDI, especially in industries like fintech and e-commerce, yet obstacles still exist in luring these investments. According to all the findings, developing nations can improve their chances for economic success by creating an atmosphere that encourages diaspora investment which will shift those nations into the global investment scene. Ultimately, FDI regulations and government programs are needed in order to fully utilize diaspora-led FDI for sustained growth.

Keywords: Foreign Direct Investment (FDI), Diaspora Investment, Bosnia and Herzegovina, Economic Development, Diaspora Engagement.

* Emina Dizdarević, BA in International Relations and has worked with UNHCR and the Danish Refugee Council. She is currently pursuing an MA in Comparative Public Law in Bosnia and Herzegovina. Contact: emina.dizdarevic1@icloud.com

1. INTRODUCTION

To begin, it is important to define Foreign Direct Investment (FDI) and discuss how diaspora can influence it. FDI is the process whereby residents of one country (the source country), acquire ownership of assets to control the production, distribution, and other activities of a firm in another country (the host country) (Moosa, 2004).

The distinguishing feature of FDI, compared to other forms of international investment, is the element of control over management policies and decisions (Moosa, 2004, p.2). Control implies that the investor has some degree of discretionary decision-making power in management policies and strategies. For example, this control can occur through the ability to elect or select one or more members of the board of directors of the foreign company or subsidiary. These features are crucial for successful and profitable FDI. In regards to FDI and diaspora, researchers have found a positive association between migration and international flows of goods and capital (Fossati, 2019). The size of ethnic diasporas is certainly associated with the volume of trade between their home and their host countries as migrants capitalize on unique cultural skills to take advantage of international business opportunities (Fossati, 2019, p.5). This is crucial because a lot of the time the cultural differences between trading partners created the need for mediation, a role that was typically assumed by trusted countrymen of exporting countries serving as commercial agents in order to help a business deal go through. From this perspective, diasporas can be conceptualized as an example of a broader class of groups who leverage on their distinctive sociocultural status and occupational skills to facilitate domestic and international economic exchanges.

While globalization and technology have reduced the need of mediation in cross-border economic exchanges, informational irregularities continue to impede transnational economic engagement as investors in source countries often lack knowledge about key factors that shape the investment climate in investment destinations, such as prevailing business culture and regulatory framework, diasporas can still leverage on their knowledge of host and home countries. In the context of international investment, in particular, diasporas can decrease uncertainty through two channels. First, investors in a source country may assume about cultural and social conditions in destination countries by observing and interacting with ethnic diasporas. Second, diasporas can provide information about specific business opportunities and help alleviate credible commitment issues, thereby decreasing the informational irregularities that hinder cross-border economic exchanges. This will be discussed in more detail below.

2. HISTORICAL OVERVIEW OF DIASPORA AND FDI

Throughout history, especially the 20th century, we saw many advancements in transportation, communication, technology etc., which all led to globalization. Markets were opening and trade laws were put in place for a safer way of conducting business, and therefore, encouraging foreign direct investment.

A major change over the past three decades has also been that governments have become more favorable towards FDI, and have liberalized their FDI regime accordingly, though at different times, speeds and depths in different countries and regions. Over the past fifteen years, countries have regarded FDI increasingly as contributing to their development strategies for the technology and capital it provides. They have even have started to compete for FDI. Investment policies have become more liberal at the national and regional level, but there is no comprehensive framework at the multilateral level. Some home countries are also increasingly facilitating FDI into developing countries using guarantee funds, matchmaking and other measures (Willem te Velde & Nair, 2006). In a globalized and interdependent world, every country needs cooperation and partnership. In the framework of this mission, every state undertakes policies and reforms that impose radical internal changes. Supporting these changes requires financial and human resources that states are trying to secure through various sources. Diaspora is in fact the first catalyst that provides incentives to the economy to meet national needs with financial and human resources and that helps overcome relative isolation from global trade flows. Through the engagement of the diaspora, states are extending their political and administrative functions beyond national borders and through agreements are improving relationships with other countries.

This stimulates the interest of foreign investors who are always looking for new markets, less expensive, rich in natural sources. FDI through financial capital and foreign currency it brings, technological innovation, human capital development, trade opening contributes to the economic growth of the country (Milova & Vokshi, 2022). Migration is also an increasingly important facet of the global political economy. Like flows of commodities and capital, flows of labor have increased dramatically in recent years. The United Nations' Population Division put the share of the world's population residing outside their nation of birth at almost 200 million people- or approximately 3% of the world's population- in 2007. That number continues to grow: The Organization for Economic Cooperation and Development (OECD) estimates that the number of legal immigrants entering OECD countries stands at about 3 million annually (Leblang, 2010, p. 584). Just as with flows of commodities and capital, scholars have devoted enormous energies to the exploration of the consequences of immigration. Some academics argue that migration causes "brain drain", in which highly qualified and educated citizens of a nation depart in quest of higher salaries. Some argue that the possibility of leaving encourages those who remain to invest in their own human capital, therefore offsetting the brain drain. There are many different viewpoints regarding FDI and diaspora, all the pros and cons, highlighting different aspects and effects.

On one hand, diaspora investment can be a very positive thing where knowledge and financial skills are brought to the home country, and the familiar contacts, market condition, legal framework and other networks can lead to an increased economic growth. On the other hand, some say that diaspora investments might not be as good as they seem, because investors might have their own motives, like increasing their wealth without much thought about building up the home country's economy and creating jobs. Lastly, the varying

viewpoints on the relationship between FDI and diaspora highlight the complexity of both phenomena.

Diaspora communities' potential for attracting foreign direct investment (FDI) can have varying effects based on a range of factors, such as financial resources, cultural affinities, and the extent to which investment decisions align with the country's development goals. To effectively use the positive aspects and remove any possible disadvantages, policymakers and stakeholders need to have a comprehensive understanding of these complexities.

3. UNDERSTANDING DIASPORA INVESTMENT (DPI AND DDI)

The diaspora plays a variety of roles in the economy, and in particular, its potential for development has been recognized. Diaspora investment has been utilized to describe cross-border business-directed investment flows transacted by a "diasporan" (an individual living in diaspora) in their country of origin. (Elo & Riddle, 2016).

Concerning diasporans, their place of investment is often connected to homeland or home region, particularly due to their market-specific knowledge and social network advantage as mentioned before. Their home-country investments may not be limited to payments or entrepreneurship, instead, they may take the form of diaspora portfolio investment (DPI), such as diaspora bonds, home-country equity or debt-structured investments, etc. or diaspora direct investment (DDI) through which business operations are brought to and started in the diasporan's home country (Elo & Riddle, 2016, p.16). Regarding diaspora portfolio investment (DPI), a mentioned above, diaspora bonds are one such mechanism that can enable developing countries to borrow from their expatriate (diaspora) communities (Ketkar & Ratha, 2010). A diaspora bond is a debt instrument issued by a country or potentially, a sub- sovereign entity or even a private corporation, to raise financing from its overseas diaspora. In the example of India, on three occasions since 1991 it has raised over US\$35 billion using these bonds- the rationale behind the Indian authorities, is that they have used this instrument for balance of payments support, to raise financing during times when they had difficulty in accessing international capital markets (Ketkar & Ratha, 2010, p. 252). It's also crucial to remember that by acquiring these bonds, diaspora members can contribute to the advancement and economic growth of their home countries while potentially earning financial rewards in the future. On the other hand, with diaspora direct investment (DDI), this is, as the name suggests, a way to directly invest in businesses in the form of purchasing equity or ownerships stocks. In this way, the use of diaspora bonds or other governmental instruments is avoided.

All in all, both types of investment have their advantages and disadvantages, but one thing is for sure; the reason diaspora choose to invest in their home country is much deeper than one would initially think. It mostly has to do with their strong emotional and cultural ties to their homeland. It is a sense of familiarity like nowhere else, which can be a useful thing

when wanting to invest, or do business in their country of origin. Accordingly, in this case, investing would be one way for them to get closer or reconnect with their roots.

4. FDI IN DEVELOPING COUNTRIES

It is widely believed that the trend towards globalized production and marketing has major implications for developing countries' attractiveness to foreign direct investment (FDI). The boom of FDI flows to developing countries since the early 1990s indicates that multinational enterprises (MNEs) have increasingly considered these host countries to be profitable investment locations. At the same time, various experts argue that the determinants of and motivations for FDI in developing countries have changed in the process of globalization (Nunnenkamp, 2002). Regarding the factors that determine foreign direct investment, this is anticipated to have two connected effects:

- Host countries are evaluated by MNEs on the basis of a broader set of policies than before. The number of policies constituting a favorable investment climate increases, in particular with regard to the creation of location-specific assets sought by MNEs.
- The relative importance of FDI determinants changes. Even though traditional determinants and the types of FDI associated with them have not disappeared with globalization, their importance is said to be on the decline. More specifically, "one of the most important traditional FDI determinants, the size of national markets, has decreased in importance. At the same time, cost differences between locations, the quality of infrastructure, the ease of doing business and the availability of skills have become more important" (Nunnenkamp, 2002, p.4).

This is the reason why today, MNEs are expected to move some of their production facilities to developing countries which characteristically have a large work force that is willing to work for low wages and long hours. All of this can be described as a result of the pressure that globalization has placed on prices as a way to keep up with the global competitiveness. In this regard, human resource development (HRD) and foreign direct investment (FDI) are generally considered among the key drivers of economic growth in developed and developing countries. While HRD and FDI individually affect growth, they also reinforce each other through complementary effects. In general, enhanced HRD increases incoming FDI by making the investment climate attractive for foreign investors. This is done through a direct effect of upgraded skill level of the workforce, as well as via indirect effects such as improved sociopolitical stability and health. On the other hand, FDI contributes to HRD since MNEs themselves can be active providers of education and training, bringing new skills, information and technology to host developing countries. Ultimately, this complementary effect leads to a virtuous circle of HRD and FDI where host countries experience continuous inflow of FDI over time by increasingly attracting higher value-added MNEs, while at the same time upgrading the skill contents of preexisting MNEs and domestic enterprises (Majeed & Ahmad, 2008).

5. POLICY IN BOSNIA AND HERZEGOVINA FOR DIASPORA DRIVEN FDI

The main objective of Bosnia and Herzegovina would be to achieve long-term growth based on increased investments and on adoption new technologies with increased competitiveness of the products on the world market. Investments for the renewal and increase of domestic capital, for keeping up with new technologies, are necessary prerequisite for making a long-term growth.

Foreign direct investments are considered to be the best source of capital, and have an advantage over other sources of capital, such as debt, portfolio investment and foreign aid. The advantages of foreign direct investment, compared to credits are, that they do not represent a significant capital outflows in the future, which can disrupt the current balance and economic growth in the future. Foreign direct investment is related to investments in fixed assets and represent a long-term investment. Analysis of financial effects show that foreign investments represent the inflow of foreign resources which are contributing to increase of total investment in the host country. Their share in total domestic investment increasing, especially in countries in transition. In addition to the basic (initial) capital inflows, foreign direct investment is presenting also all reinvested profits of branches of foreign companies in a host country (Sušić, Stojanović-Trivanović, & Sušić, 2017). Furthermore, there are Business zones (BZ) that represent a space for wide variety of business activities. They operate and are managed by specialized team of professionals or a specific organization, and are formed as a result of organized development concept of the state, region or municipality. To the entities that operate within the business zone, are typically offered certain benefits, such as cheaper rent or allowance, various tax benefits, deferred payment options, assistance with exports of goods and services, faster and easier access to capital and so on. Business zone can be organized and managed by the local government or regional organization, which is proved to be the most effective approach to managing and developing the business areas. Efficiency of the business area depends on the characteristics and imposed operating policies in the zone. So, business zones are a tool for the development of entrepreneurship and attracting investment, both domestic and foreign.

The free zone is part of the customs territory of a particular country, which is specially separated by fence and marked, in which the economic activities are performed under special conditions. Usually, these conditions are defined in detail by national laws on free zones. The users of these zones do not pay import duties and value added tax- VAT. Customs duties and tariffs are not charged on imports, and import of equipment that will be used for production and operations within a free zone, is exempted from customs and other duties. It is important to point out that investments in the free zone, transfer of profit and transfer of investment are not charged at all. Free Zone, first of all, implies more liberal regime of business. The need for regulatory standardization requirements for the formation, function and defining benefits for work in free zones is stated in the regulation, which was initially defined by the entities' Laws on Free Zones, and finally established by the Law on

Free Zones BH. The relevant legislation that touches the issues of operations in free zones, refers to the Law on Customs Policy of BH, the Law on Free Zones in BH and the Law on foreign direct investment in BH (Sušić, Stojanović-Trivanović, & Sušić, 2017, p. 8). More importantly, up until April of 2017, BiH had no official policies adopted or implemented towards its diaspora population.

Engagement of BiH institutions towards its diaspora communities has been quite limited and underdeveloped, and with viable initiatives to move forward. This is unfortunate as the Bosnian–Herzegovinian diaspora population is estimated at anywhere between 1.6 million to 2.4 million people, yet has a limited involvement in democratic processes at home, disproportionate to their overall size and diversity (Hasić & Telalović, 2021). Our country needs to actively promote diaspora investment opportunities through marketing initiatives, and bureaucratic barriers need to be removed in order to have more investment and therefore, more long-standing economic growth.

6. SUCCESSFUL DIASPORA DRIVEN FDI PROJECTS

One of the most interesting success stories in regards to diaspora driven FDI belongs to Senad Šantić, a Bosnian diaspora member, who returned to Mostar, Bosnia and Herzegovina, and co-founded an IT consulting company called ZenDev.

The company quickly grew to 15 employees and is expected to hire even more people as time goes by. Šantić recognized the availability of support in BiH to expand his company, including co-financing and training provided by USAID through the Diaspora Invest project. The main goal of the project is to encourage diaspora investment in BiH and provide grants and technical support to startups and early-stage companies. The software development industry in BiH has seen considerable expansion, with exports rising by nearly 30 percent in 2017 and job opportunities increasing by 17 percent. He thinks that the present is the right moment to invest in BiH because of its growth potential. The Diaspora Invest initiative took place from April 2017 until March 2022 (Sarajevo Times, 2019).

ZenDev is the example of a successful FDI project, driven by the diaspora. It is through these initiative projects like Diaspora Invest, that an opportunity is created for FDI ventures that are essential for success. By recognizing and fostering the opportunities of diaspora investment, governments can establish a stable framework for diaspora-led FDI and motivate additional diaspora individuals to assist in the development of their home nations.

7. FUTURE OF FDI

The landscape of FDI is changing very quickly, fueled by digital innovations and a more interconnected global marketplace. As economies all over the world adjust to digital transformation and new business models, the methods of conducting FDI are shifting.

FDI is currently moving towards digital FDI, and as businesses grow more dependent on digital platforms and technologies, investments are progressively directed towards areas like e-commerce, fintech, and digital infrastructure. These new sectors of FDI

are thriving because they are easy to scale, and there are lower entry barriers. An example could be the rise in digital start-ups and platforms, all driven by the global expansion of internet and mobile technology.

The diaspora can be very helpful in turning these investments into promising digital enterprises, leveraging their networks to overcome the barriers that many emerging economies face. However, despite many advancements, developing countries still face the before-mentioned barriers of attracting FDI, especially in digital areas. One challenge is the lack of digital infrastructure, which prevents entry or participation in the first place. Digital FDI cannot be realized without fast and reliable internet connection and secure payment systems. Knowledge and resources are going to be needed in order to support this digital infrastructure expansion. The role of diaspora will also entail the provision of advocacy for the improvement of digital laws and policies in their home countries. Many countries are shackled with outdated regulations that do not provide little to no clarity in regards to digital economy, creating uncertainty for potential investors which prevents them from investing.

According to the World Economic Forum, “countries that provide a stable political and economic environment are more likely to see increased digital FDI” (World Economic Forum, 2023). In this context, the diaspora can also act as a stabilizing force, encouraging better governance and promoting trust in the political and economic systems of their home countries. The most pressing issues continue revolving around data privacy and cybersecurity, therefore, the quality and quantity of FDI will likely depend on how governments and businesses choose to adapt to this changing landscape of global investment. Forward-thinking policies will be needed in order to unlock the full potential of FDI.

Ultimately, the potential that FDI holds is undeniable, however, only with the collaboration among governments, investors, and entrepreneurs can a setting that promotes digital FDI be established. Diaspora communities have widespread networks and strong connections to both their homeland and host countries, and are uniquely fit to significantly influence this future, aiding in the assurance that digital FDI flows are sustainable, inclusive, and advantageous for all stakeholders.

8. CONCLUSION

In summary, this study emphasized how diaspora-led FDI plays one of the most important roles in promoting economic growth in developing countries. Through the analysis of the historical context of FDI and diaspora, we have gained insight into the vast potential it has. I also highlighted the importance of policies and initiatives that promote and support diaspora-led FDI. For example, the legal framework of Bosnia and Herzegovina requires a reform of the FDI laws and new laws need to be implemented in this regard. Support mechanisms are needed to create an investable environment in which diaspora people can invest in their home countries and contribute to economic development. Successful projects like ZenDev in Bosnia and Herzegovina highlight the positive outcomes of diaspora-led FDI. As the world's diaspora communities become increasingly connected and technology advances, future trends suggest that diaspora-led FDI will continue to grow in importance, which is why governments need to proactively continue their work on establishing a framework suitable for FDI.

LIST OF REFERENCES

- Elo, M., & Riddle, L. (2016). Understanding diaspora investment. In *Diaspora business* (pp. 13-28). Brill.
- Fossati, D. (2019). Embedded diasporas: Ethnic prejudice, transnational networks and foreign investment. *Review of International Political Economy*, 26(1), 134-157.
- Hasić, J., & Telalović, A. (2021). Diaspora, deliberation and democracy: Examining externally-sponsored initiatives for the development of local fora in Bosnia and Herzegovina. *Innovation: The European Journal of Social Science Research*, 34(5).
- Ketkar, S. L., & Ratha, D. (2010). Diaspora bonds: Tapping the diaspora during difficult times. *Journal of International Commerce, Economics and Policy*, 1(02), 251-263.
- Leblang, D. (2010). Familiarity breeds investment: Diaspora networks and international investment. *American Political Science Review*, 104(3), 584-600.
- Majeed, M. T., & Ahmad, E. (2008). Human capital development and FDI in developing countries.
- Milova, O., & Vokshi, A. (2022). Diaspora impact on foreign direct investment: State institutions on diaspora engagement. *ICMS XXXI*, 71.
- Moosa, I. A. (2004). Foreign direct investment. In *International financial operations: Arbitrage, hedging, speculation, financing and investment* (pp. 318-340). Palgrave Macmillan UK.
- Nunnenkamp, P. (2002). Determinants of FDI in developing countries: Has globalization changed the rules of the game? (No. 1122). Kiel Working Paper.
- Sarajevo Times. (2019). Senad Santic opened Zendev Company in BiH after he returned from Sweden. <https://sarajevotimes.com/senad-santic-opened-zendev-company-in-bih-after-he-returned-from-sweden/>
- Susic, I., Stojanovic-Trivanovic, M., & Susic, M. (2017, May). Foreign direct investments and their impact on the economic development of Bosnia and Herzegovina. In *IOP Conference Series: Materials Science and Engineering* (Vol. 200, No. 1, p. 012019). IOP Publishing.
- Willem te Velde, D., & Nair, S. (2006). Foreign direct investment, services trade negotiations and development: The case of tourism in the Caribbean. *Development Policy Review*, 24(4), 437-454.

World Economic Forum. (2023). Davos: How the digital FDI initiative is helping overcome investment barriers for emerging economies. World Economic Forum. <https://www.weforum.org/stories/2023/01/davos2023-digital-fdi-initiative-investment-barriers-emerging-economies/>

JUDICIAL INDIVIDUALIZATION DURING JUVENILE PRISON SENTENCE

Amra Karadža^{*}

Abstract

The subject of this paper is the judicial individualization in the execution of juvenile imprisonment sentences. Recognizing children and youth as the future of our societies, it is imperative to nurture and protect them until they fully develop. When a young individual deviates, it becomes crucial to find the best way to guide them back on track. Hence, the individual assessment of youth in conflict with the law is pivotal. The judiciary, in its adjudicative function, plays a crucial role in directing, guiding, and concluding the process of dealing with juvenile offenders, striving to find the best ways to serve the juvenile's best interests. The court's role in determining guilt and individualizing criminal sanctions, especially imprisonment, is significant. Moreover, the authority of the court remains important in the implementation or execution phase of these decisions, particularly in the execution of imprisonment sentences, which are undoubtedly the most severe criminal sanctions in most criminal legislations.

To delve into the topic of judicial individualization in the execution of juvenile imprisonment sentences, it is essential to explain the concept and purpose of executing such sentences. The main part of this paper discusses the role that the court and judges play in achieving individualization. Additionally, it focuses on each role of the court individually. To conclude, it will discuss the importance of this topic.

Keywords: Judicial individualization, execution, criminal sanctions, juvenile offenders, rehabilitation.

^{*} Amra Karadža MA, is Judicial Intern at the Court of Bosnia and Herzegovina, specializing in Criminal Law. She has recently worked on projects related to organized crime and corruption, war crimes, domestic violence and other important topics, Bosnia and Herzegovina. Contact: amra.karadza5454@gmail.com

1. INTRODUCTION

It is universally acknowledged that children and youth represent the future of our societies, and it is imperative that we undertake all necessary measures to nurture and protect them until they reach full development. In instances where a child or young individual deviates from the lawful path, it is our obligation to identify the most effective means of assisting them in returning to it. Consequently, the individual assessment of youth in conflict with the law is of paramount importance. Our objective is to determine the strategy that holds the greatest potential for positively influencing that young individual. Furthermore, individual assessments provide an optimal approach for involving the young person in the construction of their own future (Vaičiūnienė, 2021). The court, in the exercise of its adjudicative functions, constitutes one of the most significant entities within the realm of criminal law. Through substantive rulings and decisions of varying legal nature, juvenile judges direct, guide, and conclude the process of rehabilitating juvenile offenders, striving to discover the most effective methods to achieve the best interests of the minor. This entails the individualization of available instruments in the fight against juvenile delinquency, both in the phases of imposition and implementation or enforcement of sanctions (Pleh, 2020). The role and significance of the court in criminal proceedings, particularly at the stage of determining the culpability of the perpetrator and the individualization of criminal sanctions, especially custodial sentences, are highly significant. Moreover, the authority of the court is equally critical in the phase of executing or applying that decision, specifically in the enforcement of criminal sanctions, with particular emphasis on custodial sentences, which are undoubtedly the most severe form of criminal punishment under most criminal legislation (Pleh, 2018, p. 279). To delve into the topic of judicial individualization in the execution of juvenile imprisonment, it is essential to elucidate the concept and purpose of executing custodial sentences for minors. The primary focus of this discourse is the title of the topic itself, which elucidates the role that the court and judges play in effecting individualization. We will particularly address each role of the court in detail. In concluding this work, we will also reflect on the observation and diagnosis of the personalities of juvenile offenders. Ultimately, the importance of this topic in the concluding remarks will be articulated.

Consequently, it is particularly important to establish a criminal law model that enhances juvenile's trust in the judiciary and empowers them, thereby increasing their potential for positive change. To achieve this, it is necessary to operate within a child-friendly justice paradigm, providing children the opportunity to realize their rights and ensuring their voices are heard while simultaneously encouraging their engagement and participation to the greatest extent possible. Equally important is the socialization of children within the legal system, which helps them build trust in the decisions that affect them and to accept the legitimacy of, and to believe in, the institutions that enforce these decisions. This is necessary to ensure that procedural safeguards are adapted to children and that procedural fairness is upheld, values that serve the best interests of the child (Vaičiūnienė, 2021).

In every form of the court's role in the execution of prison sentences, there is a clear enhancement of the execution system and an increase in its efficiency, thereby providing greater security and a higher level of protection of the human rights of inmates. Therefore, promoting the significance of, proposing, and initiating the expansion of judicial jurisdiction in the execution of prison sentences as part of its original, supervisory, and supplementary competencies is fully justified (Pleh, 2018).

Each year, over one million juveniles within the European Union encounter criminal proceedings both within and across national borders. Research indicates that achieving an understanding of the criminal process among suspected or accused juveniles presents a complex and sometimes insurmountable challenge (Daly and Rap, 2018). Despite the increasing focus on juvenile justice issues by international institutions and organizations in recent decades, and thirty years following the adoption of the United Nations Convention on the Rights of the Child, the protection of children's rights in everyday practice remains a significant challenge (Beneitez and Dumortier, 2018). For a long time, children have been regarded as "objects of law" rather than "subjects," with their status and interventions determined by legal professionals (judges, prosecutors, probation officers), who are perceived to know what is best for the child. The notion that children are incapable of managing certain "adult rights" is still deeply entrenched.

In Bosnia and Herzegovina, the application of juvenile sanctions, particularly imprisonment, reflects the legal framework aimed at rehabilitation and social reintegration. According to the Agency for Statistics of BiH (2022), a total of 78 juveniles were convicted, with only 5 receiving juvenile imprisonment as a sanction, emphasizing its use as a last resort. Educational-correctional measures dominated, including warnings, guidance, and supervision, reflecting the rehabilitative approach of the juvenile justice system. Juvenile imprisonment in BiH is applied in rare and severe cases, such as when other measures are ineffective or the offense's gravity necessitates it. This aligns with the principles of minimal intervention and the prioritization of non-custodial measures for juveniles, as outlined in domestic laws and international guidelines like the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). Data from earlier years also show a consistent trend, with the majority of sanctions being non-custodial, further supporting the system's focus on reform over punishment.

2. CONCEPT AND PURPOSE OF EXECUTING JUVENILE IMPRISONMENT

The primary purpose of juvenile criminal sanctions is to suppress acts that violate or endanger values protected by criminal legislation, i.e., to combat all types, forms, and manifestations of criminality. The purpose of these sanctions is also to influence their development and strengthen their personal responsibility, correct antisocial attitudes and behaviors, foster proper upbringing and development, and ensure the reintegration of the juvenile into the social community (Macanović, 2014).

As highlighted in the academic writings, juvenile imprisonment is the last resort of the formal social reaction to criminal behavior. The purpose of executing this sentence is the enforcement of final and executable judicial decisions, i.e., the protection of society from criminal acts within the social environment with the aim of their rehabilitation, treatment, and preparation for life in freedom, in accordance with the law and social norms. Execution of the sentence begins at the moment when the decision imposing the penalty becomes final, provided there are no legal obstacles to its execution.

According to the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Republic of Srpska (2010, Article 31)², the purpose of juvenile imprisonment is precisely defined. Within the general purpose of criminal sanctions, the aim of criminal sanctions for juveniles is to provide protection, care, assistance, and supervision, as well as to ensure general and specialized training, which influences the development and strengthening of the juvenile's personal responsibility, ensuring their upbringing and proper development of personality, so that their reintegration into the social community can be secured (Article 31, Paragraph 1). When it comes to juvenile imprisonment, the purpose of this sanction is also to exert an increased influence on the juvenile perpetrator of the criminal act to deter them from committing future offenses, as well as to deter other juveniles from committing crimes (Article 31, Paragraph 2). This aligns with the general purpose of criminal sanctions outlined in the Criminal Code as *lex generalis* but tailors these aims to address the specific needs of juveniles. While the Criminal Code emphasizes societal protection, deterrence, and rehabilitation, the juvenile law refines these goals by prioritizing the personal development, upbringing, and reintegration of young offenders. It emphasizes protection, care, supervision, and education to foster personal responsibility and proper personality development, ensuring long-term societal reintegration. Both frameworks share the goals of deterrence and reducing recidivism, but the juvenile law introduces specialized measures, such as training and rehabilitation, to address the developmental needs of

² The Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings in the Republic of Srpska governs the protection, rights, and treatment of minors involved in criminal proceedings, whether as suspects, accused, victims, or witnesses. This law aligns with international standards, such as the UN Convention on the Rights of the Child, focusing on rehabilitation, reintegration, and avoiding unnecessary stigmatization of minors. In Bosnia and Herzegovina, the country's complex constitutional structure allows for the development of separate laws by its entities. In Federation of Bosnia and Herzegovina and Brčko District, there is no identical law to the one in the Republic of Srpska, but there are similar legal frameworks governing the treatment of children and juveniles in criminal proceedings. In FBiH, the legal framework for dealing with juveniles is regulated by the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of FBiH, which is aligned with international standards, including the UN Convention on the Rights of the Child. In Brčko District, the treatment of juveniles in criminal proceedings is regulated by the Law on Juvenile Offenders and Protection of Juveniles in Brčko District, which specifically addresses the issue, and provisions of the general Criminal Code of BD for certain specific situations. At the state level, the Law on Juvenile Offenders and Protection of Juveniles in Bosnia and Herzegovina applies to criminal acts under state jurisdiction (e.g., organized crime, human trafficking). This law is harmonized with entity-level laws and international standards.

juveniles. This approach balances deterrence with reform, reflecting a system that views punishment as a tool for growth and reintegration rather than solely retribution.

As referenced in the scholarly works on this law, the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Republic of Srpska, which came into force in 2011, represents a significant advancement compared to previous legal solutions in dealing with juveniles in criminal proceedings and consolidates provisions of substantive and procedural law into a unified law. It adopts recommendations from international organizations and international conventions regarding the rights of the child and the application of alternative measures. It introduces the obligation to educate all participants in criminal proceedings involving juveniles and a series of other rules and innovations, thereby aligning this law with contemporary quality global solutions regarding the treatment of juveniles in conflict with the law. The same Law, Article 1, establishes specific rules for the treatment of children who are in conflict with the law, younger adults, and children who are victims or witnesses, which must be adhered to by courts, prosecutors, including authorized officials, guardianship bodies, families, schools, institutions at all levels of the social community, as well as other participants involved in the criminal procedure in a manner that enhances the sense of dignity and personal worth of the child without discrimination. Consideration is given to the child's age, the best interests of the child, their right to life, survival, and development, enabling the child to express their opinions on all matters affecting them in accordance with their age and maturity, with all efforts aimed at the rehabilitation and social reintegration of the child and their assuming a constructive role in society (Macanović, 2018).

In Bosnia and Herzegovina, juvenile imprisonment is considered a measure of last resort, imposed only under strictly defined conditions for juveniles who commit serious offenses or demonstrate persistent criminal behavior. According to the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina (2010), juvenile imprisonment aims to rehabilitate the offender, ensure their reintegration into society, and deter both the individual and others from future criminal activities (Article 31). Legal provisions emphasize the proportionality of sanctions and require the court to consider the offender's age, maturity, and personal circumstances before imposing this measure. Furthermore, the Law on the Execution of Criminal Sanctions of FBiH ("Official Gazette of FBiH," Nos. 44/98, 42/99, 12/09, and 42/11) allows for the postponement or interruption of juvenile imprisonment in exceptional cases, such as severe illness or pressing educational needs. As emphasized by Mujkanović (2015), juvenile imprisonment in Bosnia and Herzegovina seeks to balance rehabilitation with societal protection, reflecting international standards for juvenile justice and the principle that deprivation of liberty should serve the juvenile's best interests.

3. JUDICIAL INDIVIDUALIZATION IN THE EXECUTION OF JUVENILE IMPRISONMENT

Judicial individualization is the process by which judges tailor legal decisions, such as sentencing or penalties, to the specific circumstances of the case and the individual involved, ensuring fairness and proportionality. It considers factors like the offender's age, background, intent, mental health, and likelihood of reoffending, with the goal of balancing punishment, rehabilitation, and societal protection. Particularly important in juvenile justice, it emphasizes rehabilitation and alternative measures over punitive sanctions. While judicial individualization promotes fairness by recognizing the unique aspects of each case, it also requires careful balance to avoid inconsistency or bias in judicial decisions.

When a convict begins serving a custodial sentence, specific behavioral rules apply to them. Life within the correctional facility is governed by strict "prison rules." Throughout the duration of the sentence, the execution of the penalty is individualized for the convicted person, reflecting their progress or regression in the realization of rights and privileges (Milić, 2019).

The juvenile judge in Bosnia and Herzegovina possesses a broad scope of jurisdiction and responsibility. In certain situations, they are required to act when legal conditions are met, which they monitor *ex officio*. In other instances, they may intervene if they assess that their intervention is necessary to protect the best interests of the juvenile. In a third scenario, they act upon the request or petition of the juvenile or the entity executing the criminal sanction, or where the sanction is being executed. However, it is important to note that all judicial roles are interwoven and complement each other to varying degrees, making it impossible to speak of a strict division of jurisdiction. Moreover, each judicial role has its specificities, allowing it to be categorized distinctly (Pleh, 2020).

As previously mentioned, and according to the literature concerning this law one of the fundamental and arguably most important subjects of juvenile justice is the court, whose jurisdiction extends to the phase of post-penal support for the juvenile. Specifically, the juvenile judge makes decisions based on their assessment of the merits of the case, determining whether the juvenile has committed a criminal offense and whether they are guilty, subsequently deciding on the measures or sanctions to be imposed (United Nations Convention on the Rights of the Child). In this process, the court "initiates" judicial individualization by considering the circumstances of the specific event and the established factual state, taking into account the type and severity of the act, and particularly focusing on the personality and life of the juvenile (Kosović, 2018).

The role of the court in the execution of juvenile imprisonment does not cease. The court is exceptionally active, responsible, and consequently very significant at this stage³.

3.1. Administrative role of the court

The administrative role of the court is reflected in directing the juvenile to serve a criminal sanction and in the court's decision regarding the postponement of the execution or the suspension of criminal sanctions upon the request of the juvenile, their parents, guardians, adoptive parents, or the competent guardianship authority. Given the nature and purpose of the criminal sanction, these situations have specific characteristics concerning the execution or application of criminal sanctions for juveniles. These specificities manifest in the entities executing the criminal sanctions, the nature and methods of their execution, the duration of the sanction, and so forth.

When the court imposes a juvenile imprisonment sentence, the directive for its execution is sent to the competent guardianship authority, or, in cases involving institutional educational measures and juvenile imprisonment, to the relevant institution for the execution of the sanction. The execution authority is obliged to commence the execution of the specified sanction within a designated timeframe, and if execution does not occur, it must notify the court (Pleh, 2018).

Furthermore, the administrative role of the court is evident in its ability to, upon the request of authorized entities and for reasons provided in the general regulations on the execution of criminal sanctions, decide on the postponement or suspension of institutional educational measures or juvenile imprisonment.⁴ For each stated reason for postponement or

³ In BiH, a juvenile judge must meet general requirements for becoming a judge, as well as specific requirements related to specialization in juvenile justice. The criteria are regulated by the laws of the respective entity, Brčko District, or the state, depending on the jurisdiction. A candidate must meet the general criteria for judicial appointments, including legal education, the bar exam, and professional experience. Additionally, they must undergo specialized training in juvenile justice and demonstrate expertise in handling juvenile cases. This ensures that juvenile judges are well-equipped to prioritize rehabilitation and the protection of minor's rights in line with international standards.

⁴ Articles 162 and 179 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (FBiH) provide for the application of general regulations in such situations, specifically the Law on the Execution of Criminal Sanctions of FBiH ("Official Gazette of FBiH," Nos. 44/98, 42/99, 12/09, and 42/11; hereinafter: ZIKS FBiH). ZIKS FBiH stipulates that in cases of postponement or interruption of the execution of institutional correctional measures, the provisions of cantonal laws are applied *mutatis mutandis*. For instance, Article 44, Paragraph 1 of the Law on the Execution of Sanctions in Sarajevo Canton ("Official Gazette of Sarajevo Canton," No. 27/07; hereinafter: ZIKS KS), provides that the court may postpone the commencement of a correctional measure or interrupt its execution if the juvenile has contracted a severe acute illness; if there has been a death or severe illness in the juvenile's immediate family; if the juvenile is about to complete schooling or take examinations for which they have been preparing, and the execution of the correctional measure at that time could adversely affect the fulfillment of those obligations; if a pregnant juvenile has less than five months until delivery; or if the juvenile has a child under one year of age. On the other hand, the penalty of juvenile imprisonment may be postponed or interrupted in accordance with Article 27 of ZIKS FBiH.

suspension, laws have established specific time limits regarding how long the postponement or suspension may last, which the court monitors *ex officio*. Additionally, while the postponement or suspension is in effect, the juvenile judge *ex officio* verifies the existence of the stated reasons. Thus, when such circumstances cease to exist, the juvenile judge revisits the decision, effectively revoking the order for postponement or suspension (Pleh, 2020). Moreover, if the court determines that the suspension or postponement was granted based on false documents and evidence or if it is not being used for the intended purpose, the juvenile judge revokes the order and directs the juvenile to report immediately, and no later than three days from the receipt of the order, to the institution for the execution of the educational measure or juvenile imprisonment. Appeals against the judge's decision to revoke the suspension order may be filed by the juvenile, their parents, adoptive parent, or guardian within three days from the receipt of the order to the juvenile council. The council decides on the appeal within three days (Law on the Protection and Treatment of Children and Juveniles RS).

To ensure that any of the aforementioned decisions are adequate and feasible, the juvenile judge indirectly monitors developments and changes in circumstances related to the juvenile in question, and, as previously stated, does so *ex officio*. By exercising necessary oversight, the court fulfills not only its administrative role but also its supervisory function (Pleh, 2018).

3.2. Substantive role of the court

A particularly significant role of the court is its authority to reconsider and render a substantive decision regarding an already imposed criminal sanction if the desired purpose is not being achieved. This pertains to judicial individualization in the process of executing a criminal sanction aimed at achieving greater effectiveness of the sanction and, ultimately, the

This provision allows a convicted person who is at liberty to request a postponement of imprisonment, or such postponement may be requested with their consent by immediate family members or proposed by the competent social welfare authority, under the following conditions: (1) if the convicted person is suffering from a severe acute illness; (2) if a death or severe illness has occurred in their immediate family; (3) if postponement is necessary for the execution or completion of exceptionally urgent agricultural or seasonal work, or work caused by natural disasters or other emergencies, and the convicted person's family lacks other capable members or the financial means to hire assistance; (4) if the convicted person must complete a specific task already begun, and failure to do so would result in irreparable or significant damage; (5) if postponement is necessary for the completion of education or examinations for which the convicted person has been preparing; (6) if both the convicted person and their spouse or other household members are sentenced to imprisonment, or if such household members are already serving their sentences, and their simultaneous imprisonment would jeopardize the care of minors, sick, or elderly household members; (7) if the convicted person is a woman breastfeeding a child under one year of age or is pregnant; and (8) if the convicted person is the primary provider for the family, and their imprisonment would jeopardize the livelihood of the household. The postponement of imprisonment under point (1) of Paragraph 1 of this Article may last for up to one year, while in cases under points (2), (3), and (4), it may last up to three months. For cases under points (5), (6), and (8), the postponement may last up to six months, and under point (7), until the child reaches one year of age.

better social reintegration of the juvenile. This substantive role is reflected in the court's decision-making regarding the suspension of the execution of a criminal sanction and/or the substitution of an imposed sanction with another, as well as in the juvenile judge's decision regarding the conditional release of the juvenile.

Suspension is permissible in two instances (Article 45). The first relates to circumstances or actions of the juvenile that arise after the decision to impose an educational measure: if circumstances that were not present at the time of the decision or were unknown emerge after the imposition of a special obligation, warning measure, intensified supervision measure, or institutional measure, and these circumstances would significantly affect the juvenile or their parents, guardians, or adoptive parents in their decision-making regarding the measure; if the decision cannot be executed due to refusal to comply with the imposed educational measure or at the behest of the authority executing the measure, or if other circumstances prescribed by law arise that would be significant for the decision-making process. In these examples, the juvenile judge may substantively alter their decision concerning the type and severity of the sanction, without limitations, regardless of whether the execution process has commenced, the success of the application or execution of the sanction, or the nature of the educational measure in question (Kosović, 2018).

The second situation concerns the (non)achievement of success in rehabilitation, where it can be reasonably expected that another measure would fulfill the purpose of the educational measure, but only under specific conditions (Pleh, 2020). These conditions stipulate that the educational measure cannot be suspended or replaced with another sanction before the minimum duration of six months has elapsed, in order to assess the degree of its effectiveness. Furthermore, within six months, it may only be replaced with a milder educational measure, and only after six months of applying the initially imposed educational measure, if it is in the best interest of the juvenile, can it be replaced with any other educational measure, including a more severe one. The most severe institutional educational measure, namely referral to a correctional facility, can be suspended from execution after the six-month period, while within that timeframe, it can only be replaced with a measure directing the juvenile to a special institution for treatment and training, intended for juveniles with psychological or physical developmental impairments (Pleh, 2020).

The third substantive role of the court, in addition to its authority concerning the suspension of measures and/or the replacement of one educational measure with another, is the conditional release of the juvenile from the execution of the institutional educational measure and from juvenile imprisonment (Articles 43 and 53). When a juvenile has been imposed an institutional educational measure or juvenile imprisonment, the court may conditionally release them from the institution or prison if they have spent at least six months there, or after one-third of the juvenile imprisonment has elapsed, and if it can be reasonably expected based on the achieved success in rehabilitation that the juvenile will not commit further criminal acts and will behave well in the community in which they will reside.

Additionally, the juvenile judge may decide to impose one or more intensified supervision measures on the juvenile during the conditional release (Pleh, 2020).

The substantive nature of the court's decision is evident in relation to the cessation of the execution of institutional treatment sanctions and conditional release, when alongside formal conditions, the “substantial” condition—achieving success in rehabilitation (successful resocialization) and expected good behavior in the environment where the juvenile will live (successful reintegration)—is fulfilled. This is also true concerning additional decisions regarding the imposition of alternative sanctions such as intensified supervision or special obligations (Pleh, 2018).

Regardless of formal conditions, in the process of rendering substantive decisions, the juvenile judge's individualization of the conditional release measure or criminal sanctions is essential, which is achieved through collaboration with entities involved in juvenile justice that address the psychological and physical state and personality of the juvenile, as well as through direct contact with them. Given that substantive decisions have the most significant impact on the personality and life of the juvenile, we emphasize the substantive role of the court as a special and paramount aspect (Pleh, 2020).

Considering that circumstances may arise in the execution of a criminal sanction that were not present (or known) at the time of the decision, or may undergo changes, such newly emerged circumstances necessitate a reassessment of judicial individualization of the criminal sanction, adapting it to the perpetrator of the criminal act (Pleh, 2022).

3.3. Supervisory role of the court

The supervisory role of the court entails judicial oversight over the process of executing and applying the imposed criminal sanction, with the aim of assessing its efficiency and effectiveness, as well as protecting the guaranteed human rights of the juvenile throughout this process. The court exercises this oversight through direct contact with juveniles during its regular visits, conducted once or twice a year, and ad hoc visits, or indirectly via reports submitted by the administrations of the institutions where the juvenile serves their criminal sanction or by social welfare centers that implement the majority of criminal sanctions, as well as specific entities where the sanction is executed. In performing this function, the juvenile judge is supported by expert advisors.

Thus, by reviewing the relevant documentation, the juvenile judge determines the legality and correctness of the procedures and assesses the success achieved in the rehabilitation and proper development of the juvenile's personality. Any identified shortcomings or other observations must be promptly reported to the Federal Ministry of Justice, as well as to the administration of the institution where the educational measure is being executed. The notified parties are required to conduct appropriate checks without delay and take measures to rectify any illegality or irregularities, informing the juvenile judge of

their actions. Substantive decisions arise from the insights the court gains while fulfilling its supervisory role.

In this context, one example of the court's supervisory function is the oversight of the execution of special obligations, whereby the court can request reports from certain entities regarding the progress and results of implementing the special obligation and the opinions of the social welfare authority. Furthermore, the guardianship authority is obliged to submit reports to the court every six months, and the court may request a report at any time deemed necessary, requiring it to be provided within the shortest possible timeframe (Pleh, 2022).

3.4. Additional role of the court

In the context of Bosnian-Herzegovinian criminal legislation concerning juveniles, the court's additional role is limited to adjudicating appeals made by juveniles against decisions of the head of the institution or resolutions regarding the juvenile's grievances. If a juvenile believes that their rights have been infringed upon or that irregularities or illegalities have occurred during the execution of an educational measure or a juvenile detention sentence, they possess the right to appeal to the head of the institution or facility where the criminal sanctions are being served. The head of the institution or facility is required to issue a reasoned decision within three days, either rejecting the appeal as unfounded or recognizing its full or partial validity, after which immediate measures shall be taken to rectify any identified irregularities or illegalities. Should the juvenile remain dissatisfied with the resolution of their grievance, they have the right to file an appeal with the judge who oversees the execution of the educational measure or the judge who imposed the juvenile detention sentence, within eight days of receiving the decision (Article 133).

4. OBSERVATION AND DIAGNOSIS OF JUVENILE OFFENDERS

Observation and personality diagnosis of juvenile offenders are conducted during the execution of institutional educational measures and juvenile detention sentences. Personality assessments of juveniles are carried out to facilitate an individualized approach and to select an appropriate intervention program, as well as a treatment plan based on which the institutional sanction will be executed. Furthermore, adequate information regarding the (lack of) progress of the juvenile is obtained through observation and personality diagnosis, enabling the court, in fulfilling its substantive role, to determine the necessity of taking appropriate measures, such as granting access to privileges, suspending the execution of the imposed criminal sanction, or substituting the imposed sanction with another one that better serves the purpose of sanctioning, as well as conditional release (Pleh, Suljagić, Suljagić, 2020).

As stated in the academic writings on this topic, in the reception department, a thorough observation and exploration of the juvenile's personality is conducted from psychological, pedagogical, criminological, social, health, security, and other perspectives,

with the aim of determining the most suitable intervention program for the juveniles. The observation and diagnosis of juvenile offenders constitute a complex activity that involves systematic and planned data collection. To provide a clearer understanding of the activities of the professional team, we will outline the responsibilities of the social worker, educator, and psychologist within the reception department. The activities of the social worker may commence even before the juvenile arrives at the educational-correctional facility or juvenile detention center. For instance, a visit by the social worker to the juvenile's family environment, where feasible, serves as a good practice example. If such a visit is not possible for any reason, family members may be encouraged to allocate time for discussions with the social worker during their visit with the juvenile. A true depiction of the family and its environment is best achieved through a field visit by the social worker, sometimes accompanied by a group educator.

The role of the psychologist in the reception department is crucial during the assessment of the juvenile's personality. Immediately upon the juvenile's admission, the psychologist should conduct an interview. During this initial conversation, the psychologist must create a relaxed atmosphere and convey through their demeanor and attitude that the juvenile is accepted and that no value judgments will be made regarding what they share. The educator in the reception department collects information on the degree of formal and informal education. Due to their chronological age and previous lifestyle, juveniles often lack basic literacy and have not completed their educational process (Macanović, 2021).

5. CONCLUSION

The treatment and sanctioning of juveniles in conflict with the law demand a balanced approach that prioritizes their rehabilitation and reintegration into society. Judicial individualization emerges as a critical aspect, allowing for tailored sanctions that consider the unique circumstances, needs, and potential of each juvenile offender. In Bosnia and Herzegovina, the low application of juvenile imprisonment (only 5 cases in 2022) underscores the legal system's commitment to minimizing custodial sentences in favor of educational and corrective measures, in line with international standards like the Beijing Rules. However, challenges remain, particularly in ensuring procedural fairness and securing juveniles' trust in the judicial system. To address these, a child-centered justice model must be strengthened, emphasizing the active involvement of juveniles in decisions affecting them, respecting their rights, and fostering their belief in the legitimacy of justice institutions. This approach not only aligns with the principles of the Convention on the Rights of the Child but also enhances the efficiency and human rights protections within juvenile justice systems, paving the way for more effective outcomes in reducing recidivism and promoting social cohesion.

In conclusion, juvenile imprisonment in Bosnia and Herzegovina is governed by a legal framework that prioritizes rehabilitation, reintegration, and the best interests of the child, in line with international standards such as the United Nations Convention on the

Rights of the Child and the Beijing Rules. Both entity-level laws, including the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings and the Law on the Execution of Criminal Sanctions, emphasize the proportionality and exceptional nature of custodial sanctions, applying them only for severe offenses or repeated criminal behavior when alternative measures are deemed ineffective. Juvenile imprisonment serves not only to protect society but also to influence the juvenile's development, foster personal responsibility, and prepare them for reintegration into the community. By incorporating individualized assessments and procedural safeguards, the justice system reflects a child-centered approach, ensuring dignity and fair treatment. However, the effectiveness of these measures depends on continued efforts to harmonize legal provisions with practical implementation, addressing challenges in procedural fairness and ensuring access to education, care, and support during incarceration. This approach underscores the importance of balancing societal protection with the rehabilitative needs of juveniles to achieve sustainable outcomes.

It is essential to acknowledge that, on one hand, the varying characteristics of psychological development and maturity among children limit their ability to navigate the judicial process; on the other hand, juveniles possess significant potential and the capacity to modify their behavior.

Individual assessment is necessary and exceptionally important, as it prevents arbitrary, unjustified, irresponsible, and inadequate decisions. Moreover, assessments are crucial because all decisions within the juvenile justice system impact the lives of juveniles and their families. In this context, information obtained through assessments aids in decision-making within the juvenile justice system. These decisions are significant not only for juveniles but also for society as a whole. The quality of the individual assessment process, as well as the information and conclusions derived from it, are key to ensuring fair, timely, and effective decision-making. Highly competent and adequately trained assessment professionals employing a transdisciplinary approach play a vital role in this process.

In conclusion, effective decision-making within the juvenile justice system is undoubtedly important, but it is equally vital to remember that we are working with and for young individuals. Thus, the broader picture should "depict" the promotion of youth welfare and the provision of assistance to help them become mature and responsible adults leading high-quality lives (Vaičiūnienė, 2021).

LIST OF REFERENCES

Books and Book chapters (printed version)

- Daly, A., Rap, S., (2018), "Children's Participation in Youth Justice and Civil Court Proceedings", International Human Rights of Children, Springer, page 1-21
- Dumortier E., Bernuz Beneitez M.J., (2018). "Why Children Obey the Law: Rethinking Juvenile Justice and Children's Rights in Europe through Procedural Justice", Youth Justice 18, 34–51.
- United Nations Convention on the Rights of the Child, "Official Gazette of the Socialist Federal Republic of Yugoslavia, International Treaties", Number: 15/90.
- Kosović, J., (2018). Commentary on the Law on the Protection and Treatment of Children and Minors in Criminal Proceedings of the Federation of Bosnia and Herzegovina, the Republic of Srpska, and the Brčko District of Bosnia and Herzegovina, Sarajevo: OSCE Mission in Bosnia and Herzegovina.
- Macanović, N., Nadarević, D. (2014). Penological Andragogy, Banja Luka: European Defendology Center.
- Mujkanović, N. (2015). Juvenile Justice in Bosnia and Herzegovina: Balancing Rehabilitation and Deterrence. Sarajevo: Faculty of Criminal Justice, Criminology, and Security Studies.
- Pleh. V., (2020). Uloga i značaj sudije za maloljetnike u postupku izvršenja krivičnih sankcija prema maloljetnicima u Bosni i Hercegovini, [The Role and Importance of the Juvenile Judge in the Execution of Criminal Sanctions for Minors in Bosnia and Herzegovina], Review: Journal for Social Issues, LXI, Number 2, p. 45 -68.
- Pleh. V., Suljagić. S., Suljagić., A. (2020). Opservacija i dijagnostika ličnosti maloljetnih prestupnika u krivičnom zakonodavstvu i praksi BiH, [Observation and Diagnosis of Personality in Juvenile Offenders within Criminal Legislation and Practice in Bosnia and Herzegovina]. Banja Luka: Center for Modern Knowledge.
- Pleh, V., (2022), Sudska individualizacija mjera i sankcija maloljetnim prestupnicima u maloljetničkom pravosuđu Bosne i Hercegovine, [Judicial Individualization of Measures and Sanctions for Juvenile Offenders in the Juvenile Justice System of Bosnia and Herzegovina], Law and Justice: Journal for Legal Theory and Practice. - ISSN 1512-8571 (Year 20, Number 1, 2022, p. 459-478)

Books and Book chapters (online version)

- Agency for Statistics of Bosnia and Herzegovina. (2022). Prijavljeni, optuženi i osuđeni maloljetnici u Bosni i Hercegovini za 2022. godinu. Sarajevo: BHAS. Retrieved from: bhas.gov.ba
- Milić, I., (2019). Individualizacija kazne zatvora na osnovu Zakona o izmenama i dopunama Zakona o izvršenju krivičnih sankcija iz 2019. Godine, [Individualization of Prison Sentences Based on the Law on Amendments and Supplements to the Law on the Execution of Criminal Sanctions from 2019], Proceedings of the Faculty of Law in Novi Sad, p. 1271-1285 Available at: <https://scindeks-clanci.ceon.rs/data/pdf/0550-2179/2019/0550-21791904271M.pdf>
- Macanović, N., (2021). Resocijalizacija maloljetnih prestupnika, Centar modernih znanja Banja Luka, [Resocialization of Juvenile Offenders, Center for Modern Knowledge Banja Luka], Available at: https://www.researchgate.net/publication/354099897_Resocijalizacija_maloljetnih_prestupnika_-_odabrana_poglavlja
- Pleh V., (2018). Uloga suda u postupku izvršenja kazne zatvora u Hrvatskoj, Francuskoj i Bosni i Hercegovini (pregledni naučni rad), [The Role of the Court in the Execution of Prison Sentences in Croatia, France, and Bosnia and Herzegovina (Review Scientific Paper)], Yearbook of the Faculty of Law in Sarajevo, LXI, p. 279-314. Available at: <https://www.pfsa.unsa.ba/pf/wpcontent/uploads/2019/01/Godisnjak-PFSA-2018-za-web.pdf>
- Vaičiūnienė, R., (2021). Individualna procjena optužene ili osumnjičene djece: pregled dobre prakse u kontekstu Direktive 2016/800 EU, [Individual Assessment of Accused or Suspected Minors: A Review of Best Practices in the Context of Directive 2016/800/EU], Available at: <https://teise.org/wp-content/uploads/2021/06/Unofficial-translation-of-the-Handbook-in-Croatian.pdf>

Laws

- Beijing Rules. (1985). United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Adopted by General Assembly resolution 40/33.
- Law on the Execution of Criminal Sanctions of the Federation of Bosnia and Herzegovina. (Official Gazette of FBiH, No. 44/98, 42/99, 12/09, 42/11).
- Official Gazette of BiH. (2004). Law on Statistics of Bosnia and Herzegovina ("Službeni glasnik BiH," Nos. 26/04 and 42/04).
- Zakon o zaštiti i postupanju sa maloljetnicima u krivičnom postupku Republike Srpske [Law on the Protection and Treatment of Children and Juveniles] (Official Gazette of Republic of Srpska, Number. 13/10 and 63/13).

Zakon o zaštiti i postupanju sa maloljetnicima u krivičnom postupku Federacije Bosne i Hercegovine [Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina] (Official Gazette of FBiH, No. 44/98, 42/99, 12/09, 42/11).

PROTECTED WITNESSES

*Lejla Softić**

Abstract

The aim of this article is to disseminate the role of a witnesses in criminal proceedings, integral part of it being potential disadvantages for their health, life and security. As it is important to have a witness, it is of the same importance to provide them adequate protection and security. Sensitive cases involving highly confidential information or people infamously known for their illegal activities, mostly obstruct the will to testify, invoking fear and concern for close relatives and friends. It is evident that there is a need for legal framework to ensure adequate flow of the proceeding and allow people to testify, ultimately contributing to reaching of a fair judgment. Bosnia and Herzegovina drafted two special laws: Witness Protection Program Law and the Law on Protection of Witnesses under Threat and Vulnerable Witnesses. Content of the laws are to be studied in order to identify which protection measures could be applied and who exactly is considered eligible to be a protected witness. Article further elaborates on execution of protective measures, established by provisions of mentioned laws and scope of activities entrusted to the State Investigation and Protection Agency. The article will further stress the key role of a witness protection in combating serious crimes.

Keywords: Witness, witness protection, testimony, legal framework, physical harm, psychological support, SIPA.

* Lejla Softić, MA in Comparative Public Law, intern at the Basic Court of Brčko District, Bosnia and Herzegovina. Contact: lejlaasoftic59@gmail.com

1. INTRODUCTION

Criminal prosecution as a complex procedure is dependent on rightful application of both procedural and substantive rules. As an example, a motion of a Prosecutor for imposition of prohibiting measures upon an individual, will not be upheld by the Court if the act committed does not constitute a criminal offence – contrary to the principle of legality. Hence, both types contribute to harmonious operation of a criminal justice system.

Extensively, substantive criminal law determines legal definitions of offences prescribed as punishable, as well as types of sanctions and their limits. Questions which may be imposed are: did the person commit the crime? Which criminal offence did the person commit? What kind of defense is a person entitled to in relation to the offence committed?

Procedural criminal law is a tool based on which prosecutor executes series of criminal proceedings and enforces substantive criminal law (*Criminal Procedure | Wex | US Law | LII / Legal Information Institute*, n.d.). It governs the procedures that involve investigation, detection, and prosecution of criminal offences. The question that arises here concerns the fact whether prosecutors acted within the legal scope while investigating, arresting and prosecuting defendant. It is in the nature of the crime to be dangerous, which is why maximum efforts were made to legally protect anyone involved in the process whether it is a prosecutor, a defendant or a witness. For the purposes of this paper, procedural law will be more relevant for examining the position and rights of a witness in criminal proceedings.

The concern for enabling protection of witnesses can be observed from the aspect that the attempts to promote its importance expand from national borders to international level. One of the results is set of guidelines introduced by United Nations Office on Drugs and Crime, concerning procedural protection and the establishment of covert witness protection units, one of them being “Good practices for the protection of witnesses in criminal proceedings involving organized crime”(*Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008). Article 24 of the Organized Crime Convention specifically sets out the main aim to protect witnesses from retaliation and intimidation.

When it comes to lobbying for the protection of witnesses, International Criminal Court and the European Union are essential actors for its’ international recognition. It shall be interpreted that advocating of influential international actors, therefore raising awareness and setting out positive practices, stresses out the concern for this procedural concern to be adequately and analogously applied throughout legal systems.

The paper is constructed in a way that firstly we shall resonate on the general overview of the topic, following the explanation of practices and challenges within the jurisdiction of Bosnia and Herzegovina grounded in two domestic laws. The conclusion will identify significant findings of the research.

2. GENERAL OVERVIEW

Considering the Oxford Dictionary, “One who gives evidence in relation to matters of fact under inquiry; *spec.* one who gives or is legally qualified to give evidence upon oath or affirmation in a court of justice or judicial inquiry.” (Oxford English Dictionary, 2024). Hence, a witness is a person who saw or heard the crime take place or may have important information about the crime or the defendant (*Witness / Definition, Types & Roles*, n.d.). All witnesses in any type of legal proceedings are obliged to give sworn testimony whereas they are also previously informed by judges that false testimonies are a criminal offence. The role of a witness, specifically in criminal proceedings, is crucial due to their presence and knowledge about the events which have occurred at the place of perpetration of crime.

Under legal interpretation, they are not only called upon to confirm the evidence collected during investigation procedures but their testimonies are considered as evidence as well, which is why it is important for them to tell the truth. It should be noted that in some cases, if there is no dispute about what a witness has to say, prosecution and defense could agree on eligibility of evidence and there will be no need for them to give testimonies in person.

The right to call upon a witness belongs to both parties - prosecutor and defendant, as well as the Court where witness credibility is what could bolster their cases. It shall be mentioned that we differentiate between different types of witnesses such as expert witnesses (specialist of a certain field that give their opinion within that scope) or lay witness (someone who watched an event happen and can provide information) (*U.S. Attorneys / Discovery / United States Department of Justice*, 2014). For the purposes of this research, we ought to be focused on lay/casual witnesses.

The manner in which they are treated is different from the one of the accused persons, because they are being questioned, not interrogated. This type of questioning is recognized as direct examination where the party that had called upon a witness asks open questions that leave space for further explanations. The opposite of direct examination is crossed examination where one of the subjects of the procedure asks questions to another party’s witness. One shall start with more general questions and narrow it down to specific ones. Who, what, why, where, how, tell me about, or describe, are openings to such questions. Even with modern day improvements of technology and science, arguably, most Courts still highly rely onto witness testimony (*Witness Evidence and Questioning*, n.d.). Testimonies can completely change the course of a proceeding and prevail into favor of one of the sides.

Harsher the criminal offence in question, harsher the sanctions and tensions are always at their peak. Stepping forward and giving a testimony which has a potential to harm either of the sides and impose an unwanted result is definitely a risk. Consequently, it is logical that they should be enjoying protection under the law and the State is obliged to

provide specific departments that will ensure the execution of mentioned laws in practice. Following chapter observes conversion of the general overview mentioned within jurisdiction of Bosnia and Herzegovina.

3. LAW OF BOSNIA AND HERZEGOVINA

Decentralization of Bosnia and Herzegovina has resulted in various laws, codes, and regulations, enforced at entity levels. These are very similar to each other, some of the provisions may differ however, all of them are supposed to be in conformity with the Constitution of the State which is a primary navigator and fundamental to any other enacted law. That is why we have the main Constitution – the Dayton Peace Agreement, but at the same time each of the entities (including District) and each of the Cantons in Federation of BiH has their own constitution. It is not then a surprise that when it comes to criminal matters, we have the Code on Criminal Procedure of Bosnia and Herzegovina at the State level, subsequently we have three additional ones for each entity and a district. It is inevitable that within what we mentioned beforehand, Criminal Code of Bosnia and Herzegovina is what we turn to when searching for substantive criminal law.

When it comes to the execution of criminal law, Code on Criminal Procedure of Bosnia and Herzegovina (or either of the entities) is our main internal source. We label it as main internal source because it directly concerns the whole aspect of criminal proceedings and elements it consists of. Additionally, the word “internal” signifies that it is a domestic source of law. Majority of the Code on Criminal Procedure deals with witnesses within various contexts. Provisions concern the facts that we previously have mentioned in general overview and interpreting those laws we establish that they serve to take care of the witnesses and protect them from any type of harm. That is why we have provisions on how to properly conduct examination, also the law excludes certain groups of people or limits them (minors), where they shall not give their testimony as a witness due to potential harmful effects to their professional occupation or State they serve (“Official Gazette” of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, & 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 and 65/18), 2018).

Another important fact is that a witness can refuse to respond to a question if such response would result in self-incrimination as well as their right to be aware of content of indictment. Article 267 of the Code on Criminal Procedure - Protection of Witnesses from Insults, Threats and Attacks, briefly touches upon protection of witnesses in a more specific manner. Under paragraphs (1) and (2), the judge or the presiding judge has an obligation to protect them from insults, threats, and attacks. The same judge is entitled to warn or fine any of the participants in the proceedings or any other parties that have insulted, threatened, or jeopardized the safety of the witness before the Court. If the situation aggravates (3), and there is a serious threat imposed upon a person, the Prosecutor shall be informed to undertake appropriate criminal prosecution. Lastly (4), only when there is a petition of the parties or the defense attorney, the judge shall order execution of necessary measure by the police to

achieve maximum protection of a witness (“Official Gazette” of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, & 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 and 65/18), 2018). This is the only article within the Code that explicitly addresses possible situations with potential to disrupt and impose a threat to the security of a witness.

Comparatively, victim and Witness Protection Act of 1982 (the United States) recognizes any “intimidation of or retaliation against witnesses a Federal offense” (J Heinz, 1983, pp. 13-18) However, what we are searching for in domestic law is Article 91 – Protected Witness, where its stipulated that the provisions of the special laws shall be applied to protected witnesses in criminal proceedings.(“Official Gazette” of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, & 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 and 65/18), 2018)

Bosnia and Herzegovina has two special laws regulating the matter: The Witness Protection Program Law in Bosnia and Herzegovina (2014) and Law on Protection of Witnesses under Threat and Vulnerable Witnesses (2003). The first is focused on the enforcement mechanisms and establishment of a department for witness protection, while the latter concerns measures of protection of witnesses in specific situations as prescribed by the law. Since we mentioned main internal sources of the criminal procedure, the two special laws are considered secondary internal sources. Not because they are of a less importance, but because they do not relate to the criminal proceeding as a whole – just the specific part of it. Both serve the same purpose which is to ensure that witness can openly and freely give out their testimony before the Court while providing them protection before, during, and after the proceedings (in certain cases). We are already familiar with the notion of a witness, so it is expected that the Witness Protection Program Law describes the absence of a witness a failure and inadequate prospect of investigation and establishment of facts that are crucial to development of the proceeding (“Official Gazette” of Bosnia and Herzegovina, No. 29/04 36/14, n.d.). According to the Law, along with the consent of the witness, instance in which they can be granted protection are:

- 1) if they face a danger to life, health, or freedom
- 2) if they are suitable for witness protection measure
- 3) can be protected if the danger realizes after the termination of the proceeding
- 4) if the danger is a result of their willingness to testify and their testimony conducted during the proceedings (“Official Gazette” of Bosnia and Herzegovina, No. 29/04 36/14, n.d.).

It shall be noted that some of these provisions extensively apply to their family members that may be exposed to danger because of the testimony. The consent is of a grave importance and must be given explicitly by the witness for the Court to evaluate the facts and needs for protection. Moreover, speaking of more aggravating circumstances and under the Law on Protection of Threatened and Vulnerable Witnesses, a witness whose personal

security or that of his family is endangered due to participation in the proceedings and his testimony, whose reasonable fear materialized through threats or intimidation, shall be considered as a witness under threat. On the other hand, a vulnerable witness is someone who suffered mental or physical trauma by the events of the offence or additionally is diagnosed with serious mental condition rendering him unusually sensitive. In the group of vulnerable witnesses, we count in children and juveniles. In both cases and under both Codes, the Court is the one who has the authority to grant the protection and decides upon the measures they are going to apply as well as the termination of them. The request for this, made by the Prosecutor *ex officio* or a defense attorney, shall include information about the identity of a witness, the trial, and the facts that prove that witnesses' life or their family's life is being endangered. What should be explicitly stated here is that the Court shall never apply the more severe measure if the same effect can be achieved with the application of the less severe/lenient one. Further, it is the Court's or prosecutor's duty to inform *ex officio* either of the two groups of witnesses mentioned about available protection measures.

Protection measures mentioned under the Law on Protection of Witnesses under Threat and Vulnerable witnesses refers to granting not only legal aid but even assistance and support of social care bodies ("Official Gazette" of Bosnia and Herzegovina, 3/03, 21/03, 61/04, 55/05, n.d.). Therefore, we can conclude that measures concern psychological, social, and professional protection. Some of them deviate from standard rules under Code on Criminal Procedure of BiH, whereas the judge can control the process of examining the witness whereas in the case of witnesses' best interests they are entitled to, with the previous consent of the defense attorney and other parties in the proceedings, ask questions to the witness on their behalf. One of the measures of protection could be examination of a witness using technical means to transfer audio and video. This would enable everyone in the courtroom ask questions while the witness is in another room. Furthermore, in cases where it is evident that the presence of the accused would completely disrupt testimony of a witness, the Court can *ex officio* or after hearing parties order for the accused to be removed from the courtroom.

However, if there is no appeal to such request especially on the part of the defense attorney, the Court is obliged to provide technical mean for audio and video transfer so that the accused could follow the testimony (or recordings of it). The protection of a witness under threat goes to such an extent that the judge may, with the notion of the Prosecutor, order that some or all personal details to be hidden after the indictment has been issued ("Official Gazette" of Bosnia and Herzegovina, 3/03, 21/03, 61/04, 55/05, n.d.). From the provisions under examined law, we may conclude that the witness indeed is entitled to protection before their examination, during their testimony, but it is not explicitly stated that protection continues after the proceeding. The only provision that kind of provides for such protection is the Article 13 - Additional measures to provide for the non-disclosure of the identity of the witness. Hereby, in exceptional cases where there is justified fear that revealing personal details of a witness would impose a serious threat to themselves or their

family, the Court can ex officio or with the approval of the parties decide : “the personal details of the witness shall remain confidential for such period as may be determined to be necessary, but in any event not exceeding thirty years, following upon the day the decision became final.”(Parliamentary Assembly of BiH, 2003) The Law then provides several provisions on witness protection hearing and the manner in which it is exercised through Articles 15-23.

Coming back to the Witness Protection Program Law, significance of it lays within a fact that it had established a program and department for witness protection. That department is: The Witness Protection Department within the State Investigation and Protection Agency or as we could easily recognize it - SIPA. SIPA has been given extensive free will and independence to decide upon measure to be taken however, not prior to careful assessment of the circumstances - gravity of the offence and extent of the risk, rights and impacts on the accused person ("Official Gazette" of Bosnia and Herzegovina, No. 29/04 36/14, n.d.). The Department ensures efficient protection of witnesses prior, during and after criminal proceedings, by providing support and protection to witnesses in accordance with relevant regulations Also, the Department decides on and implements measures for foreign witnesses and make sure that such measures are in compliance with the international conventions or agreements made between BiH and other respective country (*Witness Protection Department - SIPA.GOV.BA*, n.d.)

- 1) Their sphere of influence concerns:
- 2) processing data and keeping required records particularly considering the security of data and information related to witness protection in criminal proceedings,
- 3) continuously following regulations related to protection and if needed, providing expert opinion about regulations,
- 4) create temporary cover identity for a witness (certificates or other documents),
- 5) other tasks in accordance with the law (*Witness Protection Department - SIPA.GOV.BA*, n.d.).

The obligations of the Department towards the protected witness or vice versa, shall be defined in a special and binding contract. If the measures are no longer needed, the Department is obliged to inform public and non-public agencies involved without leaving out the interest of a protected witness. In accordance with the Witness Protection Program Law, the so-called support measures we mentioned, the law prescribes following protection measures:

- 1) physical and technical protection measures,
- 2) safe facilities,
- 3) relocation within the BiH but also to another state,

- 4) protection and support to cooperative witnesses or suspects have been granted immunity/reached a settlement with the Prosecutor's Office ("Official Gazette" of Bosnia and Herzegovina, No. 29/04 36/14, n.d.).

As soon as the Department was established, they were faced with a lot of work due to ongoing war crimes proceedings. To this present day, they have provided different forms of protection to over 1000 witnesses who testified before the Court B&H and entity courts as well as to their family members (*Witness Protection Department - SIPA.GOV.BA*, n.d.). The work of this Department has been praised by not only domestic actors, but also it can be observed from the perspective of their participation in various international networks for battles against organized crime and money laundering (*High Representative: SIPA Internationally Recognised | Office of the High Representative*, 2005). However, the Department faces issues in terms of lack of sufficient resources due to which their activities often direct onto regular police enforcement which unfortunately does not specialize in witness protection area.

War crime proceedings require high level of witness protection in order to refrain them from threats, disclosures of identity and distressing effects of the proceeding invoked by revisiting unwanted memories. Due to these reasons, the Court of B&H established Witness and Victim Section (further as "WVS") equipped with psychologists tasked to guide and support witnesses, especially those for war crimes, through the steps of the procedure. For an example, psychologists of the WVS stay with witnesses during their testimonies before the Court to be able to intervene if anything seems to obstruct the testimony. To some extent, the same employees are entitled to give suggestions to judges in terms of communication and treatment of a witness (OSCE, 2010, pp. 17-22). Unfortunately, there were few cases in which witnesses' identities were uncovered, their positions being immediately threatened and course of the proceedings obstructed. Some of the witnesses even expressed their concerns after being unexpectedly confronted with the accused in Court hallways or courtrooms.

Observing courts at entity level, usually those established in bigger cities have Departments for Witness Support providing the same services as previously elaborated and derived from mentioned legal basis. Beforehand, excluding mentioned laws enacted later on, war crimes were prosecuted at cantonal and district courts that initially did not possess any type of law or department with an aim to provide protection to witnesses (novinarstvo (CIN), 2005). Consequently, the procedure was psychologically damaging for the witness, as it was also easy to manipulate, scare and threaten them. Due to this fact, credibility of the proceeding was also under attack.

4. CONCLUSION

A witness is a critical component to fairness of criminal proceedings. The laws mentioned and corresponding department – SIPA, contribute to reassurance and protection of the witnesses, extending to their close ones. It is non-negotiable that mentioned laws provide positive and concrete legal basis crucial for future improvements. Further, SIPA effectively works to ascend to their purpose. However, internal disagreements and scandals are affecting the credibility of the institution consequently, questioning their activities and internal plans. Role of the Court is not only related to protection of a witness but at the same time, execution of an effective, fair and just criminal proceeding. Due to this fact, balance shall be established between the extent of protection and requirements for reaching a judgment. This balance is supported by the fact that Bosnia and Herzegovina already had enacted laws for this specific purpose and existing case-law navigates judges through the course of the proceeding. It shall be noted that majority of the countries worldwide are facing the problem of non-cooperation of witnesses and victims as it was evident in prosecution of war crimes in BiH. They would refuse to give testimony or evidence due to fear, and this fear is additionally one of the main obstacles in combating against heavy crimes (organized crimes, human trafficking, etc.). Therefore, an objective solution for these issues is enshrined in constant development of criminal procedure measures upheld by adequate financial support of the state, therefore improvement of witness protection measures, and efficient cooperation between courts and other state departments. It is hard to measure true effectiveness of witness protection programs in any country due to confidentiality of information. It could be interpreted that programs are effectively serving their purpose – hence the scarce case-law information. In general, it should be recognized among every country that any witness is important and entitled to be contemplated for application of protection measures, not only witnesses who were undercover investigators or police officers. The good practice is, almost all countries have enacted legislative frameworks for this issue and are trying to enhance their laws and programs. Ultimately, investing in offering a safe space for truthful testimonies could only impose positive benefits on judicial systems and combating crimes.

LIST OF REFERENCES

- Criminal procedure | Wex | US Law | LII / Legal Information Institute.* (n.d.). Retrieved October 6, 2024, from https://www.law.cornell.edu/wex/criminal_procedure
- Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime.* (2008).
- High Representative: SIPA Internationally Recognised | Office of the High Representative.* (2005, June 30). <https://www.ohr.int/high-representative-sipa-internationally-recognised/>
- J Heinz. (1983). Victim and Witness Protection Act of 1982 | Office of Justice Programs. *U.S. Department of Justice, Office of Justice Programs*, 13–18.
- Novinarstvo (CIN), C. za istraživačko. (2005, July 10). *Protecting witnesses from their neighbors.* CIN. <https://cin.ba/svjedoci-na-sudenjima-za-ratne-zlocine-traze-zastitu/>
- “Official Gazette” of Bosnia and Herzegovina, 3/03, 21/03, 61/04, 55/05. (n.d.). *Law on protection of witnesses under threat and vulnerable witnesses.*
- “Official Gazette” of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, & 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 and 65/18). (2018). *CRIMINAL PROCEDURE CODE OF BOSNIA AND HERZEGOVINA.*
- “Official Gazette” of Bosnia and Herzegovina, No. 29/04 36/14. (n.d.). *Witness Protection Program Law.*
- OSCE. (2010). *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing* (A Report of the Capacity Building and Legacy Implementation Project, pp. 17–22). <https://www.osce.org/files/f/documents/3/b/118893.pdf>
- Oxford English Dictionary. (2024, June). *witness, n. Meanings, etymology and more | Oxford English Dictionary.* Oxford English Dictionary. https://www.oed.com/dictionary/witness_n
- Parliamentary Assembly of BiH. (2003). *The Law on Protection of Witnesses under Threat and Vulnerable Witnesses.* <https://advokat-prnjavorac.com/legislation/Law-on-protection-of-witnesses-under-threat-and-vulnerable-witnesses.pdf>
- U.S. Attorneys | Discovery | United States Department of Justice.* (2014, November 7). <https://www.justice.gov/usao/justice-101/discovery>

Witness / Definition, Types & Roles. (n.d.). Study.Com. Retrieved October 6, 2024, from <https://study.com/learn/lesson/witness-types-roles-law.html>

Witness Evidence and Questioning. (n.d.). Defence-Barrister.Co.Uk. Retrieved October 6, 2024, from <https://www.defence-barrister.co.uk/witness-evidence-and-questioning>

Witness Protection Department—SIPA.GOV.BA. (n.d.). Retrieved October 6, 2024, from <http://www.sipa.gov.ba/en/about-us/structure/organisational-structure/witness-protection-department>

BUSINESS ENVIRONMENT AND ITS IMPACT ON ATTRACTING FOREIGN DIRECT INVESTMENT

*Elif Tanrıverdi**

Abstract

This study provides an in-depth look at the complex relationship between business environments and foreign direct investment. The study examines this critical issue by focusing on emerging economies, such as Kosovo. In this research, analytical and empirical research methods have used to highlight the importance of FDI in promoting economic growth. FDI not only increases production capacity but also supports economic growth by increasing purchasing power and creating employment opportunities, especially in countries in transition. This analysis distinguishes between endogenous and exogenous variables to classify the various elements of the business environment. It is important to emphasize how a supportive business environment plays a vital role in attracting investment. The main factors affecting FDI include infrastructure quality, political stability, workforce skills, market potential and tax incentives. These initiatives are critical to creating a more favorable investment climate. As a result of the variables the study concludes by emphasizing the need for continuous reforms to strengthen the business environment. Such strategic efforts are crucial to optimize FDI flows and advance sustainable economic development. By strengthening regulatory frameworks and improving infrastructure, developing countries can be in better position itself to attract foreign investors. Furthermore, creating a strong business environment can also support the development of local entrepreneurs, increasing economic diversification. As a result, it not only facilitates the flow of capital, but also contributes to the long-term stability and growth of the national economy. Therefore, policymakers and governments need to prioritize these initiatives and develop comprehensive and sustainable strategies to improve the business environment.

Keywords: Foreign Direct Investment, Business Environment, Economic Growth, Political Stability, Investment Incentives

* Elif Tanrıverdi holds a BA and an MA in Comparative Public Law from the International University of Sarajevo, Türkiye. Contact: elif.demir210@outlook.com

1. INTRODUCTION

This paper will give insight into business environment and its impact on attracting foreign direct investment. Firstly, general information about foreign direct investment will be presented and then, secondly information about the business environment of in order to focus on further part of the paper. After that, it will talk about importance of a favourable business environment. Most importantly, this paper will also focus on factors to attract foreign direct investment in a way that explaining each factor in details. Last but not last, this paper will cover government policies and regulations which part will give suggestions to states in order to attract business environment and foreign direct investment. Finally, there will be example part from Kosovo to see how business environment has impact on attracting foreign direct investment.

A foreign direct investor is an entity that resides in a single economy who makes an investment in a business located in a nation's economy other than their own, with a long-term connection and a permanent stake and influence. If an investor makes foreign direct investment (FDI), it means that they have an important role in how the business is run in another country's economy. This type of investment includes the first transaction between the two businesses as well as any ensuing transactions—both incorporated and unincorporated—between them and their subsidiaries abroad at large. Both private citizens and companies may engage in FDI. (Defination and Sources, 2007)

The most obvious benefit of FDI is the creation of employment, which is one of the main reasons a country, especially one that is still developing, will seek to draw FDI. Foreign Direct Investment stimulates the production as well as the service sector, leading to the creation of employment and lowering the nation's levels of unemployment. A country's economy as a whole benefits from more employment since it increases earnings and gives people greater purchasing power. (Calimanu, 2023)

Numerous factors, including economical distance or transport costs, market share, cluster effects, factor costs, incentives from government, business or investment environment, stability in politics, economic risk, and barriers to trade or openness, are listed as potentially significant factors influencing foreign direct investment. (Lim, 2001)

2. DEFINITION OF BUSINESS ENVIRONMENT

An organization's surrounding circumstances, happenings, and influences that impact its operations and expansion are collectively referred to as the business environment. The entirety of the people, organizations, rival businesses, governmental bodies, legal systems, the media, investors, and other elements that impact business operations but are not under the control of commercial organizations is collectively referred to as the business environment. Although, they are outside the control of business organizations, factors like shifting consumer tastes and needs, quick developments in technology, rising market competition, and modifications in economic legislation all have a significant impact on how

well businesses operate. The business environment's components are separated into two categories. One is internal, integrating the elements present within the company as a whole. These include labor unions, business cultures, value systems, vision and purpose, and human resources. Conversely, there is an external one, which consists of external elements that impact a business's activities. It is divided into two more portions. This category includes macro variables including sociocultural, legislative, political, and international aspects. Thus, micro which business is directly and immediately impacted by this environment. Customers, investors, suppliers, and so forth make up this group. (Business Environment: Meaning, Definition, Components, Dimension, Importance, and Impacts , 2023)

3. IMPORTANCE OF A FAVOURABLE BUSINESS ENVIRONMENT

The development of economic growth and the attraction of foreign direct investment depend on an encouraging business environment. A bad business climate, or one marked by high expenses, long lead times, and dangers, may stunt economic growth and discourage foreign direct investment. For developing and transitional nations, foreign direct investment is the main source of funding. If developing nations adopt laws and policies that encourage investment and business development, they will be in a strong position to compete for foreign direct investment. However, since FDI is currently flowing into these nations at a fairly modest rate and is trending downward, it is unclear how these nations can dramatically increase their share of FDI through coordinated efforts to enhance the business climate. One of the most important components for promoting a developing nation's economic growth is seen to be foreign direct investment. In light of the recent general decline in economic investment, the flow of foreign direct investment is very important. Reductions in FDI have an influence on investment, which lowers employment creation. These might result in a drop in the amount of consumption and a negative trend in savings. (Jahedi, 2013)

A business environment encompasses all of the outside influences such as market conditions, administration, legal framework, and cultural atmosphere, that market entities encounter as they enter, operate, and depart the market. Enhancing the business environment is an essential strategy for promoting economic growth and a crucial step in raising the standard of economic development. In economic growth, the mistaken belief that GDP is fundamental that is refuted by a supportive business climate. It modifies the general relationship between areas, between economic activity and society as a whole and between towns and villages. Developing balance on many fronts, the organic growth of society, and an increase in the quality of economic development are all supported by an encouraging business environment. Enhancing the business climate greatly stimulates economic development and contributes to a rise in the income of each person. Developments in the business climate, meantime, encourage firms to innovate and increase efficiency, which helps them move up the value chain and draw in foreign direct investment. Additionally, a supportive business climate minimizes operating expenses for businesses as well as the cost of beginning and exiting the market with flexibility and assistance. As a result, businesses

contribute more to innovation and research, which raises the standard of economic development. (Shengbing He, 2022)

4. FACTORS TO ATTRACT FOREIGN DIRECT INVESTMENT

There are certain factors for countries to attract foreign direct investment in their countries. Those are wage rates, labour skills, tax rates, transport and infrastructure, size of economy or potential for growth, political stability, property rights, raw materials, exchange rate and access to free trade zone etc. Big business owners investigate a number of factors to determine whether making an investment in another nation would benefit their organization. Salary and wages are then the most crucial factors. Every corporate organization prioritizes cutting costs, which is why they want low-rate salaries and wages. (Haudi, 2022)

Certain sectors, including technology and medicine, demand labor with a greater level of ability. Multinational corporations will thus make investments in nations with cheap salaries combined with strong labor productivity and skill levels. For instance, despite cheap salaries, India has drawn substantial investment in call centers due to the country's high English-speaking population. Because of this, it is a desirable location for outsourcing and draws investment. (Pettinger, 2019) A well-designed road and rail system can guarantee efficient and timely communications. Shipping, infrastructure, and communication are critical for large enterprises or businesses focused on exports. It can guarantee rapid distribution and an uninterrupted supply chain. The value chain suffered if there were transportation or infrastructural issues. Transportation costs are also significant; lower costs attract foreign direct investment investors. (Haudi, 2022) The accessibility of essential resources and basic supplies is crucial for attracting foreign direct investment. FDI investors often select a certain firm for a given nation depending on the resources that are available. Establishing a firm in an area where there is sufficient labor, infrastructure, and raw supplies will make it easy to become successful. (Haudi, 2022)

Big businesses that create large quantities of goods and conduct business globally desire exemptions from taxes and other government facilities related to trade, vat, and additional taxes. For this reason, emerging nations provide some appealing attributes such as reduced taxes, exemption from certain taxes for specific years, and more. Tax rates that are lower and other benefits might attract more investors to the host nation. (Haudi, 2022) The sale of goods directly to the nation drawing the investment is a common goal of foreign direct investment. Consequently, drawing investment will depend on factors like the number of people and the potential for development in the economy. Because it is not worthwhile to spend for a tiny population, small countries may be at a disadvantage. (Pettinger, 2019) Any economy may be destroyed by instability in politics. You cannot run a business or make smart choices while there is political instability. Political stability is crucial for both attracting foreign direct investment and conducting business in one's own nation. Business and society benefit when the political climate is stable and does not change significantly. Investors seeking foreign direct investment always want to advance in a politically stable

nation by developing a positive connection with the government. (Haudi, 2022) Political stability is also connected to property rights because investor may purchase real estate or land. Since it will be less expensive for the multinational to buy assets, a poor currency exchange rate in the host nation might draw in more FDI. Exchange rate changes, however, may deter investors. (Pettinger, 2019) Access to the EU Single Market is important for businesses investing in Europe. It is a free trade region with low non-tariff restrictions due to the harmonization of laws, regulations, and free movement of people. For instance, if the UK leaves the Single Market, FDI will probably find it less appealing after Brexit. (Pettinger, 2019)

5. GOVERNMENT POLICIES AND REGULATIONS

An enterprise's ability to succeed is also influenced by the assistance that its state offers. The state may be a significant barrier to the formation and growth of businesses, but it may also, on the one hand, offer an appealing and simpler environment for commercial enterprises through its rules. The state's role in the enterprising economy is to safeguard every economic initiative by using all available legal means, rather than to engage in its own business operations. Though they are viewed as an essential administrative function for profitable business, the government, its agencies, and its employees do not exercise executive authority. Although undeveloped and developing nations are just beginning to build policies that are crucial to the growth of this sector of the economy, nations with developed economies have a long history of supporting business ownership and have excellent plans in place. As such, the institutional, physical, and financial infrastructure of a nation has a major impact on the growth of its firms. In the same way, a country's ability to support business is positively correlated with its degree of infrastructural development. Countries has certain roles in order to create attractive business environment. Government should provide a fair legal system to protect enterprises rights arising from property rights, contracts between companies and even they countries should have proper laws in case of bankruptcy of the company. States should simplify the registration process for businesses. Also, they should implement strict rules pertaining to intellectual property. They should also have certain incentives for the companies. Moreover they should reduce the stigma attached to failing businesses.

Economies with lower rates of firm formation tend to have more of them. Failed entrepreneurs are a valuable resource, according to a research from the European Commission Competitiveness Council. They should invest in education to provide training to their citizens or those who will start a new business or to teach them how to improve in business and in the market. Countries should simplify tax laws. Many start-ups will be attracted to nations that offer competitive tax rates, streamline government processes, and encourage entrepreneurship. In order to encourage people to launch their own businesses, it is imperative that tax regulations be made simpler. (Haris Abrar Kashmiri, 2017) If countries implement these policies or regulations, they will develop in the business environment, which

will lead to FDI development and investors to invest in the country. Besides, investors always want to invest in economically and politically stable countries. It is important for countries to have a good vision and mission in terms of their strategies. The developments that countries make in the business environment will include not only companies within the country but also other people who want to invest, and will lead to more investments. When considering how to strengthen local economies through internationalization, authorities should consider a wider range of factors than just the attraction of foreign direct investment. The integration of foreign businesses into the local economy is just as crucial as the businesses' appeal; otherwise, the advantages will be insignificant. (Hardman, 2019)

6. BUSINESS ENVIRONMENT AND FOREIGN DIRECT INVESTMENT IN KOSOVO

In comparison to several other European nations undergoing transition, Kosovo had to deal not solely with the difficult process of change but also with the complex damage created by conflict. The business climate has also been impacted by this peculiarity, particularly with regard to the frequently negative perception that international investors held of Kosovo as a destination for investment. Kosovo was also obligated to work toward removing the psychological distance that foreign investors had formed between them and the country because of its lengthy history of being portrayed as a place of political unrest and conflict rather than as a place where business opportunities could be found. The nation works tirelessly to remove this barrier, among other things by highlighting to foreign businesses the progress made in enhancing its business climate. When it comes to boosting the flow of foreign direct investment, Kosovo has many advantages.

By the Central European Free Trade Agreement, which covers seven non-EU nations including Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, Moldova, and Serbia, Kosovo has been able to establish free access to nearby markets in the past couple of years. As of 2016, Kosovo also has access to the European Union market through the Stabilization and Association Agreement. In addition, Kosovo has a Free Trade Agreement with Turkey and is a member of the Generalized System of Preferences Program with the United States, Japan, and Norway. By using Kosovo's cheap employee pool and other benefits, incorporation into these economies helps multinational corporations view the country as an opportunity rather than a minor market while conducting production processes aimed at major markets.

Regarding the economic interaction between Kosovo and these markets, it can be said that, despite all of the anticipated challenges in the short and medium terms—during which domestic companies must contend with the pressures of competing against larger, more established foreign companies—in the long run, as demonstrated by the economies of Central European nations—such as Hungary, the Czech Republic, and Slovakia—benefits would accrue to both business owners and the nation's economy. Furthermore to meeting a crucial requirement—namely, being a part of wider markets—Kosovo provides numerous

other necessary that can encourage the entry of foreign investors into the nation, including significant mineral resources, human capital, assets left over from the privatization process, and numerous other sectors. In light of the institutional factor's consolidation and the realization of foreign direct investment's critical role in the nation's economy, Kosovo has been stepping up its efforts to promote economic activity and enhance the business climate in recent years.

Numerous elements that are part of the three primary political, economic, and commercial facilitation aspects have improved. The development of a legislative framework compliant with EU law has advanced, notably the Law on international Investments, which guarantees equitable treatment for both domestic and international investors. For protection and encourage investments and prevent double taxation, bilateral agreements have been inked with a number of nations. Protection and security, unrestricted financial transfers, unrestricted profit and dividend repatriation, immunity from retroactive legal applications, and protection from expropriation are all guaranteed by these accords. It has been observed that there have been some encouraging outcomes in the areas of fiscal changes and incentives for promoting investment, which improve the business climate. The current fiscal package, for example, which aims to encourage the formal economy, went into effect on September 1, 2015; the tax rate on dividends is zero percent; Work on implementing business tax incentives is now continuing; the length of these breaks will depend on the amount of money invested and the quantity of new employment that the company create. Efforts were undertaken to liberalize imports of production lines, equipment needed for production, raw materials, and information technology equipment in an effort to expand manufacturing activity. Kosovo uses low tax rates to meet the requirement of low operating expenses, which is viewed as an incentive for investors. In terms of tearing down administrative obstacles, progress has been made in cutting down on the duration and expense of business registration, which is currently free and can be completed in two days. There has been progress in terms of contract execution, license and permit reduction, etc. Investments have been made in the development of business parks, incubators, and economic zones in order to provide the physical infrastructure needed for employment. Good outcomes are obtained in terms of enhancing the standard infrastructure and safeguarding industrial and intellectual property. (Hykmete Bajrami, 2019)

7. CONCLUSION

A comprehensive examination of many key elements that characterize the business environment was provided in this study. The importance of foreign direct investment for economies that are transitioning is widely acknowledged, as was previously indicated. FDI provides value-added inputs to host nation economies in addition to cash benefits. In this aim, its establishments have implemented certain changes aimed at enhancing the business climate to draw in as much foreign direct investments as possible. As in many other nations, Kosovo also placed the enhancement of the business environment high on its national agenda by bringing this process under the purview of the National Council for Economic Development,

which assigns responsibilities for implementing reforms to liable state and local agencies in collaboration with executives from business and global partners. The fact that Kosovo possesses rich resources of all kinds, human capital, unrestricted access to important markets, and other advantages made it clear that there are several requirements for growing FDI inflows. (Bajrami H. K., 2019)

In addition to the improvements that have been achieved in enhancing the business environment, Accordingly, in order to enhance a country's capacity to draw in foreign direct investment, it must make a concerted effort to focus on a number of key goals, including: establishing ongoing stability in politics; maintaining the rule of law; developing unified policies based on expertise and the economy; respecting the rights of individuals; ensuring open and accountable administration; improving intellectual and industrial property; developing additional regulations that attract businesses and investors; providing excellent educational opportunities in line with labor market demands; creating strategies for manufacturing sectors; updating the model for the privatization of available assets; and improving both the physical as well as intellectual property facilities. The EU integration process is a significant factor that attracts foreign direct investment. This is because moving closer to the EU entails fulfilling a set of political as well as economic requirements that improve the business environment in the nation and satisfy a number of other requirements that impact the development of FDI. Still, taking into account that this process encompasses a wide range of elements that define the nation's overall state of growth, both financially and politically. Given the connection between an improved business climate and an increase in foreign direct investment, a set of policy proposals is crucial in this respect. (Bajrami & Krasniqi, 2019)

LIST OF REFERENCES

- Bajrami, H.K. (2019). Business Environment and Foreign Direct Investment in Kosovo: Overview of the Relationship Between Institutional Reforms and FDI. Retrieved from ProQuest: <https://www.proquest.com/openview/36dd60ef486a10a5283765c65620dfbe/1?pq-origsite=gscholar&cbl=2032168>
- Bajrami, H. and Krasniqi, L. (2019). Business Environment and Foreign Direct Investment in Kosovo: Overview of the Relationship Between Institutional Reforms and FDI. . EBSCO: <https://web.s.ebscohost.com/abstract?direct=true&profile=ehost&scope=site&authType=crawler&jrnl=22478531&AN=139611007&h=RsyB0%2fTNTmCNHxrXtgvxO5rcYidOCWv1duds1UwV4iJi907SouKLeed%2b56> Retrieved from [2kmxxQz5wU8LFnLSFcrEdBi6wkUA%3d%3d&crl=c&resultNs=AdminWebAuth&resultLoca](https://www.ebscohost.com/abstract?direct=true&profile=ehost&scope=site&authType=crawler&jrnl=22478531&AN=139611007&h=RsyB0%2fTNTmCNHxrXtgvxO5rcYidOCWv1duds1UwV4iJi907SouKLeed%2b56)
- Business Environment: Meaning, Definition, Components, Dimension, Importance and Effects. (2023, December 24). Vedantu: Retrieved from <https://www.vedantu.com/commerce/business-environment#>
- Calimanu, S. (2023, 03 11). 16 Advantages and Disadvantages of Foreign Direct Investment. Foreign Direct Investment Research: <https://researchfdi.com/resources/articles/foreign-direct-investment-advantages-disadvantages/#:~:text=Economic%20growth&text=FDI%20boosts%20the%20manufacturing%20and,overall%20economy%20of%20a%20country.> where was it taken from
- DEFINITIONS AND SOURCES. (2007). UNCTAD: Retrieved from https://unctad.org/system/files/official-document/wir2007p4_en.pdf
- Hardman, J. (2019, February 21). What policies work for foreign direct investment? LSE: Retrieved from <https://blogs.lse.ac.uk/gild/2019/02/21/what-policies-work-for-fdi/>
- Haris Abrar Kashmiri, R.A. (2017). GOVERNMENT POLICY IN ENTREPRENEURSHIP DEVELOPMENT OLE. University of Kashmir: Retrieved from <http://ddeku.edu.in/Files/2cfa4584-5afe-43ce-aa4b-ad936cc9d3be/Journal/ac537afac8f5-4f3a-9140-e0b234204c62.pdf>.
- Hykmete Bajrami, L.K. (2019). Business Environment and Foreign Direct Investment in Kosovo: Overview of the Relationship Between Institutional Reforms and FDI. Retrieved from Economic Research Guardian: [https://www.ecrg.ro/files/p2019.9\(2\)4y3.pdf](https://www.ecrg.ro/files/p2019.9(2)4y3.pdf)

- Jahedi, R. (2013). To create a conducive business environment to attract Foreign Direct Investment in Bangladesh. Grinning: [https://www.grin.com/document/322461#:~:text=A%20favorable%20business%20climate%20is,FDI%20\(OSCE%2C%202006\)](https://www.grin.com/document/322461#:~:text=A%20favorable%20business%20climate%20is,FDI%20(OSCE%2C%202006).). where was it taken from
- Lim, E.-G. (2001, November). Determinants of Foreign Direct Investment and Growth and the Relationship Between them: Summary of Current Literature. IMF: Retrieved from <https://www.imf.org/external/pubs/ft/wp/2001/wp01175.pdf>
- Pettinger, T. (2019, November 28). Factors affecting foreign direct investment (FDI). Economics Help: Retrieved from <https://www.economicshelp.org/blog/15736/economics/factors-that-affect-foreign-direct-investment-fdi/>
- Shengbing He, H. Y. (2022, September 30). Quality of business environment, human capital structural improvement and economic development. Frontiers: Retrieved from <https://www.frontiersin.org/articles/10.3389/fenvs.2022.964922/full#>

TRANSITIONAL JUSTICE AND GENDER

*Salora Turkmanović**

Abstract

In the aftermath of conflicts, women are often found on the periphery of justice as their voices are often silenced by cultural norms, deeply rooted stereotypes, and expectations of society. This Article aims to explore the often unseen and misunderstood struggles women face in the transitional justice process, struggles that lead to the absence of women from the process that is meant to heal an entire society. These processes, either judicial or non-judicial, are important for addressing human rights abuses, yet the exclusion of women weakens their impact.

Transitional justice is not a mere process, it is a collective journey toward healing and reconciliation, which is dependant on the recognition of all victims, particularly women whose experiences are frequently overshadowed. Without the active participation of women, the efforts of transitional justice may be deemed incomplete and ineffective, as the involvement of women is crucial for ensuring meaningful and far-reaching justice, which can only be a reality when women are transformed from silent victims to core contributors to change.

Keywords: Transitional justice, Reconciliation, Women in conflict, Victim participation, Empowerment

* Salora Turkmanović, MA, is an Assistant in the area of Civil Law at the Faculty of Law, International University of Sarajevo, Bosnia and Herzegovina. She has experience in civil law, business law, execution law, and family law. Contact: sturkmanovic@icloud.com

1. INTRODUCTION

Pain is present for as long as man has existed. Why? – the question many of us may pose, but never get a definitive answer to it. Can it be because there are people who like to see suffering in the eyes of others, bruises and scars left from the harsh and evil touch, or is it simply that some have no empathy, no fear, no emotion? Sadly, one may fear there are more questions than answers. War and conflict only leave open wounds in the souls of victims and deep scars in people's lives. It is not sufficient to say that justice will repair the broken souls of victims, however, the promise of transitional justice may shed light on the dark past and heal victims while rebuilding society.

Transitional justice as an important process, should be ongoing in a society that is going through a post-conflict period. The process is aimed at addressing deeply rooted wounds left by atrocities, violence, human rights abuses, and political oppression, by acknowledgment of the pain endured, offering a voice to the voiceless, offering reparations and a chance to face the past and build a better future. (Sida, n.d.) The ultimate goal of the process is not only to deliver justice to victims of atrocities but also to foster reconciliation, rebuild trust in state institutions, and achieve peace.

As Transitional Justice is designed to be inclusive, and transformative for the society, it often does not include women in the process itself. Historically, the role of women in post-conflict societies was passive, as they were only viewed as victims and not contributors to the process of peacebuilding itself. By examining of gendered dimensions of transitional justice, this Article highlights the importance of women's voices and perspectives in these transformative process.

2. TRANSITIONAL JUSTICE

Transitional justice is a process that can be judicial or non-judicial (OHCHR, n.d.). The non-judicial aspect of transitional justice does not rely on traditional legal institutions. The process of Transitional justice requires active participation from society in order to prevent the recurrence of past or even new violations.

Transitional justice is composed of two terms, namely „transitional“ and „justice“. The concept of the word „transitional“ implies a change or transformation from a period of mass atrocities and human rights violations to a democratic, peaceful regime, led by the rule of law. (Bickford, 2004) The concept of „justice“, as it is generally accepted, is hard to achieve because it entails balancing different interests, perspectives, and different values that societies hold.

According to Bickford, 2004, the prosecution of the perpetrators is dependent on the effectiveness of mechanisms of international law, however, in cases such as these, justice expands beyond its simple definition encompassing a wider range of its application, such as truth-seeking mechanisms and the process of reparation.

The broad and evolving concept of justice results in the broader goal of Transitional Justice, including justice for victims, strengthening peace, fostering reconciliation, and promoting democratic principles. Building a foundation for long-lasting peace and equality is essential for the promotion of democratic principles.

According to Mihr, 2013, institutions of a country must ensure a „minimum standard of accountability, transparency, and free participation“ for there to be promotion of democratic principles. Accountability is essential for addressing past atrocities, however, without democratic pillars such as transparency and participation of citizens, true justice may be hard to reach. It is evident that the goals of transitional justice are mutually inclusive, as one may not be viable without the other.

Objectives of transitional justice manifest in different forms, such as a criminal trial, or establishment of temporary bodies such as Truth Commissions, other reparation programs, reforms of the security systems (targeting entities such as the police or the judiciary), and memorialization efforts such as creating memorial centers or museums to honor victims. (Robins, n.d.)

It can be concluded that the mentioned objectives are all institutional elements of Transitional justice, and in order to achieve it there needs to be a close relationship between truth-telling and the mentioned objectives. The process may be undermined if there is an exclusion of any of the mentioned elements, as it may be deemed ineffective or an attempt to silence victims.

In the Statement to the Security Council, Michelle Bachelet (2019), argued that initiatives of truth-seeking in conflict-torn societies next to enabling victims to face their experiences and past, have also made it possible for victims and perpetrators to establish a connection that facilitates the recognition of different accounts of the events that occurred. Furthermore, they have argued that this process has been deemed empowering for many victims, especially women who belong to minorities or indigenous communities that have been marginalized during conflict or post-conflict.

3. TRANSITIONAL JUSTICE AND GENDER

Today's world, cruel in the least, is amidst numerous conflicts and oppressive regimes that we might not even be aware of existing. In this world, the reign is held by hunger, poverty, shortage of clean water, dissatisfaction, poverty, violence, and much more. However, the eyes of those who have not experienced this on their own skin are blind to the circumstances in which others are forced to live in. Likewise, many of us are blind to the suffering of women who are specifically targeted for violence, where their voices are being silenced, their bodies are being violated, and their feelings are being numbed by the physical and psychological pain they are experiencing as their rights are disintegrating. According to

the United Nations Secretary-General, 2024, in situations of concern, Women and girls make up over 3,522 UN-verified reported cases of conflict-related sexual violence.

Furthermore, findings of the International Center for Transitional Justice (ICTJ) (n.d.) reveal that in post-conflict societies, women are often disproportionately targeted and suffer due to their gender or sexual identity. During a period of conflict, women are subjected to various forms of violence – physical, mental, and sexual – along with displacement, socioeconomic discrimination, and the trauma of losing loved ones due to forced disappearances.

Moreover, the experiences of women vary on the basis of their ethnic, religious, and cultural background, which affects the process of trauma. Women who come from societies that hold specific cultural or religious views may endure more psychological pain. In the example of the aforementioned, there may be a situation in which women whose husbands have forcibly disappeared during a conflict in some cultures may face significant discrimination because of their uncertain marital status, as they are neither married nor are they widowed. Such discrimination is a result of a situation which is beyond their control. This is the case because men, traditionally, are the providers in such societies, and their disappearances can push these women into poverty, which will inevitably subject them to further stigma from family and members of the community. (Sáenz Feehan, 2024)

The acts of violence which are specifically targeted at women during time of conflict due to their gender are beatings, genital mutilation, rape, forced pregnancies, sterilization, loss of reproductive capacity, child abduction, and even forced labor. These acts do not only have a detrimental effect on women, who are victims but also have a negative effect on the community. (Parliamentary Assembly of the Council of Europe, n.d.)

Addressing gender-based violations through Transitional Justice is vital for ensuring justice for victims, combating the marginalization of women and other gender groups, and preventing future abuse. (Gender Justice, n.d.)

It is of equal importance to underscore that Transitional Justice should focus on the root cause and the consequences of mistreatment and abuse against women. As many of us are not aware, the mistreatment of women in conflict usually stems from gender inequality, and patriarchal structures, all existing before the conflict itself. Recognizing the existence of gender-based discrimination, and human rights violations is simply not sufficient for change to begin.

3.1. The Participation of Women in the Transitional Justice Process

It should be argued that everyone has a fundamental right to participate in Transitional Justice. The process of transitional justice, specifically the right to effective legal remedy, the right to justice, and the right to reparation of harm is embedded in international human rights law. (OHCHR, n.d.)

As women are a targetted group and are subjected to many atrocities during conflict and even post-conflict times, their participation in the political sphere is important for gender equality and democracy. Women should be encouraged to contribute to public and political life through strengthening democratic values in society.

In societies that claim to uphold democratic ideals, discriminatory power may exist. By engaging in politics, women may challenge the mentioned structures and incentivize institutions to affirm their rights, dignity, and equal treatment. In this instance, women are in a unique position to challenge power structures by holding those responsible for discrimination and violations of women's rights accountable.

Taking into account the aforementioned, the involvement of women in the decision-making process is crucial, as the inclusion benefits the effectiveness of Transitional Justice mechanisms, and allows direct addressing of the unique experiences and needs of women. Furthermore, engaging a diverse group of women, sadly, those who have experienced different human rights abuses may act as insurance that those insights contribute to shaping processes that are more responsive to gender-specific violations.

Moreover, this inclusion of women in the process of Transitional Justice may set a powerful example, which would encourage broader participation from society. Reversing the trend of marginalization and exclusion of women from the process may inspire others to take part in the efforts leading to change, a more inclusive approach to addressing human rights violations and potentially fostering long-term societal change.

3.2. International Framework for the participation of Women in the Transitional Justice process

In the aftermath of conflict, wounds left by war and atrocities are long open after the end of the conflict itself. The voices of those who are meant to heal are too often being silenced. The violence that women and girls are going through in these societies has hardened access to education, marginalized women, and made life difficult for women in general. (United Nations Secretary-General, 2024)

For this reason participation of women in the Transitional Justice process is recognized as a fundamental human right that is supported by a range of international frameworks. These frameworks emphasize the importance of gender inclusivity in post-conflict reconstruction and the pursuit of justice. (UN Women, 2022) The question whose answer remains hidden is whether societies can move forward if a part of their population is excluded from the transitional process.

3.2.1. UN Security Council Resolution 1325 (2000) on Women and Peace and Security

According to Resolution 1325 (2000), women play a crucial role in the prevention and resolution of conflict, as well as in peace-building efforts. The resolution emphasizes the

need for increased participation and involvement of women, particularly in the decision-making processes related to conflict prevention. Due to the significant impact armed conflicts have on women and girls, it is essential to ensure their full participation in peace processes and in the promotion of international peace and security.

It is important to emphasize that Resolution 1325 (2000) encourages all parties that participate in the armed conflict to undertake measures in order to protect women and girls from gender-based violence with special emphasis put on rape and sexual abuse, as well as, other forms of violence which are used in the course of such conflicts.

3.2.2. Universal Declaration on Human Rights (UDHR)

According to provisions of Article 2 of the Universal Declaration of Human Rights (UDHR) (1948), every person is entitled to all the rights and freedoms that the Declaration has set forth without distinction on any basis, that of race, color, sex, religion, language, political or other opinion, national or social origin, property, birth or any other status. Furthermore, according to Article 6 of the Declaration (1948), every person has the right to recognition everywhere as a person before the law. This principle is important because victims, especially women, are actively being denied legal recognition and justice. In terms of the aforementioned, this principle ensures that women are to be recognized as active participants in the legal and judicial process in order to achieve the goals of transitional justice through truth commissions and legal prosecutions which should uphold the above-mentioned right.

Article 7 of the Declaration (1948) correlates with Article 6 due to it stating that everyone is equal before the law and, as such, is entitled without any discrimination to equal protection of the law. Women and other vulnerable groups face systemic discrimination during the period of conflict and in the post-conflict period, as mentioned previously. Article 7 ensures the active addressing of discrimination and promoting equality before the law, which is fundamental in the course of this process.

Taking all the previous into consideration, it can be said that such an international legal instrument does not make a place for gender-based violence not only when post-conflict societies or societies in which armed conflict is currently the case, but in any instance. However, it is evident that in many societies the aforementioned is not being respected due to gender-based violence being a reality for many women and people all around the world.

3.2.3. International Covenant on Civil and Political Rights (1966)

According to Article 25, of the International Covenant on Civil and Political Rights (1966), persons are encouraged to take part in the conduct of political affairs either directly or through freely chosen representatives, to vote and to be elected, and to have access, on general terms of equality to public service in the country.

It is evident that such a Covenant encourages persons and, therefore, women to engage in political conduct within their country and to have been provided with access to public service in that same country, which they can resort to in any instance. Furthermore, the same article underlines the importance of inclusivity and non-discrimination. In conclusion, without this approach, the risk of incompleteness and ineffectiveness is viable.

3.2.4. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979) and general recommendations of the CEDAW Committee

According to Article 7 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979), States that are Parties to the Convention should take all appropriate measures to eliminate discrimination against women in public and political life and particularly ensure women equal terms with men when it concerns voting in all elections and public referenda, while also being eligible for election in all publicly elected bodies. Participation in the formulation of government policy and implementation of the same, holding public office and performing public functions at all levels of the government, and participation in non-governmental organizations and associations that are concerned with the public and political life of the country are all important roles that should be partly fulfilled by women in order to ensure the positive and effective outcome of this process.

The Convention directly addresses essential gender issues, focusing primarily on ensuring that women receive the same rights and values as men. It serves as a strong foundation for women, particularly those who wish to contribute to the rebuilding of their societies after the conflict.

In these terms, ensuring the involvement of women in decision-making processes is vital for the success of transitional justice and the success of society in overcoming hardships that came as a result of the conflict.

3.2.5. 2030 Agenda for Sustainable Development

Regarding the future, the 2030 Agenda for Sustainable Development is to address issues such as poverty, education, climate change, health, and more. One of the most important aspects of this Agenda regarding Transitional Justice is the commitment to achieve gender equality and empower all women and girls in society. This process involves fostering peaceful and inclusive societies that support sustainable development, ensuring access to justice for everyone, and establishing effective, accountable, and inclusive institutions at all levels, while emphasizing the importance of a transparent and accountable government.

Moreover, SDGs address the underlying cause of conflict, in terms of tackling problems such as poverty, lack of education, and inequality. The sustainable development initiative aids in building a strong and healthy community, that should be less prone to instability and violence. It can be underlined that the SDGs help transitional justice

mechanisms to operate jointly and create a broader, sustainable, and fairer future for society. Next to the aforementioned international legal instruments, there are also relevant reports of the UN Secretary-General and Special Rapporteurs which reference the inclusion of women in the Transitional Justice processes from the year 2010.

4. CHALLENGES IN ADDRESSING GENDER IN TRANSITIONAL JUSTICE

There are certain difficulties that Transitional justice faces in accomplishing its aims in post-conflict societies, especially in regard to injustice made to a certain gender. Today, understanding the struggle of women to seek for respect their human rights is a slow and developing area. Often, and especially in societies that are making efforts to align with modern standards, gender abuses are often neglected. (Council of Europe, n.d.). This, in fact, distorts the overall goals of transitional justice concerning gender by altering the establishment of the historical record and undermining the legitimate initiatives that transitional justice seeks to promote. Consequently, this negatively affects men's and women's access to justice.

Another fact is that, until recently, women and the issue of gender were overall forgotten or rather poorly touched upon by the Truth Commissions themselves. (Secretary General of the UN, 2020) If Truth Commissions as such disregard this in the course of their action, it can be said that Transitional Justice itself will be lacking in pursuing its aims and all in regards to gender.

In conclusion, it is important to underline that the institutional silence that surrounds gender-based violations, the normalization of violence against women, and their marginalization especially in isolated cultures is what makes it difficult for survivors to seek justice. Furthermore, some systems lack resources, funding, and will to prosecute the perpetrators, which leads to victims being afraid, and overall discouraged to talk about past events. This all asks for a serious approach of institutions, governments, and governmental bodies in ensuring that gender-based violence is adequately addressed.

5. COLOMBIAN TRUTH COMMISSION

The sad history of Colombia between 1964 and 2016 remains unknown for most people. The dark period of 52 years has been marked by horrific acts and constant living in fear. Mass displacement, killing, and different forms of violence have scarred the history of this country and its society. Human rights abuses that have taken place in this period demand more attention, as it is not only important to honor the victims, but also to ensure the non-repetition of such grave violations in Colombia and even further.

5.1. Brief Historical Overview

Because of the grave human rights violations, The Truth Commission in Colombia was created as a part of the peace agreement which was concluded between the Colombian government and the Revolutionary Armed Forces in Colombia (FARC).

According to the Mapping Militant Organization (2019), the FARC was a Marxist-Leninist guerrilla group, that was founded by two men man, Manuel Marulanda and Jacobo Arenas in 1964. The group was formed in order to represent the interests of the rural population of Colombia. The activities of the group were funded by various illegal actions, including kidnapping, drug trafficking, and extortion. Their initial attack occurred in the same year the organization was established and marked their first confrontation with the Colombian government. The final attack of the group took place in 2015, resulting in approximately 150,000 people losing access to clean water after they bombed an oil pipeline in the Colombian city of Nariño, leading to water contamination. (Mapping Militant Organization, 2019)

After a peace agreement concluded with the Colombian government, the FARC was demobilized and disarmed in 2016. (Mapping Militant Organization, 2019) Now the FARC is a political party with the name Revolutionary Alternative Common Force. It is important to highlight that Colombia has experienced armed conflict for the past 52 years. Throughout this period, many violent acts have occurred, including kidnapping, torture, and murder.

According to Venegas (2022), the report of the Truth Commission has processed data between the years 1985 and 2018 and in that period, there were 450.666 homicides committed, around 121.758 persons were forcibly displaced, 50.770 were victims of arbitrary detentions, kidnapping and extortions, 16.238 children were recruited and over 8 million persons were forcibly displaced.

5.2. The truth

María Cecilia Ibáñez (2022), states that the report of the Truth Commission features testimonies from women and emphasizes the significance of sexual and reproductive rights. The report also recognizes the violence inflicted on the reproductive rights of female combatants and mobilized girls during the conflict, including the coercion of contraception and abortion. Notably, this report marks the first instance in which a Truth Commission has included reproductive violence in its findings. (María Cecilia Ibáñez, 2022)

According to Martinez, Artega & Landazabal (2020) and their observations, certain stereotypes in society are associated with reproduction and violence against women and girls in the context of conflict. While these stereotypes existed before the conflict, they became particularly visible during such times. One prevalent stereotype is the expectation that women should reproduce and fulfill their roles as mothers at any cost, which undermines the ability of women who become pregnant as a result of rape to make autonomous decisions regarding

their pregnancies. Additionally, single women and adolescent girls often face denial of access to contraceptives, as they may be subject to social rejection or stigmatization for exercising their free will. Armed groups have exploited these stereotypes to exert control over the behavior of girls and women, dictating how they should dress, act in society, and relate to others. (U.S. Department of State, n.d.)

Some of the other stereotypes according to Martinez et al, (2020) are that:

- Women and girls are emotionally unstable and therefore are incapable of making rational decisions when it concerns their sexual and/or reproductive lives;
- Women who come from a background of poverty are irresponsible and are therefore forcibly sterilized;
- Women who are combatants are unable to become mothers because that would weaken their abilities as combatants and therefore the group which they are fighting for;

Afro-Colombians, girls of color, and Indigenous women have been hypersexualized and viewed as both inferior and overly resilient. (Martinez et al., 2020) These harmful stereotypes have significantly hindered if not entirely obstructed, these women's access to healthcare services and have been used to justify physical, sexual, and emotional exploitation. (Barragan, 2016)

Women have endured immense suffering during the conflict in Colombia, as they have faced humiliation, misunderstanding, and the violation of their rights. Those who have experienced such traumas often endure severe psychological scars, making recovery a challenging journey throughout their lives.

Women and girls have been forced to become sexual slaves of their commanders, while they were also recruited into guerilla and paramilitary groups and were then abused by fellow combatants. (Colombia: "Scarred Bodies, Hidden Crimes" - Sexual Violence against Women in the Armed Conflict - Colombia, 2004)

Furthermore, it is not enough that women have gone through various types of torture, psychological abuse, and violation of their bodily integrity, being left feeling scared, abandoned, and violated, yet they are also punished by the community by being rejected by their families, being left with the belief that such a situation is their fault, and even being refused medical care despite being victims. (Amnesty International, 2004)

The experiences of women who have endured violence over years of torture are deeply disturbing. Testimonies of victims leave a lasting impression on the reader as one may feel and empathize with the suffering of those who have survived. The example that sums up best the dark past of many women in Columbia is the following:

“They mark their territory by leaving scars on the bodies of the women. It is a terror without sound.” (Colombia: “Scarred Bodies, Hidden Crimes” - Sexual Violence against Women in the Armed Conflict-Colombia, 2004)

5.3. The present

As mentioned, the peace agreement was signed in 2016, and in this regard, the UN Security Council has created a mission to monitor and verify the peace agreement, which mission was later on succeeded by the UN Verification Mission in Colombia in 2017. (Hassan, n.d.) This mission was renewed in 2023, but armed conflict has not ceased in some of the areas of Columbia, which increased the risk of sexual violence. (United Nations Secretary-General, 2024)

United Nations Secretary-General (2024) mentions that: “In 2023, the National Victims’ Unit recorded 668 cases of conflict-related sexual violence, affecting 605 women, 35 men, 21 persons of diverse sexual orientation and gender identity, and 7 girls, occurring mainly in the Departments of Cauca, Chocó and Nariño. Among the victims, 209 were Afro Colombians, 58 were individuals from Indigenous communities, and 42 were persons living with disabilities.” According to Mishra (2024), the Special Representative of the Secretary-General of the UN has emphasized that the peacebuilding process is being slowed down by the unstable security situation in Columbia, as persistent violence is present in some regions of the country.

Prior to signing the peace agreement, the government of Colombia, in 2011, put into force Law 1448 (Victims and Land Restitution Law). (Cortés, 2014) This Law was enacted to provide justice, truth, reparation of damage, and non-reoccurrence of the horrific acts. (Cortés, 2014) The original duration of the law was supposed to be 10 years, however, due to the horrific acts not being left in the past and the need for proper reparation has led to the extension of the duration of the law, until 2031. (Rojas Morales, 2023)

The Law has also established the National System of Attention and Reparation for Victims (NSARV), whose duration is the same as of Law 1448. (Rojas Morales, 2023) The NSARV created a registry that includes over 9 million registered victims of the armed conflict that took place in Columbia, it focused on collective reparation of the Afro-Columbian, Indigenous and Romani communities, it processed land restitution claims, aided victims in rehabilitation by providing psychological, legal and medical services, and it has made effort in designing measures to prevent the recurrence of violence. (Dejusticia, 2020)

It is important to understand that peace-building processes, such as the one taking place in Colombia, need great funding. In this regard, the USA approved \$471 million in 2022 for Colombia. (Hassan, n.d.)

6. CONCLUSION

In the final remark, it is important to understand that Transitional Justice should not be and cannot be an alternative to accountability provided by criminal law itself. Criminal accountability is essential; however, it should be supported by Transitional Justice that encompasses justice, reparations, and efforts for its non-reoccurrence. Legal frameworks for the participation of women in Transitional Justice processes do exist, however, they often do not meet their intended impact in practice. Although various resolutions advocating for the involvement of women in Transitional Justice have been adopted, there has been limited progress toward achieving gender equality in the implementation itself. It is suggested that institutions require additional guidance on effectively representing and encouraging women's participation in the Transitional Justice process.

Furthermore, it is important to note that many women hesitate to come forward and share their experiences due to fear of condemnation and judgment from their communities. Feelings of shame and embarrassment regarding their pasts often lead these women to refrain from disclosing their stories to others, which is contrary to the idea of Transitional Justice. In societies where women are not a big part of the decision-making process undoubtedly discourages other women from taking part in the reconciliation process and coming to terms with the past. Another hardship is that many women due to the background in which they grew up, will not come forward and will not portray their story of being a victim.

In the case of Columbia, despite the significant efforts to achieve transitional justice, which must persist, it is important to understand that this process follows years of human rights violations and abuse of rights. It is of great importance to empower victims to share their experiences, as many of them continue to suffer alone and in silence, afraid to speak about their experiences from the fear of being condemned by society. This does not only heal victims psychologically, allowing them to move forward and seek help, but it is essential for establishing the truth about the past. Establishing the truth is a fundament for entering the process of healing, as progress can only be visible once those who are responsible are held accountable and will answer for their actions in the past.

Despite advancements in various aspects of society, we have been lacking in the area of Transitional Justice for decades. More progressive societies must strive to assist those struggling with similar challenges, helping them overcome obstacles and empowering women and other marginalized groups to seize opportunities and build a better future. Achieving this requires a commitment to confronting and reconciling with the past, which process is challenging and takes time.

LIST OF REFERENCES

Books

Bickford, L. (2004). Transitional Justice. In *Encyclopedia of Genocide and Crimes against Humanity* (Vol.3).
https://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/droi20060828_definition_/droi20060828_definition_en.pdf

Reports / Official Documents

A/75/174 The gender perspective in transitional justice processes – Note by the Secretary-General. (2020). Retrieved from <https://digitallibrary.un.org/record/388337>

Convention on the Elimination of All Forms of Discrimination against Women. (n.d.). Retrieved from <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>

OHCHR. (n.d.-a). International Covenant on Civil and Political Rights. Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

OHCHR. (n.d.-c). OHCHR | OHCHR: Transitional justice and human rights. Retrieved from <https://www.ohchr.org/en/transitional-justice>

Resolution 1325 (2000) on Women and peace and security. (2000). Retrieved from <https://www.un.org/ruleoflaw/blog/document/security-council-resolution-1325-2000-on-women-and-peace-and-security/>

The rule of law and transitional justice in conflict and post-conflict societies. (2004, August 23). Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

Transforming our world: the 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs. (n.d.). Retrieved from <https://sdgs.un.org/2030agenda>

Secretary-General of the UN. (2020). The gender perspective in transitional justice processes Note by the Secretary-General. <https://documents.un.org/doc/undoc/gen/n20/186/87/pdf/n2018687.pdf>

United Nations Secretary-General. (2024). Conflict-related sexual violence. Report of the United Nations Secretary-General. <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2024/05/SG-2023-annual-reportsmallFINAL.pdf>

United Nations Secretary General. (2024). 15th Report of the United Nations Secretary-General on Conflict-related sexual violence. The United Nations. <https://e4k4c4x9.rocketcdn.me/en/wp-content/uploads/sites/15/2024/06/202404-UN-annual-report-CRSV-factsheet-covering-2023.pdf>

U.S. Department of State. (n.d.). 2023 Country Reports on Human Rights Practices: Colombia. United States Department of State. Retrieved November 11, 2024, from <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/colombia/>

Academic Articles

Almagro, M. M., Schulz, Phillip. (2022, October 19). Gender and Transitional Justice. Oxford Research Encyclopedia of International Studies. Retrieved from <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-669>

Martinez, C. C., Arteaga, C. R., & Riaño Landazabal, J. F. (2020). An examination of Reproductive Violence against women and girls during the armed conflict in Colombia. Cener for reproductive rights. <https://reproductiverights.org/wp-content/uploads/2021/09/ENG-FULL-Reproductive-Violence-Conflict-Colombia.pdf>

Mihr, A. (2013). Transitional Justice and the Quality of Democracy. *International Journal of Conflict and Violence*, 7(2).

Websites / Online Publications

Democratic Progress Institute. (n.d.). Addressing Gender in Transitional Justice Mechanisms. Democratic Progress. Retrieved from <https://www.democraticprogress.org/wp-content/uploads/2016/01/Gender-in-Transitional-Justice-Mechanisms.pdf>

Gender and Transitional Justice - United Nations University. (n.d.). Retrieved from <https://unu.edu/publications/articles/gender-and-transitional-justice.html>

Gender and transitional justice in Africa. (2020, February 10). ACCORD. Retrieved from <https://www.accord.org.za/ajcr-issues/gender-and-transitional-justice-in-africa/>

Gender justice and women's rights. (2022, November 21). Oxfam International. Retrieved from <https://www.oxfam.org/en/what-we-do/issues/gender-justice-and-womens-rights>

- Homepage | International Center for Transitional Justice. (n.d.). Retrieved from <https://www.ictj.org>
- Justice for past crimes can build a shared future. (n.d.). OHCHR. Retrieved from <https://www.ohchr.org/en/statements/2020/02/justice-past-crimes-can-build-shared-future>
- Revolutionary Armed Forces of Colombia—People’s Army | Mapping Militants Project. (2019, July 7). Retrieved from <https://mappingmilitants.org/profiles/revolutionary-armed-forces-of-colombia-peoples-army>
- María Cecilia Ibáñez. (2022, July 8). Getting reproductive violence recognized as one of the realities of the armed conflict in Colombia | Women’s Link. Retrieved from <https://www.womenslinkworldwide.org/en/blog/sexual-and-reproductive-rights-1/getting-reproductive-violence-recognized-as-one-of-the-realities-of-the-armed-conflict-in-colombia>
- NGOs and Centers Working on Transitional Justice. (n.d.). Lawyering Peace Class. Retrieved from <https://www.lawyeringpeaceclass.com/ngos-working-on-transitional-justice>
- Report: “A violence without name: reproductive violence in the Colombian armed conflict.” (n.d.). Women’s Link Worldwide. Retrieved from <https://www.womenslinkworldwide.org/en/files/3122/executive-summary-reproductive-violence-in-the-colombian-armed-conflict.pdf>
- What Is Transitional Justice? | International Center for Transitional Justice. (n.d.). Retrieved from <https://www.ictj.org/what-transitional-justice>
- Women’s Meaningful Participation in Transitional Justice. (n.d.). UN Women. Retrieved from <https://www.unwomen.org/sites/default/files/2022-03/Research-paper-Womens-meaningful-participation-in-transitional-justice-en.pdf>
- Amnesty International. (2004). Colombia: Violence Against Women—Scarred Bodies, Hidden Crimes [Press release]. <https://www.amnesty.org/en/wp-content/uploads/2021/09/amr230482004en.pdf>
- Barragan, Y. (2016, November 23). Afro-Colombians and the Peace Agreement in Colombia. AAIHS. Retrieved from <https://www.aaihs.org/afro-colombians-and-the-peace-agreement-in-colombia/>
- Colombia: “Scarred bodies, hidden crimes”—Sexual violence against women in the armed conflict—Colombia. (2004, October 13). ReliefWeb. <https://reliefweb.int/report/colombia/colombia-scarred-bodies-hidden-crimes-sexual-violence-against-women-armed-conflict>

- Cortés, P. M. (2014, January 13). The Victims and Land Restitution Law in Colombia in context. Transnational Institute. Retrieved from <https://www.tni.org/en/publication/the-victims-and-land-restitution-law-in-colombia-in-context>
- Dejusticia. (2020, August 25). ABC del pasado, presente y futuro de la Ley de Víctimas. Dejusticia. Retrieved from <https://www.dejusticia.org/abc-del-pasado-presente-y-futuro-de-la-ley-de-victimas/>
- Gender Justice. (n.d.). International Center for Transitional Justice. Retrieved July 30, 2024, from <https://www.ictj.org/gender-justice>
- Government of Colombia compensates victims of armed conflict. (2024, August 9). Prensa Latina. Retrieved from <https://www.plenglish.com/news/2024/08/09/government-of-colombia-compensates-victims-of-armed-conflict/>
- Hassan, T. (n.d.). World Report 2023: Colombia. Human Rights Watch. Retrieved November 10, 2024, from <https://www.hrw.org/world-report/2023/country-chapters/colombia>
- Parliamentary Assembly of the Council of Europe. (n.d.). Sexual violence against women in armed conflict. <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17741>
- Rojas Morales, L. M. (2023, June 6). Colombia's measures for armed conflict victim reparations and land restitution. Pathfinders. <https://www.sdg16.plus/policies/colombias-measures-for-armed-conflict-victim-reparations-and-land-restitution/>
- Sáenz Feehan, E. (2024, June 23). Widows in conflict: An invisible humanitarian crisis. Friends of Europe. <https://www.friendsofeurope.org/insights/critical-thinking/widows-in-conflict-an-invisible-humanitarian-crisis/>

EUROPOL'S FUNCTION IN BOSNIA & HERZEGOVINA AND ITS ROLE IN THE EUROPEAN UNION

*Kenan Ademović**

Abstract

The European Union Agency for Law Enforcement Cooperation (Europol) serves as a critical centre for addressing different threats organized different crime activities, actions involving terrorism, and other cross-border security fears across Europe and its neighboring regions. Acting as a central implementor for international cooperation, Europol spearheads efforts to challenge complex security issues that exceed national jurisdictions. This paper examines Europol's institutional structure, focusing on its operational roles, governance, and its strategic impact in Bosnia and Herzegovina (BiH), an EU membership candidate country. BiH faces significant challenges such as organized and systematized crime, fraud, and political instability, and has benefited greatly from the resources and experience of Europol in fortifying its law enforcement systems. The analysis highlights Europol's operational initiatives, its partnerships with regional police enforcement in BiH, as well as the judicial system governing its activities in the region. Specific attention is given to Europol's role in enabling information exchange and providing technical and analytical support to ensure effective cross-border collaboration.

Additionally, this research sightsees the comprehensive implications of Europol's engagement in BiH, emphasizing its contributions to the country's EU integration efforts by reinforcing governance, the rule of law, and regional security. The findings highlight Europol's key role in strengthening BiH's security architecture while fostering stability and cooperation in the Western Balkans, ultimately contributing to the region's enduring political and economic development

Keywords: EUROPOL, Bosnia and Herzegovina, European Union, EU integration

* Kenan Ademović, Assistant Professor in the field of State and International Law at the Faculty of Law, International University of Sarajevo and attorney at law, Bosnia and Herzegovina. Contact: kademovic@ius.edu.ba

1. INTRODUCTION

The formation of the European Union (EU) was a crucial milestone in European history. The major idea of this unification was to establish unity, economic growth, and long-term stability among these European countries. It is well known that Europe had a long history of conflicts among countries among them. The major concern which was actually the foundation for this integrations was the issue of security. It was recognized among all the countries that something had to be done in order to counteract threats postured by organized corruption, extremism, and transcontinental and transnational criminal activities. All these activities could destabilise the EU's stability and prosperity. Europol was established in 1999 (Europole, n.d.), (Great Britain, 2009), (Konig, 2023). It actually represents as a joint platform with the aim to support law enforcement management among Member States. By doing so it will be capable of fighting all the above-mentioned complex challenges.

It is well known, that Bosnia and Herzegovina (BiH) is a candidate country for EU membership. However, due to its past conflicts which happened in the 1990s and its strategic geographical position, located in the canter-heart of Europe and the Western Balkans, presents distinct security challenges. These elements have made it easier for a number of illegal operations to flourish, including the financing of terrorism, drug smuggling, and human trafficking. In order to prevent and stop these activities, Europole is seen as indispensable partner to help law enforcement organizations in Bosnia and Herzegovina should conform to EU operational and legal norms ((Karakas, 2017). A new National/Joint Contact Point located in the BiH institutions building was created in June 2023, with the aim to create a full cooperation with Europol.

This study investigates the Europol's integral role inside the EU's security framework, and putting the major highlight on the influence it has in BiH. The operational contribution of the Europol is investigated and according to this areas of success are identified together with the areas where improvement can be conducted. Finally, the paper provides recommendations with the goal to foster the cooperation between Europol and BiH's institutions, aiming to adopt more robust security measures and fast-track BiH's integration into the EU frameworks.

2. EUROPOL'S INSTITUTIONAL POSITION, INFORMATION SHARING, OPERATIONAL SUPPORT AND CAPACITY BUILDING AND TRAINING

Europol operates as a specialized EU agency under a legal framework shaped by key agreements, including the Lisbon Treaty (About Parliament, Euporean Parliament, n.d.), (Parliament, n.d.) and the Europol Regulation (EU) 2016/794 (Union E. , EUR-Lex, n.d.). Specialized units within its organizational framework focus on important issues like cybercrime, organized crime, counterterrorism, drug trafficking, and human trafficking.

These divisions offer Member States and Partners all-encompassing support while addressing intricate and dynamic threats.

Facilitating intelligence sharing between EU Member States and external Partners, such as Bosnia and Herzegovina, is a one of the components of Europol's mission. Article 6 of the Europol Regulation, underlines this function. It is of the utmost importance that collaboration be improved through operational and analytical assistance. The legislative mandate of Europol is defined in this article (Rošić, 2008). It gives Europol the right to help and provide assistance to all the EU Member States' in their efforts fight against terrorism, human trafficking, drug smuggling and other serious crimes. For criminal investigations and operations involving two or more Member States, this is accomplished through information sharing, strategic and operational assistance, and operational analysis.

Law enforcement agencies and Europol's partners can effectively and instantly share sensitive crime-related information thanks to the Secure Information Exchange Network Application (SIENA) (Secure Information Exchange Network Application (SIENA), n.d.). It is important to stated that the access to information has a high level of strict restriction and that all data is highly encrypted. These are major requirements that guarantee confidentiality, integrity, which is in line with the EU data protection regulations. Joining and connecting different players, like EU Member states, third parties, different agencies, enables SIENA to establish smooth international cooperation between all the involved and as well integrating with Europol's databases and analytical tools (Konig, 2023). One of the mail goals of SIENA is through these exchanges of information to fight against terrorism and organized crime internationally. This network can as well be used by BiH law enforcement agencies that are able to exchange intelligence, which is crucial for identifying patterns in transnational crime and developing timely responses. Basically, the Europol develops a common intelligence ecosystem which enables proactive actions across countries by coordinating international efforts against terrorism and organized crime (Bensahel, 2003).

Europol played a crucial role in the establishment and operation of Joint Investigation Teams (JITs) as per Framework Decision 2002/465/JHA (Monitor, n.d.). One of the main goals of these teams is to bring together law enforcement officials from several nations to work together with the goal of fighting and stopping different crime activities and risks. Through their collaboration JIM can share intelligence, knowledge, accelerate investigation procedures. As they are using the all the available data from the Europol this will of course improve their operational efficacy on the international level. This collaborative strategy has been quite successful in stopping complex criminal activities such as people-smuggling and narcotics trafficking in the Western Balkans, which are frequently targeted by organized crime networks.

How does Europol help candidate nations? Europol provides its help to the candidate nations in building capacities and this is mainly done through training programs and operational guidelines. The main goal is to enhance the local law enforcement

capabilities and to align them with EU legislation. In order to combat the day-to-day developing various security treats, Europol offers different training programs that are organized by sophisticated and highly specialized personnel with the goal to improve present-day tactics which are used in the investigation, improve different procedures used in forensic and other fields. Most of the workshops and webinars that have been conducted until today had a focus on issues how to handle sensitive data, how to create effective counterterrorism response plans and procedure and techniques used to fight cybercrime. During these webinars as well law enforcement officers are introduced to possible new threats, such as the use of advanced technology for illegal purposes. Additionally, Europol has enabled the establishment of networking opportunities and information-sharing mechanisms to smooth cross-border collaboration, ensuring that law enforcement agencies may successfully involve in and benefit from the broader European security framework.

The legislative framework that regulates Europol's activities has to undergo a substantial transformation due to the complex security concerns and the rapidly evolving political landscape of the world. The agency was first established under the *Europol Convention* (2000) (Union E. , EUR-Lex, n.d.). However, its operational scope and legislative framework were altered with the approval of the Europol Regulation (EU) 2016/794 (Union, n.d.) which went into effect in 2017.

Under this new regulation the Europol's mandate was significantly strengthened. This is seen the creation of a larger database and a stronger support to the Member States. Additionally, it implemented strong measures to improve overall performance, operational responsibility, and data privacy.

One of the issues that is always a concern to the public is the protection of personal data. In order to fulfil this data Europol established very strict and comprehensive guidelines that provide all necessary information regarding gathering, processing, and sharing of personal data while protecting basic right, privacy laws and respecting EU data protection requirements. This is of the utmost importance as all this data has to be protected due to the fact that Europol combats different dangers like, terrorism, organized crime, and other transnational dangers (Rošić, 2008).

In order to oversee Europol and how it processes the data in the 2017 regulation a Protection Supervisor's (EDPS) (Union E. , European Data Protection Supervisor, n.d.) was established. Through inspections, data protection advice, and investigation of potential infractions, the EDPS strikes a balance between privacy rights and Europol's operational needs. With the emerging of the new technologies like artificial intelligence (AI) (Union E. , European Data Protection Supervisor, n.d.), the EDPS has provided new guidelines which deal with this kind of information. The idea for these guidelines is that the usage of AI and similar techniques are in accordance with legal and ethical requirements. Additionally, the EDPS has been essential in shaping the EU's data protection strategy by influencing key

regulations such as the General Data Protection Regulation (GDPR) and ensuring its implementation for supranational agencies like Europol.

The *Europol Regulation* (EU) 2016/794, expanded their area of work, so besides working with the Member states, they have expanded their field of work to the non-member states as well. This enables further sharing of the information and intelligence however the level of security measures has been kept the strict and at a high level. This new legal framework, now has a broader and wide basis which enables the Europol to provide better and comprehensive support to national law enforcement agencies, to conduct joint operations, and fight various threats. Therefore, by balancing operational needs with individual rights, the Regulation makes the agency a key part of the EU's internal security architecture.

3. EUROPOL'S WORK IN BOSNIA AND HERZEGOVINA

3.1. Cooperation Framework

Bosnia and Herzegovina as a candidate to become an EU member, is trying to comply with the EU norms, and showed an initiative in fortifying its connection with Europol. BiH signed the Stabilization and Association Agreement (SAA) (European Union, n.d.) in 2008 which was the milestone in this process. By signing this document, a framework for collaboration was established in various areas, like interior affairs, justice, and security. This agreement highlights the common commitment to developing governance, consolidation of the rule of law, and fostering the stability in the region.

Targeted programs like the *Partnership against Crime and Terrorism project in the Western Balkans* (WB PaCT) (CEPOL, n.d.), lasted from October 2020 to the end of March 2024. The goal of this project was to improve collaboration not only regionally but as well EU collaboration aiming to strengthen the ability of Western Balkan authorities to fight against terrorism and organized crime. Through this program a relationship between Bosnia and Herzegovina and the Europol was strengthened. One of the activities of this program was the delivery of training from Europol and the EU Agency for Law Enforcement Training (CEPOL) to the law enforcement authorities in Bosnia and Herzegovina.

This partnership has improved the nation's compliance with EU norms by enhancing expertise in areas such as drug smuggling, human trafficking, cybercrime, counterterrorism, and investigative methods. To improve the effectiveness of international law enforcement operations, these efforts facilitate collaborative training, information exchange, and capacity-building programs.

As well, it is important for Bosnia and Herzegovina to adopt best practices in day-to-day work, be a part of regional security discussions and to establish closer operational ties and connections with neighboring nations. This all provides a platform for the BiH's law enforcement forces. Combining all these initiatives, with the Europol's sophisticated instruments and intelligence-sharing systems enables BiH to fight different security risks on one side and on the other promoting regional confidence and cooperation. There are two sides

of these cooperation. On one side this is strengthening the security capacities of Bosnia and Herzegovina, and on the other it is increasing the ensuring peace, strengthening stability and security not only in the Western Balkans and the whole Europe.

3.2. Operational Impact

As in other countries of the EU Europol in Bosnia and Herzegovina has a crucial role in in the enhancement of Bosnia and Herzegovina's law enforcement capacities through sharing intelligence, conducting joint operations and conducting different capacity-building programs. As BiH is integrated in the SIENA it enables BiH's law enforcement agencies to access and to share intelligence on various activities. The effectiveness of this platform was seen in the process of locating and stopping different organized crime operations throughout the Western Balkans. This platform enables BiH and other European countries' real-time information sharing and communication which is the key feature of its success and effectiveness. This kind of collaboration framework shows its benefits in stopping organized crime activities and increasing the security.

It should be mentioned that apart from sharing various intelligence Europol can be involved in different operations with the goal of identifying and stopping criminal activities. One of the most notable is the *Operation Archimedes* (Europol, 2021), which was carried out in September 2014. This operation targeted gangs that were involved in human trafficking across the Western Balkans. This operation was very international and widespread over the world, as it included countries like United States, Norway, Serbia, Switzerland, Australia, Colombia as well as 28 EU nations. This operation resulted in arrest of significant individuals and large criminal networks were broken down. This has shown the effectiveness and the capabilities of Europol and how international cooperation is important for breaking up criminal activities and their networks.

The partnership between Bosnia and Herzegovina and Europol was even more strengthened by the creation of a National Contact Point for BiH law enforcement agencies. This is a direct secure link between Bosnia and Herzegovina and various domains of the Europole, like SIENA. On April 20th, 2022, the Council of Ministers of Bosnia and Herzegovina adopted a Conclusion to send a Liaison Officer from Bosnia and Herzegovina to EUROPOL to The Hague. This Liaison Officer was proposed by the Ministry of Security to implement the Agreement on Operational and Strategic Cooperation between BiH and the European Police Office (Authorities, 2020). It is Aleksandar Stjepanović, a police officer of the Ministry of Internal Affairs of the entity of the RS, who was appointed and his mandate is four years (S.R., 2022).

The importance of training and capacity-building programs conducted by Europol cannot be emphasized enough and its dedication in the improvement of BiH's law enforcement capacities. The efficiency of the programs is seen already in the day-to day

security issues, providing the enforcement officers capabilities and resources to deal with these issues.

Europol in the recent past has conducted several seminars regarding cybercrime prevention as this is one of the significant topics in the digital era. During the seminar officers were provided lectures and training courses on how to use cutting-edge methods for obtaining electronic evidence and conducting digital forensics. These are crucial aspects of modern investigations into crimes involving technology.

Another aspect which is very important and which is highlighted by Europol is the establishment of a strong and effective partnership and collaboration between the local communities and law enforcement. In line with EU human rights and policing standards, continuous community policing and public safety efforts have been designed at increasing public trust and engagement with law enforcement.

Conducting all these activities on one hand fundamental right and democratic ideal are preserved and on the other hand security matters are addressed in a positive manner.

It is without any doubt that a collaboration between Bosnia and Herzegovina and the Europol has had a favourable impact on the ability of Bosnia and Herzegovina to combat organized crime, deal with emerging challenges, and strengthen regional security cooperation. For Europe to be safer it is important that the partnership between Bosnia and Herzegovina and Europol is strengthened especially with the Bosnia and Herzegovina being the candidate for entering into the EU community.

3.2.1. Case studies in Bosnia and Herzegovina

A big operation was conducted by Europol in June 2023 which was targeted at a big drug trafficking group which was operating across two continents and in BiH. As a result of this lengthy operation, which resulted in numerous action days, including the arrest of six individuals on June 19, 38 persons were taken into custody. Eight representatives of Bosnia and Herzegovina's national government were among those arrested. Analyzing encrypted communications using tools like ANOM and SkyECC produced important evidence. The investigation also resulted in the seizure of more than €6 million worth of assets, including cash and real estate, and more than 300 kilograms of cannabis (Kingham, 2023). There was no generally known name for this surgery.

The international law enforcement initiative known as Operation Europol was another crucial element of Europol's efforts to combat organized crime, with a focus on drug trafficking, money laundering, and corruption. One of its most important operations was conducted in Bosnia and Herzegovina in 2023, marking a watershed in the country's ongoing battle against organized criminal syndicates and corrupt networks.

The operation involved cooperation from BiH's law enforcement agencies, specifically the State Investigation and Protection Agency (SIPA) and the Ministry of Internal

Affairs (MUP), as well as international partners like Europol, the Federal Bureau of Investigation (FBI), and the Drug Enforcement Administration (DEA). The objective of this operation was to stop and dismantle drug trafficking routes, money laundering and as well to capture the senior members of this organized crime group. The operation resulted in more than 20 people being arrested and taken to custody. It should be mentioned that in this group not only criminals were taken to custody but as well some very known members of law enforcement. Among the detained were present and former police personnel. This demonstrates the corruptive nature of some of the police officials in BiH and the connection between the organized crime and fraudulent officials in BiH (SarajevoTimes, 2024), (Sharad, 2023).

One of crucial feature which enabled this operation to be effective was the utilizations of the encrypted communication platforms. It is without say that criminals during their criminal operations today use very sophisticated communications methods, which make is difficult for the law enforcement to intercept and disrupt illicit activities. However, as in this specific case, criminals were collaboration with both dishonest political and law enforcement officers, this complicated the inquiry further. Herzegovina's criminal activities, law enforcement, and politics, which presented significant obstacles in the fight against organized crime.

An excellent example of the growing participation of international law enforcement in fighting criminal networks in the Western Balkans is *Operation Black Tie*. Joint work and collaboration enabled to expose the presence of the systematic corruption, and the links that between criminal groups, dishonest politician and law enforcement members. This exemplified as well showed the remarkable results that have been obtained as a result of collaboration between Europe, international organizations and Bosnia and Herzegovina, underlining the need for a wide-ranging approach to battle organized crime on a national and regional scale (SarajevoTimes, 2024).

Since these case studies demonstrate both Europol's operational expertise and BiH's proactive involvement in regional security initiatives, they mark a significant advancement in the region's fight against transnational crime.

3.3. Legal and Policy Framework

border collaboration are greatly influenced by the legislative and policy environment that facilitates BiH-Europol cooperation. The essential parts of this framework are legal assistance agreements and cooperation protocols that have been signed between BiH and Europol. These documents are the basis for effective and successful fight against any kind of transnational crime. The main features of these agreements are defined procedure regarding gathering and passing relevant information in a methodological manner, conduct joint work on investigations. This all makes it easier to share evidence across national boundaries. When talking and referring to criminal activities like drug and/or human

trafficking, organized crime, money laundering and terrorism, this is extremely important as the criminal activity crosses several jurisdictions. These legal frameworks establish a more coherent and cohesive strategy for combatting cross-border criminal risks by ensuring effective collaboration between law enforcement authorities in Bosnia and Herzegovina and other European countries.

So, having these agreements is not only for operational purposes and collaboration but as well having these agreements will accelerate not only the investigation, but as well some procedural components like the transportation of evidence material and suspects across the borders. These agreements are constructed in such a way that they are in compliance with both the national legal norms of Bosnia and Herzegovina and the international norms, which enhances the collaboration of BiH with the Europol and the EU members.

As in every segment improvement can be made in this matter as well. The idea is that the legal framework be more adjusted and in line with the EU law. One of the segments that needs to be improved are the protection of data and privacy rights. This is becoming extremely important due to the presence and constant change of the digital scenery.

Stricter data protection laws would guarantee adherence to EU privacy regulations, such as the GDPR, and align BiH's legal system with the EU's dedication to protecting people's rights. This is extremely important especially as in the past years the law enforcements are more and more using digital evidence in the process of combating different criminal activities which are happening across borders.

The willingness of Bosnia and Herzegovina to improve and revise its own legislation is considered a significant step in confirming its dedication to Euro-Atlantic unity. By doing this, BiH has demonstrated its willingness to adopt the rule of law and human rights standards that underpin EU membership and to make the required adjustments to bring its legal and policy framework into compliance with EU best practices. This will enable a much smoother integration of BiH into the EU community.

For BiH to meet the EU's requirements regarding combating cybercrime, different kind of trafficking, terrorism, etc. it is essential for BiH to adopt state-of-the-art operational and legal protocols. By putting these improvements into practice, BiH's security environment will be improved and will be better able to support regional and international law enforcement efforts.

Of course, a lot more has to be done so that the laws of BiH satisfy and fulfil the requirements set by the international law enforcement cooperation. It should be stated that BiH did make a significant progress when referring to the compliance of its legal and policy framework with EU norms.

BiH will play a bigger role in European security and move closer to EU membership if data privacy is strengthened, national laws are brought into line with EU standards, and new security threats are addressed.

4. CHALLENGES AND FUTURE PERSPECTIVES

It is without say that BiH has made a good progress and that excellent collaboration with Europol has been achieved, which had a direct impact on its security and progress in the law enforcement initiatives. However, still more work has to be done. It is evident that one of the major problems and challenges in BiH is its political division and by the nation's complicated political structure, as a country with two entities and one district. This in the sense as each of these entities in some of the segments has its own governments, law enforcement entities, etc. It is needless to say that these entities and base on ethnicities and rivalries among the entities. This kind of fragmentation is creating problems and a lot of challenges across several governmental levels is essential. It is this fragmentation and political bodies that are standing on the way for bolstering the rule of law and conforming to EU norms.

Another problem which stands in the way of efficient collaboration and governance is the existence of corruption in the political and judicial institutions in BiH. Due to this situation, the public confidence in the rule of law has been undermined. There is significant public distrust in the fairness of the legal system, according to the Transparency International. There is a great perception that the legal system is susceptible to corruption and political meddling. So, for BiH it is quite difficult to completely engage in cooperation with international law enforcement like Europol due to all these reasons, as one of the major foundations of Europol is transparency and justice. Political division, corruption within law enforcement agencies, jeopardizes investigations, enables effective utilization of resources and undermines the trust of the public in law enforcement. Public support for crucial security measures may be undermined when people think that the same organizations tasked with protecting them are dishonest.

Other issues that impede BiH's attempts to update its law enforcement practices is the lac of sophisticated technology. It is true that progress has been made regarding inclusion of the sophisticated technology in the work of policy however much has to be done when referring to cybercrime's growing sophistication. It is not only the integration of the technology, and keeping up to date with its fast development, but as well education of the personnel to be able to use such technology. Complexity of cyberthreats, which may have various forms for identity theft, hacking, and the use of digital platforms for illegal purposes presents a significant challenge for BiH's police forces. Due to the flaws in the BiH cybersecurity infrastructure criminal organizations can conduct more frequently criminal activities and conduct illegal actions. So, it is of the utmost importance for the BiH to invest in the new technological systems to fight cyber-crime and as well to education its personnel in this domain.

When referring to the operations that are happening across the borders, which need quick actions and effective solutions this is still a challenging and difficult task to be fully implemented by BiH forces. The reason for this is lack of a streamlined decision-making process among BiH's fragmented political environment. Even though BiH has been integrated into Europol's networks and cooperation programs, this division and unclear slow decision-making process is strongly identified as a problem.

For instance, when urgent law enforcement activities require the participation of multiple government agencies, the existing political tensions may cause significant acts to be postponed. This highlights the importance of developing a more cohesive governance structure that can expedite decision-making and encourage a better-coordinated response to security-related challenges.

These issues need to be solved as soon as possible while BiH must continue its connection and collaboration with Europol and other international security agencies. It is clear that a successful way to fight all illegal and criminal activities is to strengthen political unity, upgrade technological equipment and educate personnel.

Furthermore, fostering stability and cooperation in the long run, both domestically and internationally, will depend heavily on increasing public trust in the legal system and law enforcement.

All the above-mentioned problems and challenges have to be solved. It should be noted that with constant efforts by Bosnia and Herzegovina's civic society, police, and political leadership this can be resolved. By addressing these problems and bringing itself closer to EU standards, BiH will be in a better position to accomplish its larger objectives of Euro-Atlantic integration, improve its security environment, and promote regional collaboration.

5. FUTURE COLLABORATIONS

To enhance collaboration with Europol and address current challenges in BiH, several key recommendations are proposed.

✓ **Strengthen Regional Cooperation:** Improving the networks between law enforcement organizations in the Western Balkan region will provide better intelligence exchange and cooperative efforts, allowing for more efficient responses to transnational threats including cybercrime, terrorism, and organized crime.

✓ **Continuous Training for Law Enforcement:** The operational ability of BiH law enforcement to tackle challenges like cybercrime and international drug trafficking will be strengthened by ongoing professional development adapted to changing crime patterns.

✓ **Enhance communication, expedite investigations, and fortify relationships** between EU agencies and BiH law enforcement.

✓ Focus on Anti-Corruption Measures: Strong anti-corruption measures in the legal, political, and law enforcement sectors will increase public confidence, strengthen ties with Europol, and boost the effectiveness of domestic law enforcement.

✓ Promote Community-Based Policing: Involving communities in crime prevention programs will improve criminal detection, strengthen bonds between the public and law enforcement, and increase public safety in general.

By implementing these measures, BiH can strengthen its partnership with Europol, improve security, and align its law enforcement practices with European standards.

6. CONCLUSION

In conclusion, Europol plays a pivotal role in enhancing security in the EU and strengthening law enforcement in BiH. Through intelligence sharing, joint operations, and capacity-building, it has helped BiH address critical security challenges and align with its EU integration goals.

It should be stated that this collaboration faces challenges. The challenges are identifying in the political fragmentation which is mainly connected to the ethnical division which is standing the way to reforms and governance. Due to evident corruption within the politics, judicial system and law enforcements the public trust is undermined ad this all hampers international cooperation. In order for these issues to be addressed and solved it is required to conduct a deep institutional reform, conduct anti-corruption measures, and all this has to be done in a transparent manner.

For BiH to combat cybercrime it has to upgrade its technological readiness as well as education and capacity building. Additionally, fostering transparency, accountability, and civil society participation will build trust and enhance security efforts. Europol's ongoing assistance will be essential to enhancing security, fostering stability, and creating a safer, more connected Western Balkans within the EU as BiH moves closer to EU membership.

LIST OF REFERENCES

- About Parliament, European Parliament.* (n.d.). Retrieved from Treaty of Lisbon: <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-lisbon>
- Authorities, b. o. (2020). *Regional Narrative Progress Report on the Implementation of the Roadmap.* Retrieved from SEESAC: <https://www.seesac.org/>
- Bensahel, N. (2003). *The counterterrorism coalitions: cooperation with Europe, NATO,.* RAND Corporation.
- CEPOL. (n.d.). *WB PaCT.* Retrieved from <https://www.cepol.europa.eu/international-cooperation/wb-pact>
- European Union, E.-1. (n.d.). *Stabilisation and Association Agreement with Bosnia and Herzegovina.* Retrieved from Stabilisation and Association Agreement with Bosnia and Herzegovina: <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-bosnia-and-herzegovina.html>
- Europol. (2021). *Operation Archimedes Infographics.* Retrieved from <https://www.europol.europa.eu/publications-events/publications/operation-archimedes-infographics>
- Europole. (n.d.). *Europole History.* Retrieved from <https://www.europol.europa.eu/about-europol/history>: <https://www.europol.europa.eu/about-europol/history>
- Great Britain, E. U.-C. (2009). *Europole: Coordinating the feight against serious and organized crime -HL Paper 183.* London: Satationary Office.
- Karakas, Ž. (2017). Razvoj Europolovih istražnih ovlasti. *Zagrebačka pravna revija, Vol. 6 No. 2*, 175-201.
- Kingham, T. (2023, 23 06). Retrieved from Influential drug trafficking organisation halted in Bosnia and Herzegovina: <https://www.border-security-report.com/influential-drug-trafficking-organisation-halted-in-bosnia-and-herzegovina/>
- Konig, F. (2023). *The rise of the EU Police Cooperation.* Bembo: Knowledge Works Global Ltd.
- Monitor, E. (n.d.). *Framework decision 2002/465 - Joint investigation teams.* Retrieved from https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vitgbgi b3czi

- Parliament, E. (n.d.). *European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI))*. Retrieved from European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI)): https://www.europarl.europa.eu/doceo/document/TA-6-2008-0055_EN.html?redirect
- Rošić, M. (2008). Europol i međunarodna policijska suradnja kriminalističke policije Republike Hrvatske. *Hrvatski ljetopis za kazneno pravo i praksu, Vol. 15 No. 1*, 205-254.
- S.R., F. (2022, 4 20). *FENA*. Retrieved from FENA: <https://www.fena.ba/article/1264747/com-appoints-a-liaison-officer-of-bosnia-and-herzegovina-at-europol>
- SarajevoTimes. (2024, 4 22). *More than 20 people were detained in the Black Tie 2 operation*. Retrieved from <https://sarajevotimes.com/more-than-20-people-were-detained-in-the-black-tie-2-operation/>
- Secure Information Exchange Network Application (SIENA)*. (n.d.). Retrieved from Secure Information Exchange Network Application (SIENA): <https://www.europol.europa.eu/operations-services-and-innovation/services-support/information-exchange/secure-information-exchange-network-application-siena>
- Sharad, N. (2023, 4 23). *The 420*. Retrieved from <https://www.the420.in/operation-black-tie-targets-drug-kingpins-inner-circle-in-bosnia-and-herzegovina/>
- Union, E. (n.d.). *EUR-Lex*. Retrieved from EUR-Lex: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0794>
- Union, E. (n.d.). *European Data Protection Supervisor*. Retrieved from European Data Protection Supervisor: https://www.edps.europa.eu/_en
- Union, E. (n.d.). *European Data Protection Supervisor*. Retrieved from European Data Protection Supervisor: https://www.edps.europa.eu/data-protection/our-work/subjects/artificial-intelligence_en
- Union, E. L.-E. (n.d.). *Document 32000D0641*. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000D0641>

THE BLOCKCHAIN DATA GATEKEEPERS LIMITED LIABILITY FOR VIOLATIONS OF THE GDPR

Asim Jusić *

Abstract

Data gatekeepers (data controllers and processors) that use blockchain for data transfer effectively enjoy limited liability for violations of the GDPR. This is due to the fact that applying the GDPR's data gatekeeper system of liability to a decentralized technology such as blockchain is difficult for three reasons. Firstly, identifying data gatekeepers on the blockchain can only be done by either assigning data gatekeeper roles to actors on the blockchain, or structuring the blockchain as private or permissioned one, so as to fit with GDPR requirements. Neither of these approaches provides a universally applicable and satisfactory method for privacy protection. Secondly, because of their knowledge and investment in infrastructure, large data gatekeepers such as IBM, Amazon and Microsoft have an informational advantage over data protection authorities (DPAs) and an additional protective layer against liability, as their blockchain infrastructure is used by other businesses and corporations that are primarily liable for data processing. Finally, administrative fines and reputational damages for non-compliance with the GDPR are insufficient deterrents for large data gatekeepers, whereas damages awarded to individual data subjects for data gatekeepers' violations of GDPR are extremely low and too costly to obtain.

Keywords: GDPR, blockchain, data gatekeepers, liability, compliance.

* Asim Jusic, SJD, Assistant Professor, at the International University of Sarajevo, Attorney, Bosnia and Herzegovina. Contact: ajusic@ius.edu.ba

1. INTRODUCTION

The blockchain, a distributed ledger technology that enables rapid data transfer (McKinsey, (2016) and the EU's General Data Protection Regulation (Regulation EU/2016/679 General Data Protection Regulation (GDPR), 2018), a globally respected privacy protection regulation, both matured during the past decade, at approximately the same time. A growing body of studies has discussed compliance frictions between the GDPR and blockchain because of the GDPR's impact on privacy protection worldwide and blockchain's value to multiple industries (Khazaei & Arabsorkhi, 2024; Jusic, 2022; Jusic, 2020).

There is – to the best of my knowledge – no work to date that focuses exclusively on the liability of data gatekeepers on blockchain under the GDPR. This paper seeks to fill that gap by advancing the following argument(s): The liability of large data gatekeepers using blockchain is limited for three reasons. Firstly, identifying gatekeepers on the blockchain is problematic. Public blockchains resist centralization, while the use of private/permissioned blockchains offers easier compliance with the GDPR but decreases decentralization, blockchain's main advantage over traditional centralized databases. Secondly, it is shown that large data gatekeepers such as IBM, Microsoft and Amazon have informational and technological advantages over DPAs, and are able to deflect direct liability by transferring it downstream to business users, which creates a moral hazard and limits the effectiveness of DPA supervision. Finally, it is argued that two key sources of liability under the GDPR – administrative fines and individual claims – are insufficient deterrents against non-compliance for large data gatekeepers. For large data gatekeepers, the threat of GDPR-related sanctions is minor relative to such organizations' economic power and the benefits of non-compliance, while court processes are costly, inefficient, and fail to provide significant reparations to individual claimants.

Part Two of the paper briefly discusses importance of the GDPR and blockchain, and lays out architectural difference between the GDPR's reliance on centralized intermediation and data gatekeepers, and blockchain's decentralized, disintermediated architecture. Part Three of the paper consists of the main argument and lays out the key issues with data gatekeepers' liability, i.e. identification of the gatekeepers on the blockchain, large data gatekeepers' informational and technological advantages over DPAs, and the limitations of the two main methods of monetary liability – i.e. administrative fines and individual claims – against large data gatekeepers under the GDPR. Limitations of the paper and future avenues for research are set out in the Conclusion.

2. THE GDPR'S INTERMEDIATION AND THE BLOCKCHAIN'S DISINTERMEDIATION

2.1. *The GDPR*

The GDPR turned high-level principles of privacy by design and default into an obligation of data controllers and processors. For the purposes of this paper, data controllers and processors are considered 'data gatekeepers', intermediaries via whom data subjects access various services and/or on whom data subjects rely for the protection of their personal data and who act as enforcers of data GDPR for public authorities (Gadinis & Mangels, 2016, p. 802; Loo, 2020, pp. 482–485). Data gatekeepers are expected to process personal data while abiding by six core GDPR privacy principles: (a) lawfulness, fairness and transparency in relation to the data subject (owner of the personal data); (b) purpose limitation; (c) data minimization; (d) accuracy; (e) storage limitation; and (f) integrity and confidentiality (GDPR Art. 5. (1)).

Several other characteristics underlie the GDPR having become so important. The GDPR directly affects the use of private data of several hundred million persons by both EU and non-EU commercial and non-commercial entities, and indirectly also millions of non-EU citizens. Precise numbers are unavailable, but estimates are that the GDPR directly affects more than 20 million firms based or operating in the EU (Walsh, 2024). The GDPR is built to have an extraterritorial impact and an effect upon international data transfer flows well beyond the EU. Entities with a seat in the EU that process data outside of the EU remain bound by GDPR, and so do non-EU entities that process personal data while performing commercial and non-commercial activities in the EU or in relation to the EU. Finally, the process of international data transfer outside of the EU towards third parties is subject to various, often onerous, GDPR obligations (GDPR Art. 3; Kuner (editor) et al., 2020, p. 757).

2.2. *The Blockchain*

In its classical version, the blockchain is a distributed ledger, a chain of blocks wherein each block holds data that can be created by multiple anonymous originators using multiple internet addresses, retaining anonymity for the creators in the data creation process. The data recorded in the block is relatively safe from tampering, accessible only to those possessing cryptographic keys necessary to decrypt and read the data inside the block (Bambara & Allen, 2018, pp. 1–13).

The blockchain has two characteristics that make it distinct. Firstly, is decentralized and disintermediated, as individuals can transfer and exchange data without intermediaries or a single controlling central authority. Secondly, public blockchain is relatively trustless, transparent and immutable. Participants need not know or trust each other to engage in data transfers, and the data exchanged on the blockchain is mostly secure from external intrusion (Böhme et al., 2015; Mougayar & Buterin, 2016; Werbach, 2017).

Decentralization, disintermediation, relative trustlessness, and immutability are precisely the main benefits that made blockchain technology of choice for data-heavy industries ranging from finance, healthcare and education to supply chains, the fashion & textile industry, and energy companies. Reports suggest that the blockchain market is headed to touch the \$60 billion mark in 2024 and will revolutionize international and local transactions alike (Tripathi et al., 2023, pp. 4, 9–14).

2.3. Intermediation and Disintermediation as a Source of Compliance Tension

From the discussion above, it seems that in the modern economy, which revolves around and thrives on the use of data and data transfer, the number of blockchain use cases in multiple industries should (or at least could) be endless. Nevertheless, scaling blockchain has proven to be problematic because of its non-compliance with legal requirements, most importantly data protection regulations such as the GDPR (Schellinger et al., 2022, p. 4631).

Sources of compliance tensions between blockchain and the GDPR are numerous (see Jusic, 2022) and will not be discussed here in detail. For purposes of this paper, the relevant factor is the different approaches to intermediation, centralization, and supervision employed by the GDPR and blockchain, which can be summarized as follows:

On the one hand, the GDPR is structured around the intermediation and centralization of data processing by data gatekeepers⁵ and the supervision of data gatekeepers by DPAs. Formally, the GDPR defines a data controller as a natural or legal person or public entity that, alone or jointly with other data controllers, determines the purposes and means of the processing of personal data, assesses privacy risks, and implements technical and organizational measures to protect data subjects' GDPR rights (GDPR Art. 4., 24. and 26.). The data processor is a natural or legal entity that is contractually bound and subordinate to the data controller, who processes personal data on behalf of and in accordance with data controller's documented instructions, and also controls its data sub-processors, if there are any (GDPR Art. 4. and 28.). National DPAs, independent public bodies endowed by the GDPR with numerous investigative and corrective powers, supervise data gatekeepers' (data controllers, processors, and their representatives) compliance with the GDPR (GDPR Art. 51-59.; Ustaran, 2023, pp. 329–334).

On the other hand, in opposition to the GDPR, public blockchain is, in principle, disintermediated, decentralized, and not supervised by any external authority.⁶

⁵ The term 'gatekeeper' used in this paper is not to be confused with the term gatekeeper used in the EU's Digital Markets Act (DMA). The DMA defines gatekeepers as large digital platforms with special obligations towards data subjects because of their overwhelming influence as a gateway between businesses and consumers. Such DMA designated gatekeepers include companies like Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft. See (European Commission, 2023).

⁶ This holds for a public blockchain that is a backbone of, for example, cryptocurrencies like Bitcoin. Private blockchains and, to a lesser extent, hybrid and consortium blockchains, are closed networks, and are often under

Disintermediation is a removal of the need for gatekeepers to manage transactions or keep data. Absence of gatekeepers removes the need for a central authority that controls or supervises gatekeepers (Garg, 2023, p. 354; Quiniou, 2019, pp. 1–5, 37–59). Assuming that classical decentralized versions of blockchain can be scaled, in the long run, disintermediation using blockchain challenges traditional notions of government and the social role of legislation such as the GDPR. It implies that individuals can use technology to act as ‘sovereigns’ and control not only data transfers but also legal processes regulating data transfers independently of local laws and legal entities that control access to data services and act as intermediaries between individuals and government structures (Clifton & Pal, 2022, p. 322). In a utopian – or dystopian, depending on one’s preference – future, blockchain and its offshoots can theoretically create conditions for the slow end of the traditional state and law as we know it.

3. LIABILITY OF DATA GATEKEEPERS ON BLOCKCHAIN SYSTEMS: AN UPHILL BATTLE?

Ostensibly, the GDPR was crafted as a universally applicable technology-neutral privacy regulation. Effectively, it was envisaged for application onto the classical centralized databases in which entities controlling databases and determining the purpose and means for data processing are known in advance and held accountable for data protection flaws (Daoui et al., 2019). Because of the intermediation/disintermediation difference between the GDPR and the blockchain, the informational advantage of large data gatekeepers over DPAs, and GDPR enforcement issues, identifying and holding blockchain gatekeepers liable for data protection flaws is more problematic than in the case of traditional centralized databases.

3.1. Identifying gatekeepers on the blockchain

The first problem of applying GDPR to the blockchain is identifying the data gatekeepers that authorities will control and regulate. To date, two solutions for this issue have been proposed: assigning data gatekeeper roles to actors on the blockchain on the basis of their activity, or using private/permissioned blockchain because of its (relatively) simpler compliance GDPR requirements. However, neither of these solutions is universally applicable or entirely satisfying, for the following reasons:

Firstly, it is questionable whether the assignment of data gatekeeper roles on public blockchain is useful in any way. A French data protection authority, for example, suggested that data gatekeepers that perform writing on the public blockchain should be considered data controllers. In practice, according to this proposal, data controllers on the blockchain would be either individuals who process personal data for business purposes – as GDPR does not apply when individuals process data solely for personal purposes – or legal entities writing

the control of a single central entity or node with low or no anonymity. For this reason, private, hybrid, and consortium blockchains are sometimes deemed as “not real blockchains”. See (Campbell, 2024).

personal data on a blockchain as a part of their activities. The problem with the former proposal is that it rests on the goodwill of blockchain network members to act as data controllers. In the event that network members collectively reject the role of data controllers, the French data protection authority suggests that networks form a legal entity to act as data controller (Commission Nationale de l'Informatique et des Libertés, 2018; Daoui et al., 2019). But there is no effective way to coerce dispersed blockchain network members to assume roles of intermediary and enforcer for public authorities. As to the latter example, creating a legal entity that would act as a data controller would represent precisely the type of centralization that the classical blockchain was created to avoid.

Secondly, in the case of the private/permissioned blockchain, the identification of data gatekeepers is a non-issue. Unlike public/permissionless blockchain, a private/permissioned blockchain is a decentralized ledger with an identifiable owner or entity that can change entries on the blockchain and control, which can access the network, view information, and create data. Access to private/permissioned blockchain network is restricted, and identities of network members are known (Dock, 2024). Because roles and identities of all actors on a private/permissioned blockchain are known, the accountability of each actor is easily determined (European Blockchain Observatory Forum, 2019, p. 14). One could conclude that private/permissioned blockchains can more easily comply with the GDPR because private/permissioned blockchains are not very different from classical centralized databases.

But it would be hasty to conclude that the GDPR and private/permissioned blockchains are congruent. Private/permissioned blockchains differ in underlying technology and distribution of responsibilities among actors. There is no universal structure for all private/permissioned blockchains, only an infinite variety of use cases that may or may not comply with the GDPR to varying degrees. Because there is no single universal structure of private/permissioned blockchains, the GDPR cannot be consistently and uniformly applied to them without costly investment in understanding the technology and structure behind each separate private/permissioned blockchain (European Parliamentary Research Service, 2019, p. 101).

3.2. Data gatekeepers informational advantage over DPAs

Data gatekeepers can create blockchains for data processing or, in the event that they are not themselves the creators, have expert knowledge of the inner functioning of the blockchain that they use for data processing. For that reason, data gatekeepers, particularly large ones, have an informational and technological advantage over supervisors, i.e. DPAs. This advantage of data gatekeepers creates a principal-agent problem between DPAs, who act as principals, and large data gatekeepers, who act as their agents and enforcers of data protection laws such as the GDPR: Large data gatekeepers were initially wary of the blockchain, but decided to invest in it largely as a result of the Bitcoin and cryptocurrency hype. Crucially, large data gatekeepers focus on the blockchain infrastructure and providing

enterprise-ready blockchain platforms. IBM, for example, offers IBM Blockchain, an enterprise blockchain solution that businesses and corporations can use to join existing blockchains or create entirely new blockchain platforms. Blockchain projects operating IBM Blockchain cover various industries ranging from trade finance and supply chains to identity services (Jenkinson, 2020; IBM, 2024). Amazon and Microsoft provide similar services ((Jenkinson, 2020; Amazon, 2024). By providing their blockchain infrastructure for use to other businesses and corporations, large data gatekeepers erect an additional shield against their own liability. Business and corporations that use large data gatekeepers' blockchain infrastructure are primarily liable for data processing (Raghavan & Viswanathan, 2021).

Since large data gatekeepers have an informational and technological advantage over government bodies, bodies such as DPAs will know less about the blockchain than large data gatekeepers and are less able to check their compliance with the GDPR, even under ideal conditions. But DPAs are from perfect; in spite of the GDPR having been enacted in 2016 and having been in force since 2018, DPAs across EU remain weak institutions. Available studies consistently find that DPAs across the EU experience two types of challenges. Firstly, DPAs are underfunded and understaffed, burdened by numerous trivial data protection complaints based on misunderstandings of the GDPR, and, at times, lacking in means to coerce data gatekeepers to cooperate with them during investigations. Secondly, DPAs have trouble dealing with cases of the regulation and investigation of cases involving new technologies. In such cases, DPAs report that they either lack technical tools and knowledge to assess electronic evidence collected during investigations, or that they require additional time and resources to develop and test regulatory approaches for new technologies such as the blockchain (European Union Agency for Fundamental Rights, 2024; European Data Protection Board, 2021).

Economic theory would label a case of large data gatekeepers having more knowledge and resources for dealing with data processing on the blockchain relative to the comparatively weaker DPAs as a variation of the principal-agent problem.⁷ The principal, i.e. the DPA, is supposed to monitor agent(s), the data gatekeeper(s), who oversee the enforcement of decisions and rules (the GDPR), on behalf of the principal. The DPA lacks sufficient information and resources, and cannot afford the monitoring costs necessary for successful supervision of the data gatekeepers. Because the data gatekeepers know the DPAs' limitations, they can benefit from violating rules with low risk of sanctions. In the long run, this situation creates a moral hazard, and undermines the legitimacy and effectiveness of the DPAs as principals-supervisors (Karjalainen, 2022, p. 5).

⁷ Similar principal-agent problems occur when authorities supervise gatekeepers that are entrusted with enforcing anti-money laundering regulations and guarding the integrity of the financial markets and transactions, see (Jusic, 2017, pp. 109–114). The principal agent problem between DPAs and data gatekeepers analyzed in this paper is the one where data gatekeepers are simultaneously enforcers. Another type of principal-agent problem is the relationship between the data subject and the data gatekeeper. The data subject as a principal provides the data to the agent, the data gatekeeper, who can then use and reuse the data in ways that are unknown or even harmful to the data subject. See (Balachandran, 2020).

3.3. Non-deterrent administrative fines, onerous litigation and negligible damages

The GDPR contains two systems of financial fines and liability for data gatekeepers. On one side, the GDPR imposes significant administrative fines for non-compliance of data gatekeepers, with the maximum fine being €20 million or 4% of the company's global annual turnover, whichever is higher (GDPR, Art. 83.) On the other, data subjects can sue the data gatekeeper and claim damages for violations of their GDPR rights (GDPR, Art. 82.) For smaller data gatekeepers, the threat of non-compliance fines and lawsuits is arguably the more powerful incentive for compliance with the GDPR. However, for two reasons that have more to do with the weakness of GDPR's enforcement than the blockchain itself, the threat of monetary fines, lawsuits, and related reputational risks of negative publicity are insufficient to deter large data gatekeepers that use blockchain from suboptimal compliance with the GDPR.

Firstly, although fines for non-compliance with the GDPR have progressively escalated in recent years, their effect on large data gatekeepers' has not been as significant as initially appeared. For example, the UK Information Commissioner's Office sanctioned TikTok with a £12.7m fine for mishandling private data, Luxembourg's data protection authority fined Amazon €746m for targeted advertising in 2021, and the Irish data protection authority sanctioned Meta with a €405m fine for mishandling children's data in 2022. These figures may at first glance appear astronomical, but they are still less than 0.01% of these companies' annual turnover (Berryman, 2023) and it is unclear if these fines were ever collected (Jennings-Trace, 2024). Overall, due to their 'data power' and financial resources, in the case of large data gatekeepers, the benefits of using blockchain for data transfers probably outweigh the risk of monetary fines (Karjalainen, 2022, pp. 2–5).

The counterargument to this claim can be found in rare empirical studies that suggest that high monetary fines combined with reputational risks can incentivize even large data gatekeepers to improve compliance with the GDPR (European Center for Digital Rights, 2023, pp. 13–16). However, such studies cover only short timeframes, and for that reason their findings are limited. The GDPR has been in force for only six years. Over a longer period of time, however, not even high monetary fines combined with reputational damage will act as sufficient incentive for large data gatekeepers to comply with the GDPR. Just as reputational losses and harsh sanctions failed to regulate financial markets by disciplining gatekeepers like global banks (Gadinis & Mangels, 2016, pp. 812–815) eventually – if it is not already the case – a class of large data gatekeepers will come to occupy such a massive share of the data economy as to become 'too big to fail'. Data gatekeepers like Google or Microsoft are already so big that subjecting them to even the most severe GDPR sanctions, such as a temporary or permanent limitation of work or a ban on data processing (GDPR Art. 58. 2.f) is unimaginable, as it would prove excessively disruptive for the data economy.

The second source of monetary liability for data gatekeepers is the possibility that individuals can sue data gatekeepers and claim damages for violations of GDPR rights (GDPR, Art. 82). In theory, the cumulative effect of such lawsuits and court decisions should be gradual clarification and strengthening of individuals' privacy protection and the accountability of data gatekeepers (Solove, 2023, p. 993). However, several reasons and the recent case law of the Court of Justice of the European Union (CJEU) suggest that courts are unable and unwilling to grasp new technologies, and cannot protect privacy against resourceful large data gatekeepers. A rich base of empirical literature has already shown that, due to external limitations (i.e. low budget and dependence on external actors for enforcement of their decisions) and internal weaknesses (limited human resources, opportunism, conformism, etc.), courts are primarily concerned with their self-interest rather than finding novel solutions for new social issues (McCann, 2004, p. 507; Galanter, 2015, p. 119; Jusic, 2018, pp. 610–612). Furthermore, courts are not equipped to deal with technology-related privacy issues. Most judges worldwide admit their ignorance of the basics of internet technology (Mashnitski, 2015), and likely know even less about privacy issues emanating from technologies such as the blockchain. Finally, in several opinions rendered during 2023 and 2024, the CJEU⁸ established the following guidelines for relying on GDPR Article 82 as grounds for individual compensation:

- a mere infringement of the GDPR by a data controller does not merit compensation;
- claimants need to prove the existence of damage (material or non-material) and a causal link;
- personal data theft is insufficient grounds for compensation unless there is evidence that the stolen data was misused;
- national courts can award minimal compensation for damages that courts deem negligible (Arthur Cox LLP, 2024).

In practical terms, these CJEU guidelines are meant to disincentivize litigation or make it pointless. The prospect of high costs of proving the existence of individual privacy harms in courts that lack technological knowledge, in exchange for compensations that can be as low as several hundred euros and symbolic corrective effects, will probably have the effect of deterring prospective claimants from filing lawsuits against resourceful data gatekeepers (Loeff & Loyens, 2024). As Daniel Solove argues, data protection laws create a semblance of protecting privacy through individual rights when they do not (Solove, 2023, p. 993).

⁸ See Court of Justice of the European Union cases C-300/21 – UI v Österreichische Post AG (May 2023), C-340/21 – VB v Natsionalna agentsia za prihodite (December 2023), C-667/21 – ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein (December 2023), C-687/21 – BL v Saturn Electro-Handelsgesellschaft mbH Hagen (January 2024), C-741/21 – GP v Juris GmbH (April 2024), and C-182/22 – JU v Scalable Capital GmbH (June 2024).

4. CONCLUSION

This paper has examined the limited liability enjoyed by data gatekeepers operating blockchain systems under the General Data Protection Regulation (GDPR). After laying out architectural difference between the GDPR's reliance on centralized intermediation and data gatekeepers, and blockchain's decentralized, disintermediated architecture, it has gone on to argue that assigning roles of data gatekeepers to blockchain actors is of limited practical value. Public blockchains resist centralization and the use of private/permissioned blockchains offer easier compliance with the GDPR but decreases decentralization, blockchain's main advantage over traditional centralized databases. Furthermore, the paper shows that large data gatekeepers have informational and technological advantages over DPAs, and are also able to deflect direct liability by transferring it downstream to business users, which creates a moral hazard and limits the effectiveness of DPA supervision. Finally, two key enforcement mechanisms under the GDPR – administrative fines and individual claims – were shown to be insufficient deterrents against non-compliance for large data gatekeepers. For such gatekeepers, the threat of GDPR sanctions is minor relative to their economic power and the benefits of non-compliance, while court processes are costly, inefficient, and fail to provide significant damages to individual claimants.

This paper has several limitations. The analysis primarily focused on existing literature and regulatory frameworks. Due to blockchain technology's rapid evolvement, conclusions drawn by this paper may soon become outdated. The paper's findings also cannot be generalized due to a lack of comprehensive empirical data on issues such as enforcement trends across diverse blockchain platforms. Also, the work primarily examines the relation between the blockchain and the GDPR. Comparative analyses with other global regulatory frameworks – for instance the California Consumer Privacy Act – could offer additional insights into alternative approaches to gatekeeper liability within blockchain ecosystems.

Future research in the area of gatekeeper liability in relation to the blockchain could overcome this paper's limitations. Empirical studies should track the effectiveness of fines, litigation and reputational risk as motivations for large data gatekeepers' compliance with the GDPR. Furthermore, future research into alternative liability frameworks, including collective responsibility models for decentralized blockchain networks or shared accountability mechanisms, could pave the way for GDPR enforcement paradigms better suited to blockchain.

LIST OF REFERENCES

- Amazon. (2024). *Distributed Ledger Software & Technology—Amazon Managed Blockchain—AWS*. Amazon Web Services, Inc. <https://aws.amazon.com/managed-blockchain/>
- Arthur Cox LLP. (2024, July 19). *The Right to Compensation Under the GDPR: Key Takeaways from Recent Case Law of the Court of Justice of the European Union*. Arthur Cox LLP. <https://www.arthurcox.com/knowledge/the-right-to-compensation-under-the-gdpr/>
- Balachandran, K. R. (Ed.). (2020). Data Fiduciary in Order to Alleviate Principal-Agent Problems in the Artificial Big Data Age. In *Information for Efficient Decision Making* (pp. 41–90). World Scientific. https://doi.org/10.1142/9789811220470_0002
- Bambara, J. J., & Allen, P. R. (2018). *Blockchain. A practical Guide to Developing Business, Law and Technology Solutions*. McGrawHill.
- Berryman, A. (2023, May 25). *GDPR Fines: Are They Working?* Infosecurity Magazine. <https://www.infosecurity-magazine.com/opinions/gdpr-fines-working/>
- Böhme, R., Christin, N., Edelman, B., & Moore, T. (2015). Bitcoin: Economics, Technology, and Governance. *Journal of Economic Perspectives*, 29(2), 213–238. <https://doi.org/10.1257/jep.29.2.213>
- Campbell, C. (2024, June 27). *What Are the 4 Different Types of Blockchain Technology?* Search CIO. <https://www.techtarget.com/searchcio/feature/What-are-the-4-different-types-of-blockchain-technology>
- Clifton, J., & Pal, L. A. (2022). The policy dilemmas of blockchain. *Policy and Society*, 41(3), 321–327. <https://doi.org/10.1093/polsoc/puac025>
- Commission Nationale de l’Informatique et des Libertés. (2018). *La Blockchain: Quelles solutions pour un usage responsable en présence de données personnelles?* https://www.cnil.fr/sites/cnil/files/atoms/files/la_blockchain.pdf
- Daoui, S., Fleinert-Jensen, T., & Lempérière, M. (2019). *GDPR, Blockchain and the French Data Protection Authority: Many Answers but Some Remaining Questions*. <https://stanford-jblp.pubpub.org/pub/gdpr-blockchain-france>

- Dock. (2024). *Public vs. Private Blockchains: Which Is Better?*
<https://www.dock.io/post/public-vs-private-blockchains>
- European Blockchain Observatory Forum. (2019). *Legal and regulatory framework of blockchains and smart contracts.* https://blockchain-observatory.ec.europa.eu/publications/legal-and-regulatory-framework-blockchains-and-smart-contracts_en
- European Center for Digital Rights. (2023). *GDPR: a culture of non-compliance?*
https://noyb.eu/sites/default/files/2024-01/GDPR_a%20culture%20of%20non-compliance.pdf
- European Commission. (2023, September 6). *Digital Markets Act: Commission designates six gatekeepers* [Text]. European Commission - European Commission. https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328
- European Data Protection Board. (2021). *Overview on resources made available by Member States to the Data Protection Authorities and on enforcement actions by the Data Protection Authorities.* <https://www.statewatch.org/media/3516/eu-edpb-overview-national-data-protection-resources-9-22.pdf>
- European Parliamentary Research Service. (2019, July). *Blockchain and the General Data Protection Regulation.*
[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU\(2019\)634445_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf)
- European Union Agency for Fundamental Rights. (2024). *GDPR in practice – Experiences of data protection authorities.* <https://fra.europa.eu/en/publication/2024/gdpr-experiences-data-protection-authorities>
- Finck, M. (2019). *Blockchain and the General Data Protection Regulation.* European Parliamentary Research Service. [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU\(2019\)634445_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf)
- Gadinis, S., & Mangels, C. (2016). Collaborative Gatekeepers. *Washington and Lee Law Review*, 73(2), 797.
- Galanter, M. (2015). The Radiating Effects of Courts. In K. O. Boyum & L. Mather (Eds.), *Empirical Theories About Courts* (Digital, pp. 117–142). Quid Pro Books.

- Garg, R. (2023). *Blockchain for Real World Applications*. Wiley. <http://gen.lib.rus.ec/book/index.php?md5=69786A3186624AFBDE99A8B596E19653>
- General Data Protection Regulation (GDPR) (2018). <https://gdpr-info.eu/>
- IBM. (2024). *IBM Blockchain—Enterprise Blockchain Solutions and Services*. <https://www.ibm.com/blockchain>
- Jenkinson, G. (2020, March 29). *Big Tech in Blockchain: Comparing IBM, Microsoft, Apple, Google and More*. Cointelegraph. <https://cointelegraph.com/news/big-tech-in-blockchain-comparing-ibm-microsoft-apple-google-and-more>
- Jennings-Trace, E. (2024, November 2). *GDPR fines are almost never paid, will the AI Act be different?* TechRadar. <https://www.techradar.com/pro/gdpr-fines-are-almost-never-paid-will-the-ai-act-be-different>
- Jusic, A. (2017). Kuwait’s Administrative Risk-based Model for the Prevention of Money Laundering: Costs and Benefits of Compliance with the Financial Action Task Force (FATF) Standards. *Arab Law Quarterly*, 31(2), 101–133.
- Jusic, A. (2018). Damned if it Doesn’t and Damned if it Does: The European Court’s Margin of Appreciation and the Mobilizations Around Religious Symbols. *University of Pennsylvania Journal of International Law*, 39(3), 561.
- Jusic, A. (2020). Dealing with Tensions Between the Blockchain and the GDPR. In S. A. Bhatti, A. Dato, & D. Indjic (Eds.), *The LegalTech Book: The Legal Technology Handbook for Investors, Entrepreneurs and FinTech Visionaries* (pp. 83–86). John Wiley & Sons.
- Jusic, A. (2022). Privacy between Regulation and Technology: GDPR and the Blockchain. *IUS Law Journal*, 1(1), 47–59.
- Karjalainen, T. (2022). The battle of power: Enforcing data protection law against companies holding data power. *Computer Law & Security Review*, 47, 105742. <https://doi.org/10.1016/j.clsr.2022.105742>
- Khazaei, E., & Arabsorkhi, A. (2024). Comparative Studies: Blockchain Technology Applications in GDPR - Representing an Applicability Model. *2024 10th International Conference on Web Research (ICWR)*, 187–194. <https://doi.org/10.1109/ICWR61162.2024.10533322>

- Kuner (editor), C., Bygrave (editor), L. A., Docksey (editor), C., & Drechsler (editor), L. (2020). *The EU General Data Protection Regulation (GDPR): A Commentary*. Oxford University Press.
- Loeff & Loyens. (2024, April 26). *Legal framework on non-material damages under the GDPR: A status quo*. <https://www.loyensloeff.com/insights/news--events/news/legal-framework-on-non-material-damages-under-the-gdpr-a-status-quo/>
- Loo, V. R. (2020). The New Gatekeepers: Private Firms as Public Enforcers. *Virginia Law Review*, 106, 467–522.
- Mashnitski, A. (2015, July 31). *Judges Know Nothing About Technology, Judge Says*. FindLaw. <https://www.findlaw.com/legalblogs/technologist/judges-know-nothing-about-technology-judge-says/>
- McCann, M. (2004). Law and Social Movements. In A. Sarat (Ed.), *The Blackwell Companion to Law and Society* (pp. 506–522). Blackwell. <http://eu.wiley.com/WileyCDA/WileyTitle/productCd-0631228969.html>
- McKinsey. (2016). *How blockchains could change the world*. <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/how-blockchains-could-change-the-world#>
- Mougayar, W., & Buterin, V. (2016). *The Business Blockchain: Promise, Practice, and Application of the Next Internet Technology* (1 edition). Wiley.
- Quiniou, M. (2019). *Blockchain: The Advent of Disintermediation*. John Wiley & Sons, Ltd.
- Raghavan, S., & Viswanathan, R. (2021, June 3). A legal perspective on blockchain-anchored business networks. *IBM Blog*. <https://www.ibm.com/blog/a-legal-perspective-on-blockchain-anchored-business-networks/>
- Solove, D. (2023). The Limitations of Privacy Rights. *Notre Dame Law Review*, 98(3), 975.
- Tripathi, G., Ahad, M. A., & Casalino, G. (2023). A comprehensive review of blockchain technology: Underlying principles and historical background with future challenges. *Decision Analytics Journal*, 9, 100344. <https://doi.org/10.1016/j.dajour.2023.100344>
- Ustaran, E. (2023). *European Data Protection Law and Practice* (Third). IAPP.

Walsh, D. (2024, November 12). *GDPR reduced firms' data and computation use* | MIT Sloan. <https://mitsloan.mit.edu/ideas-made-to-matter/gdpr-reduced-firms-data-and-computation-use>

Werbach, K. (2017). Trust, But Verify: Why the Blockchain Needs the Law. *Berkeley Technology Law Journal*, 33, 489. <https://doi.org/10.2139/ssrn.2844409>

EXTENDING THE SCOPE OF CONSUMER PROTECTION TO LEGAL ENTITIES: PROSPECTS FOR THE EU CONSUMER *ACQUIS* AND CONSUMER LAW IN BOSNIA AND HERZEGOVINA

*Emir Sudžuka**

*Irfan Osmanović***

Abstract

The evolving landscape of EU consumer protection law has primarily focused on natural persons, leaving legal entities without similar protections. This article examines the potential to extend consumer protection to legal entities, particularly small businesses entering into contracts outside their professional activities. It compares how different EU Member States define "consumer" and considers expanding this definition within the EU's consumer *acquis*. Several countries, such as Greece and Luxembourg, already provide protections for legal entities in specific circumstances, while others, like France and Malta, adopt more flexible approaches. The article emphasizes the need to adapt consumer laws to modern realities, recognizing that legal entities can be as vulnerable as individuals in certain transactions. In conclusion, it advocates for expanding EU consumer protection laws to include legal entities, thereby improving fairness and legal certainty in the internal market. This extension is crucial as it aligns with the evolving economic landscape where small businesses often face similar vulnerabilities as individual consumers, thus necessitating a more inclusive regulatory framework that reflects contemporary market dynamics.

Keywords: Consumer protection, Legal entities, EU consumer *acquis*, Natural persons, Small businesses, Contract law, Harmonization

* Emir Sudžuka, Notary Public, Zenica, Adjunct Professor at the International University of Sarajevo, Bosnia and Herzegovina. Contact: emir.sudzuka@s-law.ba

** Irfan Osmanović, LL.M, Legal Associate at Law firm Legal Solutions, Sarajevo; Teaching Assistant at the Faculty of Law of Vitez University, Bosnia and Herzegovina. Contact: irfan.osmanovic@gmail.com

1. INTRODUCTION

Modern society thrives on economic growth, driven by the encouragement of consumer spending. Consequently, just as in any competitive environment, a set of rules is necessary to ensure fairness in the marketplace (Steennot, 2014). The initial regulation of consumer protection originated in the 18th century and began to develop significantly in the latter half of the 20th century. Between 1960 and 1970, European countries such as Sweden, Great Britain, Belgium, Germany, and France enacted laws aimed at safeguarding consumer rights (Schuller, 2012). Since 1985, consumer protection has become a pivotal aspect of the European Union's legislative agenda, leading to the adoption of numerous measures that address a variety of issues, including substantive law, trade in goods and services, and enforcement mechanisms (Basedow, 2021, pp. 136-137). While many directives serve as important sources of consumer protection law in the EU and define the terms "consumer" and "trader," ambiguities persist. These regulations are designed to set a minimum standards of protection of consumers when purchasing goods and services. Consumers are typically afforded additional safeguards due to their perceived status as the weaker party in contractual relationships with traders or professionals. The rationale for such protection is that it serves as an exception to the principle of contractual freedom and must be narrowly interpreted. Thus, only a specific category of individuals—those acting outside their trade, business, or profession—should qualify for this protection (Devenney & Kenny, 2012). This notion of the consumer, emphasises a number of economic rationales. The consumer is defined purely in economic terms and the focus lies on their role as a market participant, not on other roles that individuals may have in society (for example, citizen, subject of fundamental rights). Further, a specific goal is defined which the consumer is assumed to pursue, namely the maximisation of utility or personal satisfaction. (Mak, 2016). It is evident that the definition of "consumer" must be restricted; without such limitations, anyone could claim to be in a weaker position and require additional protection. This scenario would be unsustainable and could overwhelm the courts, leading to a lack of legal certainty. Hence, legislators have crafted narrow definitions of "consumer" to mitigate these risks (Steennot, 2014). The term "consumer" derives from the Latin word "consumere," which means to use up, eat, or waste, contrasting with "producere," which means to lead, bring forth, or draw out (Devenney & Kenny, 2012). This distinction highlights the economic rationale for positioning producers and consumers as opposing entities (Vermeersch & De Witte, 2004). While the notion of "consumer" has its roots in economics and sociology, it has evolved to possess a distinct legal meaning, triggering the application of specific rules collectively known as "consumer protection law" (Manko, 2013). The extent of consumer protection is contingent upon how the term "consumer" is defined in law. Legal provisions that offer protection to consumers are often justified by the assumption that they lack sufficient knowledge in transactions with professionals or possess inadequate bargaining power. This raises the question of whether similar protections should be extended to small business owners who may find themselves in

comparable positions of disadvantage (Micklitz et al., 2013). Legal entities and companies are generally not viewed as weaker parties because they are considered to be economically stronger, more legally experienced, and better organized, making them less likely to require protection (Schuller, 2012, pp. 123). However, this assumption does not hold true in all cases. To achieve a harmonized approach to consumer protection across national legal systems, it is crucial to accurately define the term "consumer" and ensure adequate protection. Professor Mišćenić notes that the goal of EU consumer law measures is to harmonize the legal frameworks of Member States for the benefit of both the internal market and consumer protection (Mišćenić, 2022, pp. 700). Thus far, this objective has only been partially realized, and the EU continues to seek effective solutions. This article will provide a comparative analysis of the varying definitions of "consumer" across EU Member States and the EU consumer *acquis*. Particular focus will be given to examining the justification and approaches for broadening the definition of "consumer" to encompass legal entities, especially those engaging in atypical contracts outside their professional activities.

The methodology of this paper primarily employs comparative and normative methods to examine the extension of consumer protection to legal entities within the EU and Bosnia and Herzegovina. A comparative analysis will highlight similarities, differences, and varying approaches among EU Member States in implementing consumer protection rules related to definition of „consumer“. Additionally, the research will include an examination of relevant case law and European and national legislative framework. The normative approach will enable an evaluation of existing legal norms and proposals for reforms, with a focus on aligning Bosnia and Herzegovina's consumer protection laws with EU standards while addressing divergences among Member States. Additionally, the article will consider the implications of consumer protection laws in the context of e-commerce, especially during the COVID-19 pandemic, where the dynamics of consumer behavior and legal protections have evolved significantly Ayu et al. (2022) and the need for legal certainty has become increasingly paramount (Lambi, 2024).

2. CONSUMER IN EUROPEAN UNION CONSUMER ACQUIS

The concepts of 'consumer' and 'trader' are fundamental to the implementation of EU consumer protection rules and serve as a prerequisite for establishing an effective legal framework for protection. EU law lacks a consistent and uniform definition of "consumer" and "trader," with notable variations among the Member States. (Manko, 2013) In EU law, the concept of a 'consumer' is crucial not only within the expanding body of consumer *acquis* but also in EU private international law, particularly in the Rome I and Brussels I Regulations, which contain specific provisions for consumer protection. Additionally, the Commission's proposal for a Common European Sales Law (CESL) introduces a distinct set of rules governing consumer transactions. In recent years, while the EU consumer *acquis* has been

systematically revised and the core principles of European contract law are being developed, academic discussion in international legal literature has largely focused on the objectives and principles of consumer contract regulation. In contrast, less attention has been devoted to defining the scope of individuals eligible for enhanced consumer protection. (Kignisepp, Varv, 2011) .

Consumer protection issues are transversal to several EU policies and are considered to be covered by around 90 EU directives, a circumstance that makes the consumer *acquis* in this area complex and sometimes inconsistent. The notion of consumer has been defined in different directives in the area of contract law (such as: Doorstep Selling Directive (85/577/EEC), Distance Contracts Directive (97/7/EC), Consumer Sales Directive (99/44/EC); Electronic Commerce Directive (2000/31/EC); Price Indication Directive (98/6/EC); New Timeshare Directive (2008/122/EC); Distance Marketing of Consumer Financial Services Directive (2002/65/EC); Unfair Commercial Practices Directive (2005/29/EC); New Payment Services Directive (2007/64/EC); Package Travel Directive (90/314/EEC); Consumer Credit Directive New Consumer Credit Directive (2008/48/EC)). In the area of non-contractual obligations, a 'consumer' has been defined in the EU producer liability directive (85/374/EC) and, in the area of procedural law, in the regulations Brussels I and Rome I. In relation to various EC consumer directives, the term *consumer* has been defined in several ways (Belohlavek, 2010):

1. Directive 85/577, Article 2: A *consumer* refers to a natural person who, in transactions governed by this Directive, acts for purposes that can be considered outside their trade or profession.
2. Directive 90/314, Article 2(4): A *consumer* is defined as a person who receives or agrees to receive a package (*the principal contractor*), any person on whose behalf the principal contractor agrees to purchase the package (*the other beneficiaries*), or any person to whom the principal contractor or other beneficiaries transfer the package.
3. Directive 93/13, Article 2(b): A *consumer* refers to any natural person who, in contracts subject to this Directive, acts for purposes outside their trade, business, or profession.
4. Directive 94/47, Article 2: A *consumer* is described as a *purchaser* and refers to any natural person who, in transactions governed by this Directive, acts for purposes that can be regarded as outside their professional activity and who has had the right under the contract transferred to them or established for their benefit.
5. Directive 97/7, Article 2(2): A *consumer* means any natural person who, in contracts covered by this Directive, acts for purposes outside their trade, business, or profession.

6. Directive 98/6, Article 2(e): A *consumer* is any natural person who purchases a product for purposes that do not fall within the scope of their commercial or professional activity.
7. Directive 99/44, Article 1(2)(a): A *consumer* refers to any natural person who, in contracts governed by this Directive, acts for purposes unrelated to their trade, business, or profession.
8. Directive 87/102, Article 1(2)(a): A *consumer* means a natural person who, in transactions governed by this Directive, acts for purposes that can be regarded as outside their trade or profession.
9. Directive 2000/31, Article 2(3): A *consumer* is any natural person acting for purposes outside their trade, business, or profession.
10. Directive 2002/65, Article 2(d): A *consumer* is defined as any natural person who, in distance contracts governed by this Directive, acts for purposes outside their trade, business, or profession.
11. Directive 2005/29, Article 2(a): A *consumer* refers to any natural person who, in commercial practices governed by this Directive, acts for purposes outside their trade, business, craft, or profession.

Although these definitions largely converge, certain differences still remain. Despite variations in wording, the majority of definitions of the term *consumer* in EU legislation share a common core: a consumer is a natural person acting outside the scope of economic activity. (Manko, 2013).

The package travel directive stands out among other directives because, in Article 2(4), it defines the term *customer* as a person “who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’).” While this directive, like others regulating contract law, includes a definition of *consumer*, it notably differs in that the concept extends beyond natural persons to include all purchasers of package travel, even those acting within the scope of their commercial or professional activities. (Kignisepp, Varv, 2011).

We can see that the above mentioned definitions of consumer strictly limit the application of such provisions to natural person, leaving essentially no room for protection of legal entities which may, in fact, act in the capacity of consumers when purchasing goods or services unrelated to their commercial or professional activity. However, seeing that Consumer law is the area of 'minimum harmonization' in the EU, the approach which would offer a degree of protection to legal entities, could be adopted at the Member States level. In fact, many Member States are actively implementing provisions of consumer protection to

both natural and legal entities. Examples from national legislation will be addressed in the following chapter.

For the definition of the term consumer within the EU Consumer Acquis, decision in *Idealservice* case (ECH judgment of 22 November 2001, joined cases C-541/99 and C-542/99 – *Cape Snc v IdealserviceSrl* and *Idealservice MN RE Sas v OMAI Srl* [2001], ECR I-9049) is fundamental. This case raised two key questions: First, if a businessman purchases goods or services entirely unrelated to their professional activity or trade, should they also be considered a consumer? The ECJ did not address this issue. The second question concerned whether a legal person could be classified as a consumer. The ECJ's answer was no and it expressly stated (concerning the consumer definition of Art. 2 of the Directive 93/13) that Community law in this respect is not to be given a wider interpretation:

"It is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision."

This judgment must be interpreted clearly: the Unfair Contract Terms Directive is a 'minimum harmonisation' directive, allowing Member States the flexibility to adopt more protective measures. Furthermore, the Directive only harmonizes national laws regarding unfair terms in consumer contracts. As a result, it does not prevent Member States from extending equivalent protections to business-to-business relationships. (Micklitz, Stuyck, Terryn, Droshout, 2010. pp 29.).

However, during the Commission's discussions on consumer regulation within the Draft Common Frame of Reference (DFRC)⁹, the experts reached a consensus that the definition of a consumer should apply exclusively to natural persons. This stance is also expressed in the DCFR. Pursuant to Article 2(1) of the proposal for a consumer rights directive the notion of consumer initially covered just natural persons. The opinion published

⁹ DCFR is the Draft Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law). As the title suggests, the DCFR contains principles which underpin the model rules; definitions of terms used in the model rules; and model rules on a number of areas of private law.

The European Parliament and Commission were concerned that divergent national contract laws within the member states were having a detrimental impact on cross-border trade in the internal market, given high transaction costs for traders wishing to sell in another member state and a lack of consumer confidence in purchasing products from another member state. Furthermore, the development of European contract law had been piecemeal. Specific issues, mainly relating to consumer protection, had been looked at individually, which had resulted in inconsistencies, gaps and overlaps in the resultant EU legislation.

The Commission sought a common frame of reference which could be used in trying to resolve these issues. The result was the DCFR. The DCFR is an academic text which can be used as a basis by the European institutions to produce a common frame of reference in future.

on 16 July 2009 by the European Economic and Social Committee, emphasized that the framework directive should adopt a clear stance on whether the concept of a consumer could be extended to certain legal persons, as implemented by several Member States. Following this opinion, the directive proposal was amended to include a provision allowing Member States to maintain or extend the directive's rules to natural or legal persons who do not fall under the directive's definition of a consumer.

Recital 13 of the adopted directive grants Member States the right to maintain or introduce national legislation that aligns with the provisions of the directive, or specific parts of it, for transactions outside its scope. At the same time, the recital also allows Member States to extend the application of the directive's rules to legal persons or natural persons who do not qualify as 'consumers' under the directive, such as non-governmental organizations, start-ups, or small and medium-sized enterprises. (Kignisepp, Varv, 2011).

On 9 October 2010, the European Commission issued an unofficial note regarding the proposal for a Consumer Rights Directive, intended to guide its implementation for certain types of contracts. The note clarifies which legal or natural persons, not falling under the definition of 'consumers' in Article 2(1), could still benefit from the directive's provisions at the discretion of Member States. For example, Member States may extend consumer-like protections to NGOs or small businesses. However, the note underscores that while these entities may enjoy the same rights as consumers, they should not be referred to as 'consumers,' as this would contradict the definitions outlined in the directive proposal.

3. DEVIATION OF THE CONCEPT OF CONSUMER IN EU MEMBER STATES

The exploration of the notion of "consumer" as defined in the national laws of EU Member States reveals a complex and varied landscape, influenced by each Member State's legal traditions and the principle of minimal harmonization employed in EU directives to date. Several Member States, including Estonia, Germany, Belgium, and Poland, adopt a negative definition of "consumer," which limits the scope of who qualifies for consumer protection. In contrast, other Member States, such as Finland and Sweden, utilize a positive method, defining "consumer" by outlining specific characteristics that qualify an individual as a consumer (Joustra, 1998). The majority of Member States maintain a single, overarching definition of "consumer" that applies across consumer law (e.g., Austria, Germany, Poland). However, some Member States have multiple definitions depending on the context, while others define the term separately in each transposing act. Notably, in France, the term "consumer" is not defined in legislation; instead, it is left to the courts to determine whether an individual qualifies as a consumer based on the circumstances of each case (Manko, 2013). This lack of a uniform definition can lead to inconsistencies in consumer protection

across the EU. A number of Member States have not adhered strictly to the definitions provided in the aforementioned directives. Instead, they have developed their own interpretations of "consumer," extending protections to additional groups. This includes the concept of the final addressee, which is recognized in some Member States, as well as the extension of protections to businesspersons entering atypical contracts, legal persons, and employees under the umbrella of community law provisions (Schulte-Nolke, Twigg-Flesner, Ebers, 2008). For instance, Pelikánová (2019) discusses how the harmonization of protections against misleading commercial practices has resulted in ongoing divergences among Central European countries, highlighting the complexities of consumer definitions in practice. Countries such as Cyprus, France, Hungary, Ireland, and Luxembourg do not recognize a unified legal definition of "consumer" within the directives. Instead, they either define "consumer" separately in each transposing act or refrain from providing a definition altogether. In France, for instance, case law has established a notion of "consumer," where a consumer is understood to be a natural or legal person entering into contracts that are not directly related to their profession, as established in the leading decision of the Cass. Civ. on April 28, 1987. In Malta, the Minister responsible for consumer affairs has the authority to designate any class or category of persons, whether natural or legal, as "consumers" for the purposes of the Consumer Affairs Act, following consultation with the Consumer Affairs Council. In Spain, a critical requirement for someone to be classified as a consumer or user is that they "acquire, use, or enjoy as a final addressee some goods," without the intention of integrating these goods into production, transformation, or commercialization processes. A similar notion exists in Greece, where the law does not impose limitations on private purposes. According to Article 1(4)(a) of the Consumer Protection Act 2251/1994, a consumer is defined as any "natural or legal person to whom products or services on the market are aimed and who makes use of such products and services, provided that the person is the end recipient." This concept of the end recipient is also applied in Hungary and is reflected in the Luxembourg Consumer Protection Act. In Poland and Latvia, businesses entering contracts outside their usual scope of activity are granted protection. In Romania, the exclusion of legal entities from consumer protection is considered a possible violation of the constitutional right to equality before the law (Alexandru & Cristina, 2013). This situation highlights the importance of a more unified approach to consumer protection within the EU, as noted by Lazíková (2016), who stresses the significance of EU secondary legislation in achieving consumer protection goals. The persistent differences in consumer definitions and protections across Member States highlight the urgent need for harmonization, especially given the growing complexity of cross-border transactions. Giliker (2017) highlights that aligning national laws with EU directives is crucial to effectively safeguarding consumer rights across the Union. However, the process of achieving harmonization is complicated by the varied legal traditions and practices of Member States, often resulting in inconsistencies in the application of consumer protection laws.

4. EU LAW: PROSPECTS OF AFFORDING LEGAL ENTITIES CONSUMER PROTECTION

While legal entities are typically seen as better informed, organized, and economically stronger, not all of them share these characteristics, which are often used to justify their exclusion from consumer protection. Future developments in EU consumer law should aim to extend consumer protection to cover specific types of legal entities.

The definition of "consumer" should be a flexible concept, as demonstrated in several EU Member States, allowing for the expansion and extension of protection to different types of persons in various circumstances. Consumers should not be defined solely based on their nature; instead, their actions and behavior should be the prevailing factors in assigning them consumer status and the accompanying protection (Schuller, 2012). Lessons can be learned from the end recipient model, which is applied in Greece, Hungary, and Luxembourg. This model extends consumer protection to legal entities as long as they personally use purchased products or services without further innovation or commercialization.

The adoption of such a model would reflect provisions currently used in Spain, where the essential prerequisite for consumer status is that the consumer "acquires, uses, or enjoys as a final addressee some goods," without the aim of integrating them into production, transformation, or commercialization processes (Mifsud & Verret, 2015). A step in the right direction for the EU Consumer Acquis could also involve applying the Maltese model of *ad hoc* designation of consumer status to any other class or category of persons, whether natural or legal, from time to time. This flexibility could enhance consumer protection in various contexts, particularly in light of the evolving economic landscape (Micallef, 2017). Furthermore, the incorporation of legal entities into consumer protection frameworks could address the challenges faced by social enterprises and businesses operating in the public interest, as noted by Gidron (2010), who emphasizes the need for simultaneous intervention across legal, funding, and organizational support to promote social businesses effectively.

Another possible solution is to adopt the French model, which deliberately avoids establishing a rigid definition of "consumer." Under this approach, the concept of a consumer would not be strictly defined in the directives; instead, consumer status would be determined on a case-by-case basis, enabling a more flexible and nuanced assessment of consumer needs and protections. This flexibility is reflected in debates on the legal status of public law entities, emphasizing the need to adapt legal frameworks to better accommodate diverse economic actors (Poddubnaya et al., 2021). In conclusion, the development of consumer protection laws in the EU should align with the realities of modern commerce, acknowledging that legal entities may also be vulnerable in specific transactions. By

embracing more inclusive definitions and approaches to consumer protection, the EU can create a fairer marketplace that addresses the diverse needs of all economic participants.

5. CONSUMER IN BIH LAW – GROUNDS FOR APPROXIMATION WITH THE EU LAW?

The issue of consumer protection has traditionally been overlooked; however, the rapid advancement of technology and accelerated global economic growth have underscored the growing need for legal regulation and protection in this area. This trend is particularly noticeable in the Western Balkan countries, including Bosnia and Herzegovina (BiH).

As part of the Stabilization and Association Agreement (SAA)¹⁰ between Bosnia and Herzegovina and the European Union, B&H is obligated to align its national legislation with the EU *acquis*, including areas related to consumer protection. This agreement serves as a critical framework for BiH's gradual integration into the EU's internal market, requiring the adoption and implementation of legal standards that ensure high levels of consumer rights and protections. Harmonizing legislation with the EU consumer *acquis* is essential for fostering legal certainty, protecting consumers' economic interests, and enhancing their trust in the marketplace. Meeting these obligations under the SAA is a key step toward strengthening Bosnia and Herzegovina's institutional and legislative framework, ultimately supporting its path to EU membership.

For a long time, legal protection in B&H was not regulated by a single comprehensive law but was instead based on various regulations, primarily the Law on Obligations. This remained the case until the adoption of specific laws designed to address consumer protection in Bosnia and Herzegovina (Bogdanić & Milačić, 2015). The legal framework for consumer protection in Bosnia and Herzegovina reflects a distinct effort to align and harmonize national legislation with EU law, a key requirement for BiH's progress toward full EU membership.

A key objective of the European Union is to protect consumer health and safety, safeguard their economic interests, and promote effective consumer information and education. Moreover, effective consumer protection is crucial for the efficient functioning of a market economy (Randjelovic & Ljajić, 2017). Due to the complexity of the socio-economic landscape, consumer protection in BiH is governed by both state and entity-level laws. The regulation of relationships between consumers, producers, and traders began with

¹⁰ The Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, entered into force on 1 June 2015, the procedure provided for in Article 134 of the Agreement having been completed on 30 April 2015. <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-bosnia-and-herzegovina.html>

the Law on Consumer Protection, adopted in 2002, which was initially designed as a temporary solution. A revised law, which remains in effect, was enacted in 2006 (Bogdanić & Milačić, 2015). At the entity level, the first consumer protection law in the Republika Srpska was adopted in 2012, with subsequent amendments made in 2014. However, the Federation of Bosnia and Herzegovina has yet to adopt a dedicated consumer protection law, meaning that the provisions of the Law on Consumer Protection in B&H continue to apply. The Law on Consumer Protection in Bosnia and Herzegovina defines a consumer in Article 1(3) as any natural person who purchases, acquires, or uses products or services for personal or household use. Article 1(4) defines a producer as any natural or legal person operating in Bosnia and Herzegovina, regardless of the type of industry or ownership, who produces goods or supplies services in whole or in part. The current legal framework for consumer protection in B&H must be aligned with EU standards to ensure that consumers are adequately protected in an increasingly digital and interconnected marketplace. As the EU continues to develop its consumer protection directives, BiH must work to align its legislation with these standards, ensuring that consumers remain protected amid rapid technological progress (Pelikánová, 2019). In conclusion, advancing consumer protection laws in Bosnia and Herzegovina is essential for creating a fair and balanced marketplace. By harmonizing national legislation with EU directives and tackling the specific challenges of modern commerce, B&H can strengthen consumer rights and protections, supporting its broader objective of EU integration.

6. CONCLUSION

The EU consumer *acquis* has adopted the practice of including a definition of a consumer in each individual legislative act, resulting in variations among these definitions. Although phrased differently, most definitions of the term ‘consumer’ in EU legislation share a common core. Specifically, a consumer is generally understood as a natural person acting outside the scope of economic activity.

The definition is framed negatively, meaning it requires that a consumer acts outside the scope of business activities. The directives differ in their interpretation of economic activity; some explicitly include ‘craft’, while others do not. A notable exception is the Package Travel Directive, which adopts a broader concept of ‘consumer’, extending it to encompass companies and business travelers as purchasers and users of travel services.

The legal systems of the Member States differ significantly regarding the scope of the notion of ‘consumer.’ In most Member States, a single overarching definition applies across consumer law, while some employ multiple definitions depending on the context. In certain cases, the notion of ‘consumer’ is defined separately in each transposing act. The most intriguing situation is found in France, where the notion of ‘consumer’ is not defined at

all. Instead, it is left to the courts to determine whether, under specific circumstances, someone qualifies as a consumer. According to well-established French case law, a consumer is a natural or legal person entering into contracts unrelated to their profession. Additionally, in some Member States, consumer protection is extended to legal entities, provided they personally use the purchased products or services without further innovation or commercialization. Taking in consideration all these legislative options, it is clear that the notion of consumer cannot be determined in a unique and exclusive way, but some of the national legal system managed to find the balance between requirements given by EU legislator (in terms of directives transpositions) and the interest of consumers within national system. Based on a given analysis, it is possible to conclude that notion of consumer cannot be limited only to natural persons, but it can be also extended to legal entities under above-described conditions within some of national legal systems. This fact confirms the defined hypothesis of this paper: legal entities can under certain conditions enjoy protection as a consumer. In that regard, there is a space for further development of EU consumer protection law at both EU and national level and this developments in Member States in terms of defining consumer can serve as a guidance for non-member states intending to join the EU community. Especially in that regard, we can refer to BiH legal framework for consumer protection which has been harmonised with the EU law. However, in terms of determining notion of consumer, there is a need to revise the current law and expand the definition of consumer, following the good practices of EU member states legislation. Such activities would for sure help the national legal system of Bosnia and Herzegovina to follow the actual trends and developments in the consumer protection standards.

LIST OF REFERENCES

- Arindrajaya, A., & Koos, A. (2022). *Legal Protection Against Cryptocurrency Investors: Overview of Indonesian Consumer Protection Law*. Journal of Human Rights Culture and Legal System. doi:10.53955/jhcls.v2i2.32.
- Aulia, R. (2023). *Strengthening Legal Mechanisms for Consumer Protection in the Digital Marketplace*. doi:10.61838/kman.isslp.2.4.1.
- Barkatullah, A., & Djumadi, A. (2018). *Does self-regulation provide legal protection and security to e-commerce consumers?* Electronic Commerce Research and Applications. doi:10.1016/j.elelap.2018.05.008.
- Basedow, J. (2021), *EU Private Law, Anatomy of a Growing Legal Order* Interesantia, Cambridge.
- Bessie. (2023). *Consumer Protection for Losses Arising from the Use of Auto Pilot-Based Technology in Indonesia*. Policy Law Notary and Regulatory Issues (Polri). doi:10.55047/polri.v3i1.964
- Buana, A. (2023). *Unincorporated Merchant: How Does the Law Protect Consumers in Electronic Commerce?* Substantive Justice International Journal of Law doi:10.56087/substantivejustice.v6i1.238.
- Cseres, K. (2018). *The Active Energy Consumer in EU Law*. European Journal of Risk Regulation. doi:10.1017/err.2018.7.
- Dellaert, B. (2018). *The consumer production journey: marketing to consumers as co-producers in the sharing economy*. Journal of the Academy of Marketing Science. doi:10.1007/s11747-018-0607-4.
- Devenney, J., & Kenny, M. (Eds.). (2012). *European Consumer Protection: Theory and Practice*, Cambridge University Press.
- Epstein, R., & Schoukens, P. (2021). *A positivist approach to rights of nature in the European Union*. Journal of Human Rights and the Environment doi:10.4337/jhre.2021.02.03
- Fadhlurrahman. (2023). *Legal Protection for Consumers for Electronic Goods that Do Not Have SNI (Indonesian National Standard)*. Josar (Journal of Students Academic Research). doi:10.35457/josar.v8i2.2636.

- Guo, Y., et al. (2017). *To sell or not to sell: Exploring sellers' trust and risk of chargeback fraud in cross-border electronic commerce*. Information Systems Journal doi:10.1111/isj.12144.
- Hutabarat, A., et al. (2023). *Supervision of financial planning companies in consumer protection efforts*. Borobudur Law Review doi:10.31603/burrev.7776
- Kignisepp, M., & Varv, A. (2011). *The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive - a Significant Change of Paradigm*. Juridica International, 18, 44.
- Mak, V. (2016). The consumer in European regulatory private law. A functional perspective on responsibility, protection and empowerment. In D. Leczykiewicz, & S. Weatherill (Eds.), *The Image(s) of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (pp. 381-400). Hart Publishing.
- Manko, R. (2013). *The notion of 'consumer' in EU law*. Library of the European Parliament. Retrieved from European Parliament ([https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI\(2013\)130477_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf))
- Micklitz, H.-W., Stuyck, J., Terryn, E., & Droshout, D. (2010). *Consumer Law: Ius Commune Casebooks for a Common Law of Europe* Hart Publishing.
- Miščenić, E. (2022). *The constant change of EU Consumer Law: the real deal or just an illusion?* Anali Pravnog fakulteta u Beogradu, 70(3).
- Naingolan, A. (2023). *Guarantee of Legal Protection in Cross-Border Electronic Transactions*, Journal of Law and Sustainable Development. doi:10.55908/sdgs.v11i12.2700.
- Schüller, B. (2012). *The Definition of Consumers in EU Consumer Law*. In J. Devenney & M. Kenny (Eds.), *European Consumer Protection* (pp. 123-142). Cambridge University Press.
- Schulte-Nolke, H., Twigg-Flesner, C., & Ebers, M. (2008). *The Consumer Acquis and its Transposition in the Member States*. Walter de Gruyter.
- Silambi, et al. (2022). *Legal protection for availability, quality food safety and food waste management*. IOP Conference Series: Earth and Environmental Science. doi:10.1088/1755-1315/1107/1/012081.
- Steennot, R. (2014). *The Notion "Consumer" in European Private Law*. Master Thesis, University of Gent.

- Subagyono, A. (2021). *Consumer Dispute in Electronic Transactions: State Obligation and Dispute Settlement Under Indonesia Consumer Protection Law*. Journal of Law and Sustainable Development. doi:10.55908/sdgs.v11i10.1240.
- Valensia, R., & Sartono, A. (2020). *Product Standardization Through “SNI” as a Form of Consumer Protection in Indonesia*. Jurnal Ilmiah Hukum Legality. doi:10.22219/ljih.v28i1.10953.
- Vermeersch, A., & De Witte, M. (2004). *Europees consumentenrecht*. Maklu, Antwerpen.
- Wiguna, A., & Yustiawan, A. (2023). *Responsibility of Business Actors for the Transfer of Consumer Change Form*. Policy Law Notary and Regulatory Issues (Polri). doi:10.55047/polri.v2i1.510

