

# Chile

## 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 13 onwards).

2. *Based on the wording of those provisions, is the provided definition of rape (YES/NO):*
  1. *Gender specific, covering women only*  
**NO**, anyone can be a victim irrespective of their gender.
  2. *Gender neutral, covering all persons*  
**NO**, the Penal Code envisions only a male perpetrator.
  3. *Based on the lack of consent of victim* **NO**
  4. *Based on the use of force or threat* **YES**
  5. *Some combination of the above* **NO**
  6. *Does it cover only vaginal rape?* **NO**
  7. *Does it cover all forms of penetration?*  
**YES**. The crime of rape considers penetration as the carnal access of: the vagina, the anus, and the mouth, in the Article 361 of the Penal Code.
  8. *Is marital rape in this provision explicitly included?* **NO**

9. *Is the law silent on marital rape?*  
**YES**, marital rape is criminalized (implicitly) in Article 361 since Law n° 19.617, that modified the Article 367, and considered marital rape as a crime in 1999<sup>1</sup>.
10. *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?* **YES**
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?*  
The legal age for sexual consent in **heterosexual sex is fourteen years of age**, and in **homosexual sex is eighteen years of age**. This conclusion can be obtained from the Articles 361, 362 and 365.
5. *Are there provisions that differentiate for sexual activity between peers? If so, please provide them.*  
**YES**. Law 20084 or the Adolescent Responsibility for Violations of Criminal Law lays down special rules for adolescents that commit sexual crimes. It limits criminal proceedings against the accused if there is a difference of two years in ages of the victim and accused for the conduct described in Article 362 and three years for the conduct described in Articles 365, 366, 366 bis, 366 quater and 366 quinquies.<sup>2</sup>
6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.*

#### Minor Imprisonment

- minimum degree: sixty-one days to five hundred and sixty days
- medium degree: five hundred and forty-one days to three years
- maximum degree: three years and one day to five years

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<sup>1</sup> Evolución experimentada en el período 1990-2015 por los delitos sexuales contemplados en el Código Penal chileno, Biblioteca del Congreso Nacional de Chile, in: [https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/56629/1/Evol\\_delitos\\_sexuales2015.pdf](https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/56629/1/Evol_delitos_sexuales2015.pdf)

<sup>2</sup> Article 4, Law 20084.

Major Imprisonment

- minimum degree: five years and one day to ten years
- medium degree: ten years and one day to fifteen years
- maximum degree: fifteen years and one day to twenty years

#	Offence	Provision (Section - Act)	Prescribed Sanction
1	Punishment for Rape of a person that is fourteen years age or more (“violación propia”)	Article nº 361, Penal Code	Major imprisonment in its minimum (five years and one day to ten years) to medium degree (ten years and one day to fifteen years).
2	Punishment for Rape of a person that is less than 14 years of age (“violación impropia”)	Article nº 362, Penal Code	Major imprisonment in any of its degrees (minimum degree: five years and one day to ten years, medium degree: ten years and one day to fifteen years, maximum degree: fifteen years and one day to twenty years).
3	Special kind of rape (“estupro”)	Article nº 363, Penal Code	Minor imprisonment in its maximum degree (three years and one day to five years) to a major imprisonment in its minimum degree (five years and one day to ten years).
4	Sodomy of a minor	Article nº 365, Penal Code	Minor imprisonment in its minimum (sixty-one days to five hundred and sixty days) to medium degrees (five hundred and forty-one days to three years).

5	Aggravated or calificated sexual abuse	Article n° 365 bis, Penal Code	<p>With major imprisonment in its minimum (five years and one day to ten years) to medium degree (ten years and one day to fifteen years), if any of the circumstances listed in article 361 occur (circumstances of rape);</p> <p>With major imprisonment in any of its degrees (from five years and one day to twenty years), if the victim is under fourteen years of age;</p> <p>With minor imprisonment in its maximum degree (three years and one day to five years) to a major imprisonment in its minimum degree (five years and one day to ten years), if any of the circumstances listed in the article 363 occur, and if the victim is a minor, but over fourteen years of age.</p>
6	Sexual abuse of a person that has more than fourteen years old (“abuso sexual propio”)	Article n° 366, Penal Code	<p>Minor imprisonment in its maximum degree (three years and one day to five years), when the abuse consists in the concurrence of any of the circumstances listed in article 361.</p> <p>Minor imprisonment in its maximum degree (three years and one day to five years) when the abuse consists in the concurrence of any of the circumstances listed in article 363, as long as the victim is over fourteen and under eighteen years of age.</p> <p>The penalty of minor imprisonment will be applied in its minimum (sixty-one days to five hundred and forty days) to medium degree (five hundred forty-one days to three years), when the abuse consists of the use of surprise or another maneuver that does not involve the consent of the victim, provided that the victim is over fourteen years of age.</p>

7	Sexual abuse of a person less than fourteen years old (“abuso sexual impropio”)	Article 366 bis, Penal Code	Minor imprisonment in its maximum degree (three years and one day to five years) to major imprisonment in its minimum degree (five years and one day to ten years).
8	Improper or indirect sexual abuse or minor exposure to act of sexual significance	Article 366 quater, Penal Code	<p>Minor imprisonment in its medium (five hundred and forty days to three years) to maximum degree (3 years and one day to five years) when a person under fourteen years of age is made to see or listen to pornographic material or witness shows of the same character for the purpose sexual arousal</p> <p>Minor imprisonment in its maximum degree (three years and one day to five years) when a person under fourteen years is made to perform actions of sexual significance in front of themselves or another person for the purpose of procuring sexual arousal.</p> <p>Whoever carries out any of the conducts described in the preceding paragraphs with a person under the age of eighteen but over the age of fourteen, concurring with any of the circumstances of number 1 of the article 361 or those listed in the article number 363 or through threats in terms of the articles 296 and 297, will have the same penalties indicated in the previous paragraphs.</p> <p>If the author falsifies their identity or age, the applicable penalty increases by one degree.</p>
9	Rape with homicide	Article 372 bis, Penal Code	Perpetual imprisonment (no access to benefits until twenty years of effective imprisonment) to qualified perpetual imprisonment (no access to benefits until forty years of effective imprisonment).

10	Theft with rape	Article 433 n° 1, Penal Code	Major imprisonment in its maximum degree (fifteen years and one day to twenty years) to qualified perpetual imprisonment (no access to benefits until forty years of effective imprisonment).
11	Kidnapping with rape	Article 141, Penal Code	Major imprisonment in its maximum degree (fifteen years and one day to twenty years) to qualified perpetual imprisonment (no access to benefits until forty years of effective 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?*

There is a National Programme for the Attention, Protection, and Reparation for Violence Against Women, conducted by the National Service of Women and Gender Equity (SERNAMEG). This Programme offers need-based attention at their different centers including centers for women, centers for men that exercise violence against women inside a relationship, centers for the attention and reparation of women victims, and survivors of sexual violence. The Programme also offers shelter houses for at-risk women, and for female survivors of human trafficking and immigrant victims of exploitation.

The centers for the attention and reparation of women victims, and survivors of sexual violence, offers reparative, psychosocial and legal services to women that are over eighteen years of age, who are living in or have lived through situations of sexual violence. Their main purpose is to diminish the impact of and generate awareness about the unnatural nature of sexual violence on women and their attention is oriented towards service, not economic compensation.<sup>3</sup>

<sup>3</sup> Servicio Nacional de la Mujer y la Equidad de Género, en: [https://www.sernameg.gob.cl/?page\\_id=26815](https://www.sernameg.gob.cl/?page_id=26815)

## Aggravating and mitigating circumstances

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

**YES.** In addition to the general aggravating factors such as recidivism listed in Article 12 of the Penal Code, Article 368 prescribes aggravating circumstances for sexual crimes, including rape. They are:

- if the crime is committed by public authority, a minister of a religious cult, a guardian, a teacher, an employee or a person in charge of the victim's education, guardianship, cure or care;
- if committed by anyone against a minor during the functions that they carry out, even sporadically, in educational facilities; or,
- if committed by those persons who provide school transport service

When these aggravating circumstances are found, the range of penalty associated with the crime is reduced, in effect increasing the minimum punishment, in such a way that the final applicable range of penalty is aggravated.

Article 371 of the Code changes the liability of accomplices who execute the crime by exploiting a relationship of dependency between them and the victim to that of perpetrators.

Additionally, Article 368 bis of the Penal Code also makes having two or more perpetrators an aggravating circumstance.

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.** There is no explicit disposition that considers this to be an aggravating circumstance, but the general regime of aggravations could allow this thesis, specially, the one described in Article 12 n° 7 of the Penal Code (crime committed with breach of trust).

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. These are listed in Article 11 of the Penal Code and according to these general rules 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 as a form of extinction of criminal liability is only permissible in crimes that permit private prosecution.

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**, but in case of victims fourteen years or older, only the victim themselves may report the crime. In case of rape of a victim younger than fourteen, the incident need not have been reported by the victim.<sup>4</sup>

As stated in Article 369 of the Penal Code read with Article 54 of the Criminal Procedure Code, rape and other sexual violence related offences are associated with a special type of public criminal action, namely ‘crimes of public action prior to a particular instance’. In such cases a victim is required to report the incident before the prosecutor can initiate an investigation.

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

**NO**, private prosecution is not permitted for rape cases. As stated above, rape is a ‘crime of public action prior to a particular instance’.

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<sup>4</sup> Articles 369 quinquies, Penal Code and Articles 53, 54 and 108 Criminal Procedure Code.



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

**NO**, there is no plea bargaining in Chilean criminal law. Although, we have a similar institution called ‘*procedimiento abreviado*’, in which the perpetrator agrees to waive their right to an oral trial, and a minor penalty is argued by the prosecutor. Furthermore, this kind of plea bargain is only possible for crimes in which the prosecutor has asked for imprisonment that is not greater than five years in its maximum degree, and ten years in its minimum degree.

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

**NO**, following the same logic as the previous question.

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

At present, rape is time-barred from prosecution after ten years if the victim is over the age of eighteen.

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

**YES**. Since 18 July 2019, there is no limitation for prosecution of sexual crimes committed against minor victims. However, for crimes committed between 23 August 2007 and 18 July 2019, minor victims have a ten year limitation period that starts to run from their eighteenth birthday.<sup>5</sup>

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

**NO**, there are no mandatory requirements for the realization of the investigation and prosecution of a rape case. Nonetheless, there is a special valorization for sexological medical analysis to prove cases of rape. Example of this is that the national association that develops this medical exam suggests that victims approach a centre for the procedure within forty eight hours of the rape<sup>6</sup>.

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

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<sup>5</sup> Law n° 21.160 and Law n° 20.207

<sup>6</sup> Medical legal service of Santiago, “Expert’s medical-legal report in sexual crime: a practical guideline for its correct realization”, in: <https://scielo.conicyt.cl/pdf/rchog/v69n1/art12.pdf>.

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

**NO.** However there is a law that regulates the filming of investigative interviews, and judicial declaration of girls, boys and adolescents in case of serious and grave crimes, such as rape. This law aims to avoid secondary victimisation, in girls, boys and adolescents that have been victims of serious offenses.

Furthermore, minor rape victims may ask to testify behind a screen in the court room, but this possibility depends on the discretion of the judge. In any case, victims eighteen years or older have no recourse to a similar provision to not testify in the presence of the offender.

#### War and/or conflict

21. *Is rape criminalized as a war crime or crime against humanity?* **YES**, in Law n° 20.357, that was published on 18 July 2009.

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

**NO**, crimes against humanity are considered imprescriptible.

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

**YES**, Article 40 of Law n° 20.357 states that in cases of crimes against humanity, war crimes and genocide, “criminal action and punishment for the crimes provided in this law do not prescribe”.

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 public information that provides exact data on the number of cases of rape that have been reported, prosecuted or sanctioned for the past two to five years. This information may be obtained by asking directly to the public service in charge of maintaining this data, but the response of the public offices is very slow. The information that is currently available is only for data up to 2016 and considers sexual offenses in general without a separate classification for rape.

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Report frequency of rape crime from 2001 till 2016 (Source: <http://www.seguridadpublica.gov.cl/estadisticas/tasa-de-denuncias-y-detenciones/delitos-de-mayor-connotacion-social-series-de-datos-2001-2017/>):

Frequency of reports of rape crimes according to "territorial units"

Territorial unit	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Percentage of variation (last year)
Whole country	1.905	1.759	1.721	2.278	2.451	2.614	2.672	2.941	2.907	2.681	3.101	2.800	2.750	2.510	2.426	2.510	3,5 %

## 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 main barriers for the accountability of rape are the following: A large number of cases are not reported by the victims. This is due to the lack of sexual education and conservative sexual education in public and private schools. The concept of rape is not well understood by the community and therefore, many victims of rape do not personally recognize that they have been subjected to a crime. However, this has started to change over the past few years, mostly thanks to the development of a strong feminist movement that has placed the importance of consent in sexual relations.

Even if victims agree to report their crimes, the cultural barriers of the agents that are in charge of receiving their testimonies, specially the police, make the prosecution of rape even harder. Police is often reluctant to receive reports on rape, and the State has not given enough gender sensitisation trainings to them to execute their duties correctly. This also results in underreporting of rape or other sexual assault cases. In addition, judicial stereotypes replicate patriarchal notions of female sexuality in their sentences. This came to light last year specially when some rape cases acquired public attention. These regressive attitudes within judicial institutions also discourage reporting in rape cases.

Furthermore, there is no national program or office representing the interests of victims in cases, as there is for accused persons/defendants. This means that often

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victims do not have legal representation in the form of a counsel to accompany them in the development of their rape investigations.

The lack of proof and excessive emphasis on biological tests to produce evidence for the rape trial generates a big number of cases that end up being abandoned by the Prosecution. When there is no biological evidence in a case, the expert evidence on the damage caused by rape becomes all the more important<sup>7</sup> but there are very few experts in Chile that can present such kind of expert testimony which causes delay and the cases remain paralyzed in the meantime.

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<sup>7</sup> Spanish name of this report is “peritaje de daños”.

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

*Chilean Penal Code, 1874.*

**Article 361: Rape of a person that is more than fourteen years of age (*violación propia*)**

Rape will be punished with a penalty of major imprisonment in its minimum to medium degree.

Rape is committed by he who accesses carnally, by the vagina, anus or mouth, of a person that is more than fourteen years old, in one of the following cases:

- 1° When force or intimidation is used.
- 2° When the victim is deprived of sense, or when their inability to oppose is taken advantage of.
- 3° When the alienation or mental disorder of the victim is abused.

**Article 362: Rape of a person that is less than 14 years of age (*violación impropia*)**

Anyone who carnally accedes, vaginally, anally or orally, to a person under fourteen years of age, will be punished with major imprisonment in any of its degrees, even if there is no circumstance of those listed in the previous article.

**Article 363: Special kind of rape (*estupro*)**

He who carnally accedes, vaginally, anally or orally, a minor who is older than fourteen years old, will be punished with minor imprisonment in its maximum degree to a major imprisonment in its minimum degree, if any of the following circumstances occur:

- 1° When an anomaly or mental disturbance, even if temporary, of the victim is abused, which due to its minor entity does not constitute alienation or disorder.
- 2° When a dependent relationship with the victim is abused, such as in cases where the aggressor is in charge of her custody, education or care, or has an employment relationship with her.
- 3° When the serious distress in which the victim is found, is abused.
- 4° When the victim is deceived by abusing their inexperience or sexual ignorance.

**Article 365: Sodomy of a minor**

He who carnally accedes a minor under eighteen years, of the same sex, without the circumstances of the crimes of rape or “estupro”, will be punished with minor imprisonment in its minimum to medium degrees.

**Article 365 bis: Agravated or calificated sexual abuse**

If the sexual action consists in the introduction of objects of any kind, vaginally, anally or orally, or if animals are used, it will be punished:

1. With major imprisonment in its minimum to medium degree, if any of the circumstances listed in article 361 occur;
2. With major imprisonment in any of its degrees, if the victim is under fourteen years of age, and
3. With minor imprisonment in its maximum degree to a major imprisonment in its minimum degree, if any of the circumstances listed in the article 363 occur, and if the victim is a minor, but over fourteen years of age.

**Article 366: Sexual abuse of a person that has more than fourteen years old (*abuso sexual propio*)**

He who abusively performs a sexual action other than carnal access with a person over fourteen years of age, will be punished with minor imprisonment in its maximum degree, when the abuse consists in the concurrence of any of the circumstances listed in article 361.

The same penalty will be applied when the abuse consists in the concurrence of any of the circumstances listed in article 363, as long as the victim is over fourteen and under eighteen years of age.

The penalty of minor imprisonment will be applied in its minimum to medium degree, when the abuse consists of the use of surprise or another maneuver that does not involve the consent of the victim, provided that the victim is over fourteen years of age.

**Article 366 bis: Sexual abuse of a person that has less than fourteen years old (*abuso sexual impropio*)**

He who performs a sexual action other than carnal access with a person under the age of fourteen, will be punished with the penalty of minor imprisonment in its maximum degree to major imprisonment in its minimum degree.

**Article 366 ter: Definition of sexual action**

For the purposes of the three previous articles, sexual action shall be understood as any action of sexual significance and relevance carried out through bodily contact with the victim, or that has affected the victim's genitalia, anus, or mouth, even when there is no body contact with her.

**Article 366 quater: Improper or indirect sexual abuse or minor exposure to act of sexual significance**

He who, without performing a sexual action in the above terms, to seek sexual arousal or the sexual arousal of another, performs actions of sexual significance in front a person under fourteen years of age, makes them see or listen to pornographic material or witness shows of the same character, will be punished with minor imprisonment in its medium to maximum degree.

If, for the same purpose of procuring their sexual arousal or the sexual arousal of another, determines a person under fourteen years of age to perform actions of sexual significance in front of themselves or another person, or to send, deliver or display images or recordings of your person or of another minor under fourteen years of age, with sexual significance, the penalty will be minor imprisonment in its maximum degree.

Whoever carries out any of the conducts described in the preceding paragraphs with a person under the age of eighteen but over the age of fourteen, concurring with any of the circumstances of number 1 of the article 361 or those listed in the article number 363 or through threats in terms of the articles 296 and 297, will have the same penalties indicated in the previous paragraphs.

The penalties indicated in this article shall also apply when the crimes described in it are committed at distance, by any electronic means.

If in the commission of any of the crimes described in these articles, the author falsifies their identity or age, the applicable penalty will be increased by one degree.

**Article 368**

If the crimes foreseen in the two previous paragraphs were committed by public authority, a minister of a religious cult, guardian, teacher, employee or person in charge for any title or cause of education, guardianship, cure or care of the offended, the person responsible will be imposed with the penalty mentioned in the crime excluding its minimum degree, if it consists of two or more degrees, or its inferior half, if the penalty is a degree of one that is divisible. The same rule shall apply to anyone who has committed the aforementioned crimes against a minor during the functions that they carry out, even sporadically, in educational facilities, and to those who commit them on the occasion of the school transport service they provide at any title.

Except for cases in which the crime is one of those that the law describes and punishes expressing the circumstances of using force or intimidation, abusing a relationship of dependence on the victim, or abusing authority or trust.

**Article 372 bis: Rape with homicide**

He who, with occasion of rape, also commits homicide on the person of the victim, will be punished with perpetual imprisonment to qualified perpetual imprisonment.

If the perpetrator of the described in the previous paragraph is a man and the victim is a woman, the crime will be called rape with femicide.

**Article 433: Theft with rape**

He who is guilty of theft with violence or intimidation of people, whether the violence or intimidation takes place before the theft to facilitate its execution, in the act of committing or after it is committed, to favor their impunity, will be punished:

1° With major imprisonment in its maximum degree to qualified perpetual imprisonment when, on the occasion or motive of the robbery, homicide or rape is also committed.

2° With greater imprisonment in its maximum degree to perpetual imprisonment when, on the occasion or occasion of the robbery, one of the injuries included in articles 395, 396 and 397, number 1 is committed.

3° With greater prison in its medium to maximum degree when the injuries referred to in number 2 of article 397 are committed or when the victims are retained under ransom or for a period greater than that which is necessary for the commission of the crime.

**Article 141: Kidnapping with rape**

Whoever, without the right, locks up or detains another by depriving him of his freedom, commits the crime of kidnapping and will be punished with the penalty of presidency or minor imprisonment in its maximum degree.

The one who provides a place for the execution of the crime shall incur the same penalty.

If he is executed to obtain a ransom or to impose demands or to initiate decisions, he will be punished with the penalty of greater prison in its minimum to medium degree.

If in any of the above cases, the confinement or detention lasts for more than fifteen days or if it results in serious damage to the person or interests of the kidnapped person, the penalty will be greater prison in its medium to maximum degree.



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Whoever, on the occasion or occasion of the kidnapping, also commits homicide, rape, sodomitic rape , or some of the injuries included in articles 395, 396 and 397 No. 1, in the person of the offended person, will be punished with greater prison in its maximum degree ap qualified perpetual residue.