

Questionnaire on criminalization and prosecution of rape

Definition and scope of criminal law provisions

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.

The Criminal Code of Montenegro¹, Chapter 18 **Criminal acts against sexual freedom. Article 204. Rape says:**

“ (1) Anyone who commits adultery or an act equated with it without his consent, shall be punished by an imprisonment for a term of one to eight years.

(2) Anyone who forces another person to sexual intercourse or an act equal to it by using coercion or by threats to attack the life or body of that or some other person, shall be punished by an imprisonment penalty of two to ten years.

(3)) If a person commits an act referred to in Paragraph 1 and 2 of this Article against somebody under threats of doing something that would harm his/her honour or reputation or by serious threat of some other severe evil, s/he shall be punished by an imprisonment sentence of one to eight years.

(4)) If due to acts referred to in Paragraphs 1, 2 and of this Article a severe bodily injury is inflicted on a person, or if the act is made by more persons in an especially cruel manner or in an especially humiliating manner, or to a juvenile, or the consequence of the act is pregnancy, the perpetrator shall be punished by an imprisonment sentence of five to fifteen years.

(5) If due to acts referred to in Paragraphs 1, 2 and 3 of this Article, a person died or the act is done to a child, the perpetrator shall be punished by an imprisonment sentence of ten years at least.”

The Criminal Procedure Code of Montenegro² does not have special provisions relating exclusively to the criminal offense of rape, but it does have provisions relating to the criminal offense of sexual freedom.:

- ✓ Article 58. Right to present the evidence, Paragraph 4 “The injured party who is the victim of sexual abuse shall have the right to be heard and to have the proceedings be conducted by a judge of the same sex, if so allowed by the existing staff composition of the Court.”.
- ✓ Article 113. Manner of examination of witnesses and instructions by the Court Paragraph 5 “An injured party who is the victim of sexual abuse and violence, as well as a child being examined as a witness, shall be entitled to testify in separate premises before the judge and the Court clerk, whereas the Prosecutor, defendant and defence attorney shall be given the possibility to view the course of the examination from other premises and to put questions to the witness, after having been duly instructed by the Court of that possibility. The instruction shall be entered into the records.

2. Based on the wording of those provisions, is the provided definition of rape:

- a. Gender specific, covering women only YES/NO
- b. Gender neutral, covering all persons YES/NO
- c. Based on the lack of consent of victim YES/ NO
- d. Based on the use of force or threat YES/ NO
- e. Some combination of the above. YES /NO
- f. Does it cover only vaginal rape? YES /NO
- g. Does it cover all forms of penetration? YES/NO. If yes, please specify: It is not explicitly defined in the law, but is covered through the practice of injury expertise
- h. Is marital rape in this provision explicitly included? YES / NO
- i. Is the law silent on marital rape? YES/NO

¹ See at <https://www.paragraf.me/propisi-crnegore/krivicni-zakonik-crne-gore.html>

² See at <https://www.paragraf.me/propisi-crnegore/zakonik-o-krivicnom-postupku.html>

- j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES/NO
 - k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES /NO
3. *Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.* NO
 4. *What is the legal age for sexual consent?* 14 years
 5. *Are there provisions that differentiate for sexual activity between peers? If so, please provide them.* NO
 6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.*

The crimes of rape are punishable by imprisonment. The range of prison sentences is from one year onwards and is graded through 5 paragraphs:

- 1) Anyone who commits adultery or an act equated with it without his/her consent, shall be punished by an imprisonment penalty of one to eight years.
- 2) Anyone who forces another person to sexual intercourse or an act equal to it by using coercion or by threats to attack the life or body of that or some other person, shall be punished by an imprisonment penalty of two to ten years.
- 3) If a person commits an act referred to in Paragraph 1 and 2 of this Article against somebody under threats of doing something that would harm his/her honour or reputation or by serious threat of some other severe evil, s/he shall be punished by an imprisonment sentence of one to eight years.
- 4) If due to acts referred to in Paragraphs 1, 2 and 3 of this Article a severe bodily injury is inflicted on a person, or if the act is made by more persons in an especially cruel manner or in an especially humiliating manner, or to a juvenile, or the consequence of the act is pregnancy, the perpetrator shall be punished by an imprisonment sentence of three to fifteen years.
- 5) If due to acts referred to in Paragraphs 1, and 3 of this Article a person died or the act is done to a child, the perpetrator shall be punished by an imprisonment sentence of five to eighteen years.

7. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator? / 7. *Što propisuje zakonodavstvo u vašoj državi u pogledu odštete žrtvi silovanja i / ili seksualnog nasilja nakon osude počinitelja*

There are no explicit provisions relating to the crime of rape. Compensation may be sought through some other legal provisions.

The Law on compensation to victims of violent crimes has been adopted, but will apply from the day of Montenegro's accession to the European Union. The law in question regulates the victim's right to compensation for lost earnings, compensation for the costs of treatment and hospital stay, and compensation for funeral expenses. Funds for the payment of compensation are provided from the budget of Montenegro.

Victims in Montenegro can obtain compensation from the perpetrator, in accordance with the provisions of the Criminal Procedure Code or the Law on Civil Procedure. The Code of Criminal Procedure enables the injured party to obtain compensation for damages within the criminal procedure through a property-legal claim.

The decision on a property claim depends on the determination of certain circumstances that may not have anything to do with establishing the facts related to the decision in criminal proceedings, that is why in previous practice courts generally did not decide on property claims in criminal proceedings, but referred injured parties to litigation in order to obtain damages. The realization of compensation is based on the provisions of the Law on Obligations, which provide for compensation in case of bodily injury or impairment of health and / or monetary compensation for physical pain, mental pain due to impaired life

activity, impairment, damage to reputation, honor, freedom or the rights of a person, the death of a loved one, as well as for fear. The competent courts are the ones who determine fair compensation for the damage suffered by the victim of violence.

Aggravating and mitigating circumstances

8. *Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?*

a. *Is rape by more than one perpetrator an aggravating circumstance? YES/NO*

By law, rape involving multiple perpetrators is considered a qualifying circumstance bringing about a more serious crime form and a heavier penalty.

b. *Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) YES/NO*

- The Criminal Code of Montenegro recognizes this as a qualifying circumstance defining separate crimes: Sexual intercourse with a helpless person (Article 205), Sexual intercourse with a child (Article 206) i Sexual intercourse by abuse of position (Article 207). These Articles read:

Article 205. Sexual intercourse with a helpless person

(1) Anyone who performs sexual intercourse or an equal act taking advantage of a person's mental illness, mental retardation or other mental disorder, disability or some other state of that person due to which s/he is not capable of resistance, shall be punished by an imprisonment sentence of two to ten years.

(2) If due to acts referred to in Paragraph 1 of this Article a severe bodily injury is inflicted on a disabled person or if the act is committed by more persons or in a specially cruel or humiliating manner or it is done to a juvenile or the act resulted in a pregnancy, the perpetrator shall be punished by an imprisonment sentence of five to fifteen years.

(3) If due to an act referred to in Paragraphs 1 and 2 of this Article a person suffering the act died or it is done to a child, the perpetrator shall be punished by an imprisonment sentence of ten years at least.

- Article 206. Sexual intercourse with a child

(1) Anyone who performs sexual intercourse or an equal act with a child shall be punished by an imprisonment sentence of three to twelve years.

(2) If due to an act referred to in Paragraph 1 of this Article a severe bodily injury is inflicted to a person, or the act is performed by more persons or it resulted in pregnancy, the perpetrator shall be punished by an imprisonment sentence of five to fifteen years.

(3) If due to acts referred to in Paragraphs 1 and 2 of this Article a child died, the perpetrator shall be punished by an imprisonment sentence of ten years at least.

(4) The perpetrator of an act referred to in Paragraph 1 of this Article shall not be punished provided that there exists no larger difference between the perpetrator and the child in respect to their mental and physical development.

- Article 207. Sexual intercourse by abuse of position

(1) Anyone who by abuse of his/her position induces to sexual intercourse or an equal act a person who is in a subordinate or dependent position to him, shall be punished by an imprisonment sentence of three months to three years.

(2) A teacher, instructor, guardian, adoptive parent, stepfather, stepmother or some other person who by abuse of his/her position or authorities performs sexual intercourse or an equal act with a minor entrusted to him for teaching, education, custody and taking care, shall be punished by an imprisonment sentence of one to ten years.

(3) If an act referred to in Paragraph 1 and 2 of this Article is performed over a child, the perpetrator shall be punished by an imprisonment sentence of three to twelve years.

(4) If an act referred to in Paragraphs 1 to 3 of this Article resulted in pregnancy, the perpetrator shall be punished for an act referred to in Paragraph 1 by an imprisonment sentence of six months to five years, for an act referred to in Paragraph 2 by an imprisonment sentence of two to twelve years, and for an act as of Paragraph 3 by an imprisonment sentence of three to fifteen years.

(5) If due to an act as of Paragraph 3 of this Article a child died, the perpetrator shall be punished by an imprisonment sentence of ten years at least.

c. *Is rape by spouse or intimate partner an aggravating circumstance?* NO

9. *Does the law foresee mitigating circumstances for the purposes of punishment?* YES/NO If yes, please specify.

Mitigating circumstances can be the property status of the defendant, marital status, children and their age, previous non-conviction in general and especially non-conviction for the same criminal offense, ie. whether or not he is a special returnee.

10. *Is reconciliation between the victim and the perpetrator allowed as part of a legal response?* YES/NO If so, at what stage and what are the consequences?

a. *Regardless of the law, is reconciliation permitted in practice?* YES/NO and what is the practice in this regard?

It is not legally possible to make a legal agreement between the victim and the perpetrator, which will result in the waiver of criminal prosecution. In practice, a problem may arise if the victim has given a statement to the police but has not confirmed it before the prosecutor. As the victim's testimony is key evidence for the proceedings, if the victim refuses to testify before the prosecutor, the proceedings will be suspended.

11. **Is there any provision in the criminal code that allows for the non-prosecution of perpetrator?** YES/NO If yes, please specify.

a. *if the perpetrator marries the victim of rape?* YES/NO

b. *if the perpetrator loses his "socially dangerous" character or reconciles with the victim?* YES/NO

Prosecution/

12. *Is rape reported to the police prosecuted ex officio (public prosecution)?* YES/NO

13. *Is rape reported to the police prosecuted ex parte (private prosecution)?* YES/NO/

14. *Are plea bargain or "friendly settlement" of a case allowed in cases of rape of women?* YES/NO

15. *The Criminal Procedure Code provides for possibility of plea bargain for any crime prosecuted ex officio, apart from terrorism and war crimes, thus including rape as well.*
15. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? YES/NO*
16. *Please provide information on the statute of limitations for prosecuting rape.*

There are no special provisions specifically regulating the statute of limitations for the crime of rape. The Criminal Code of Montenegro through Chapter Ten – Article 124 **Barring by time limits of criminal prosecution:**

Unless otherwise provided in this Code, criminal prosecution may not be undertaken when:

- 1) 25 years of perpetration of a criminal offence for which a sentence of long-term imprisonment may be imposed by law;
- 2) 20 years of perpetration of a criminal offence for which a prison penalty exceeding 15 years can be pronounced by law;
- 3) 15 years of perpetration of a criminal offence for which a prison penalty exceeding 10 years can be pronounced by law;
- 4) 10 years of perpetration of a criminal offence for which a prison penalty exceeding 5 years can be pronounced by law;
- 5) 5 years of perpetration of a criminal offence for which a prison penalty exceeding 3 years can be pronounced by law;
- 6) 3 years of perpetration of a criminal offence for which a prison penalty exceeding one year can be pronounced by law;
- 7) 2 years of perpetration of a criminal offence for which a prison penalty not exceeding one year or a fine can be pronounced by law.

(2) If more than one punishment is prescribed for a criminal offense, the statute of limitations is determined according to the most severe prescribed punishment.

17. *Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES/NO/1*
18. *The statute of limitations for a criminal offense committed against a minor begins to run from the age of majority*
19. *Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.*
19. *Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? YES/NO*
20. *Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.*

An injured party who is the victim of sexual abuse and violence, as well as a child being examined as a witness, shall be entitled to testify in separate premises before the judge and the Court clerk, whereas the Prosecutor, defendant and defence attorney shall be given the possibility to view the course of the examination from other premises and to put questions to the witness, after having been duly instructed by the Court of that possibility. The injured party who is the victim of sexual abuse shall have the right to be heard and to have the proceedings be conducted by a judge of the same sex, if so allowed by the existing staff composition of the Court, to refuse to answer unnecessary questions relating to private life, require to be examined through audio-video devices.

The court may, at any time, ex officio or at the proposal of the parties, but always after their hearing, exclude the public for the whole or part of the main trial, if necessary, inter alia, for protection the interests of the minor or the protection of the personal or family life of the accused or injured party. The exclusion of the public does not apply to the parties to the proceedings, defense counsel, the injured party, and possibly legal representatives and proxies.

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?* YES/NO
22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts?* YES/NO
23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?* YES/NO
24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified?* YES/NO

Data³

25. The Law on Ratification entered into force on March 5, 2004, when it was published in the Official Gazette of Montenegro.
26. *Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years*

There is no consolidated data on rape cases. Reports on the work of the Prosecutorial Council and the State Prosecutor's Office show that due to criminal offenses against sexual freedom, proceedings were initiated:

- In 2018. against 35 persons
- In 2017. against 25 persons
- In 2016. against 26 persons
- In 2015. against 28 persons
- In 2014. against 31 persons

27. *Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.*

In practice, the reported cases of sexual violence, including rape, are at the level of incidents. It is worrisome that some doctors in health care institutions refuse examinations of victims of sexual violence. The recent analysis of in-depth interviews with representatives of institutions showed that the victims are being questioned at least three times in spite of legal possibility for a person with experience of sexual violence to testify only once during the proceedings. Furthermore, the harmful practice of confronting victims with perpetrators is widespread. The concept of free consent (without pressure / coercion) in sexual relations is completely unknown to most professionals, although Article 204 of the Criminal Code, Rape, was amended in July 2017 introducing the same. They do not know how to apply it in practice and in particular how to interpret verbally expressed resistance.

³ See at http://www.podaci.net/_gCGO/propis/Zakon_o_ratifikaciji/S-pisksu01v0402.html