



Strategic Advocacy
Human Rights

Submission to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women

By SAHR
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About SAHR

Strategic Advocacy for Human Rights ([SAHR](#)) is a US-registered 501(c)(3) non-profit legal action organization. It was founded in 2008 by [Natasha Latiff](#), a Muslim Singaporean human rights lawyer and has been building a global movement of human rights defenders (HRDs) and lawyers to support survivors of sexual and gender-based violence since.

We are a frontline of dynamic and creative millennial HRDs spanning geographic, religious and cultural bounds, speaking more than 20 languages and working virtually across borders and extreme time zones. Our goal is to break down barriers survivors encounter on their quests to justice and accountability. Towards this end we:

1. Accompany HRDs who take on cases of sexual violence to plan strategic interventions using feminist, survivor-centered and intersectional approaches to the law through our flagship Gender Justice Legal Defenders Fellowship Program;
2. Represent survivors in their pursuit of justice by documenting evidence, drafting submissions, and, advocating before key decision makers such as prosecutors, judges and government officials;
3. Facilitate workshops to bring HRDs together, share regional, inter-generational and specialist knowledge and co-create strategies and tools that lead to winning solutions;
4. Translate the lessons we have learned in our cases into positive and large-scale changes to laws, norms, practices and systems through advocacy and awareness-raising interventions aimed at driving change; and,
5. Pioneer collaborative ARTivism to build communities's support around our movement of change, taking a stand against patriarchy and misogyny, interrogating existing structures of power and reimagining a more just and equitable future.

This submission provides information on the criminalisation and prosecution of rape in Azerbaijan, Bangladesh, Brazil, Colombia, India and Kosovo. It is co-authored by Blandine Bonneville, Marina Garcez, Angie García Atehortúa, Njomza Haxhibeqiri, Shruti Mishra and Aditi Pradhan and edited by Natasha Latiff and Aditi Pradhan.

Azerbaijan

Summary

The situation in Azerbaijan with regards to the criminalization and prosecution of rape is alarming. Official statistics show that very few cases of rape are reported and convicted. In the past five years, for example, in 2019 only 22 instances were officially reported¹.

The definition of rape is not consent based and continues to focus only on violence, threat of violence, or with the use of a helpless condition of the victim. The definition also does not elaborate on what constitutes ‘sexual relations’. Similarly, the provision on buggery/sodomy also does not elaborate on the meaning of ‘actions of a sexual nature’. The law also prohibits sexual relations or acts of a sexual nature committed through coercion. However, said coercion needs to have been caused by threat of destruction, damage or withdrawal of property or with use of material or other dependency of the victim. And while the definition of rape is gender-neutral, the burden of proving the case rests with the victim, making it harder for women to secure convictions in patriarchal Azerbaijan. Furthermore, rape victims do not benefit from any provisions to protect their identity or prevent re-traumatisation. In practice, the victim has to present themselves in an open court and there are no legal safeguards to protect them from questions about their sexual history.

On the other hand, since the definition of rape is broad, from a reading of the bare provision, non-vaginal rape with all types of penetrations is also criminalised. Similarly, marital rape is also not excluded from the purview of criminalisation. Although with underreporting by the police and general unwilling familial attitudes, the law is only on paper.

The Code protects sexual activity among individuals where the age gap is less than two years.

The Code also provides the victims the right to claim compensation on the basis of the prevailing minimum wage.

The ongoing and decade-long conflict in Nagorno-Karabakh between Azerbaijan and Armenia has also had a severe impact on women. The conflict accommodates the normalization of gender-based violence and has led to a culture of silence. Poorer women sometimes resort to “survival sex” where they are pressured to offer sexual services in exchange for money. Things such as recruitment by bus drivers of a group of women to take them to another region or a military base for sex is frequent. Single women or single mothers in financial distress are most likely to be victims of these situations whereas in regions bordering the conflict and military

¹ State Statistical Committee of the Republic of Azerbaijan, available at at: <https://www.stat.gov.az/source/crimes/?lang=en>

bases, underage girls are sold by their mothers to have sexual intercourse. The economic distress created by the conflict has had a direct impact on women, increasing the violence against them. Moreover, Covid-19 has led to an increase in domestic violence and gender-based violence with the financial burden resulting from the health crisis and its implications on livelihoods and home-schooling, in addition to the stress of the military escalation, and increased levels of violence in the society at large.²

All these ill practices and the ongoing conflict prevent the women in Azerbaijan from seeking justice, and perpetuate impunity.

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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.*

See **Annex I** attached below (page 12 onwards).

2. *Based on the wording of those provisions, is the provided definition of rape:*
 1. *Gender specific, covering women only* **NO**
 2. *Gender neutral, covering all persons* **YES³**
 3. *Based on the lack of consent of victim* **NO**, rape is defined as sexual relations (without further explanation on the meaning of sexual relations) with the application of violence or with threat or use of a person in a helpless condition.
 4. *Based on the use of force or threat* **YES**

² Reports of the The Kvinna till Kvinna Foundation, September 2020 and 2019 <https://kvinnatillkvinna.org/wp-content/uploads/2020/10/The-Missing-Peace.pdf> and <https://kvinnatillkvinna.org/wp-content/uploads/2019/07/Listen-to-Her—Gendered-Effects-of-the-Conflict-over-Nagorno-Karabakh-and-Womens-Priorities-for-Peace.pdf>.

³ The report of the Council of Europe “Barriers, Remedies and Good Practises for Women’s Access to Justice in Azerbaijan” states : “This gender-neutral provision restricts women’s access to justice in cases of sexual violence and discrimination. In practice, one of the reasons why women do not apply to the courts in cases of sexual harassment, violence or other forms of discrimination is the difficulty of proving that the offence took place and the absense of reversal of the burden of proof.” (p.18) <https://rm.coe.int/azerbaijan-barriers-remedies-and-good-pratices/168075fd51>

5. *Some combination of the above.* **NO**
6. *Does it cover only vaginal rape?*
NO. The definition of rape is “sexual relations” under Article 149 of the Criminal Code which covers all sexual relations. However the provision does not clarify what “sexual relations” encompasses. Furthermore, Article 150 of the Criminal Code dealing with “Violent actions of a sexual nature” criminalises “buggery or other actions of a sexual nature”. Similar to Article 149, Article 150 does not clarify what are ‘other actions of a sexual nature’. However it can be concluded that some forms of non-vaginal rape are criminalised.
7. *Does it cover all forms of penetration?*
Not Specified. As stated above, the law does not define ‘sexual relations’ or ‘other actions of a sexual nature’. It also does not provide information on the type of penetrations that are criminalised.
8. *Is marital rape in this provision explicitly included?* **NO**
9. *Is the law silent on marital rape?* **YES**
10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?*
YES covered under general provisions. Marital rape is not excluded from the rape provisions. However, it is unofficially considered a part of a family’s “internal affairs” and social attitudes indicate that many people do not consider it a crime.⁴
11. *Is marital rape excluded in the provisions, or is marital rape not considered as a crime?* **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, there are no provisions in the law excluding criminalisation of rape in the specific context of the victim and the perpetrator living together or being engaged in a past or current sexual relationship.
4. *What is the legal age for sexual consent?* **16 years.**

⁴ Violence against women in Azerbaijan, OMCT, p 22. <https://www.refworld.org/pdfid/46c190290.pdf>

5. *Are there provisions that differentiate for sexual activity between peers ? If so, please provide them.*

YES, Article 152.1 of the Criminal Code, 1999 prescribes a punishment (of three years) for an offence of sexual relations or actions of sexual nature with a person who has not reached the age of 16 years. It is further specified in a note at the end of Article 152 that criminal liability only arises if the **age difference between the person committing the acts mentioned in the article and the age of the victim is more than two years.**

6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.*

S. no	Offence	Provision (Article - Act)	Prescribed sanction
1	Punishment for Rape	Art 149.1 - CC, 1999	Punishable by imprisonment for the term of four to eight years
2	Punishment for rape committed a group of persons	Art 149.2.1 - CC, 1999	Punishable by imprisonment for the term of five to ten years
3	Punishment for rape which resulted in a victims infection of a venereal disease	Art 149.2.2 - CC, 1999	Punishable by imprisonment for the term of five to ten years
4	Punishment for rape committed against a person who is wittingly known as a minor	Art 149.2.3 - CC, 1999	Punishable by imprisonment for the term of five to ten years
5	Punishment for rape committed with a threat of a murder or serious health damage to the victim or other person	Art 149.2.4 - CC, 1999	Punishable by imprisonment for the term of five to ten years
6	Punishment for Rape committed repeatedly	Art 149.2.5 - CC, 1999	Punishable by imprisonment for the term of five to ten years

7	Punishment for Rape which brought the death of the victim	Art 149.3.1 - CC, 1999	Punishable by imprisonment for the term of ten to fifteen years
8	Punishment for Rape which resulted by infection with HIV or other serious consequences	Art 149.3.2 - CC, 1999	Punishable by imprisonment for the term of ten to fifteen years
9	Punishment for Rape committed wittingly against a person under age of 14	Art 149.3.3 - CC, 1999	Punishable by imprisonment for the term of ten to fifteen years
10	Punishment for buggery or other actions of sexual nature with application or threat of violence	Art 150.1 - CC, 1999	Punishable by imprisonment for the term of three to five years
11	Punishment for buggery or other actions of sexual nature with application of violence (aggravated)	Art 150.2 - 150.3 - CC, 1999	Punishable by imprisonment for the term of five to fifteen years
12	Punishment for coercion to sexual relations, buggery or other actions of a sexual nature by threat	Art 151 - CC, 1999	Punishable by corrective work for the term of one to two years or imprisonment for the term of one to three years
13	Punishment for sexual intercourse with a person under 16	Art 152.1 - CC, 1999	Punishable by imprisonment for the term of up to three years
14	Punishment for sexual intercourse with a person under 14	Art 152.2 - CC, 1999	Punishable by imprisonment for the term of three to six years

15	Punishment for sexual intercourse with a person under 16, by a person in authority	Art 152.3 - CC, 1999	Punishable by imprisonment for the term of four to seven years with disqualification to hold certain positions or engage in certain activities for up to three years or without it.
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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?*

All victims in Azerbaijan have the right to receive compensation under their Criminal Procedure Code if they suffered damage from a proven criminal offence.⁵ The amount of compensation payable to such a victim is a multiplier of the minimum wage and based on the severity of the crime.⁶

Aggravating and mitigating circumstances

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

1. *Is rape by more than one perpetrator an aggravating circumstance? YES*

2. *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. While the “helpless condition of the victim” is not considered an aggravating circumstance,⁷ the rape of “a person wittingly known as a minor”,⁸ and the rape of a person under the age of 14⁹ are aggravating circumstances.

As discussed in question 5, Article 152.3 also states that sexual intercourse with a person under 16 by persons “who are responsible for the upbringing of minors, or a teacher or other employee of an educational, medical or other institutions, entrusted with the responsibility for supervision of adults” is punishable by a longer term of imprisonment, making it an aggravated circumstance.

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

9. *Does the law foresee mitigating circumstances for the purposes of punishment?*

YES, the law foresees several mitigating circumstances for the purpose of punishment in Article 59. Specifically, it also includes voluntary confession of guilt; having caused

⁵ Art 189.0 - CPC

⁶ Art 190 - CPC

⁷ Art 149 - CC, 1999

⁸ Art 149.2.3 - CC, 1999

⁹ Art 149.3.3 - CC, 1999

reduction of harm immediately after the offence by providing medical assistance; reconciliation with the victim or successor, who is his/her close relative; and compensation for harm.

Furthermore, as per Article 62.1 of the Criminal Code, “at presence of the exclusive circumstances, connected to the purposes and motives of a crime, a role of guilty, his behavior in time or after commitment of a crime and other circumstances essentially reducing a degree of public danger of a crime, and on equal active assistance of the participant of the crime accomplished by accomplices, to disclosing of this crime, punishment can be appointed below the lowest limit provided by appropriate article of the Special Part of the present Code, or the court can appoint mitigate kind of punishment, than it is provided by this article or to not apply on additional kind of punishment provided as obligatory.”

10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? If so, at what stage and what are the consequences?

YES. Reconciliation is permitted as a legal response however, reconciliation does not affect the prosecution of the case of rape. Article 73 of the Code that specifically deals with reconciliation excludes rape and other serious crimes that pose big public danger from its purview.¹⁰ According to Article 37.4, where a semi-public criminal prosecution takes place, reconciliation between the victim and the accused cannot lead to a discontinuation of proceedings. However, a reconciliation is a factor that can be considered by the courts for mitigating the sentence.¹¹

1. Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?

Activists on the ground and some rare media reports have revealed that, in practise, women are often coerced by their own families to marry their perpetrator to avoid public stigma and shame, as they are considered “spoiled”.¹² Although no statistics are officially available, activist Kamala Agazade estimates that in 80 percent of cases, young women are married off to the men who raped them.¹³

¹⁰ Art 73.1 - CC,1999

¹¹ Art 59.1.12 - CC, 1999

¹² Djalilov Ismail, “Under public stigma, families often force young women in Azerbaijan to marry those who raped them”, OpenDemocracy, 27 May 2019.

<https://www.opendemocracy.net/en/odr/azerbaijan-families-force-young-women-marry-those-who-raped-them/>

<https://media.az/society/1067723681/16-letnyuyu-devushku-pohitili-v-udzhare/>

<https://eurasianet.org/teen-rape-in-azerbaijan-spotlights-abuse-and-forced-marriages>

¹³ *idem*

11. *Is there any provision in the criminal code that allows for the non-prosecution of perpetrator?* **YES**

1. *if the perpetrator marries the victim of rape?*

NO. There are no provisions in the criminal code allowing for non-prosecution of the perpetrator if he marries the victim.

2. *if the perpetrator loses his “socially dangerous” character or reconciles with the victim?*

NO.

Prosecution

12. *Is rape reported to the police prosecuted ex officio (public prosecution)?* **YES**

13. *Is rape reported to the police prosecuted ex parte (private prosecution)?*

NO. Article 37.2 of the Criminal Procedure Code (2000) does not permit private prosecution of rape. However, according to Article 37.3 “semi-public criminal prosecution” can take place on a complaint by the victim or, in the circumstances provided in Article 37.5 of this Code, on the initiative of the prosecutor for offences under Articles [...]149.1 (related to rape).

14. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?*

NO. As stated above, the criminal code of Azerbaijan only permits “friendly settlements” in private prosecution and private prosecution of rape is impermissible. Therefore, officially, there cannot be an friendly settlements for rape cases. However, in practise a majority of rape cases end in “out-of-courts” settlements.

15. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?*

Not specified.

16. *Please provide information on the statute of limitations for prosecuting rape.*

There is no specific limitation on rape. The general rules of limitation as in Article 75 of the Criminal Code list the limitation periods as for different classifications of rape as follows:

- Seven (7) years from the date of commitment of less serious crimes (for rape related offences attracting imprisonment of 2-7 years)
- Twelve (12) years from the date of commitment of minor serious crime (for rape related offences attracting imprisonment of 7-12 years)
- Twenty (20) years from the date of commitment of a serious crime (for rape related offences attracting imprisonment above 12 years).

According to Article 91 of the Criminal Code, the limitation periods for a crime said to be committed by a minor are half of those stated above.

17. *Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?*

NO. There are no explicit provisions regulating this. However, depending on the period of limitation already prescribed, a child may be able to report the crime of rape after reaching adulthood.

18. *Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses?*

NO. There are no specific requirements for proof of rape, as the Criminal Code does not envisage any special proceeding for crimes related to sexual violence. However, in practice, after reporting the assault to the police, the victim is made to attend a medical examination. A trial is opened only in the presence of overwhelming evidence.

19. *Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial? **NO***

20. *Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? **NO***

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?*

YES, war crime. Rape is criminalized as a war crime with respect to Article 116.0.17 which states : “Infringement of norms of the international humanitarian right during confrontations, shall it be [...] commitment of other actions connected to rape, sexual slavery, compulsory prostitution, compulsory sterilization, compulsory pregnancy and also sexual violence [...] shall be punishable by imprisonment for the term from ten up to twenty years or life imprisonment.”

NO, crime against humanity. Rape is however not considered a crime against humanity.

22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts? **NO***

23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? **NO***

24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified? **NO***

Data

25. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

Data as per the [State Statistical Committee of the Republic of Azerbaijan](#)¹⁴

	2015	2016	2017	2018	2019
(Forcible and Attempted) Rape Cases Reported	27	34	37	28	22
Rape (and crimes against person's sexual immunity and sexual liberty) Cases Prosecuted	368	300	335	365	312
(Forcible and Attempted) Rape Sanctions/ Convictions	25	26	30	21	19

Other

26. 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.

- Most cases of rape or sexual/domestic violence are not reported but covered up to avoid stigmatization or further violence from the family and the community. Women who are victims of rape are considered soiled and are unable to marry or face a divorce. Sexual violence is still clearly considered a private matter that should be dealt with by the family.
- The behavior of the police appears as a clear barrier to the reporting of rape as the victim appears at risk of further violence, stigmatisation or shaming from the police who also largely considers rape to be a private matter.
- In trials of rape cases, victims almost systematically represent themselves and their rights are often not properly listed at the beginning of the trial as it is legally required. It has appeared that in certain cases judges adopt a discriminatory behavior and a victim-blaming approach.¹⁵ Reconciliation is also very frequently used to stop prosecution.

¹⁴ State Statistical Committee of the Republic of Azerbaijan, available at at: <https://www.stat.gov.az/source/crimes/?lang=en>

¹⁵ Domestic Violence Cases in the Justice System of Azerbaijan, Rule of Law and Human Rights Unit, OSCE Office in Baku, December 2031. https://www.ecoi.net/en/file/local/1190579/1226_1388757114_110044azer.pdf

- There is, generally speaking, a huge gap between the legal provisions regarding rape in Azerbaijan which are quite extensive and the practise and implementation of the law which is very discriminatory.
- The ongoing and decade-long conflict in Nagorno-Karabakh between Azerbaijan and Armenia has also had a severe impact on women. The conflict accommodates the normalization of gender-based violence and has led to a culture of silence. The violence of the conflict and repeated displacements of population has increased the propensity to violence in each household. Poorer women sometimes resort to “survival sex” where they are pressured to offer sexual services in exchange for money. Things such as recruitment by bus drivers of a group of women to take them to another region or a military base for sex is frequent. Single women or single mothers in financial distress are most likely to be victims of these situations whereas in regions bordering the conflict and military bases, underage girls are sold by their mothers to have sexual intercourse. The economic distress created by the conflict has had a direct impact on women, increasing the violence against them.¹⁶

Recommendations:

- The legal definition of rape should include the notion of consent or alternatively coercive circumstances with the shifting of the burden of proof to defendants under certain circumstances.
- Protection measures should be put in place for rape victims, allowing for the respect of the privacy of the victim in trial.
- Judges should explain to the victims their rights during the proceedings and treat them dignity and respect.
- When dealing with cases of reconciliation, Courts should proceed with caution.
- The police should receive institutional training on dealing with survivors of rape.
- Serious measures must be taken towards the protection of women and girls in Nagorno-Karabakh where the conflict especially threatens their rights.

¹⁶ Gendered Effects of the Conflict over Nagorno-Karabakh and Women’s priorities for Peace.
<https://kvinnatillkvinna.org/wp-content/uploads/2019/07/Listen-to-Her---Gendered-Effects-of-the-Conflict-over-Nagorno-Karabakh-and-Womens-Priorities-for-Peace.pdf>

Annex I: Criminal Law provisions on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification)

Azerbaijan Penal Code, 1999

Article 149 - Rape

149.1. Rape, is the sexual relations with application of violence or with threat of its application to the victim either to other persons, or with use of a helpless condition of the victim — is punishable by imprisonment for the term of four to eight years.

149.2. The same actions:

149.2.1. committed by a group of persons, by a group with a premeditated conspiracy or by an organized group;

149.2.2. which resulted in a victims infection of a venereal disease;

149.2.3. committed against the person, who is wittingly known as a minor to the guilty;

149.2.4. committed with a threat of murder or serious health damage of the victim or other persons, and also with cruelty;

149.2.5. committed repeatedly — is punishable by imprisonment for the term of five to ten years.

149.3. The same action:

149.3.1. on negligence brought the death of the victim;

149.3.2. on negligence resulted by infection of the victim with a virus HIV or other serious consequences;

149.3.3. committed wittingly against a person under age of 14 — is punishable by imprisonment for the term of ten to fifteen years.

Article 150 - Violent actions of sexual nature

150.1. Buggery or other actions of sexual nature, with application of violence or with threat thereof against the victim (male, female) or to other persons, or with use of a helpless condition of the victim (male, female) — is punishable by imprisonment for the term of three to five years.

150.2. The same actions:

150.2.1. committed by a group of persons, by a group with a premeditated conspiracy or by an organized group;

150.2.2. which resulted in a victim's (male, female) infection with venereal disease;

150.2.3. committed against the person, who is wittingly known as a minor to the guilty;

150.2.4. carried out with a particular cruelty against the victim (male, female) or against other individuals;

150.2.5. committed repeatedly— is punishable by imprisonment for the term of five to eight years.

150.3. The same action:

150.3.1. on negligence brought the death of the victim (male, female);

150.3.2. on negligence resulted by infection of the victim with a virus HIV or other serious consequences;

150.3.3. committed wittingly against a person under age of 14 — is punishable by imprisonment for the term of eight to fifteen years.

Article 151 - Coercion into actions of sexual nature

Coercion of the person to the sexual relations, buggery or to committing of other actions of sexual nature by threat of destruction, damage or withdrawal of property or with use of material or other dependency of the victim (male, female) — is punishable by corrective work for the term of one to two years or imprisonment for the term of one to three years.

Article 152 - Sexual relations and other actions of sexual nature with the person who has not reached of age 16

152.1. Sexual intercourse or committing other acts of a sexual nature with a person who has not attained the age of sixteen years — is punishable by imprisonment for the term of up to three years.

152.2. The same acts committed against a person who has not attained the age of fourteen years — is punishable by imprisonment for the term of three to six years.

152.3. The actions specified in Articles 152.1 or 152.2 of the present Code, committed by persons who are responsible for the upbringing of minors, or by a teacher or other employee of an educational, medical or other institution, entrusted with the responsibility for supervision of adults — is punishable by imprisonment for the term of four to seven years with disqualification to hold certain positions or engage in certain activities for up to three years or without it.

Note: Responsibility for the crimes stipulated in Articles 152 or 153 of this Code, arises if the age difference between the person, committed the acts mentioned in these articles and the age of the victim is more than two years.

Article 153. Depraving actions

153.1. Committing immoral acts without the use of violence against a person who has not attained the age of sixteen years – is punishable by corrective work for the term of up to two years or imprisonment for the term of up to two years.

153.2. The same acts committed against a person who has not attained the age of fourteen years - is punishable by corrective work for the term of one up to two years or imprisonment for the term of one up to three years.

153.3. The actions specified in Articles 153.1 or 153.2 of the present Code, committed by persons who are responsible for the upbringing of minors, by a teacher or other employee of an educational, medical or other institution, entrusted with the responsibility for supervision of adults - punishable by imprisonment for a term of two to four years, with disqualification to hold certain positions or engage in certain activities for up to three years or without it.

Article 176-1. Forcing of a woman to enter into marriage

176-1.1. Forcing of a woman to enter into marriage — is punishable by fine in size from two thousand to three thousand manats or by deprivation of liberty for a period up to two years.

176-1.2. The same acts committed against the person who have not achieved the legal age for marriage — is punishable by fine in size from three thousand to four thousand manats or by deprivation of liberty for a period up to four years.

Art 20 - Legal age for determination to criminal liability

20.2. The persons who have reached the age of 14, to time of committing a crime, shall be subjected to the criminal liability for deliberate murder, deliberate causing of heavy or less heavy harm to health, kidnapping of the person, rape, violent actions of sexual nature, theft, robbery, extortion, illegal occupation of the automobile or other vehicle without the purpose of plunder, deliberate destruction or damage of property under aggravating circumstances, terrorism, capture of the hostage, hooliganism under aggravating circumstances, plunder or extortion of fire-arms, ammunition, explosives and explosives, plunder or extortion of narcotics or psychotropic substances, reduction unsuitability of vehicles or means of communication.

Article 59. Circumstances mitigating punishment

59.1. The mitigating circumstances are as follows:

59.1.1. commitment for the first time, owing casual coincidence of circumstances, a crimes which are not representing big public danger or less serious crimes;

59.1.2. commitment of a crime by the minor;

59.1.3. commitment of a crime by the pregnant woman;

59.1.4. the person, committed a crime has a dependent minor child;

59.1.5. commitment of a crime by virtue of confluence at heavy vital circumstances or on motive of compassion;

59.1.6. commitment of a crime as a result of physical or mental compulsion or by virtue of material, service or other dependence;

59.1.7. commitment of a crime at infringement of conditions on legitimacy of necessary defense, detention of the person who has made socially dangerous act, emergency, proved risk, execution of the order or instructions;

59.1.8. commitment of a crime owing to illegal or immoral actions of the victim or in a condition of suddenly arisen strong emotional excitement (affect) caused by such actions;

59.1.9. commitment of a crime by a person with a mental disorder, that does not exclude sanity;

59.1.10. voluntary appearance and confession of guilt, active furtherance of disclosure of the crime, exposure of other participants of a crime, search and identification of property, obtained as a result of the crime;

59.1.11. reduction of harm that may be caused to the life and health of the victim by providing him with medical or other assistance immediately after the commission of the crime;

59.1.12. reconciliation with the victim or successor, who is his/her close relative;

59.1.13. full, voluntary compensation or elimination of harm, caused as a result of a crime;

59.1.14. partial compensation of harm, caused as a result of a crime, or other actions that resulted in harm reduction.

59.2. At assignment of punishment can be taken into account as mitigating circumstances, which have been not provided by articles 59.1.1-59.1.14 of the present Code.

59.3. If mitigating circumstance is provided by appropriate article of the Special Part of the present Code as an attribute of a crime, it repeatedly can not be taken into account at assignment of punishment.

Article 62. Assignment of mitigate punishment, than it is provided for the given crime

62.1. At presence of the exclusive circumstances, connected to the purposes and motives of a crime, a role of guilty, his behavior in time or after commitment of a crime and other circumstances essentially reducing a degree of public danger of a crime, and on equal active assistance of the participant of the crime accomplished by accomplices, to disclosing of this crime, punishment can be appointed below the lowest limit provided by appropriate article of the Special Part of the present Code, or the court can appoint mitigate kind of punishment, than it is provided by this article or to not apply on additional kind of punishment provided as obligatory.

Article 73 - Release from criminal liability due to the reconciliation with victim

73.1. The person, who has committed a crime, not representing big public danger, can be released from the criminal liability if he has reconciled with victim and has compensated cause to him or has removed caused harm.

73.2. The person who committed the act (acts) provided for in Articles 127.1, 128, 129, 130, 131.2, 133.1, 134, 142.1, 143, 156.1, 157.1 and 158.1 of this Code shall be released from criminal liability if it has reconciled with the victim and fully reimbursed the damage incurred to it.

Article 74. Release from criminal liability in connection with change of conditions

The person who has committed a crime for the first time, not representing big public danger or less serious crime, can be released from a criminal liability if it will be established, that committed act or a person who has made act owing to change of conditions, is ceased to be socially dangerous.(131)

Art 108 - Sexual violence

Rape, compulsion to prostitution, compulsory sterilization or commitment against persons of other actions connected to sexual violence —

shall be punishable by imprisonment for the term from twelve up to twenty five years or life imprisonment.

Art 116 - Infringement of norms of the international humanitarian right during confrontations

116.0. Infringement of norms of the international humanitarian right during confrontations, shall be :

116.0.17. commitment of other actions connected to rape, sexual slavery, compulsory prostitution, compulsory sterilization, compulsory pregnancy and also sexual violence;

[...] shall be punishable by imprisonment for the term from ten up to twenty years or life imprisonment.

Criminal Procedure Code of the Republic of Azerbaijan (2000)

Article 37. Types of criminal prosecution

37.1. Depending on the nature and severity of the offence, the criminal prosecution shall be carried out in the form of private, semi-public or public charges in accordance with the provisions of this Code.

37.2. A private criminal prosecution shall take place only on a complaint by the victim concerning offences under Articles 147, 148, 165.1 and 166.1 of this Code and shall be discontinued in the event of a reconciliation between the victim and the accused before the court deliberates.

37.3. A semi-public criminal prosecution shall take place on a complaint by the victim or, in the circumstances provided for in Article 37.5 of this Code, on the initiative of the prosecutor for

offences under Articles 127, 128, 129.2, 130.2, 131.1, 132-134, 142.1, 149.1, 150.1, 151, 156-158, 163, 175-177.1, 178.1, 179.1, 184.1, 186.1, 187.1, 190.1, 197 and 201.1 of the Criminal Code of the Azerbaijan Republic.

37.4. A semi-public criminal prosecution may not be discontinued by reason of reconciliation of the victim with the accused.

37.5. Where no complaint is made by the victim, a semi-public criminal prosecution may be begun by the prosecutor only in the following cases: 37.5.1. if the offence committed affects the interests of the state or society;

37.5.2. if the offence was committed by or against a representative of the government or other officials of state institutions;

37.5.3. if the offence was committed against a pregnant woman or an elderly or helpless person;

37.5.4. if the offence was committed by threats and by force or against a person dependent on the person who committed it;

37.5.5. if the offence was committed by or against a person without legal capacity or a person below the age of criminal responsibility.

37.6. A public criminal prosecution shall be brought on offences not covered by Articles 37.2 and 37.3 of this Code.

Law on Prevention of Domestic Violence (2010)

Article 1 - Basic definitions

1.0.1. "Domestic violence" - means a deliberate infliction of physical and moral damage by persons to others, covered under this Law, caused by abuse of close relative relations, current or past cohabitation.

1.0.6. "Domestic sexual violence" - denotes actions of sexual character committed against will by persons covered under this Law towards each other.

Article 4 - Persons subject to the Law

4.0. This Law applies to the following persons:

- 4.0.1. close family members (husband, wife, parents, children, grandmothers, grandfathers, grandchildren, siblings, step brothers and sisters, adoptive parents and adoptees) as well as other relatives living jointly;
- 4.0.2. formerly married couples cohabiting or living separately after dissolution of marriage;
- 4.0.3. individuals appointed guardians or foster parents, as well as persons under guardianship or in foster care;
- 4.0.4. men and women cohabiting in informal marriages, as well as close relatives living jointly with persons cohabiting in informal marriages.

Article 7 - Measures to be Taken along with Criminal Prosecution where the Crimes Related to Domestic Violence Examined as Defined in the Criminal-Procedural Legislation

7.0. After confirmation of the information related to domestic violence, along with duties related to prosecution of crimes defined in the relevant legislation, the measures to be taken shall be as follows:

- 7.0.1. provide an aggrieved person with immediate medical aid, temporary shelter in a support centre, clothing and food at public expense, as well as forward information about the aggrieved person to the relevant executive authority for conducting a course of psychological rehabilitation;
- 7.0.2. clarify circumstances that have caused to provoke domestic violence, and take measures to preclude them;
- 7.0.3. ensure prevention of violence and its non-recurrence, and provide for security of the aggrieved person during the examination;
- 7.0.4. assist in normalization of relations between parties and resumption of family affairs during the period of examination;
- 7.0.5. ensure registration with preventive purposes of persons who have committed domestic violence, and conduct educational and deterrent works with them;
- 7.0.6. explain to family members suffering from domestic violence their rights and the use of remedies established by the state and determined by this Law;
- 7.0.7. make a decision about issuance of a protective order as established hereunder;
- 7.0.8. if grounds for initiation of criminal case have not been defined as a result of examination of a complaint related to domestic violence, forward the complaint to the relevant executive authority;

7.0.9. as necessary, assist other state entities conducting examination of complaints about domestic violence.

Article 10 - Protective order

10.1 A short-term or long-term protective order may be issued to an aggravated person of domestic violence in accordance with this Law.

10.2. Short-term protective order may forbid a person who has committed domestic violence to:

10.2.1 commit violence again;

10.2.2. search for an aggrieved person if his/her whereabouts are unknown to him/her;

10.2.3. take other actions causing nuisance to an aggrieved person;

10.3. Long-term protective order may include the following along with specified in Article 10.1. of this Law:

10.3.1. rules for the communication of a person who has committed actions associated with domestic violence with his/her under-age children;

10.3.2. rules for the use of accommodation or shared property;

10.3.3. terms for covering expenses related to medical and legal assistance rendered to an aggrieved person by a person who has committed domestic violence;

10.3.4. information on explanation regarding the responsibility for non-compliance with the protective order in accordance with legislation.

10.4. A protective order is executed in the manner established by the legislation related to execution of court orders. An individual failing to comply with a protective order bears criminal responsibility in the manner established by the legislation regarding non-compliance with court orders.

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Bangladesh

Summary

There are two legislations which prescribe punishment for rape with women and children: the Penal Code and the Prevention of Oppression against Women and Children Act. Through a recent amendment in 2020 following a rise in rapes during COVID-19 lockdown, Bangladesh has elevated the punishment for rape to between rigorous life imprisonment and death.

The age of consent in Bangladesh is 14 years, with marital rape being specifically excluded for the definition of rape.

Rape trials still permit the testimony on sexual history of the victim to suggest that she has a generally immoral character. Furthermore, there are no general rape shield provisions and a victim has to mandatorily undergo a medical examination under the Prevention of Oppression against Women and Children Act when reporting an incident of rape.

Furthermore, although the legal system of Bangladesh does not provide for any reconciliation, it is usually practiced in the society due to factors which include social pressure, threats, lack of resources and courage to resist. Rape is highly under-reported which is aggravated due to lack of assistance by the police officials, lack of financial access to the justice system and threats and revictimization.

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Questionnaire on criminalization and prosecution of rape

Definition and scope of criminal law provisions

- 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.*

See **Annex I** attached below (page 9 onwards).

- Based on the wording of those provisions, is the provided definition of rape:*
 - Gender specific, covering women only* **YES**

2. *Gender neutral, covering all persons* **NO**
3. *Based on the lack of consent of victim* **YES**
4. *Based on the use of force or threat* **YES**
5. *Some combination of the above.* **YES**
6. *Does it cover only vaginal rape?* **YES**
7. *Does it cover all forms of penetration? If yes, please specify.* **NO**
8. *Is marital rape in this provision explicitly included?* **NO**
9. *Is the law silent on marital rape?* **NO**
10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?* **NO.**
11. *Is marital rape excluded in the provisions, or is marital rape not considered as a crime?*

YES. According to Section 375 of the Bangladesh Penal Code, sexual intercourse by a man with his wife (wife not being under thirteen years of age) is not rape. Therefore within the confines of a marital relationship, there is no rape.¹⁷

However Section 376 while prescribing the punishment for rape, provides that ‘rape’ by a man of his wife, who is thirteen years or older, is punishable with up to a maximum of two years of imprisonment and or with fine.¹⁸ It is thus a mitigating factor.

A legal challenge to the marital rape exception is currently pending in the High Court on the grounds that it violates the Child Marriage Restraint Act that fixes the minimum age for a women to be married at eighteen years.¹⁹

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**

¹⁷ Section 375, Bangladesh Penal Code.

¹⁸ Section 376, Bangladesh Penal Code.

¹⁹ <https://tbsnews.net/bangladesh/hc-issues-rule-legality-marital-rape-153385>

4. *What is the legal age for sexual consent? - Fourteen years generally, or thirteen when the victim is the wife of the perpetrator.*²⁰
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.*

S. No	Offence	Section	Sanction
1.	Punishment for rape	S.376, Bangladesh Penal Code	Imprisonment for life or for a term which may extend to 10 years, and fine If the woman raped is his own wife and is not under twelve years of age, he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both
2.	Punishment for rape with woman and child	S.9(i), Prevention of Oppression against Women and Children Act	Rigorous Imprisonment for life and with fine
3.	Punishment for death, in consequence of rape/ any act, of a woman or child	S.9(ii), Prevention of Oppression against Women and Children Act	Death or with transportation for life and also with fine not exceeding one lac taka

²⁰ Section 375 of the Penal Code provides, A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: Firstly. Against her will. Secondly. Without her consent. Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under fourteen years of age.

4.	Punishment for death/ injury caused to a woman or child, in consequence of rape by more than one man	S.9(iii), Prevention of Oppression against Women and Children Act	Death or rigorous imprisonment for life and also with fine not exceeding one lac taka.
5.	Attempt to cause death or hurt, after rape.	S.9(iv)(a), Prevention of Oppression against Women and Children Act	Rigorous imprisonment for life and also with fine.
6.	Attempt to rape	S.9(iv)(b), Prevention of Oppression against Women and Children Act	Imprisonment ranging from five to ten years and fine.
7	Rape in police custody, in consequence of failure to provide safety.	S.9(v), Prevention of Oppression against Women and Children Act	Rigorous Imprisonment ranging from five to ten years and fine.

In October 2020, Bangladesh, through an executive order, has amended the maximum punishment for rape to death under S.9(i) of the Prevention of Oppression against Women and Children Act.²¹

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?*

The law does not mandate any reparation, including compensation to the victim. However, under Section 545(1)(b) of the Criminal Procedure Code of Bangladesh, the courts may discretionarily direct that a fine imposed on a perpetrator be paid to the victim as compensation for any loss or injury. This section is applicable only in cases where the fine is imposed and is recoverable by the court. Further, application of this provision is at the discretion of the court and not mandatory. Similarly, Section 15 of the Prevention of Oppression against Women and Children Act also permits a rape victim to receive the fine imposed on the perpetrator as compensation.

²¹<https://bdnews24.com/bangladesh/2020/10/13/president-hamid-signs-ordinance-on-capital-punishment-in-rape-cases#:~:text=Bangladesh%20President%20Md%20Abdul%20Hamid,by%20Prime%20Minister%20Sheikh%20Hasina>

Additionally, as per Section 13 of the Prevention of Oppression against Women and Children Act, the perpetrator is responsible for paying maintenance to the victim if a child is born as a consequence of the rape.

Aggravating and mitigating circumstances

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

YES. Section 9(iii) of the Prevention of Oppression against Children and Women Act, 2000 provides that if more than one man rape a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka and Section 9(v) provides that if a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine.

1. *Is rape by more than one perpetrator an aggravating circumstance?* - **YES**

2. *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**

3. *Is rape by spouse or intimate partner an aggravating circumstance?*

NO. Rape by a husband of a wife (older than thirteen years) is punished by a term of imprisonment vastly lesser than the sanction for rape.²² He is punishable with a term of two year or less and/or with fine. In effect, marital rape is a mitigating factor.

9. *Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify.*

Not specified. While there are some mitigating factors that Courts take into account, they are not listed and therefore they are applied inconsistently.²³ There are no additional mitigating circumstances for rape offenders.

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?* **NO.**

²² Section 376, Bangladesh Penal Code.

²³ <https://www.dhakatribune.com/opinion/op-ed/2018/01/06/youre-convicted-happens-now>

1. *Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?*

YES. There have been cases where the victim has been married off to the rapist. For instance- Rozina, the 16-year-old daughter of a farmer in this district of Bangladesh, is married to the man who raped her.²⁴ The factors which result in such ‘reconciliation’ include social pressure, threats by the accused’s family and lack of resources.

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

1. *if the perpetrator marries the victim of rape? NO*
2. *if the perpetrator loses his “socially dangerous” character or reconciles with the victim NO*

Prosecution

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

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

14. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? NO, the law doesn’t allow friendly settlement in cases of rape.*

15. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? NO.*

16. *Please provide information on the statute of limitations for prosecuting rape. There is no prescribed period of limitation for prosecuting rape.*

17. *Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? As stated above, rape prosecution cannot be barred by time.*

18. *Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? If yes, please specify.*

YES. The provisions of an amendment to the Prevention of Oppression against Children and Women Act 2000 states that a medical test and a DNA test will have to be done even if the accused or the victim does not give consent to it. Previously, only the victim had to undergo a medical test. Now, both the victim and the accused undergo medical tests.²⁵

²⁴ <http://www.ipsnews.net/2003/06/rights-bangladesh-rape-victims-married-off-to-rapists/>

²⁵ <https://tbsnews.net/bangladesh/crime/rape-accused-victim-both-have-undergo-medical-and-dna-tests-144721>

19. *Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial?*

NO. According to Section 155(4) of the Evidence Act, 1872, in rape trials, evidence may be given on the prosecutrix having a generally immoral character.²⁶

20. *Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?*

YES. S. 20(6) of Prevention of Oppression against Children and Women Act, states that in case of adjudication of any offence under section 9 (Punishment for rape or death in consequence of rape), the Tribunal, on an application, can examine, if thinks fit, a woman raped or any witness in a closed door room.

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?* **YES, as crime against humanity.**

22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts?* **NO**

23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?* **NO**

24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified?* **YES**

Data

25. *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 official data on cases of rape in Bangladesh. However, “[a]ccording to ASK documentation, a total of 732 women became victims of rape and gang-rape in the year 2018. Among them, 63 were murdered after rape and 7 committed suicide.

In 2017, 818 victims reported rape.

In 2016 724 victims reported rape.”²⁷

²⁶ “155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:

...

4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character”

²⁷ <http://www.askbd.org/ask/2019/06/30/human-rights-situation-of-bangladesh-in-2018/>

No information is available on how many rape cases were prosecuted or sanctioned.

Other

26. *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.*

There are many barriers to the reporting and prosecution of rape in Bangladesh. They include the reluctance by the family to take legal action due to the social stigma surrounding victims of sexual violence and this is reinforced by lack of awareness about relevant legal and procedural processes on the part of the rape survivors and their families further. Besides this, the rape survivors and their families are met with violent suppression from influential community leaders, because the rapist is someone they want to protect. Thirdly, rape survivors may be further hindered from seeking justice due to the failure on the part of law enforcement agencies to properly discharge their duties. Due to these three factors, *shalish* or out-of-court settlement through informal community mediation becomes particularly operative in rape cases as it provides a convenient alternative to litigation for all parties involved.²⁸

²⁸ <https://www.thedailystar.net/opinion/news/why-do-rape-cases-stay-out-court-1864972>

Annex I: Criminal Law provisions on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification)

Bangladesh Penal Code

S. 375. Rape

A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Firstly. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With or without her consent, when she is under fourteen years of age.

Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

S. 376- Punishment for rape 376.

Whoever commits rape shall be punished with [imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

S.493- Cohabitation caused by a man deceitfully inducing a belief of lawful marriage

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Prevention of Oppression against Women and Children Act

S.9- Punishment for rape or death in consequence of rape

- i. Whoever commits rape with a woman or a child, shall be punished with rigorous imprisonment for life and with fine.

Explanation: Whoever has sexual intercourse without lawful marriage with a woman not being under fourteen years of age, against her will or with her consent obtained, by putting her in fear or by fraud, or with a woman not being above fourteen years of age with or without her consent, he shall be said to commit rape.

- ii. If in consequence of rape or any act by him after rape, the woman or the child so raped, died later, the man shall be punished with death or with transportation for life and also with fine not exceeding one lac taka.
- iii. If more than one man rape a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka.
- iv. Whoever attempts on a woman or a child
 - a. To cause death or hurt after rape, he shall be punished with rigorous imprisonment for life and also with fine.
 - b. To commit rape, he shall be punished with imprisonment for either description, which may extend to ten years but not less than five years rigorous imprisonment and also with fine.
- v. If a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine.

S.10. Punishment for sexual oppression:

- i. Whoever, to satisfy his sexual urge illegally, touches the sexual organ or other organ of a woman or a child with any organ of his body or with any substance, his act shall be said to be sexual oppression and he shall be punished with imprisonment for either description which may extend to ten years but not less than two years of rigorous imprisonment and also with fine.
- ii. Whoever , to satisfy his sexual urge illegally, assaults a woman sexually or makes any indecent gesture, his act shall be deemed to be sexual oppression and he shall be punished

with imprisonment for either description which may extend to seven years but not less than two years of rigorous imprisonment and also with fine.

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Brazil

Summary

Even though Brazil has one of the most progressive laws on domestic violence in the world, the Maria da Penha Law, sexual and based violence (SGBV) is still rampant.²⁹ According to the Annual Report on Public Security, Brazil has had 25.469 cases of rape reported in the first semester of 2020 and 33.019 rapes were reported in the first semester of 2019.³⁰

Reporting a crime is a hardship for victims due to the patriarchal approach in police stations. According to Instituto Patrícia Galvão, the reported figures can represent as low as 10% of actual incidents of rape in Brazil, due to under-reporting.³¹ There is a lack of victim-centred approaches by the law enforcement and medical professionals as well as a lack of supervision and punishment for professionals who do not follow guidelines of good practice. Moreover, the outdated criminal code that romanticizes violent acts, without an explicit mention of “consent” in any of the crimes typified as rape.

The first issue is the lack of importance consent plays in the articles that address rape. The law, even when describing “rape against a vulnerable person” on article 217-A does not mention the word “consent”, instead choosing the following wording “*due to illness or mental disability, does not have the necessary discernment to practice the act*” and “*by any other cause, cannot offer resistance*”. Another issue with the legal jargon of the Code is the romanticized language used to describe rape and other forms of sexual assault/abuse. Expressions like “*to have carnal conjunction*”, “*libidinous act*” and “*to satisfy one’s lust*” are used to describe actions like penetration, sexual act and masturbation, respectively. The expressions chosen can diminish the effect of the heinous actions committed by the abuser. Lastly, while Brazil ratified the Rome Statute almost twenty years ago,³² rape has not been criminalized either as a war crime or as a crime against humanity.³³

The lack of training, preparation and, many times, the officials’ own beliefs, can result in a very traumatic experience for the victim. Bad practices can range from asking the wrong questions to blaming the survivor for being assaulted/raped. Furthermore, as a rule, victims of rape cases must go under a physical examination called Exame de Corpo de Delito (articles 158-184, Criminal Procedure Code). It is a physical examination of the victim’s body, obligatory in cases where the crime leaves trace elements behind. As a part of this exam, a virginity test is

²⁹ Available on the 2019 Annual Brazilian Report on Public Security:

https://www.forumseguranca.org.br/wp-content/uploads/2019/10/Anuario-2019-FINAL_21.10.19.pdf

³⁰ Available on the 2020 Annual Brazilian Report on Public Security:

<https://forumseguranca.org.br/wp-content/uploads/2020/10/anuario-14-2020-v1-final.pdf>

³¹ <https://dossies.agenciapatriciagalvao.org.br/violencia-em-dados/estupros-no-brasil/>

³² http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm

³³ <https://www.amnesty.org/download/Documents/44000/amr190052009en.pdf>

conducted, as it is verified if the hymen was recently ruptured or not, in the case the victim was a virgin prior to the situation.

The Law 13.505/17 (which amended the Maria da Penha Law) seeks to avoid this re-traumatization.³⁴ It states that enforcement officials who attend to victims should be, preferably, women, seeking to minimize the revival of the abuse for the survivor by having highly trained professionals.³⁵

The lack of female representation in all spheres of government and public service can be one of the many explanations for the current situation. Women represent only 12% of the Military Police (46.229 women to 357.887 men) and 26,6% of the Civil Police (29.124 women to 80.316 men).³⁶ In the Judiciary, only around 37% of the judges are women.³⁷ In the Legislative branch, out of 513 Congress representatives, only 77 are women, not to mention they are underrepresented in all important positions like the Director table as well as the permanent commissions presidency.³⁸ Meanwhile the Senate only has 10 women in 81 places available (three seats for each State and Federal District).³⁹

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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.*

See **Annex I** attached below (page 12 onwards).

2. *Based on the wording of those provisions, is the provided definition of rape:*
 1. *Gender specific, covering women only* **NO**

³⁴ Lei 13.505/17. Available (in Portuguese) at:

http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13505.htm

³⁵ Article 10-A, *caput*: “It is the right of women in situations of domestic or familial violence to have the police and pericial treatment be specialized, uninterrupted and offered by previously capacitated public servants - preferably of the female gender.” Available (in Portuguese) at:

http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13505.htm

³⁶ <https://www.justica.gov.br/sua-seguranca/seguranca-publica/sinesp-1/bi/dados-seguranca-publica>

³⁷ <https://www.cnj.jus.br/participacao-feminina-na-magistratura-cresce-lentamente/>

³⁸ <https://www.camara.leg.br/noticias/554554-baixa-representatividade-de-brasileiras-na-politica-se-reflete-na-camara/>

³⁹ https://www.senado.leg.br/transparencia/LAI/secrh/parla_inter.pdf

2. *Gender neutral, covering all persons* **YES**
 3. *Based on the lack of consent of victim* **NO**. Lack of consent results in a different crime, not rape. It's called "sexual violation through fraud" (article 215), with a 2 to 6 years sentence.
 4. *Based on the use of force or threat* **YES**
 5. *Some combination of the above.* **YES**
 6. *Does it cover only vaginal rape?* **NO**
 7. *Does it cover all forms of penetration? If yes, please specify.*
YES. The way article 213 is phrased "to have carnal conjunction or practice or permit the practice of a different libidinous act on them" can cover vaginal penetration as well as anal penetration, not to mention acts like oral sex and masturbation. For article 217-A, the same is applied.
 8. *Is marital rape in this provision explicitly included?* **NO**
 9. *Is the law silent on marital rape?* **NO**
 10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?*
YES. Marital rape is not a crime by itself, but a cause for an augmentation/aggravation of the criminal sentence (article 226, II), in a general way, as it's the same possibility for anyone with a familial relationship, whether ascendant or descendant, spouse/partner, sibling, etc.
 11. *Is marital rape excluded in the provisions, or is marital rape not considered as a crime?* **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, there aren't.
 4. *What is the legal age for sexual consent?*

14 years old, as per the Criminal Code (article 217-A) and the Child and Teenager Statute, also jurisprudence from the Superior Court of Justice (second highest Court in the country), in the form of summary 593.⁴⁰

5. *Are there provisions that differentiate for sexual activity between peers? If so, please provide them.*

YES, because in Brazil only individuals 18 or older can be criminally prosecuted (this is what we call age of criminal responsibility).⁴¹

If a person is 16 or 17 years old when the infraction took place, they can be prosecuted under the “youth jurisdiction”, but this does not result in incarceration. Instead, they are sent to a juvenile detention center.⁴²

If a teenager 16 or 17 rapes a person younger than 14 (the age of consent), we have what we call an “infraction analogue to” rape, because while the teenager can be prosecuted under “youth jurisdiction”, he cannot answer for the crime of rape in regular criminal court.⁴³

6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.*

S. no	Offence	Provision (Article - Act)	Prescribed sanction
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⁴⁰ “The crime rape of a vulnerable person takes place with the carnal conjunction or practice a different libidinous act with someone younger than 14 years old, regardless the eventual consent of the victim for the practice of the act, previous sexual experience or existence of a romantic relationship with the perpetrator.” (summary 593, Superior Court of Justice, translated from Brazilian Portuguese, available at: https://ww2.stj.jus.br/docs_internet/revista/eletronica/stj-revista-sumulas-2017_46_capSumulas593-600.pdf)

⁴¹ Brazilian Constitution, article 228. Original and up to date version available on: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; English version: <http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles/constitution-of-the-federative-republic-of-brazil>

⁴² Article 103, Statute of the Child and the Teenager. “It is considered an *infraction* the conduct described as a crime or criminal contravention”. Original text in Brazilian Portuguese available on: http://www.planalto.gov.br/ccivil_03/leis/l8069.htm.

⁴³ While the conduct of rape by someone 16 or 17 years old is not literally described in the Criminal Code or in the Statute of the Child and the Teenager, the analogy between articles 213 and/or 217-A from the Criminal Code by using article 103 of the Statute of the Child and the Teenager is common in the cases described. For example, in this jurisprudence from the Supreme Court of Justice: RHC 117696 / MG judged on April 11 2014, available (in Portuguese) on: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=5559027>

1	Punishment for Rape	Article 213, <i>caput</i> , of the Criminal Code	Punishable by imprisonment for the term of six to ten years
2	Punishment for Rape, if it results in serious bodily injury or the victim is between 14 years old and (younger than) 18	Article 213, §1, of the Criminal Code	Punishable by imprisonment for the term eight to twelve years
3	Punishment for Rape, if it results in death	Article 213, §2, of the Criminal Code	Punishable by imprisonment for the term twelve to thirty years
4	Punishment for sexual violence upon fraud	Article 215 of the Criminal Code	Punishable by imprisonment for the term two to six years
5	Punishment for sexual harassment (“importunação sexual” in Portuguese), if the act is not a more serious crime	Article 215-A of the Criminal Code	Punishable by imprisonment for the term one to five years
6	Punishment for sexual harassment in a workplace situation (“assédio sexual” in Portuguese)	Article 216-A of the Criminal Code	Punishable by imprisonment for the term one to two years
7	Punishment for rape of a vulnerable person	Article 217-A, <i>caput</i> , of the Criminal Code	Punishable by imprisonment for the term eight to fifteen years
8	Punishment for rape of a vulnerable person, if it results in serious bodily injury	Article 217-A, §3, of the Criminal Code	Punishable by imprisonment for the term ten to twenty years
9	Punishment for rape of a vulnerable person, if it results in death	Article 217-A, §4, of the Criminal Code	Punishable by imprisonment for the term twelve to thirty years
10	Punishment for corruption of minors	Article 218 of the Criminal Code	Punishable by imprisonment for the term two to five years
11	Punishment for	Article 218-A of the	Punishable by imprisonment for the

satisfying one's lust in the presence of a child or teenager	Criminal Code	term two to four years
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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?*

There isn't a specific law that refers to rape/sexual violence victims, but the [Criminal Procedure Code](#) has a provision for reparations on article 387, IV. However, judges have granted restitution/reparation in considerable amounts of money to victims of such crimes in civil and administrative lawsuits. In a decision in 2013, a judge in the State of Minas Gerais awards R\$ 100,000 (a hundred thousand Brazilian reals), around USD 40,000 (forty thousand dollars) back then, in damages to a rape victim in a civil lawsuit.⁴⁴

Aggravating and mitigating circumstances

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

1. *Is rape by more than one perpetrator an aggravating circumstance? YES*
2. *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*
3. *Is rape by spouse or intimate partner an aggravating circumstance? YES⁴⁵*

9. *Does the law foresee mitigating circumstances for the purposes of punishment?*

YES. Although not specific to rape cases, the following are the circumstances considered as a rule according to the Criminal Code:

I) the convicted person is younger than 21 years old, or older than 70 years old, on the date of the sentencing;

II) unfamiliarity with the Law;

III) if the convicted person:

- a) committed the crime for a relevant social or moral value motive;
- b) sought to, by their own will and efficiency, right after the crime, to avoid it or minor its consequences, or, before the trial, have repaired the damage;
- c) committed the crime under coercion to which they could resist, or by complying with an order from a superior authority, or under the influence of violent emotion, provoked by the victim's unjust action;

⁴⁴<https://tj-mg.jusbrasil.com.br/noticias/100649406/juiz-arbitra-indenizacao-de-r-100-mil-para-vitima-de-estupro>

⁴⁵ Article 226, II of the Criminal Code: The penalty is increased when: II - by half, if the agent is ascendant, stepfather or stepmother, uncle, brother, spouse, partner, tutor, curator, preceptor or employer of the victim or if by any other title has authority over them.

- d) confessed spontaneously, before the competent authorities;
- e) committed the crime under the influence of a crowd, if it was not caused by them.⁴⁶

The law also foresees an option in which the sentence can be reduced due to a relevant situation that took place before or after the crime, even if it's not expressly provided by law.⁴⁷

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

1. *Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?*

YES. There are cases of the use of restorative justice as a form to mediate conflict situations, through systemic constellations, in cases that involve gender-based violence, like domestic violence, but it is not something that is in the law or even part of the Brazilian jurisprudence. Though the reconciliation can be a part of the procedure for the social and psychological aspect of the situation, it cannot alter the criminal procedure or have direct implications on how it is conducted. This practice is used in order to provide healing and closure for the victim on a moral and psychological level, as well as to conscientize the aggressor.⁴⁸

11. *Is there any provision in the criminal code that allows for the non-prosecution of the perpetrator?* **NO (As long as the perpetrator is 18 or older)**

1. *if the perpetrator marries the victim of rape?* **NO**

2. *if the perpetrator loses his “socially dangerous” character or reconciles with the victim?* **NO**

Prosecution

12. *Is rape reported to the police prosecuted ex officio (public prosecution)?* **YES**

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

*This is actually a very recent change, now the procedure for rape is not conditioned to the victim bringing the case to the police/prosecution. If a police report is filed, it is within the public prosecution's discretion to decide whether to prosecute or not.

⁴⁶ Article 65, Criminal Code.

⁴⁷ Article 66, Criminal Code.

⁴⁸ Restorative Justice is regulated by Resolution 225/2016 of the Council of Justice. Available at: <https://atos.cnj.jus.br/atos/detalhar/2289>

14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?
NO

15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?
NO⁴⁹

16. Please provide information on the statute of limitations for prosecuting rape.

The limitations for prosecuting rape are the following:

- Temporal lapse between the fact and the criminal procedure (prescriptive period, *prescrição* in Brazilian Portuguese), which is calculated according to the penalty of each crime in the Criminal Code. For rape (article 213) it is 16 years from the date the author of the assault’s identity was known, while for rape of a vulnerable person it is 20 years, from the date the victim turns 18 years old.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?

YES. Lei Joanna Maranhão (Law 12.650/12), that added subsection V to article 111 of the Penal Code (*prescrição* - prescriptive period in English), states that the prescriptive period will start to count after the victim turns 18 if there was not a criminal procedure started before then.

18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses?

YES. Exame de Corpo de Delito (articles 158-184, Criminal Procedure Code), a type of physical examination of the victim’s body, obligatory in cases which the crime leaves trace elements behind. The prosecution can also request a psychological assessment, but it’s not mandatory. If the victim alleges there was penetration and the exam was conducted right away, it is very difficult to manage a conviction without physical evidence. However, if it is not the case, yes there can be a conviction with only the victim’s testimony. It depends on the judge’s opinion and conclusion when analyzing the actual case.

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? **NO**

20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?

⁴⁹ “Plea bargain” is not allowed in crimes classified as *hediondo* (heinous, in a free translation), which rape and rape of a vulnerable person are. Source: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13964.htm

YES, but only in cases that involve domestic or familial violence. According to Law 13.505/17, that amended the Maria da Penha Law, the victim should be shielded from her abuser during any hearings. In addition to that, the members of the Judiciary, Police as well as Prosecution Office should be, preferably, women that specialize in cases of domestic violence.

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?* **NO**

22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts?* **NO**

23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?* **YES**

24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified?* **YES**

Data

25. *Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.*

Rape cases reported:

2020 (1st semester): 25.469 rapes, of which 22.201 were women and 14.746 were girls under 14 years old

2019 (1st semester): 33.019 rapes, of which 28.538 were women and 18.902 were girls under 14 years old⁵⁰

2018: 66.041 (rapes and attempted rapes), of which 53.726 were women

2017: 63.157 (rapes and attempted rapes), of which 50.598 were women⁵¹

Due to underreporting, those numbers could represent only about 10% of the total cases that actually took place.⁵²

The numbers of cases prosecuted and sanctioned are not public for a few reasons. Firstly, rape falls under state jurisdiction, so each of the 26 states and the federal district each have their own filing systems. Secondly, the records are, in the grand majority of states,

⁵⁰ Available on the 2020 Annual Brazilian Report on Public Security:

<https://forumseguranca.org.br/wp-content/uploads/2020/10/anuario-14-2020-v1-final.pdf>

⁵¹ Available on the 2019 Annual Brazilian Report on Public Security:

https://www.forumseguranca.org.br/wp-content/uploads/2019/10/Anuario-2019-FINAL_21.10.19.pdf

⁵² <https://dossies.agenciapatriciagalvao.org.br/violencia-em-dados/estupros-no-brasil/>

physical, so the information is not scanned or set up in any type of electronic document. And lastly, the records are sealed due to the nature of the subject, as a protection measure against both the victim and the accused until the end of the criminal procedure. The records are confidential and the procedure runs under secrecy of justice, which means that only the parties and the judiciary staff can have access to them.

While the number of cases reported is available to the public as part of the Annual Brazilian Report on Public Security, the data on rape cases prosecuted and sanctioned is not divulged to the public, since the records for the criminal procedures are sealed under secrecy of justice.

According to a 1991 report from Human Rights Watch, between 1985 and 1989 there were more than 800 cases of rape reported in the State of São Paulo, but only 155, less than 25% of them, were investigated.⁵³ More recently, the former president of the Brazilian Academy of Forensic Sciences declared that roughly only around 1% of the perpetrators of sexual crimes are sentenced and pay for the crimes committed.⁵⁴

Other

26. *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.*

The way the judicial system works in Brazil, it does not operate in a way that makes it easier for women to report sexual crimes. Police departments are usually heavily male-centered and operated environments, and this reflects the way investigations are conducted and how the survivors of abuse are treated. Moreover, the overflow of procedures and criminal reports floating around the system make everything go very slow, especially if the defendant is not under custody as a preventive measure. The Brazilian Criminal Code dates from the 1940s, and even though it has faced many reforms, there really isn't a victim-centric approach to sexual violence crimes. Another issue in regards to the operation of the Judiciary itself, considering the courts, prosecutor offices and police departments are understaffed and buried under work, not to mention the bureaucracy that comes with physical court documents, as opposed to the electronic procedure the civil courts use. Finally, the patriarchal aspect of the Brazilian society has to be mentioned, especially due to the very religious approach many policy makers and even members of the Judiciary approach their work, even though the Constitution states it's a laic/secular country. Religion in Brazil is a very lucrative business and many churches back candidates for both Congress and the Senate that will block any progressive changes in the way criminal law exists. This has a direct impact on the

⁵³ <https://www.hrw.org/sites/default/files/reports/BRAZIL910.PDF>

⁵⁴ <https://congressoemfoco.uol.com.br/opiniaao/colunas/crimes-sexuais-a-impunidade-gerada-por-um-estado-omisso/>

process of updating the legislation in order to offer a more victim-centric approach to these types of crimes, making it possible to ensure the accountability of the perpetrators. Moreover, there are plenty of members of the Judiciary and adjacent institutions (like Ministério Público, the Prosecutor Office) that make no secret of their religious beliefs when writing briefs or sentences during criminal procedures and this influences the outcome and results in impunity.

Annex I: Criminal Law provisions on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification)

[Brazilian Criminal code](#)

Article 213 (rape)

To compel someone, through violence or serious threat, to have carnal conjunction or practice or permit the practice of a different libidinous act on them.

Article 215 (sexual violence upon fraud)

To have carnal conjunction or practice a different libidinous act with someone, upon fraud or another mean **that prevents or difficulties the manifestation of the victim's free will**.

Paragraph: If the crime is also committed with the intent of economic advantage, a fine should be applied.

Article 215-A (sexual harassment, importunação sexual in Portuguese)

To practice against someone, and **without their consent**, a libidinous act with the goal to satisfy one's own or a third party's lust. (the only article that openly mentions consent, it makes sense because it's a recent addition to the code, from 2018)

Article 216-A (sexual harassment, assédio sexual in Portuguese)

To compel someone with the purpose of obtaining advantage or sexual favors, if the agent takes advantage of their condition as a hierarchical supervisor or ascendancy due to employment, position or function.

(Due to the translation of the words, both conducts are "sexual harassment" in English, though article 215-A is more general, while article 216-A limits itself to work/labor relations)

Article 217-A (rape of a vulnerable person)

To have carnal conjunction or practice a different libidinous act with someone younger than 14 years old.

§1: This also applies to those who practice the actions described in the *caput* with someone who, due to illness or mental disability, does not have the necessary discernment to practice the act, or that, by any other cause, cannot offer resistance.

Article 218 (corruption of minors)

To induce someone younger than 14 to satisfy one's lust.

Article 218-A (to satisfy one's lust in the presence of a child or teenager)

Practice, in the presence of someone younger than 14 or induce them to witness, carnal conjunction or a different libidinous act, in order to satisfy one's own or a third party's lust.

--X--

Colombia

Summary

Although Colombia has taken affirmative steps to address gender-based violence, challenges in the prosecution of sexual and gender-based crimes continue to persist. In Colombia, in 2019, a woman was killed by her partner or ex-partner every 3 days; at least one woman was assaulted by her partner or ex-partner every 13 minutes; **at least one woman was sexually assaulted every 24 minutes and of this group, 86% were girls and female teenagers.** Girls aged 10-14 are the most affected, followed by those aged 5-9.⁵⁵ In January 2020, the number of women victims of sexual violence increased by 0.89%, from 1,577 cases reported in January 2019 to 1,591 in the same period in 2020. This means that approximately every 28 minutes a woman was sexually assaulted in January 2020.⁵⁶

In addition to the rampant violence, victims cannot obtain an effective response from state institutions. The obstacles in reporting these SGBV crimes include among others women's distrust of the State, shame, lack of knowledge of procedures, the weakness or absence of institutions, the influence of gender stereotypes, the presence of armed actors, and the difficulty women have in exercising their rights.

The judicial system continues to be ineffective in addressing these cases by permitting sexist stereotyping to fester along with a lack of experience in gender affairs on the part of judicial officials. This situation tends to discourage the reporting of cases and increases the lack of confidence in the justice system thereby leading to increased impunity.

The conflict-related sexual violence continues to remain one of the big challenges in Colombia. In Order 092 of 2008 (Order 092), the Constitutional Court stated that sexual violence in armed conflict has a gender component and it is a phenomenon that is “habitual, widespread, systematic and invisible”. The Court ordered a series of measures aimed at overcoming impunity so as to include the response to the phenomenon "within the highest level of priority on the nation's official agenda."⁵⁷

The long lasting nature of the conflict and the ongoing ineffectiveness of the judicial system continue to hinder the documentation of cases, identification of the victims and dispersal of reparative measures. As a consequence, there is a significant underreporting of cases of sexual violence in the context of armed conflict.

⁵⁵ Corporación Sisma Mujer. [Women's Human Rights Are Not Quarantined. Behaviour of violence against women in the context of the COVID-19 pandemic in Colombia](#). Special Bulletin No. 20. April 23rd, 2020

⁵⁶ Corporación Sisma Mujer. [Bulletin No. 19 | March 8, 2020: International Women's Day](#). April 16, 2020.

⁵⁷ Constitutional Court. [Order 092 of 2008](#). April 14, 2008.

Despite all the structural issues that need to be overcome, it is worth noting that there have been some advances toward a more integral policy of prosecution with greater attention to victims of SGBV. For instance, the Attorney General's Office is now taking steps to achieve greater articulation among its national directions through the creation of an informal space called the Women's Thematic Table and in the proposal to create a National Committee for follow-up and orientation in the investigation and prosecution of violence.⁵⁸

Additionally, Law 1448 of 2011 has directed the Prosecutor's Office to develop a protocol for the investigation and prosecution of sexual crimes. This process has generated an opportunity and space for dialogue with civil society organisations and victim's groups.⁵⁹ The Attorney General's Office has also implemented technical-legal committees which "has allowed [the Office] to overcome obstacles in the investigative approach and strategic cases".⁶⁰

From a broader perspective, it is still necessary to ensure the effective implementation of, Order 092 of the Constitutional Court, which referred 183 cases of sexual violence against women to the Attorney General's Office; the incorporation of Law 1257 on violence against women into the Criminal Code; and, creation of an inter-institutional system for monitoring of the implementation of Security Council Resolution 1325, following the international human rights standards and the recommendations issued by different bodies of United Nations.

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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.*

See **Annex I** attached below (page 17 onwards).

2. *Based on the wording of those provisions, is the provided definition of rape:*
 1. *Gender specific, covering women only* **NO**

⁵⁸ Corporación Sisma Mujer. [Access to justice for women victims of sexual violence Sixth Follow-Up Report on Car 092 of 2008 and First Follow-Up Report on Car 009 of 2015](#), Reserved Annexes. Follow-up table to Constitutional Court Orders 092 and 009.

⁵⁹ *Ibid.*

⁶⁰ Fiscalía General de la Nación, respuesta a derecho de petición, rad. 20159430000541, 23 de julio de 2015.

2. *Gender neutral, covering all persons* **YES**
3. *Based on the lack of consent of victim* **NO**
4. *Based on the use of force or threat* **YES**, specifically through the use of “violence”
5. *Some combination of the above.* **NO**
6. *Does it cover only vaginal rape?* **NO**
7. *Does it cover all forms of penetration? If yes, please specify.*
YES, according to Article 212 of the Criminal Code, ‘carnal access’ is “understood as the penetration of the penis by anal, vaginal or oral routes, as well as vaginal or anal penetration of any other part of the human body or other object.”
8. *Is marital rape in this provision explicitly included?* **NO**
9. *Is the law silent on marital rape?* **NO**, marital rape is an aggravating factor.⁶¹
10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?*
YES. In **Judgement C-285/97**⁶² the Constitutional Court of Colombia considered the constitutionality of Articles 22 and 25 of the Law 294 of 1996 that criminalised domestic violence and prescribed a lower sanction for sexual violence between spouses respectively.

The Constitutional Court held that the sexual freedom of the spouse is not diminished by the fact of marriage. A marriage results in the acquisition of civil duties, not in the alienation of a person’s rights to sexual freedom and dignity of person. Such legal rights cannot be understood to be diminished by the existence of a marital bond, in fact, or by simple prior sexual knowledge.

The Constitutional Court declared Article 25 unconstitutional for discriminating against married individuals by prescribing lower sanctions. It held that sexual violence between spouses should also be governed under Articles 205 to 210 of

⁶¹ Art. 211.5, Act 599 of 2000.

⁶² Constitutional Court of Colombia, [Judgement C-285/97](#), June 5th, 1997.

the Criminal Code, which provide a higher sanction than in Article 25 of the Law 294 of 1996.

11. *Is marital rape excluded in the provisions, or is marital rape not considered as a crime? 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 old, according to Article 208 of the Criminal Code that criminalises ‘carnal access’ with a minor under fourteen years of age.

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.*

#	Offence	Provision	Prescribed sanction
1	Violent Carnal Access	Article 205 of the Criminal Code	Punishable by imprisonment from twelve (12) to twenty (20) years.
2	Violent Sexual Act	Article 206 of the Criminal Code	Punishable by imprisonment from eight (8) to sixteen (16) years.
3	Carnal Access Or Sexual Act In Person Rendered Incapable of Resisting	Article 207 of the Criminal Code	Punishable by imprisonment of twelve (12) to twenty (20) years. If a sexual act other than carnal access is performed, the penalty shall be from eight (8) to sixteen (16) years of imprisonment.
4	Abusive Carnal Access With A Minor Under Fourteen Years of Age	Article 208 of the Criminal Code	Punishable by imprisonment of twelve (12) to twenty (20) years.
5	Sexual Acts With A Minor Under Fourteen	Article 209 of the Criminal Code	Punishable by imprisonment from nine (9) to thirteen (13) years.

	Years Of Age		
6	Carnal Access Or Abusive Sexual Act With A Person Unable to Resist	Article 210 of the Criminal Code	Punishable by imprisonment from twelve (12) to twenty (20) years. If access is not made, but various sexual acts of him, the penalty will be from eight (8) to sixteen (16) years.
7	Sexual Harassment	Article 210-A of the Criminal Code	Punishable by imprisonment from one (1) to three (3) years.
8	Violent Carnal Access In A Protected Person	Article 138 of the Criminal Code	Punishable by imprisonment for one hundred sixty (160) to three hundred twenty-four (324) months and fined from six hundred sixty-six point sixty-six (666.66) to one thousand five hundred (1500) times the current monthly minimum wage.
9	Abusive Carnal Access In A Protected Person Under The Age Of Fourteen	Article 138A of the Criminal Code	Punishable by imprisonment from one hundred sixty (160) to three hundred twenty-four (324) months and fined from six hundred sixty-six point sixty-six (666.66) to one thousand five hundred (1,500) times the current monthly minimum wage.
10	Violent Sexual Acts On A Protected Person	Article 139 of the Criminal Code	Punishable by imprisonment for sixty-four (64) to one hundred and sixty-two (162) months and fined one hundred and thirty-three point thirty-three (133.33) to seven hundred and fifty (750) times the current monthly minimum wage.
11	Sexual Acts With A Protected Person Under The Age Of Fourteen	Article 139A of the Criminal Code	Punishable by imprisonment for sixty-four (64) to one hundred and sixty-two (162) months and fined one hundred and thirty-three point thirty-three (133.33) to seven hundred and fifty (750) times the current monthly minimum wage.

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?*

According to Article 97 of the Criminal Code, a judge may make an award for compensation for damages when such damages are derived from punishable conduct. “[T]he judge may indicate as compensation, an equivalent amount, in national currency, up to one thousand (1000) monthly legal minimum wages. This appraisal will be made taking into account factors such as the nature of the conduct and the magnitude of the damage caused. Material damage must be proven in the process”. The Code of Criminal Proceedings lays out the process for seeking these reparations for damages caused by criminal conduct in Chapter IX, arts 103-109. This process is undertaken after the criminal proceedings are completely exhausted and covers both material and moral damages originating from punishable conduct.

Aggravating and mitigating circumstances

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

Article 211 of the Colombian Criminal Code lists the aggravating circumstances in sexual violence cases as, when:

- a. The conduct is committed with the help of another or other people.
- b. The person responsible has any character, position or position that gives him or her particular authority over the victim or prompts her to place her trust in him.
- c. Contamination of sexually transmitted disease occurs.
- d. It will be carried out on a person under fourteen (14) years of age.
- e. The conduct will be carried out on a relative up to the fourth degree of consanguinity, fourth degree of affinity or first civil, on a spouse or partner or permanent partner, or against any person who is permanently integrated into the domestic unit, or taking advantage of the trust placed by the victim in the author or in one or more of the participants. For the purposes provided for in this article, the affinity will be derived from any form of marriage or free union.
- f. Pregnancy occurs.
- g. If it is committed against people in vulnerable situations due to their age, ethnicity, physical, mental or sensory disability, occupation or trade.
- h. If the act is committed with the intention of generating social control, fear or obedience in the community.

Additional general aggravating circumstances are enlisted in Article 58 of the Criminal Code.

1. *Is rape by more than one perpetrator an aggravating circumstance?* **YES.**
 2. *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.**
 3. *Is rape by spouse or intimate partner an aggravating circumstance?* **YES**
9. *Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify.*
YES, while there are no specific mitigating circumstances in rape cases, general principles on mitigation during sentencing apply in rape cases as well. Articles 55-57 of the Criminal Code enlist these mitigating circumstances. Among others they include lack of a criminal record, voluntary repair of damage, mentally inferior conditions and conduct under the influence of profound situation of marginality etc.
 However these mitigating factors are inapplicable in cases of crimes of sexual freedom committed against childrens and adolescents pursuant to Article 199 of Law 1098 of 2006 (Code of Childhood and Adolescence). Furthermore, even in cases not covered by the above exception, the courts tend to not take into account mitigating circumstances and other procedural benefits when dealing with crimes against sexual freedom, including rape.
10. *Is reconciliation between the victim and the perpetrator allowed as part of a legal response?* **NO** *If so, at what stage and what are the consequences?* **N/A**
1. *Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?* **NO**
11. *Is there any provision in the criminal code that allows for the non-prosecution of the perpetrator? If yes, please specify.* **NO**
1. *if the perpetrator marries the victim of rape?* **NO**
 2. *if the perpetrator loses his “socially dangerous” character or reconciles with the victim?* **NO**

Prosecution

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

14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?
NO

15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?
NO

16. Please provide information on the statute of limitations for prosecuting rape.

Pursuant article 83 of the Criminal Code, rape is subjected to a specific status of limitation of 20 years from the moment that the victim reaches 18 years old.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?

YES, in the case of minors, the period of limitation only begins to run when the minor reaches the age of majority and runs for twenty years.⁶³

18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? If yes, please specify. **NO**

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial?

YES. While not specifically stated for rape victims, all victims have the right to protection of their privacy and it is the responsibility of the office of the Attorney General to adopt the measures necessary for the care of the victim.⁶⁴ Particularly in case of victims of sexual assaults, the hearings are not to be held in public.⁶⁵ Furthermore, according to Article 149, in cases of “crimes against sexual freedom and training, sexual violence and intrafamily violence, the judge may, at the request of any of the intervening parties in the process, order the holding of hearings closed to the public.”

Additionally, a women's sexual history is inadmissible/not relevant proof in the framework of a criminal proceeding.⁶⁶ The Colombian Constitutional Court has held that in cases where sexual crimes are investigated, the victim’s right to privacy must be respected. It further asserted that “(...) no evidence or practice that affects the privacy of the person who was assaulted can be invoked. The judicial authorities must weigh up the procedural burdens of the accused against the fundamental rights of the victim”.⁶⁷

⁶³ Art. 83, Law 599 of 2000.

⁶⁴ Arts 11,133, Law 906 of 2004.

⁶⁵ Art. 155, Law 906 of 2004.

⁶⁶ General Prosecutor Office of Colombia. [Protocol of criminal investigation on sexual violence](#).

⁶⁷ Colombian Constitutional Court. [Sentencia T-126/18](#). April 12, 2018, para. 4.5.3

In that sense, the Court stated that if the intrusion into the victim's intimate life is only aimed at inferring an alleged consent from inferences based on prior or subsequent private relationships other than the one under investigation, such intrusion does not serve a compelling purpose and must therefore be rejected. Thus, evidence that involves an “unreasonable, unnecessary, and disproportionate interference in the victim's intimate life” and that seeks to challenge the moral fitness of the victim with social prejudice must be excluded.⁶⁸

20. *Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?*

YES. Article 206A lays down the specific mechanism through which forensic interview of child victims of sexual violence is conducted. The mechanism includes the use of specific and trained personnel for conducting the interview and it is to be in the presence of a legal representative/guardian of the victim, in a ‘Gesell Chamber’. The provision further states that preferably these child victims be interviewed only once. While there are no similar provisions in the procedural criminal law that specifically ban the revictimization for adult victims, the general principles point out that all the victims should be treated with dignity. Article 17 of the Law 1719 of 2004 enshrines an obligation to verify and avoid possible scenarios of revictimisation. It states that, “[t]he actions carried out by judicial officials must respect at all times the dignity of victims of sexual violence and attend to their needs in such a way that they do not constitute acts of re-victimization.”

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity? YES, both.*

22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts? NO*

23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES.⁶⁹*

24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES.*

Data

25. *Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.*

⁶⁸ *Ibid.*

⁶⁹ Art. 16, Law 1719 of 2014.

According to the data presented by the Commission of Gender Equity in 2019, “in 2019, 98,000 women reported complaints about gender violence, of which 22,150 were for the crime of sexual violence; 10,450 of them were minors between 10 and 14. [E]very 30 minutes a woman is victim of sexual violence, that is, every hour 2 women are violated and (every day) 48 women are victims of this scourge”⁷⁰

Source. Sisma Mujer (Colombian NGO)

Bulletin No. 19 | March 8, 2020: International Women's Day, April 16, 2020 (A translated version of this report will be included as annex).

Other sources such as the National Institute of Legal Medicine and Forensic Sciences (INML-CF)⁷¹ assert that “[i]n 2019, 25,695 medical-legal exams were performed for alleged acts of sexual violence. Of the total, 22,115 corresponded to women, or 86.07%; and 3,580 to men, or 13.93%. This meant that, for every man attacked, at least 6 women were victims of sexual violence. At least one woman was sexually assaulted every 24 minutes. With respect to the behavior of sexual violence, from 2018 to 2019 there is a decrease of 0.87% from 22,309 alleged cases of sexual violence against women in 2018, to 22,115 cases by 2019”.

Table 2 Sexual violence against women. 2018 -2019				
Year	Frequency	Women victims	Ratio of women to men	Percentage change from previous year
2018	24 minutes	1,02	5,94/ 1	+ 9,26%
2019	24 minutes	1,01	6,18/ 1	-0,87%

Source: Produced by Corporación Sisma Mujer from information of INML-CF. National Reference Centre Group on Violence. Forensis Data for Life. Tool for the interpretation, intervention and prevention of injuries of external cause in Colombia. 2017 and 2018 and Preliminary information panels on non-fatal injuries of external cause in Colombia. January to December 2019. The information for 2019 is subject to change due to updates.

Of the 22,115 cases registered by the INML-CF in 2019, 18,927 correspond to girls and adolescents, that is, 85.58% of the total number of women assaulted, which indicates that every 28 minutes at least one girl or adolescent was sexually assaulted. Within this group, girls aged 10-14 are the most affected (48.43%), followed by those aged 5-9 (25.98%).⁷²

⁷⁰ https://caracol.com.co/radio/2020/05/25/nacional/1590433432_999569.html

⁷¹ According to the data presented by The National Institute of Legal Medicine and Forensic Science, Report Forensis 2018 “26,065 cases were reported in 2018, 2,267 more than in 2017. 87.45% of the victims are children and adolescents.”, at p. 10, available at: <https://www.medicinalegal.gov.co/documents/20143/386932/Forensis+2018.pdf/be4816a4-3da3-1ff0-2779-e7b5e3962d60>

⁷² Ibid. at p. 11.

As has been documented, the presumed aggressors are people close to the victims, as shown by the fact that, of the 18,927 cases of sexual violence against children and adolescents reported in 2019, in only 633 cases (3.34%) was the presumed aggressor registered as unknown, in 9,749 cases (51.51%) the presumed aggressor was a family member and in 3,505 cases he was an acquaintance (18.51%). Another revealing figure is that in 14,671 cases of sexual violence against children and adolescents, corresponding to 77.51% of the total, housing is reported as the scene of the victimising event.⁷³

Table 3 Sexual violence by sex and age range 2019						
Age range	Sex	2019	of the annual total	Annual total	Total girls and adolescents (women)	Total women (22,115)
(00-04)	Women	2117	77,15	2744	11,19	9,57
	Men	627	22,85		NA**	NA
(05-09)	Women	4917	79,31	6200	25,98	22,23
	Men	1283	20,69		NA	NA
(10-14)	Women	9166	89,47	10245	48,43	41,45
	Men	1079	10,53		NA	NA
(15-17)	Women	2727	90,24	3022	14,41	12,33
	Men	295	9,76		NA	NA
Total children and adolescents*	Women	18927	85,21	22211	100	85,58
	Men	3284	14,79		NA	NA

Source: Produced by Corporación Sisma Mujer from information of INML-CF. National Reference Centre Group on Violence. Forensic Data for Life. Tool for the interpretation, intervention and prevention of injuries of external cause in Colombia. 2017 and 2018 and Preliminary information panels on non-fatal injuries of external cause in Colombia. January to December 2019. The information for 2019 is subject to change due to updates.

⁷³ Ibid.

Figure 1 Behaviour of sexual violence against women in Colombia. 2008 - 2019



Source: Produced by Corporación Sisma Mujer from information of INML-CF. National Reference Centre Group on Violence. Forensic Data for Life. Tool for the interpretation, intervention and prevention of injuries of external cause in Colombia. 2017 and 2018 and Preliminary information panels on non-fatal injuries of external cause in Colombia. January to December 2019. The information for 2019 is subject to change due to updates.

The graphic shows an increase of 24.03% in the number of women victims of sexual violence, from 17,830 cases in 2008 to 22,115 in 2019.⁷⁴

Regarding the behaviour of sexual violence for the current year, during January 2020, 1,845 medical-legal examinations were carried out for alleged acts of sexual violence. Of these, 1,591 corresponded to women, i.e. 86.23% of the total, and 254 to men, i.e. 13.77%. This represents a female-to-male ratio of 6:1. This meant that approximately every 28 minutes a woman was sexually assaulted during January 2020. From 2019 to 2020 (January) there is an increase of 0.89% of female victims from 1,577 reported cases in January 2019 to 1,591 in the same period in 2020.⁷⁵

⁷⁴ *Ibid.* at p. 12.

⁷⁵ *Ibid.* at p. 13.

Table 4 Sexual violence against women 2019 - 2020 (January)			
Year	Frequency	Women victims	Percentage change from year to year previous
2019	28.4 minutes	1,00	-0,25%
2020	28 minutes	1,00	+ 0,89%

Source: Produced by Corporación Sisma Mujer from information of INML-CF. National Reference Centre Group on Violence. Preliminary information on non-fatal injuries of external cause in Colombia. January 2018, 2019 and 2020. The information is preliminary and subject to change due to updates.

Table 11 Crimes against women's freedom and sexual integrity 2018 - 2019				
Year	Frequency	Women victims	Ratio of women to men	Percentage change from previous year
2018	3.6 p.m.	1,00	15,2/1	+ 2,55%
2019	23.3 hours	1,00	9,6/1	-33,2%

Source: Prepared by Corporación Sisma Mujer from the information of the Single Registry of Victims (RUV) available on the website: <https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394>. Cut-off date: 31 January 2020. Information is subject to change due to updates.

Sexual violence in the context of armed conflict in transitional justice

Despite the widespread knowledge that "sexual violence against women is a common, widespread, systematic and invisible practice in the context of the Colombian armed conflict"⁷⁶, to date, the 627 cases⁷⁷ of the Annexes reserved including 092 of 2008 and 009 of 2015 are not covered by the Special Jurisdiction for Peace.

In response to the Follow-up Committee, the JEP indicates that only 17 cases (7 cases from Order 098 of 2013 and 10 cases from Order 009 of 2015), which is equivalent to 2.7% of the cases from the Orders, may eventually come under the jurisdiction of the JEP

⁷⁶ Constitutional Court of Colombia (2008). Judge-Rapporteur Manuel José Cepeda Espinosa. Order 092 of 2008. P. 24.

⁷⁷ Follow-up table to Autos 092 of 2008 and 009 of 2015. Reserved Annexes of the Constitutional Court. Access to justice for women victims of sexual violence. Sixth Report on Follow-up to Order 092 of 2008 and First Report on Follow-up to Order 009 of 2015, Reserved Annexes. (2016). Available at: <https://www.sismamujer.org/wp-content/uploads/2018/06/2016-AUTO-SEXTO-WEB.pdf>

because they are related to Case 07 “Recruitment and Use of Children in Armed Conflict”⁷⁸

Other

26. *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.*

The gender perspective in the judicial system

Some of the remaining challenges in the framework of the criminal proceedings in Colombia are:

- Misinterpretation and application of the components of sexual crimes. The difference between some of the sexual crimes is not very clear, often leading to confusion in punishable conduct. This confusion is most evident in ‘sexual crimes with a person unable to resist’, in Article 207 of the Criminal Code and ‘carnal access or abusive sexual act with a person unable to resist’ in article 210 of the Criminal Code. As a result of this confusion, errors of congruence have been made that have even led to the acquittal of the aggressors.
- The criminal types of consummated or attempted sexual crimes are unknown, and the attempt to have carnal access to the crime of a consummated sexual act is reduced, in contravention of the Criminal Code.
- The non-recognition of ‘attempt’ crimes results in protection of the accused to the detriment of the rights of the victims.
- The rights protected are sexual freedom, integrity and education. The case law does not develop a uniform line in regard to what should be understood as sexual freedom and when should be recognised as sexual autonomy. Although the law has not restricted sexual freedom for women over 14 and under 18, some Constitutional Court decisions have held that women in this age range cannot determine their sexuality. Also, in the area of sexual autonomy, there have been decisions that establish that sexual formation ends at the age of 14 and therefore this legal right is not affected for women victims over this age. This aspect deserves to be studied by the judiciary because an assertion of this order requires a deeper understanding of what sexual autonomy means.
- In regard to the legal analysis of the element ‘violence’, the judicial practice has set a high bar before the victims. It requires that the victim must act in a certain way in order to be able to say that the element of ‘violence’ was satisfied (resisting, fleeing or asking for help); and that violence occurred must emerge as overwhelming

⁷⁸ Response of 4 March 2020. File number: 20201700102571 to the request submitted by the Follow-up Committee for Cars 092 of 2008 and 009 of 2015. Reserved Annexes of the Constitutional Court. Page 5.

conclusion to the judge leaving him without a doubt as to whether the victim could have done something to prevent the act (such as running, screaming, resisting).

- If the victim does not behave in the manner expected by the judge, the absence of her will or the effectiveness of the means used to subdue her is called into question, her consent is implied and the doubts are resolved in favor of the defendant.
- Jurisprudence states that retraction by minor victims of sexual crimes is permissible; the court is to take into account the context in which the retraction took place and the socio-family conditions are analyzed to verify if the exculpatory statement was spontaneous, free and voluntary. However, similar access is not afforded to adult women wishing to make retractions.
- The Supreme Court has developed important jurisprudence in which the responsibility of the perpetrator is established even if there is no physical evidence. However, this position is not always followed by the courts and other judicial actors who continue to rely on scientific evidence to establish ‘inability to resist’ or hymen rupture to verify penetration.

For conflict-related sexual violence:

- In the context of the current transitional justice process in Colombia, there are several big challenges facing victims of sexual violence and their rights to truth, justice and reparation. One of the main challenges is the documentation of these sexual crimes. It is pivotal that the Special Jurisdiction for Peace (JEP) opens a national case for sexual and reproductive violence of the victims during the armed conflict in the second round of prioritisation defined in **Legislative Act 01 of 2017 (constitutional reform establishing the System of Truth, Justice, Reparation and Non Repetition)**, in order to guarantee justice for the thousands of LGBT women, girls and people who were victims of sexual violence during the Colombian armed conflict.

Obstacles to access to sexual and reproductive health:

- The effects on the sexual and reproductive health of the victims are disproportionate and directly linked to the acts of sexual violence. Faced with this situation, the response of the Colombian State has been precarious, which reinforces the seriousness of these consequences. This was verified by the Court in Court Order 009, which showed that serious difficulties persist in access to testing and treatment for sexually transmitted diseases and in availing access to voluntary termination of pregnancy, which is often unavailable due to economic reasons.

Annex I: Criminal Law provisions on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification)

Criminal Code: Law 599 of 2000

Article 205. Violent carnal access.

Anyone who makes carnal access with another person through violence, will incur in prison from twelve (12) to twenty (20) years.

Article 206. Violent sexual act.

Anyone who performs a sexual act other than carnal access through violence on another person, will incur in prison from eight (8) to sixteen (16) years.

Article 207. Carnal access or sexual act in person rendered incapable of resisting.

Anyone who makes carnal access to a person whom he has made incapable of resisting or in a state of unconsciousness, or in conditions of mental inferiority that prevent him from understanding the sexual relationship or giving his consent, will incur in prison from twelve (12) to twenty (20) years.

If a sexual act other than carnal access is performed, the penalty will be eight (8) to sixteen (16) years.

Article 208. Abusive carnal access with a minor under fourteen years of age.

Anyone who carnally accesses a person under fourteen (14) years of age will incur in prison from twelve (12) to twenty (20) years.

Article 209. Sexual acts with a minor under fourteen years of age.

Whoever performs various sexual acts of carnal access with a person under fourteen (14) years of age or in their presence, or induces them to sexual practices, will incur in prison for nine (9) to thirteen (13) years.

Article 210. Carnal access or abusive sexual act with a person unable to resist.

Anyone who carnally accesses a person in a state of unconsciousness, or who suffers from a mental disorder or who is unable to resist, will incur in prison from twelve (12) to twenty (20) years.

If access is not made, but various sexual acts of him, the penalty will be from eight (8) to sixteen (16) years.

Article 210-A. Sexual harassment.

Whoever, for the benefit of himself or a third party and using his manifest superiority or authority or power relations, age, sex, work, social, family or economic position, harasses,

persecutes, harasses or physically or verbally harasses, for sexual purposes not consented, to another person, will incur a prison term of one (1) to three (3) years.

Article 211. Circumstances of punitive aggravation

The penalties for the crimes described in the previous articles will be increased from one third to one half, when:

1. The conduct is committed with the assistance of another or other persons.
2. The person responsible has any character, position or position that gives him or her particular authority over the victim or encourages her to place her trust in him.
3. Contamination of sexually transmitted disease occurs.
4. It will be done on a person under fourteen (14) years old.
5. The conduct will be carried out on a relative up to the fourth degree of consanguinity, fourth of affinity or first civil, on a spouse or partner or permanent partner, or against any person who is permanently integrated into the domestic unit, or taking advantage of the trust placed by the victim in the author or in one or more of the participants. For the purposes provided in this article, the affinity will be derived from any form of marriage or free union.
6. Pregnancy occurs.
7. If it is committed on people in vulnerable situations due to their age, ethnicity, physical, mental or sensory disability, occupation or trade.
8. If the act is committed with the intention of generating social control, fear or obedience in the community.

Article 212. Carnal access

For the purposes of the behaviors described in the previous chapters, carnal access means penetration of the penis by anal, vaginal or oral route, as well as vaginal or anal penetration of any other part of the human body or other object.

Article 138. Violent carnal access in a protected person.

Anyone who, on the occasion and during the development of an armed conflict, carries out carnal access by means of violence to a protected person shall incur in prison from one hundred sixty (160) to three hundred twenty-four (324) months and a fine of six hundred sixty-six point sixty-six (666.66) to one thousand five hundred (1500) current legal monthly minimum wages. For the purposes of this Article, carnal access shall be understood as the provisions of Article 212 of this code.

Article 138A. Abusive carnal access in a protected person under the age of fourteen.

Anyone who, on the occasion and during the development of an armed conflict, carnally accedes to a protected person under fourteen (14) years of age, shall incur in prison from one hundred sixty (160) to three hundred twenty-four (324) months and a fine of six hundred sixty-six point

sixty and six (666.66) to one thousand five hundred (1,500) current legal monthly minimum wages.

Article 139. Violent sexual acts on a protected person.

Anyone who, on the occasion and during the development of an armed conflict, performs a sexual act other than carnal access, through violence against a protected person, will incur in prison of sixty-four (64) to one hundred and sixty-two (162) months and a fine of one hundred thirty three point thirty three (133.33) to seven hundred fifty (750) current legal monthly minimum wages.

Article 139A. Sexual acts with a protected person under the age of fourteen.

Anyone who, on the occasion and during the development of an armed conflict, performs various sexual acts of carnal access with a protected person under fourteen (14) years of age or in their presence, or induces them to sexual practices, will incur in prison of sixty-four (64) to one hundred sixty-two (162) months and a fine of one hundred thirty-three point thirty-three (133.33) to seven hundred fifty (750) current legal monthly minimum wages.

Law 1719 of 2014 (on Access to Justice and Other Matters for Victims of Sexual Violence and Especially of Sexual Violence Related to the Armed Conflict)

Article 15. Crimes Against Humanity as a Judicial Truth.

Such acts of sexual violence shall be understood as "crimes against humanity" when committed as part of a widespread or systematic attack against the civilian population and with knowledge of such an attack, in accordance with the definitions of the Article 7 of the Rome Statute and the elements of the crimes developed from that Statute.

The competent judicial authority that carries out the investigation and the judgment shall state that the conduct(s) by which it is investigated or judged is of humanity, when so established.

Article 16. Modify the second paragraph of article 83 of Act 599 of 2000 as amended by Act 1426 of 2010 in the following terms:

The term of prescription for conduct punishable by enforced disappearance, torture, homicide of a member of a trade union organization, homicide of human rights defender, murder of journalist and forced displacement will be thirty years (30) years.

In the conduct of permanent execution the term of limitation shall begin to run from the perpetration of the last act. Criminal action for crimes of genocide, humanity and war crimes will be imprescripted.

Article 20. Competition.

Crimes of sexual violence may not be investigated through military criminal jurisdiction.

--X--

India

Summary

India underwent substantial rape law reform following the 2012 Delhi gang rape and murder and progress was made on several fronts. Based on the recommendations of the Justice Verma Committee the definition of rape was amended to include non-vaginal forms of rape, a victim compensation scheme was set up, the practice of two-finger rape test was abolished, rape shield provisions were included and punishment for aggravating factors was enhanced. However these changes were not without problems of their own. The law increased the age of consent to 18 years, permitted the award of death penalty in cases that resulted in the death of the rape victim and remained silent on the question of marital rape. Furthermore, no effort was made to make rape provisions gender neutral although child sexual abuse is; the provisions associated with rape in the Indian Penal Code continue to recognise only female victims.

Despite those significant amendments,, marital rape continues to be an exception to the definition of rape. At present, marital rape can only be prosecuted as (marital) cruelty and the protections afforded to rape victims are not available to survivors of marital rape. Another recommendation of the Justice Verma Committee that was overlooked by the Indian government in its rape law reform was the repeal of the Armed Forces Special Powers Act (AFSPA). The AFSPA protects members of the armed forces from criminal prosecution and has created an environment of impunity in India where they are deployed for internal security purposes. The Committee had noted that “impunity for systematic or isolated sexual violence in the process of Internal Security duties [wa]s being legitimized by the Armed Forces Special Powers Act”.⁷⁹

In addition to the above, there are several practical obstacles to overcoming impunity for sexual violence. Inconsistency in jurisprudence has created confusion regarding the effect of delay in reporting. Despite Supreme Court decisions that state that delay in reporting an incident of rape is not to be interpreted against the victim, decisions of various lower courts suggest otherwise. Even delays as small as a day have resulted in acquittals. Furthermore, in spite of decisions that state that reconciliation between victim and accused cannot be legally recognised, in practice, courts in India routinely permit disposal of cases or relaxation of bail conditions on the grounds that the victim and accused have reconciled. In the absence of procedural safeguards for the practice of reconciliation and prevention of coercion, victims are often forced to accept reconciliation terms, especially in the form of marriage to the accused due to the prevailing patriarchal notions in the society.

Rape statistics maintained by the National Crime Records Bureau show an upward trend in reporting of rape cases and conviction rates remain at an abysmally low rate of 25-30%. With high acquittal and pendency rates, India is far away from ending impunity for sexual violence.

⁷⁹ <https://thewire.in/culture/rape-security-forces-afspa>

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.*

See **Annex I** attached below (page 18 onwards).

2. *Based on the wording of those provisions, is the provided definition of rape:*
 1. *Gender specific, covering women only* **YES**
 2. *Gender neutral, covering all persons* **NO**
 3. *Based on the lack of consent of victim* **YES**
 4. *Based on the use of force or threat* **YES**
 5. *Some combination of the above.* **YES**
 6. *Does it cover only vaginal rape?* **NO**
 7. *Does it cover all forms of penetration? If yes, please specify.*
YES, a man's use of penis, any object, or part of the body, any part of the victim's body or mouth. (Section 375 if the Indian Penal Code)
 8. *Is marital rape in this provision explicitly included?* **NO**
 9. *Is the law silent on marital rape?* **NO**
 10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?* **NO**
 11. *Is marital rape excluded in the provisions, or is marital rape not considered as a crime?*

YES. According to Section 375 of the Indian Penal Code (IPC) sexual intercourse or sexual acts by a man with his wife are not rape.⁸⁰ Therefore within the confines of a marital relationship, there is no rape.

However, under Section 498A of the IPC, an offence dealing with marital cruelty, a husband can be charged with subjecting his wife to cruelty by committing marital rape. However, since Section 498A carries a maximum punishment of only three years there is a limitation period of three years within which the offence of cruelty needs to be reported.⁸¹ In addition to the offence of cruelty within which marital rape is prosecuted, non-consensual sexual intercourse during separation is also recognised as an offence. Section 376A of the IPC provides that forced sexual intercourse by a man with his wife who is living separately (either under a decree of separation or otherwise) is a criminal offence. This offence is punishable with up to a maximum of two years of imprisonment and with fine. The period of limitation for reporting the offence is three years.⁸²

Both these offences reclassify the offence of marital rape into other special, lesser offences keeping in line with the marital rape exception under Section 375 of the IPC. These provisions not only refuse to recognise the offence of rape for what it is, they also create confusion in the law which impedes justice. Therefore it is critical that the position of the law is clarified with respect to marital rape.

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?*

18 years of age. Generally, the age of consent is 18 years of age. However, the section mentioned in the previous section on marital rape- Section 375, exempted (from rape) sexual intercourse between a husband and his wife, so long as the wife was at least 15 years of age. Exception 2 of Section 375, IPC stated that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. In effect, creating an anomaly as the age of consent stands at 18 years under the Indian Penal Code as well as other statutes dealing with children, namely, Protection of Children from Sexual Offences Act (POCSO).

However, this provision has been challenged in the Supreme Court and stands modified. In *Independent Thought v. Union of India* WP(C) 382/2013 judgment dated 11.10.2017

⁸⁰ Exception 2, Section 375, Indian Penal Code.

⁸¹ Section 473, Code of Criminal Procedure.

⁸² Section 473, Code of Criminal Procedure.

the marital rape exception was read down. The Supreme Court observed that this exception is arbitrary, capricious, whimsical and violates Articles 14, 15 and 21 of the Indian Constitution and provisions of POCSO to the extent that it fixes a lower age of consent and permits forced sexual intercourse by the husband with a girl who is between the ages of 15 to 18. The Supreme Court held that Exception 2 has to be read as sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. Thus fixing the legal age for consent even within a marriage at 18 years.

5. *Are there provisions that differentiate for sexual activity between peers? If so, please provide them.*

NO. However as with commission of any offence, a minor (under the age of 18) is to be tried under Juvenile Justice (Care and Protection of Children) Act, 2015.

6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.*

S.no	Offence	Provision (Section - Act)	Prescribed Sanction
1.	Punishment for Rape	S.376(1) - IPC, 1860	Rigorous imprisonment of atleast ten years but may extend to imprisonment for life and fine.
2.	Punishment for Rape (aggravated) (custodial rape)	S.376(2) - IPC, 1860	Rigorous imprisonment of atleast ten years but may extend to imprisonment for remainder of a person's natural life ⁸³ and fine.
3.	Punishment for causing death or resulting in persistent vegetative state of victim while committing an offence under S.376 (1) and (2)	S. 376A - IPC, 1860	Rigorous imprisonment of atleast twenty years but may extend to imprisonment for remainder of a person's natural life, or death.

⁸³ Imprisonment for life is as a practice remitted to 14 years. Imprisonment for the remainder of a person's natural life cannot be remitted.

4.	Punishment for rape on woman under twelve years of age	S.376AB - IPC, 1860	Rigorous imprisonment of atleast twenty years but may extend to imprisonment for remainder of a person's natural life and fine, or death.
5.	Sexual Intercourse by husband upon his wife during separation.	S.376B - IPC, 1860	Imprisonment ranging from two to seven years and fine.
6.	Sexual intercourse by a person in authority	S.376C - IPC, 1860	Rigorous imprisonment ranging from five to ten years and fine.
7.	Gang Rape	S.376D - IPC, 1860	Rigorous imprisonment of atleast twenty years but may extend to imprisonment for remainder of a person's natural life and fine.
8.	Punishment for Gang rape on woman under 16 years of age	S.376DA - IPC, 1860	Imprisonment for remainder of a person's natural life and fine.
9.	Punishment for Gang rape on woman under 12 years of age	S.376DB - IPC, 1860	Imprisonment for remainder of a person's natural life and fine, or death.
10.	Punishment for repeat offenders (applicable for 376, 376A, 376AB, 376D, 376DA or 376DB)	S.376E - IPC, 1860	Imprisonment for remainder of a person's natural life, or death.

11.	Punishment for penetrative sexual assault of a child under the age of 18 years	S.4(1) - POCSO, 2012	Imprisonment of atleast 10 years but which may extend to imprisonment for life and fine.
12.	Punishment for penetrative sexual assault of a child under the age of 18 years	S.4(2) - POCSO, 2012	Imprisonment of atleast twenty years but which may extend to imprisonment for the remainder of natural life of that person and fine.
13.	Punishment for aggravated penetrative sexual assault of a child under the age of 18 years	S.6 - POCSO, 2012	Rigorous imprisonment for atleast twenty years, but which may extend to imprisonment for the remainder of natural life of that person and fine, or death.
14.	Punishment for sexual assault (non penetrative) of a child under the age of 18 years	S.8 - POCSO, 2012	Imprisonment ranging from three to five years and fine.
15.	Punishment for aggravated sexual assault (non-penetrative) of a child under the age of 18 years	S.10 - POCSO, 2012	Imprisonment ranging from five to seven years and fine.

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?*

The Code of Criminal Procedure sets up a 'Victim Compensation Scheme' to deal with the monetary issues surrounding reparation and rehabilitation. Section 357A of the Criminal Procedure Code requires every State Government to set up their respective

Victim Compensation Scheme. The aim of this scheme is to provide “funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation”.⁸⁴ According to this provision, when the court makes a recommendation for compensation to the victim, the legal services authorities in the state have to decide the quantum of compensation to be awarded. Compensation under this scheme is also available when the case has not been successfully proven against the accused,⁸⁵ or even when the offender could not be traced or identified.⁸⁶ It must be noted that this compensation scheme is general and not specific to victims of rape or sexual violence. To address the disparity in compensation amounts being paid by different state governments, the central (federal) government initiated the Central Victim Compensation Fund scheme in 2015.⁸⁷ This scheme sets the minimum amount of compensation to victims of various crimes across the different State Victim Compensation Schemes. For the crime of rape, the minimum compensation amount has been fixed at 3,00,000 INR (~4,070 USD).

In 2018, the Supreme Court approved the National Legal Services Authority (NALSA)’s compensation scheme for women victims/survivors of sexual assault/other crimes.⁸⁸ This scheme is in addition to the already existing state compensation scheme mentioned above and is specially designed for victims/survivors of sexual assault/other crimes. The NALSA scheme has increased the minimum compensation amount for rape (as fixed by Central Victim Compensation Fund Scheme Guidelines) to 4,00,000 INR (~5,430 USD) and 5,00,000 INR (~6,790 USD) for gang rape.

Aggravating and mitigating circumstances

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

Please refer to the sanctions table mentioned above for aggravated forms of rape.

1. *Is rape by more than one perpetrator an aggravating circumstance? YES*⁸⁹
2. *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*

⁸⁴ Section 357A, Code of Criminal Procedure.

⁸⁵ Section 357A (3), Code of Criminal Procedure.

⁸⁶ Section 357A (4), Code of Criminal Procedure.

⁸⁷ Government of India, Central Victim Compensation Fund Guidelines, 2015, https://www.mha.gov.in/sites/default/files/CVCFGuidelines_141015_2.pdf.

⁸⁸ NALSA, Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes - 2018, https://wcd.nic.in/sites/default/files/Final%20VC%20Scheme_0.pdf.

⁸⁹ Section 376D, Indian Penal Code.

3. *Is rape by spouse or intimate partner an aggravating circumstance?*

NO. As stated above in the section on marital rape, sexual intercourse without the wife's consent during separation has a lower punishment than the standard offence of rape.⁹⁰

9. *Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify.*

YES, while there are no specific mitigating circumstances in rape cases, general principles on mitigation during sentencing apply in rape cases as well.

India does not have a coherent sentencing policy or legal provisions that cover the mitigating factors. Therefore the factors that are used as mitigating vary from judge to judge. Some that are considered are:⁹¹

- a. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation;
- b. The age of the accused;
- c. The chances of re-offending or of reform and rehabilitation;
- d. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct;
- e. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance;
- f. Where the crime was not committed in a pre ordained manner; or
- g. Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness.

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? NO*

1. *Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?*

YES. Although the legal position does not support reconciliation between a victim and perpetrator, the practice existing in the society is in stark contrast to this legal position. The overarching legal position is that the Supreme Court in *Gian Singh v. State of Punjab* (2012)10 SCC 303, said that in case of serious offences like rape, the settlement between the victim and the offender can have no legal sanction at all. The Court also observed that in such offences the criminal proceeding/First Information Report (Incident report to Police)/complaint cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. This position has been reiterated by the Supreme Court in several decisions.

⁹⁰ Section 376A, Indian Penal Code.

⁹¹ *Machhi Singh v. State of Punjab* (1983) 3 SCC 470

However, despite this legal position, in practice several allowances are made when the victim and perpetrator appear to have reconciled outside the court. The practices are not defined but often lead to legal challenges to the FIR which the complainant then does not oppose; or, relaxation in/grant of bail to the accused etc. For instance, the Orissa High Court in one instance granted bail to a rape accused for marrying the girl he had raped,⁹² and the Madras High Court infamously granted permission to have a rape case settled through mediation, citing the increasing use of alternative dispute resolution techniques in criminal cases and the scope for compromise in Hindu, Islamic and Christian personal laws.⁹³ A decision from the Gauhati High Court quashing criminal proceedings on the basis of a similar compromise noted, “The ends of justice will demand that they should be left at their will and their otherwise happy marital life should not be allowed to be disturbed by the interfering clouds of litigations looming over their heads.”⁹⁴ Common reasons cited is that the accused either offered to marry the victim or has already married the victim and not allowing compounding could have a detrimental effect on the entire life of the victim.⁹⁵

This attitude can be said to stem from the prevailing attitude in society; local village councils also play a role in these reconciliation processes. For example, take the case of a girl from Bareilly, Uttar Pradesh who was married to the man who allegedly raped and impregnated her in 2017 by village elders and her family. According to media reports, her parents, daily wage labourers, had been unable to take care of her and her child.⁹⁶

Thus, it can be deduced that although reconciliation doesn't have a place in the Indian legal system it is widely practiced in the society. The reasons for reconciliation are different, stretching from social pressure, shame, to inability to look after oneself along with many other factors.

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

1. if the perpetrator marries the victim of rape? NO

⁹² BLAPL No.4588 of 2020

⁹³ *V.Mohan vs State Represented by: The Inspector of Police, All Women Police Station, Vridhachalam, Cuddalore District*; M.P.No.2 of 2014 in Crl.A.No.402 of 2014

⁹⁴ *Md. Jahirul Maulana vs State of Assam*; Criminal Petition no. 234 of 2016

⁹⁵ <https://thelawblog.in/2020/08/06/the-legality-of-compounding-in-rape-cases-removing-the-confusion-part-ii/>

⁹⁶ <https://www.article-14.com/post/how-india-s-rape-survivors-end-up-marrying-their-rapists>

2. *if the perpetrator loses his “socially dangerous” character or reconciles with the victim?* **NO**

Prosecution

12. *Is rape reported to the police prosecuted ex officio (public prosecution)?* **YES.**

13. *Is rape reported to the police prosecuted ex parte (private prosecution)?*

YES, it can be but the private prosecutor has to act under the direction of public prosecution. The private prosecutor can also submit written arguments with the permission of the Court at the stage of final hearing.⁹⁷

14. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?*

NO. Section 265A of the Code of Criminal Procedure which defines the parameters for plea bargaining in India specifically excludes offences committed against women from its scope. However National Crime Records Bureau data shows that rape cases have been disposed off by using plea bargaining.

15. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?*

NO. As in case of rape of women, Section 265A of the Code of Criminal Procedure specifically excludes offences committed against children below the age of 14 years thematically. Additionally, cases of rape of children are specifically governed by the POCSO which prescribes a minimum punishment of 10 years imprisonment, thereby excluding those offences from plea bargaining provisions.⁹⁸

16. *Please provide information on the statute of limitations for prosecuting rape.*

Rape and other offences of a serious nature are not time-barred by limitation. An offence of rape may be reported at any time according to Section 468 of the Code of Criminal Procedure, 1973.

However, since marital rape is prosecuted not as rape but as cruelty, and rape during separation is also not prosecuted as rape but as unlawful sexual intercourse, they both carry a lesser punishment and are therefore time-barred by limitation of three years from the incident.

Furthermore, despite rape not being time-barred, delay in reporting an incident of rape can often have serious repercussions on the outcome of the case. The jurisprudence of the Supreme Court lays down that in deciding cases of rape or other forms of sexual assault,

⁹⁷ Section 301(2), Code of Criminal Procedure.

⁹⁸ Section 265A(1), Code of Criminal Procedure.

courts should not pay much emphasis to any delay in reporting the incident to the police. It has said that in sexual assault cases "[t]he reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathy with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false."⁹⁹

But, there exists a general legal presumption against the truthfulness of any complaint made to the Police if there has been an inexplicable delay in reporting such an incident. And despite the legal position laid down by the Supreme Court, a delay in reporting the incident (filing a First Information Report/FIR) is often in practice a ground for dismissal of a rape complaint. For instance, in an incident in New Delhi, the court dismissed a rape case on the basis that there was a 20 hour delay in reporting the incident to the Police.¹⁰⁰ Decisions such as this one call into question the reaffirmations made by the Supreme Court on delay in reporting being an insufficient ground for dismissal of a case. Although reporting rape, in general, is not barred by time, there are still big practical challenges when they are not reported immediately after.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?

NO. Not specifically because a child victim may report the rape after reaching adulthood using the standard process. However it is likely that the above stated observations on delay in reporting the incident to the police may also apply in such cases and prejudice the child's accusation.

18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.

NO. Although there are no mandatory requirements to proceed with the investigation and prosecution of a case, the Code of Criminal Procedure addresses with procedure for medical examination of the accused and the rape victim. Section 53A permits a medical practitioner to use force (if necessary), to examine a person accused of rape where there are "reasonable grounds" to believe that such an examination "will afford evidence as to the commission of the offence". Similarly, per Section 164A a victim of rape may be subject to medical examination. However, for medical examination consent of such a woman is required.

The Supreme Court has said that in a rape case a victim's testimony "does not require corroboration from any other evidence including the evidence of a doctor", that is, that

⁹⁹ *Karnail Singh v. State of MP* (1995) 5 SCC 518.

¹⁰⁰

<https://timesofindia.indiatimes.com/city/delhi/delay-in-filing-of-fir-delhi-fast-track-court-clears-doctor-in-rape-case/articleshow/72449173.cms>

the accused can be convicted simply on the basis of the testimony of the victim.¹⁰¹ However, in order to balance the rights of the accused and protect him from false implication, such testimony must be “absolutely trustworthy, unblemished and of sterling quality”.¹⁰²

19. *Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial?*

YES. While admissible, a victim’s sexual history is deemed ‘not relevant’ for the purposes of a criminal trial. According to Section 53(A) of the Indian Evidence Act, evidence of character or previous sexual experience of a victim are not relevant evidence on the question of victim’s consent. This section specifically protects the victims of offences or an attempt to commit an offence under sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, or 376E of Indian Penal Code, that is, the offences pertaining the sexual harassment, rape and other sexual offences.

Furthermore, criminal law provisions and Supreme Court guidelines state that in a rape trial, the anonymity of the victim must be maintained- that the identity of the victim must be withheld.¹⁰³ In order to secure the victim’s identity, there is an exception to the principle of public trial that allows rape trials to be held *in camera*,¹⁰⁴ and punishment is prescribed for disclosing the identity of the victim.¹⁰⁵

20. *Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?*

NO.

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?*

NO. However, rape or sexual assault of a woman or a minor by a member of the armed forces or security forces is recognised an aggravated form of sexual assault in the domestic criminal code.¹⁰⁶ It must be noted here however that even though rape by a member of an armed force is recognised as an aggravated form of rape, rapes committed

¹⁰¹

<https://www.hindustantimes.com/delhi/rape-victims-testimony-sufficient-sc/story-IVqA6pxtbxSyNr9eSC9MjK.html>

¹⁰²

<https://theprint.in/judiciary/sc-rules-rape-accused-can-only-be-convicted-if-victims-testimony-is-of-sterling-quality/366121/#:~:text=New%20Delhi%3A%20The%20Supreme%20Court,unblemished%20and%20of%20sterling%20quality%E2%80%9D.&text=A%20trial%20court%20had%20sentenced,upheld%20by%20the%20High%20Court.>

¹⁰³ *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384

¹⁰⁴ Section 327(2), Code of Criminal Procedure.

¹⁰⁵ Section 228A, Indian Penal Code.

¹⁰⁶ Sections 5 & 9, Protection of Children from Sexual Offences Act; Section 376(2)(c), Indian Penal Code.

by members of Indian armed forces are protected from prosecution by the Armed Forces Special Powers Act (AFSPA). The AFSPA mandates that special authorisation needs to be obtained prior to registering a complaint of rape against a member of the Indian armed forces. The special authorisation is seldom granted.

22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts?* **Not applicable**

23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?*

NO. As stated in answer to Question 16, An offence of rape may be reported at any time in accordance with Section 468 of the Code of Criminal Procedure, 1973.

24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified?* **NO.**

Data

25. *Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.*

Statistics from the [National Crime Records Bureau of India](#) (NCRB)

			Rape (2019) ¹⁰⁷	Rape (2018) ¹⁰⁸	Rape (2017) ¹⁰⁹	Rape (2016) ¹¹⁰	Rape (2015) ¹¹¹
A	Cases Investigated	Cases Reported	32,033	33,356	32,559	38947	34,651
B		Cases Investigated (Reported + Pending investigation from previous years)	45,536	47,139	46,984	55,071	50,509
C		Cases closed by Police	5,504	4,841	4,364	4,628	4,390
D		Cases where Chargesheet ¹¹² submitted	24,848	28,469	28,750	33,628	30,001

¹⁰⁷ NCRB, Crime in India Report 2019, available at: <https://ncrb.gov.in/en/crime-india-2019-0>.

¹⁰⁸ NCRB, Crime in India Report 2018, available at: <https://ncrb.gov.in/en/crime-india-2018-0>.

¹⁰⁹ NCRB, Crime in India Report 2017, available at: <https://ncrb.gov.in/en/crime-india-2017-0>.

¹¹⁰ NCRB, Crime in India Report 2016, available at: <https://ncrb.gov.in/en/crime-india-2016-0>.

¹¹¹ NCRB, Crime in India Report 2015, available at: <https://ncrb.gov.in/en/crime-india-year-2015>.

¹¹² Chargesheet is the final investigation report with the formal indictment submitted by the police to the Court accusing someone of having committed the offence in question.

E		Total cases disposed off by Police	30,470	33,382	33,181	38,387	34,391
F		Chargesheeting Rate (D/E * 100)	81.5	85.3	86.6	87.6	87.2
F	Cases Prosecuted	Total Cases for Trial (Cases chargesheeted + pending cases from previous years)	162,741	156,327	146,201	152,165	137,458
G	Cases disposed off without trial	Cases abated by Court	97	50	51	n/a	n/a
H		Cases withdrawn from Prosecution	19	17	2	0	19
I		Cases compounded ¹¹³	190	209	110	215	174
J		Cases disposed by plea bargaining ¹¹⁴	6	38	31	25	1
K		Cases quashed/rejected as invalid	96	58	40	n/a	n/a
L		Total (G+H+I+J+K)	408	372	234	240	194
M	Cases where trial completed	Discharge	1,431	1,472	824	n/a	n/a
N		Acquittal	10,630	11,133	11,453	13,813¹¹⁵	13,250¹⁶
O		Conviction	4,640	4,708	5,822	4,739	5,514
P		Total (M+N+O)	16,701	17,313	18,099	18,552	18,764
Q		Conviction Rate (O/P * 100)	27.8	27.2	32.2	25.5	29.4
R	Pendency	Cases pending trial at the end of the year	145,632	138,642	127,868	133,373	118,250

¹¹³ Compounding of criminal cases occurs after the parties - complainant and accused enter into a compromise where the complainant agrees to drop the charges against the accused. Rape is a non-compoundable offence in India however as a result of conflicting jurisprudence compounding of rape cases is being permitted on a case by case basis.

¹¹⁴ Plea bargaining is not permitted for the offence of rape. NCRB is aware of this legal position but maintains that its data is accurate.

¹¹⁵ Data for Discharge and Acquittal was combined in 2016.

¹¹⁶ Data for Discharge and Acquittal was combined in 2015.

S		Pendency Percentage (R/F * 100)	89.5	88.7	87.5	87.7	86.2
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Other

26. *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.*

There are several parallel struggles for accountability for rape cases in India practically.

Under-reporting

First, cases are under reported. Victims themselves are unwilling to report incidents of sexual assault. Family honour is associated to the women in the family and therefore an allegation of rape is also thought to bring shame to the family. Police is also hostile and unwilling to record reports of rape.

Another result of these burdens is that often reporting get delayed as the victim initially feels hesitant in coming forward. As noted above, the Supreme Court has stated that delay in reporting shall not cause prejudice to the case, often in practice, even small delays in reporting are seen to cause damage to the case of the victim. Aspersions are cast on the integrity of the complaint, why it was delayed; speculations are made that perhaps to exact revenge on the accused for some other person.

Statistical Challenges

Second and third, as seen from the statistics, India has a high rate of acquittals and pendency. Last year of all the rape cases heard, 88% remained pending and the conviction rate clocked in at 27.2%. The unwillingness of the Police to record an incident of rape also carries into the unwillingness to investigate; lacunae in investigation and lack of evidence are the most cited reasons for the high number of acquittals.¹¹⁷

Judicial pendency is also major problem in India, although not specifically for rape cases. In fact, local governments from time to time constitute fast-track courts especially designed to work on rape cases but these are entirely reliant upon the discretion of the government and are inadequate even when created to address the total number of cases.

¹¹⁷ <https://www.deccanherald.com/national/conviction-rate-for-rape-cases-is-only-272-792820.html>

Unfortunately, despite attempts to resolve this through statute, progress has not been made. Unless there is change in the attitude of policing, a shift to a more survivor-centric form of investigation, the problem of acquittals will not be solved.

Lack of a trained personnel

No institution in the criminal justice system intervening in the case of a rape: judiciary, police, prosecution, or even medical professionals receive specialised training on working with rape survivors. This leads to a complete apathy in their approach towards the victims.

Prevailing patriarchal norms are an added barrier in the workings of these institutions as they continue to ‘act in the best interest of the victim’.

Rape and Intersectionality

2020 saw the culmination of these points mentioned above in the Hathras Gangrape case. The victim was a member of the dalit community (low caste) in a small town in the province of Uttar Pradesh (UP). She was allegedly raped by four upper caste men and the case’s handling by the UP Police and government received widespread condemnation. The UP Police had delayed the arrest of the accused persons for more than 10 days after the victim made her statement and her body was forcibly cremated by them without the consent of the family. The incident has highlighted how caste dynamics continue to affect victims of sexual assault and rape in India even in 2020 and that an intersectional approach is a need of the hour.¹¹⁸

Armed Forces Special Powers Act and Rape

The Indian armed forces have special protection from prosecution for criminal offences. The Armed Forces Special Powers Act (AFSPA) requires that special permission be obtained before a criminal complaint can be made against a member of the armed forces. While this law was enacted to cushion the armed forces from prosecution while working in areas with insurgency and internal armed conflict in the course of their duties. This protection from prosecution has created wide scale impunity for sexual violence offences where AFSPA is in force: regions of the North-East and Jammu & Kashmir.¹¹⁹

¹¹⁸ <https://www.bbc.com/news/world-asia-india-54335895>

¹¹⁹ <https://thewire.in/culture/rape-security-forces-afspa>;
<https://www.hrw.org/sites/default/files/reports/INDIA935.PDF>

Annex I: Criminal Law provisions on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification)

Indian Penal Code, 1860

S. 375, IPC- Rape:

A man is said to commit "rape" if he--

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

First. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape

S. 376, IPC-Punishment for rape.

- (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which 1 [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].
- (2) Whoever,—
 - (a) being a police officer, commits rape—
 - (i) within the limits of the police station to which such police officer is appointed; or
 - (ii) in the premises of any station house; or
 - (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
 - (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
 - (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
 - (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
 - (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
 - (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
 - (g) commits rape during communal or sectarian violence; or
 - (h) commits rape on a woman knowing her to be pregnant; or
 - (i) (***)

- (j) commits rape, on a woman incapable of giving consent; or
 - (k) being in a position of control or dominance over a woman, commits rape on such woman; or
 - (l) commits rape on a woman suffering from mental or physical disability; or
 - (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
 - (n) commits rape repeatedly on the same woman,
- shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

- (a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;
 - (b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;
 - (c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);
 - (d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.
- (3) [Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.]

S. 376A-Punishment for causing death or resulting in persistent vegetative state of victim:
Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous

imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

S. 376AB-Punishment for rape on woman under twelve years of age.

Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

S. 376B Sexual intercourse by husband upon his wife during separation.

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Section 376C:

Whoever, being—

- (a) in a position of authority or in a fiduciary relationship; or
- (b) a public servant; or
- (c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
- (d) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2.—For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3.—"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.—The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in *Explanation* to sub-section (2) of section 376.

S. 376D- Gang Rape

Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

S. 376DA- Punishment for gang rape on woman under sixteen years of age

Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine.

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

Provided further that any fine imposed under this section shall be paid to the victim.

S. 376DB- Punishment for gang rape on woman under twelve years of age

Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death.

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

Provided further that any fine imposed under this section shall be paid to the victim.

S. 376E- Punishment for repeat offenders:

Whoever has been previously convicted of an offence punishable under section 376 or section 376A or (section 376AB or section 376D or section 376DA or section 376DB,) and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death)

S. 498A-Husband or relative of husband of a woman subjecting her to cruelty.

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purposes of this section, "cruelty means"—

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Protection of Children from Sexual Offences Act, 2012

S. 3, POCSO- Penetrative sexual assault.

A person is said to commit "penetrative sexual assault" if--

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

S. 4, POCSO- Punishment for penetrative sexual assault.

- (1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.
- (2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.
- (3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

S. 5, POCSO-Aggravated penetrative sexual assault.

- (a) Whoever, being a police officer, commits penetrative sexual assault on a child
 - (i) within the limits of the police station or premises at which he is appointed; or
 - (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where he is known as, or identified as, a police officer; or
- (b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--
 - (i) within the limits of the area to which the person is deployed; or
 - (ii) in any areas under the command of the forces or armed forces; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where the said person is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits penetrative sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or
- (g) whoever commits gang penetrative sexual assault on a child.

Explanation.-- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to

have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

- (h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or
- (j) whoever commits penetrative sexual assault on a child, which--
 - (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; 1***
 - (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;
 - (iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; 1***
 - (iv) causes death of the child; or
- (k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or
- (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or
- (m) whoever commits penetrative sexual assault on a child below twelve years; or
- (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or
- (o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or
- (p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or
- (q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or
- (r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or
- (s) whoever commits penetrative sexual assault on a child in the course of 3[communal or sectarian violence or during any natural calamity or in similar situations]; or
- (t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

- (u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

S. 6, POCSO- Punishment for aggravated penetrative sexual assault.

- (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.
- (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

S. 7, POCSO-Sexual Assault

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

S. 8, POCSO- Punishment for sexual assault.

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

S. 9, POCSO-Aggravated sexual assault.

- (a) Whoever, being a police officer, commits sexual assault on a child--
 - (i) within the limits of the police station or premises where he is appointed; or
 - (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where he is known as, or identified as a police officer; or
- (b) (b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child--
 - (i) within the limits of the area to which the person is deployed; or
 - (ii) in any areas under the command of the security or armed forces; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where he is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being

inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or

- (e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or
- (g) whoever commits gang sexual assault on a child.

Explanation.-- when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

- (h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or
- (j) whoever commits sexual assault on a child, which--
 - (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or
 - (ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or
- (k) whoever, taking advantage of a childs mental or physical disability, commits sexual assault on the child; or
- (l) whoever commits sexual assault on the child more than once or repeatedly; or
- (m) whoever commits sexual assault on a child below twelve years; or
- (n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or
- (o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or
- (p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or
- (q) whoever commits sexual assault on a child knowing the child is pregnant; or
- (r) whoever commits sexual assault on a child and attempts to murder the child; or

- (s) whoever commits sexual assault on a child in the course of 1[communal or sectarian violence or during any natural calamity or in any similar situations]; or
- (t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
- (u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.
- (v) whoever persuades, induces, entices or coerces a child to get administered or administers or direct anyone to administer, help in getting administered any drug or hormone or any chemical substance, to a child with the intent that such child attains early sexual maturity.

S. 10, POCSO-Punishment for aggravated sexual assault.

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

--X--

Kosovo

Summary

The Socio-economic disparities between women and men in Kosovo negatively affect the reporting of rape incidents in Kosovo. Low reporting is particularly apparent when rape occurs within the confines of a marriage, due to the social norms around marriage.

The legal framework in Kosovo is fairly progressive as far as the laws are concerned. Kosovo has integrated the Istanbul Convention in its Constitution and has amended the Criminal Code to recognise domestic violence and punish physical, psychological, or economic violence. However, albeit the solid legal framework, the fulfillment of this framework stalls at the implementation level. Furthermore, as Kosovo is unable to accede to international instruments, survivors of human rights violations, *inter alia* survivors of SGBV, have limited access to international human rights mechanisms.

Victim-blaming is widespread and normalised in court decisions and official proceedings; Judges, prosecutors, lawyers and police officers need specialised training to increase their capacity to work with survivors of sexual violence. This situation is exacerbated when the survivors and victims are ethnic minorities or from the LGBTQI+ communities due their preserving marginalisation within the Kosovar society.

Survivors of conflict-related sexual violence have legal recognition and obtain reparations from the state. However, this reparations framework is indirectly discriminatory towards the minority communities in Kosovo favouring the Albanian majority.

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.*

See **Annex I** attached below (page 17 onwards).

2. *Based on the wording of those provisions, is the provided definition of rape:*
 1. *Gender specific, covering women only* **NO**.

2. *Gender neutral, covering all persons* **YES**

3. *Based on the lack of consent of victim* **YES**

4. *Based on the use of force or threat* **YES**

5. *Some combination of the above.* **YES**

6. *Does it cover only vaginal rape?* **NO**

7. *Does it cover all forms of penetration? If yes, please specify.*

YES, The Criminal Code of the Republic of Kosovo defines a sexual act as “penetration however slight of any part of the body of a person with a sexual organ or an object for sexual purpose or the penetration however slight of the anal, oral or genital opening of a person with any object for a sexual purpose, or any other part of the body or any part of an animal.”¹²⁰

8. *Is marital rape in this provision explicitly included?*

YES. If the perpetrator ‘shares a domestic relationship’ with the victim, it is an aggravated form of rape.¹²¹ ‘Sharing a domestic relationship’ means persons who are (or were) engaged, married, co-habiting or in an extra marital union.¹²²

Moreover, Article 2, paragraph 1.2.7 of the Law on Protection against Domestic Violence defines that Domestic Violence as “one or more intentional acts or omissions when committed by a person against another person with whom he or she is or has been in a domestic relationship” including “non-consensual sexual acts and sexual ill-treatment”.

What is worth mentioning however is that due to ingrained stigma around divorce and the patriarchal norms, there are additional social barriers that discourage women from reporting the rape cases. For example, there are available public phone numbers where women can report a violation or rape of their husbands. However, not always women can use their phones as freely as to report a domestic rape due to the man dominating in the relationship.¹²³

This is aggravated by the economic situation of women in Kosovo. Kosovo has

¹²⁰ Art. 225.4, Code No. 06/L-074 Criminal Code of the Republic of Kosovo.

¹²¹ Art. 227.4.9, Code No. 06/L-074 Criminal Code of the Republic of Kosovo.

¹²² Art. 113.25.1, Code No. 06/L-074 Criminal Code of the Republic of Kosovo.

¹²³ As stated by a Human Rights Defender in an interview to a SAHR Legal Associate in December 2020.

the lowest female labour force in the Western Balkans. Women additionally struggle with the implementation of their property rights. Due to long enduring patriarchal attitudes and behaviour they give up on their rights to property (particularly the right to inherit). Women own only 15%¹²⁴ of properties in Kosovo. Bearing this in mind and the fact that the victims of marital rape usually share one household with their husbands, many women in Kosovo hesitate to report any violations, including rape, with the fear of losing shelter and financial stability.

This situation is even more exacerbated once a married couple have children. Loss of financial stability can also result in loss of custody over their children. As a result, they prefer to bear the violation.

9. *Is the law silent on marital rape?* **NO.**
10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?* **N/A.**
11. *Is marital rape excluded in the provisions, or is marital rape not considered as a crime?* **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?* **16 years of age.**¹²⁵
5. *Are there provisions that differentiate for sexual activity between peers? If so, please provide them.*
YES, Article 225.1.2 recognises that sexual intercourse between “two persons who have reached the age of fourteen (14) years and where difference in their ages does not exceed two (2) years” shall not be criminalised as statutory rape.
6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.*

S.	Offence	Provision (Article -	Prescribed sanction
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¹²⁴ Land Links, *Increasing Women’s Property Ownership and Land Rights in Kosovo*, September 2019

¹²⁵ Art. 225.1.1, Code No. 06/L-074 Criminal Code of the Republic of Kosovo

no		Act)	
1	Sexual act without consent	Art. 227.1, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of two to ten years.
2	Sexual act by threatening to reveal a fact that would seriously harm the honour or reputation of the person or persons closely connected to them	Art. 227.2, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of three to ten years.
3	Sexual act by serious threat or the threat of violence	Art. 227.3.1, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to ten years.
4	Sexual act by threat of an imminent danger to the life or body of a person	Art. 227.3.2, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to ten years.
5	Sexual act by exploiting a situation in which the person is unprotected and where his/her security is in danger.	Art. 227.3.3, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to ten years.
6	Sexual act preceded, accompanied or followed by an act of torture or inhumane treatment	Art. 227.4.1, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
7	Sexual act where the perpetrator uses force	Art. 227.4.2, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
8	Sexual act where the perpetrator causes greivous bodily injury or serious disturbance to the mental or physical health of the person	Art. 227.4.3, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
9	Sexual act where the perpetrator uses or threatens to use a weapon or a dangerous instrument	Art. 227.4.4, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.

10	Sexual act where the perpetrator intentionally causes the person to become intoxicated by alcohol, drugs or other substances	Art. 227.4.5, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
11	Sexual act where the offence is jointly committed by more than one person	Art. 227.4.6, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
12	Sexual act where the perpetrator knows that the person is exceptionally vulnerable because of age, diminished mental or physical capacity, physical or mental disorder or disability or pregnancy	Art. 227.4.7, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
13	Sexual act where the victim is between the ages of sixteen and eighteen years	Art. 227.4.8, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
14	Sexual act where the perpetrator is the parent, adoptive parent, foster parent, step parent, grandparent, uncle, aunt or sibling of the person or shares a domestic relationship with the victim	Art. 227.4.9, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
15	Sexual act where the perpetrator is a teacher, a religious leader, a health care professional, a person entrusted with such person's upbringing or care or otherwise in a position of authority over the person	Art. 227.4.10, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five to fifteen years.
16	When the offences in 227.1,2,3,4 result in the death of the victim	Art. 227.5, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of not less than ten years or by lifelong imprisonment.

17	Where the offences in 227.1,2 are committed against a person under the age of sixteen years	Art. 227.6, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of five years to twenty years.
18	Where the offences in 227.1,2 are committed against a person under the age of fourteen years	Art. 227.7, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of at least ten years.
19	Where the offences in 227.6,7 are committed under the circumstances of 227.3,4	Art. 227.8, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of at least fifteen years.
20	Where the offences in 227.6,7 results in the death of the victim	Art. 227.9, Criminal Code of the Republic of Kosovo	Punishable by imprisonment of at least twenty years or lifelong imprisonment.

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?*

According to Article 62 of Kosovo’s Criminal Procedure Code the injured party has the right to a reasonable, court-ordered restitution from a defendant(s) who has admitted to or been adjudged to be guilty of a criminal offence that has caused financial, physical and emotional harm to the injured party. When the court is unable to order restitution from the defendant(s), “the injured party has the right for the court to refer the order of restitution to the coordinator of the victim compensation fund.”¹²⁶

Additionally, in cases where the injured party cannot obtain restitution from the defendant then s/he can submit an application for compensation before the Ministry of Justice. According to Article 6 of the Law on Crime Victim Compensation, criminal offences that fall within the definition of domestic violence under the Law on Protection Against Domestic Violence are compensable in this manner. However, individuals may also submit other requests based on the nature and consequences caused by the crime, particularly if the victim is a vulnerable victim.

Restitution is defined as repayment of damages by a convicted person to the injured party for any damages that directly or indirectly resulted from the criminal offence.¹²⁷ These damages can be for harm resulting from the criminal action, including loss of property, profits, liberty; or physical, psychological harm; or the loss of life of a spouse or

¹²⁶ Art. 62.1.5, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

¹²⁷ Art. 19.1.13, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

immediate family member. The court may order the payment of damages based on a reasonable estimate of the monetary value of the harm caused.¹²⁸

Aggravating and mitigating circumstances

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

See table of sanctions above for aggravated forms of rape.

1. *Is rape by more than one perpetrator an aggravating circumstance? YES¹²⁹*

2. *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) YES¹³⁰*

3. *Is rape by spouse or intimate partner an aggravating circumstance? YES.¹³¹*

9. *Does the law foresee mitigating circumstances for the purposes of punishment? If yes, please specify.*

Article 70 of Kosovo's Criminal Code regulates the general rules of mitigating and aggravating circumstances but these rules apply to all offenses and are not tailored for rape cases specifically.

Depending on the term of imprisonment, the prescribed punishment for different forms of rape can be mitigated to a maximum of six-months (from two years) to five years (from ten years). According to general rules of mitigating punishment¹³² the court shall consider the good character of the offender and evidence of provocation by the victim among other circumstances.

10. *Is reconciliation between the victim and the perpetrator allowed as part of a legal response? If so, at what stage and what are the consequences?*

NO. Reconciliation and mediation are legally not permitted.

1. *Regardless of the law, is reconciliation permitted in practice? and what is the practice in this regard?*

NO. While there are cases where judges are inclined to reconcile married couples in domestic violence cases, in 2018, the Law on Mediation was amended to prohibit any mediation for domestic violence cases.¹³³

¹²⁸ Art. 19.1.14, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

¹²⁹ Art. 227.4.6, Code No. 06/L-074 Criminal Code of the Republic of Kosovo

¹³⁰ Art. 227.4.10, Code No. 06/L-074 Criminal Code of the Republic of Kosovo

¹³¹ Art. 227.4.9, Code No. 06/L-074 Criminal Code of the Republic of Kosovo

¹³² Art. 70, Code No. 06/L-074 Criminal Code of the Republic of Kosovo

¹³³ Art. 2, paragraph 3, Law on Mediation, Republic of Kosovo

11. *Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? If yes, please specify.* **NO.** Even elimination of harm, or compensation for damages of rape do not result in suspension of criminal proceedings.¹³⁴

1. *if the perpetrator marries the victim of rape?* **NO**

2. *if the perpetrator loses his “socially dangerous” character or reconciles with the victim?* **NO.**

Prosecution

12. *Is rape reported to the police prosecuted ex officio (public prosecution)?* **YES**

13. *Is rape reported to the police prosecuted ex parte (private prosecution)?* **YES**

14. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?*
Guilty pleas can be negotiated in accordance with Article 233 of the Criminal Procedure Code of Kosovo to lead to leniency or waiver of punishment. This is a general provision and rape offences are not specifically excluded. However, the injured party (victim) still gets an opportunity to make their claim for damages,¹³⁵ and waiver of punishment is not possible for offences where punishment of at least ten years can be imposed.¹³⁶

15. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?*
Similar to answer 14, there can be negotiations after an offender pleads guilty. When a case concerns a child, a parent or the child’s guardian represent the victim.

16. *Please provide information on the statute of limitations for prosecuting rape.*

The statutory limitations for criminal offences is regulated under Article 99 of Kosovo’s Criminal Code as follows:

- thirty (30) years from the commission of a criminal offense punishable by life long imprisonment;
- twenty (20) years from the commission of a criminal offense punishable by imprisonment of more than ten (10) years;
- fifteen (15) years from the commission of a criminal offense punishable by imprisonment of more than five (5) years;

¹³⁴ Art. 230.4, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

¹³⁵ Art. 233.8 and 233.9, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

¹³⁶ Art. 234, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

- ten (10) years from the commission of a criminal offense punishable by imprisonment of more than three (3) years;
- six (6) years from the commission of a criminal offense punishable by imprisonment of more than one (1) year.

The term of imprisonment for different classifications of rape falls within a wide bracket (for e.g. the standard (non aggravated) rape is punishable with 2-10 years of imprisonment). Depending on the classification, the abovementioned statutory limitation periods will apply.

17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?

NO. There are no explicit provisions on statutory limitation period for child survivors of rape. The statutory limitation period for the rape of a minor between the ages of 14-18 years is 15 years and under the age of 14 years is 20 years. Therefore, a child survivor is able to report a case of rape after reaching adulthood.

18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses?

NO, but it is highly unlikely to convince a judge that a rape happened if there is no forensic evidence. Victim-blaming is still quite prevalent and evident in court decisions. As an illustration, two men accused of rape of a 19 year-old women were acquitted because the court did not consider the victim's statement sufficient to prove the crime beyond any reasonable doubt. In fact, the court considered the victim's behaviour to be the reason for the rape as she had travelled in a car with male drivers and had not given any clear destination to them despite being aware of the fact that they were married. The court stated that the victim had tacitly agreed to enter into sexual relations with the accused persons by agreeing to be in a closed space with them.¹³⁷

*19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial? **NO.***

20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?

NO. However generally, an injured party or witness can seek protective measures or anonymity in case of a serious risk and in cases involving domestic violence, the victim (when in a domestic relationship) can seek protective measures under the Law on Protection against Domestic Violence.¹³⁸

¹³⁷ Court Decision by the Basic Court of Gjilan/Gnjilane, Decision #PKR. Nr200/2014 Decided in July 2017

¹³⁸ Arts 221 and 228, Code No. 04/L-123 Criminal Procedure Code of the Republic of Kosovo

War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?* **YES**

22. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts?*

NO. According to Article 104.1 of the Criminal Code, no statutory limitation applies to the offenses of genocide, war crimes, crimes against humanity, or other criminal offenses to which the statutory limitation cannot be applied under international law.

23. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?* **YES**

24. *Has the Rome Statute of the International Criminal Court (ICC) been ratified?* **NO**

Data

25. *Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.*

Data retrieved from the Information Office of the Kosovo Police on 4 December 2020

Year	Attempted rape	Rape
2015	6	32
2016	6	28
2017	10	28
2018	5	32
2019	5	47
2020	4	58
Total	36	225

Other

26. *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.*

Women in numbers: The interconnection between women’s socio-economic position and gender-based violence in Kosovo

Kosovar women face many challenges in their daily lives in general. With only 13,7% of women being employed and only 8% of them owning property,¹³⁹ a high percentage of women are not financially self-sufficient and thus are faced with structural barriers when accessing justice.

According to Kosovo Women Network, 62% of Kosovars have experienced domestic violence in their lifetimes. 49% of Kosovars have reported to have experienced sexual harassment in their lifetimes women constituting the majority of this percentage.¹⁴⁰

According to the data retrieved from the Information Office of the Police there have been 261 cases of attempted rape and rape reported between 2015 and 2020. These reported cases include both rape that was committed within marriage as well as cases where the perpetrator had no family relations with the survivor/victim. This data indicates a progressive growth on the level of reported rape cases in front of the police. However, this data may still not portray the full picture of rape cases in Kosovo.

Underreporting of cases

While rape is well defined in the criminal laws of the Republic of Kosovo, rape cases are still under-reported due to various social factors ranging from poor socio-economic position of women, systematic victim-blaming by public authorities, public authorities’ lack of capacities on applying a gender-perspective when handling rape cases, insufficient confidentiality,¹⁴¹ social stigma around survivors of sexual and gender-based violence, lack of trust on the protection that the justice system can provide,¹⁴² low sentencing for perpetrators,¹⁴³ and other intersecting factors.

Furthermore, regardless of the relation with the perpetrator, it can be assumed that it is less reported when it happens within the domestic context. As a local human rights advocate has stated, “[t]he under-reporting gets intensified after the couple has children.

¹³⁹ Kosovo Women Network, *From Words to Action*, 2017, p. 6. <https://tinyurl.com/y2ngs2tk>

¹⁴⁰ *Ibid*

¹⁴¹ *supra* (n 1) p. 3

¹⁴² *supra* (n 3) p. 7

¹⁴³ *supra* (n 1) p. 20

Women won't report any violence out of fear of not being able to see their children afterwards. They risk losing the custody of their children. In courts, the partner with a better financial position are the ones who get custody. [...] Sexual violence in marriage is one of the most under-reported crimes. In a marriage, [it is perceived that] the man has an automatic right to request sexual favours from their wives."¹⁴⁴

The fear of social stigma also discourages individuals from reporting cases of rape and the situation is worse when the victim is affected by intersectionalities.

Intersectionality: the lack of proper protection for marginalised groups in Kosovo

In cases where the victims come from marginalised groups such as roma, ashkali, egyptian or LGBTQ+ communities, chances of their cases being considered are lower.

An illustrative example is the case of Kujtim Veseli, an 11 year-old ashkali boy living under severe poverty who was systematically raped by his neighbour. Kujtim's family reported the case to the police station several times and the alleged perpetrator even admitted having raped Kujtim. The alleged perpetrator was also a habitual offender with 15 indictments and 26 criminal reports. However the prosecutor did not order his detention, thus leaving Kujtim in a highly vulnerable position.¹⁴⁵ As a result of the state's omission Kujtim was not only raped but also murdered by the same individual.¹⁴⁶

According to KIPRED's findings, the Department of Forensic Medicine, Kosovo Police and prosecutorial services are not coordinated well enough to take effective and prompt responses to rape cases. Crisis Centres or Sexual Referral Centres as the Kosovo Police do not have the proper expertise to handle the sensitivity of rape cases.

Currently, there is an ongoing campaign organised by civil society activists through which they demand an apology from the Kosovo Police for neglecting Kujtim's case: initiating investigations for the prosecutors and other officials who did not take suitable measures to prevent the violation; and, reparations for Kujtim's family from the government. Their main goal is to prove that this case was not treated with professionalism because of the institutional racism within the Kosovar public authorities.

The Serb minority of Kosovo is in a disadvantaged position as well. One of the disadvantages of the Serb minority is their language. While many Serbs can function without knowing an Albanian and Serbian is recognised as an official language, the right to use it before public authorities not been fulfilled to a satisfactory level.

¹⁴⁴ Interview with a local kosovar human rights defender on 23 September 2020

¹⁴⁵ These violations are also concluded from the Kosovar Ombudsperson at this [report](#)

¹⁴⁶ Ombudsperson of the Republic of Kosovo, *Ex Officio Report Nr. 567/2019*. Available at: <https://tinyurl.com/y2m5p2xx>

Authorities still fail to abide by their obligation to respect the minorities' rights to use their language in legal proceedings.¹⁴⁷ Reporting rape cases in Serb majority municipalities may not be problematic. However, if a Serb survivor has to report their case in a Albanian majority municipality it is challenging to have immediate translation from Albanian to Serbian and this discourages survivors from approaching the police.

Kosovar legal framework, advancements and barriers to properly uphold human rights

The framework for the protection of human rights, *inter alia* women's rights, in Kosovo is also concerning. There has been a significant level of progress when it comes to addressing domestic violence in Kosovo. The Criminal Code which was amended in late 2018 and entered into force in early 2019 has finally integrated domestic violence in itself.¹⁴⁸ This amendment has finally recognised sexual violence within a domestic relationship and has expanded to include physical, psychological or economic violence within the intent to violate the dignity of a person within the domestic relationship.

It is still early to evaluate how much protection this amendment has ensured, but institutions should proactively seek paths on fully implementing the existing legal framework.

Kosovo has a unique system of enforcing human rights. Instead of signing international covenants, it has integrated them to its constitution, thus making these covenants not only directly applicable in Kosovo but has also given them priority over the local legislation.¹⁴⁹ This is a way to compensate for Kosovo's limited ability to sign such agreements, accede to major bilateral bodies or mechanisms that enforce human rights law. Lately, Kosovo has amended its Constitution to include the Istanbul Convention as well.

This situation improves the legal framework protecting human rights in Kosovo. However, avenues for individuals whose rights have been violated are limited to the local judiciary only. The highest instance an individual can reach in human rights cases is the Constitutional Court of Kosovo. As Kosovo has not ratified CEDAW in a traditional way, the avenues for making complaints beyond the local judiciary are finite. In addition to that, Kosovo is not a member of the European Council, and as such no complaints can be made before the European Court for Human Rights as well.

¹⁴⁷ NGO AKTIV, *Language Impediments to Equal Access to Services* (p. 35-36) <https://tinyurl.com/y685jvtm>

¹⁴⁸ Art. 243, Criminal Code of the Republic of Kosovo <https://tinyurl.com/yxhtt76w>

¹⁴⁹ Art. 22, Constitution of the Republic of Kosovo. <https://tinyurl.com/y53qep4b>

Although the Constitutional Court of Kosovo supposedly has to harmonise its decisions with CEDAW and regularly refers to ECHR jurisprudence, the fact that the Constitutional Court decisions will not be further reviewed by an international mechanism still puts survivors and human rights defenders in a disadvantaged position. Furthermore, the local judiciary is still considered to be vulnerable to undue political influence, slow and lacking capacities.¹⁵⁰

Zooming into the practice

As court decisions, or the way a state official handled the case would be the ones for which an individual could render a complaint in international mechanisms for protection of their rights, examining court decisions and practices of public institutions holds a crucial importance.

Glancing through court decisions with rape charges is sufficient to identify the victim-blaming pattern present in the jurisprudence. According to the analysis of jurisprudence and findings of KIPRED, on a case where two men were accused of rape of a 19 year-old girl the court has exhibited many aspects of victim-blaming while acquitting defendants due to insufficient evidence.¹⁵¹ The Court considered that the women agreed to travel with a car with a male driver regardless of knowing that the driver was married and that she did not know the destination.¹⁵² The Court also was of the position that the survivor has silently agreed to have sexual relations with the defendants as she did not refuse to be in the same space as accused.¹⁵³

Reparation for survivors of conflict-related sexual violence

20 years after the end of the 1999 conflict in Kosovo, survivors of rape in the context of the conflict are inaudible. Stigma around these victims has persisted for a long time. The silence first broke in 2018, when Vasfije Krasniqi Goddman - a survivor, spoke out about her experience surviving sexual violence while still a teenager from a Serb police officer during the war in Kosovo. This public testimony followed the public expressing sympathy towards survivors of rape in the context of war.

However, it is arguable whether this support and sympathy would exist if the survivor was from the opposite side of the conflict. Historical animosity between the Albanians and Serbs has led to a situation where Serbs generally deny or do not speak out about

¹⁵⁰ Council of Europe, *Kosovo Progress Report*, 2020 (p. 5)

¹⁵¹ *supra* (n 3) p. 44.

¹⁵² Court Decision by the Basic Court of Gjilan/Gnjilane, Decision #PKR. Nr200/2014 Decided in July 2017 and *supra* (n 3) p. 44 and.

¹⁵³ *supra* (n 14)

rape in Kosovo, and Albanians in Kosovo do not include rape survivors of the Serb ethnicity.

The Criminal Code of Kosovo recognises sexual violence both as a war crime¹⁵⁴ and as a crime against humanity.¹⁵⁵ This category of survivors are entitled to reparations - monthly financial assistance - as recognised in the Law on Reparations¹⁵⁶ since 2014. The enactment has created a Government Commission for the Recognition and Verification of the Status of Sexual Violence Victims during the Kosovo Liberation War. To this day, this Commission has received around 400 applications of CRSV survivors. However the law is indirectly discriminatory towards the minority. There is a temporal jurisdiction which is mainly intended to include Albanian survivors, i.e., 27.02.1998 until 20.06.1999. 20 June 1998 corresponds with the entry of NATO forces in Kosovo, and is perceived as Kosovo's liberation day. In reality, the members of the minority community continued to suffer from CRSV after June 1998 but this narrow timeframe indirectly excludes them from seeking reparations.

While survivors of CRSV of the minority groups are indirectly discriminated by Kosovo's legal framework concerning reparations, Albanian survivors of CRSV get neither acknowledgement nor reparations from the Serbian state. As a result none of the parties get suitable recognition from the party that committed the crimes.

¹⁵⁴ Art. 145.2.22, Criminal Code of the Republic of Kosovo, 2019

¹⁵⁵ Art. 143.1.7, Criminal Code of the Republic of Kosovo, 2019

¹⁵⁶ Law on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims of War and their Families.

Annex I: Criminal Law provisions on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification)

Criminal Code of the Republic of Kosovo

Article 225: Definitions relating to the criminal offenses against sexual integrity

For the purposes of this chapter the following terms shall have this meaning:

1. Term "Consent" means:
 - 1.1. the voluntary agreement of a person who has reached the age of sixteen (16) years to engage in the sexual act in question;
 - 1.2. the voluntary agreement of two persons who have reached the age of fourteen (14) years and where difference in their ages does not exceed two (2) years to engage in the sexual act in question.
2. No consent is obtained where:
 - 2.1. such person expresses, by word or conduct, a lack of agreement to engage or to continue to engage in the sexual act;
 - 2.2. the agreement is expressed by the words or conduct of a person other than the victim;
 - 2.3. the agreement of the victim was obtained by deception, fear or intimidation, where such means do not involve the use of force, serious threat or exploitation as provided for in paragraph 3. of Article 227 of this Code; or
 - 2.4. such person is incapable of agreeing to the sexual activity because of diminished mental or physical capacity or intoxication by alcohol, drugs or other substances.
3. No action under paragraphs 1. and 2. of this Article shall be interpreted as limiting the circumstances in which there is no consent.
4. Term "Sexual act" means penetration however slight of any part of the body of a person with a sexual organ or an object for sexual purpose or the penetration however slight of the anal, oral or genital opening of a person with any object for a sexual purpose, or any other part of the body or any part of an animal.
5. Term "Subjecting another person to a sexual act" means the commission of a sexual act on another person by the perpetrator, or inducing another person to commit a sexual act on the perpetrator or a third person or inducing a third person to commit a sexual act on another person.
6. Term "Private parts" means the breasts of a woman, the penis, vagina and/or anus.
7. Term "Touching" means any direct or indirect contact, where there is no penetration, between the body of a person with any part of the body of another person or with an object.

8. Term “Child pornography” means any visual image or visual depiction or representation, including any photograph, film, video, picture or computer generated image or picture, whether made or produced by electronic, mechanical or other means, which shows or represents:
 - 8.1. the genitals (vagina, penis or anus) or the pubic area of a child primarily for sexual purposes;
 - 8.2. a real child engaged in actual or simulated sexually explicit conduct;
 - 8.3. a person appearing to be a real child engaged in actual or simulated sexually explicit conduct; or
 - 8.4. realistic images of a non-existent child engaged in actual or simulated sexually explicit conduct.
9. Term “Prostitution” means offering or providing sexual services in exchange for payment, goods or services including, but not limited to, the discharge of an obligation to pay or the provision of goods or services including sexual services gratuitously or at a discount. It is irrelevant whether the payment, goods or services are given or promised to the person engaging in the sexual services or to a third person.
10. Sexual purposes means any act done for the purposes of the sexual gratification of a person

Article 226: Mistake of fact as to age of victim

1. For the purposes of the Chapter, a mistake as to the age of the victim who is under the age of sixteen (16) shall not be a mistake of fact under Article 25 of this Code if the perpetrator was negligent in making such mistake.
2. The perpetrator is not criminally liable because of a mistake of fact under Article 25 of this Code if he or she, for justifiable reasons, did not know and could not have known that the victim was under the age of sixteen (16).

Article 227: Rape

1. Whoever subjects another person to a sexual act without such person’s consent shall be punished by imprisonment of two (2) to ten (10) years.
2. Whoever subjects another person to a sexual act by threatening to reveal a fact that would seriously harm the honor or reputation of such person or of a person closely connected to such person shall be punished by imprisonment of three (3) to ten (10) years.
3. Whoever subjects another person to a sexual act in one or more of the following circumstances shall be punished by imprisonment of five (5) to ten (10) years:
 - 3.1. by serious threat or the threat of violence;
 - 3.2. by threat of an imminent danger to the life or body of such person or of another person; or

- 3.3. by exploiting a situation in which the person is unprotected and where his or her security is in danger.
4. When the offense provided for in paragraph 1. or 2. of this Article is committed under one or more of the following circumstances, the perpetrator shall be punished by imprisonment of five (5) to fifteen (15) years:
 - 4.1. the offense is preceded, accompanied or followed by an act of torture or inhumane treatment;
 - 4.2. the perpetrator uses force;
 - 4.3. the perpetrator causes grievous bodily injury or a serious disturbance to the mental or physical health of the person;
 - 4.4. the perpetrator uses or threatens to use a weapon or a dangerous instrument;
 - 4.5. the perpetrator intentionally causes the person to become intoxicated by alcohol, drugs or other substances;
 - 4.6. the offense is jointly committed by more than one person;
 - 4.7. the perpetrator knows that the person is exceptionally vulnerable because of age, diminished mental or physical capacity, physical or mental disorder or disability, or pregnancy;
 - 4.8. the victim is between the ages of sixteen (16) and eighteen (18) years;
 - 4.9. the perpetrator is the parent, adoptive parent, foster parent, step parent, grandparent, uncle, aunt or sibling of the person or shares a domestic relationship with the victim
 - 4.10. the perpetrator is a teacher, a religious leader, a health care professional, a person entrusted with such person's upbringing or care or otherwise in a position of authority over the person:
 - 4.10.1. by abusing his or her control over the financial, family, social, health, employment, educational, religious or other circumstances of such person or a third person;
 - 4.10.2. where the victim is held in prison, pre-trial detention, a disciplinary centre, has been committed to an educational institution or educational correctional institution, is a patient at a hospital, mental health or rehabilitation facility, a resident of a residential care home or shelter, or is held in or confined to any other place by an order of the court or prosecutor or under a law; or
 - 4.10.3. by abusing his or her authority or authority over a victim and who is entrusted to the perpetrator for upbringing, education or care.
5. When the offense provided for in paragraph 1., 2., 3. or 4. in this Article results in the death of the victim, the perpetrator shall be punished by imprisonment of not less than ten (10) years or by lifelong imprisonment.

6. When the offense provided for in paragraph 1. or 2. of this Article is committed against a person under the age of sixteen (16) years, the perpetrator shall be punished by imprisonment of five (5) to twenty (20) years.
7. When the offense provided for in paragraph 1. or 2. of this Article is committed against a person under the age of fourteen (14) years, the perpetrator shall be punished by imprisonment of at least ten (10) years.
8. When the offense provided for in paragraph 6. or 7. of this Article is committed under one or more of the circumstances provided for in paragraph 3. or 4. of this Article, the perpetrator shall be punished by imprisonment of at least fifteen (15) years.
9. When the offense provided for in paragraph 6. or 7. of this Article results in the death of the victim, the perpetrator shall be punished by imprisonment of at least twenty (20) years or life long imprisonment.

Law on Protection Against Domestic Violence, 2010

Article 2: Definitions

1.2. Domestic Violence - one or more intentional acts or omissions when committed by a person against another person with whom he or she is or has been in a domestic relationship, but not limited to:

[...]

1.2.7. non-consensual sexual acts and sexual ill-treatment;

--X--