

Submission to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women. December 2020.

Country: Venezuela

Organization: Asociacion Civil Mujeres en Linea

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We agree to make this response public

## 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.

#### a. The Venezuelan Penal Code

The last reform was completed in 2005 and some changes were made, specifically regarding the so-called sexual crimes: rape and sexual abuse<sup>1</sup>. Within these changes, the crime of sexual violence was expanded, previously typified only as a carnal act, to be "a carnal act vaginally, anally or orally, or introduction of an object by one of the first two routes, or an object that simulates sexual objects is introduced orally". It was added within the aggravated violation when "it was committed with abuse of authority, trust or domestic relations, when committed by the joint action of two or more people" and the corresponding penalties were increased<sup>2</sup>. Likewise, the mitigating circumstance was eliminated in the event of a crime of rape, lewd acts or kidnapping against a sex worker<sup>3</sup>.

However, discriminatory articles that reinforce gender stereotypes remained in the reform of the Penal Code of 2005<sup>4</sup>. Article 393, for example, which allowed the cessation of the sentence provided that the person who committed the crime married the victim, remained in force<sup>5</sup>. In the event that the marriage took place after the conviction, the execution of penalties and criminal consequences ceased<sup>6</sup>.

Articles 394 and 395, on the other hand, established a different penalty for the woman who incurs in the factual assumption that contemplates adultery, to that of the man who incurs in this same punishable act, they also remained in force<sup>7</sup>.

It was not until 2015 that the Supreme Court of Justice eliminated these discriminatory elements in the Constitutional Chamber of the Supreme Court of Justice and interpreted article 393 of the Criminal Code, to establish that the forgiveness of the victim through the celebration of marriage will not be allowed as form of cessation of the crime of gender violence<sup>8</sup>. Subsequently, on August 11, 2016, the Constitutional Chamber of the Supreme Court of Justice declared articles 394 and 395 of the aforementioned code on adultery invalid, arguing that these articles were unconstitutional because they contained discriminatory elements<sup>9</sup>. The second section of article 393 of the Penal Code is partially annulled by reissuing the repealed 395; and the aforementioned article 393 is constitutionally interpreted. Sentence N ° 695, of 06/02/2015. Issued, by the Constitutional Chamber, of the Supreme Court of Justice (TSJ)<sup>10</sup>.

However, the Title "Of crimes against the good customs and good order of families" is still in force, as well as other challenged provisions<sup>11</sup>.

It is evident that the institutions have no interest in promoting the protection and guarantee of the rights of women by virtue of the voluntary errors that they have been committing and repeating in them, it can be clearly observed in the following request.

"In Constitutional Chamber. File No. 15-0601. Speaker Judge: Carmen Zuleta De Merchán. This Constitutional Chamber, in use of judicial notoriety, found that in Official Gazette No. 5362 Extraordinary, of July 9, 1999, the late Supreme Court of Justice in plenary session on June 29, 1999, declared "[...] the partial nullity of the second part of article 395 of the Penal Code [GO N ° 915 Extraordinary of June 30, 1964], with regard to the text contained in said norm 'if she is single or widowed and, in any case, honest', because it collides with Article 61 of the Constitution, in the terms expressed. On the grounds of the above nullity, the second part of article 395 of the Penal Code, should be understood as follows: "Those convicted of seduction, rape or kidnapping will be sentenced, by way of civil compensation, if the marriage does not take place, to provide the offended" (*non-official translation*).

Since the second section of article 393 of the current Penal Code, published in Official Gazette No. 5,768, Extraordinary, of April 13, 2005, contains a wording similar to the normative provision already annulled<sup>12</sup>.

Sentence No. 255, with a presentation by Judge Carmen Zuleta De Merchán in the Constitutional Chamber of the Supreme Court of Justice; Issued on June 2, 2015, the second section of Article 393 of the Penal Code of 2005 was declared partially null and void as it was a reissue of Article 395 of the Penal Code of 1964, which was annulled by the late Supreme Court of Justice in plenary session. on June 29, 1999. Exp. -2015-601.

The aforementioned sentence declared ex officio the reissue of the rule contained in the second section of Article 393 of the Penal Code, published in Official Gazette No. 5768, Extraordinary, of April 13, 2005. Consequently, partial nullity is declared of the second part of Article 393 of the Penal Code, in the terms established in the sentence handed down by the late Supreme Court of Justice in plenary session on June 29, 1999.

The Chamber carried out the constitutional interpretation of Article 393 of the current Penal Code, with regard to marriage, and establishes that in the prosecution of crimes of gender violence under no circumstances does the victim have room for forgiveness, by holding the marriage, as a form of procedural self-composition, only applicable to the sentence for civil compensation by the guilty of the crimes of seduction, rape and kidnapping of the offended.

Likewise, Article 393 of the current Penal Code is interpreted constitutionally, with regard to marriage, which should be understood as follows: "Those convicted of seduction, rape or kidnapping will be sentenced, by way of civil compensation, to provide the offended. In the same way, in the Sole Paragraph, in the same sentence it will be declared that the offspring will enjoy the same rights that the civil law grants to the children, if the State of the parents allows it and in any case the guilty will be sentenced to maintain said offspring." (*non-official translation*)

Therefore it is not understood why justice operators insist on keeping in force in its reissue a rule that has been repeatedly declared null and unconstitutional, as is the case of Article 393 second apart from the Penal Code. This shows the lack of training and awareness in the area of gender violence and in the meantime, there are no public policies truly oriented to re-educate the personnel of the Venezuelan judicial system, women victims of gender violence will not achieve true gender justice.

From the sentence in question, the Constitutional Chamber orders the mention of this ruling on the main page of the website of the Supreme Court of Justice, with the following indication "sentence that ex officio declares partially null the second part of Article 393 of the Criminal Code of the 2005, as it was a reissue of article 395 of the 1964 Penal Code, which was annulled

by the extinct Supreme Court of Justice in plenary session on June 29, 1999. "After an exhaustive search on the aforementioned website regarding the publication of this Judgment it was found that to date the order of the Constitutional Chamber of the Court has not been complied with

Supreme Court, which indicates that in practice the previously annulled articles continue to apply.

Despite the existence of different laws on gender-based violence that complement the Penal Code, there is no formal rule in Venezuela that regulates a specific protocol for action and investigation of cases of sexual violence. Its absence has promoted a tendency in courts to request testimonial evidence from third parties and the taking of physical samples in order to confirm the victim's statement, which is often questioned<sup>13</sup>. On the other hand, this absence implies the lack of protocols or guides that guarantee the carrying out of procedures that are necessary and that in many cases are omitted or not carried out with a gender perspective.

FOR AN EXAMPLE OF THIS WE HAVE THE FOLLOWING ARTICLES OF THE PENAL CODE OF 2005:

Article 374 which establishes the crime of rape<sup>14</sup>;

Article 378 which establishes the crime of aggravated rape of minors<sup>15</sup>;

Article 379, which establishes the crime of ex officio prosecution in the cases indicated in said chapter of the penal code<sup>16</sup>;

Article 380, which establishes the crime of incest<sup>17</sup>;

Article 381 which establishes the crime of alteration of good customs by acts committed in public and incitement to prostitution<sup>18</sup>;

Article 383 which establishes the crime of abduction of a married woman for the purpose of debauchery<sup>19</sup>;

Article 384 which establishes the crime of kidnapping<sup>20</sup>;

Article 385 mitigating the crime of kidnapping<sup>21</sup>;

Article 393 grounds for exemption from punishment.<sup>22</sup>

b. Organic Law on the Right of Women to a Life Free of Violence<sup>23</sup>

In November 2006, the Law on the Right of Women to a Life Free of Violence (LDMVLV) was enacted, it acquired an organic character and was published in Official Gazette No. 38,647 on March 19, 2007; The constitutionality of the organic nature was declared in accordance with the provisions of the Constitutional Chamber of the Supreme Court of Justice as recorded in file 06-1870 and judgment dated February 14, 2007<sup>24</sup>. Adapting to the legal characteristics of organic laws, in Regarding its form and content, taking into account that it is intended to regulate one of the assumptions provided in the aforementioned constitutional rule that make it possible to agree on its organic nature.

Finally, this Organic Law on the Right of Women to a Life Free of Violence (LODMVLV), was reformed in 2014 (published in Official Gazette No. 416,781, dated November 25, 2014.)

After 13 years of the promulgation of the (LODMVLV), to date there is no regulation, even though this Law provided for its creation for the implementation of the regulation<sup>25</sup>. Since there is no regulation that unifies the procedures for handling and handling cases, each body that receives complaints has discretion over the way in which they implement said law. Likewise, this has led to the maintenance of some discriminatory practices, "such as maintaining the conciliatory act despite the fact that it is repealed in the legislation, the request for psychological reports from the victims to channel complaints, and the non-application of the corresponding protection and security measures "

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

Yes, based on Article 374 Venezuelan Penal Code<sup>26</sup> and Article 43 Organic Law on the Right of Women to a Life Free of Violence (LODMVLV) <sup>27</sup>

### a. Gender specific, covering women only

No, the Venezuelan Penal Code punishes the crimes of rape committed against the female and male sex. Article 374 Venezuelan Penal Code; while the Organic Law on the Right of Women to a Life Free of Violence (LODMVLV) in its article 43 is specific to women.

### b. Gender neutral, covering all persons

Yes

### c. Based on the lack of consent of victim

Yes, based on the victim's lack of consent; However, the same Article 374, No. 1, of the Venezuelan Penal Code provides that the same sanction will be applied when the victims consent to the carnal act due to their age or vulnerability.

**d. Based on the use of force or threat**

According to article 374<sup>29</sup> under study, it provides that this act will be sanctioned, whether or not there are forces or threats. In the same way, article 43<sup>30</sup> indicates violence or threats.

**e. Some combination of the above. YES / NO**

Yes

**f. Does it cover only vaginal rape? YES /NO**

No

**g. Does it cover all forms of penetration? YES/NO. If yes, please specify.**

Yes. The aforementioned text establishes that the crime is committed vaginally, anally or orally, including the introduction of sexual objects or that simulate the same.

**h. Is marital rape in this provision explicitly included? YES / NO**

NO. In the Venezuelan Penal Code does not typify sexual violence between spouses; but it is established by the Organic Law on the right of women to a life free of violence in its article 43<sup>31</sup>.

**i. Is the law silent on marital rape? YES/NO**

The Venezuelan Penal Code yes, but the Organic Law on the right of women to a life free of violence, no.

**j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES/NO**

The Venezuelan Penal Code does not establish it, but the Organic Law on the right of women to a life free of violence does. It is one of your goals.

**k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES /NO**

Not in the Venezuelan Penal Code; but in the Organic Law on the Right of Women to a Life Free of Violence (LODMVLV), yes in its article 43, establishes the following specifications: "If the perpetrator of the crime is the spouse, common-law partner, former spouse, former partner, person with whom the victim maintains or maintained an affective relationship, even without coexistence, the penalty will be increased from one quarter to one third "

**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?**

According to Article 46 of the Venezuelan Civil Code<sup>32</sup>, Section III Of the Necessary Requirements to Contract Marriage "A woman who has not reached fourteen (14) years of age and a man who has not reached sixteen (16) years of age cannot validly contract marriage"

But on October 16, 2014, the Constitutional Chamber of the Supreme Court of Justice<sup>33</sup> (File No. 10-0161) modified article 46 of the Venezuelan Civil Code, which established 14 years as the minimum age for marriage in the case of women and 16 years in the case of men. By this decision, the minimum age for marriage for women and men is 16 years.

**5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.** No

**6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.** Article 374 of the Venezuelan Penal Code and article 43 of the Organic Law on the right of women to a life free of violence<sup>34</sup>; both provisions provide a penalty of ten (10) to fifteen (15) years in prison, which may be increased according to its aggravating circumstances.

**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 the Organic Law on the Right of Women to a Life Free of Violence, in its articles 61 35, 62 36 and 66 37, establishes the payment of compensation and reparation to victims of violence or their heirs in case of death the victim. If I cause patrimonial damage to property and real estate, it will be forced to repair them. Said regulation establishes compensation for sexual harassment. This is only established in the standard; but the practice and due to the multiple failures in the institutions that generate systematic impunity and revictimization for victims and their families, it is unknown that they seek this type of reparations, since it is difficult to reach a conviction for the responsible for crimes.

**Aggravating and mitigating circumstances**

**8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?** Yes. Article 68 of the Organic Law on the Right of Women to a Life Free of Violence addresses these circumstances. They are:

- i. To enter the residence of the attacked woman or the place where she lives, when the conjugal or marital relationship of the woman victim of violence with the accused, is in a situation of de facto or legal separation, or when the marriage has been dissolved by final judgment.
- ii. To enter the residence of the woman victim of violence or in the place where she inhabit, using the consanguinity or affinity bond.
- iii. Execute it with weapons, objects or instruments.
- iv. Execute it to the detriment of a pregnant woman.
- v. Execute it in a sheaf or with a group of people.
- vi. If the author of the crime is a public official, in the exercise of his functions.
- vii. Perpetrate it to the detriment of especially vulnerable people, with disabilities physical or mental.
- viii. That the accused has been sanctioned with a definitive sentence by the commission of any of the crimes provided for in the Organic Law on the Right of Women to a Life Free of Violence
- ix. Deliberately transmitting to women victims of violence, infections or diseases that put your health at risk.
- x. Carry out actions that deprive the victim of the ability to discern, consequence of the use of fraudulent means or narcotic or exciting substances.

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

**b. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference)** YES. According to the aggravating circumstances established in Article 68, No. 7, of The Organic Law on the Right of Women to a Life Free of Violence. But it does not specifically address relationships where there is an imbalance of power.

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

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

Yes. In case the accused admits the facts. As established by the second bullet from article 107 “Of the preliminary hearing” section of the Organic Law on The Right of Women to a Life Free of Violence.

**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?**

Although the rule has been repealed, in practice is allowed. In the stage of trial shall cease all penalties related to the punishable act in case of having gotten married.

**a. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?** Yes, in practice it is allowed. In practice it happens that receiving officials of the complaint urge the parties in the case of concubine and conjugal relations to reconcile and seek professional help such as psychological help or therapy couples.

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

a. if the perpetrator marries the victim of rape? YES

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

**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**

**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. Impunity, systematic and widespread.** Lack of diligence and due process. One of the most serious problems that Venezuela has and especially the women and girls, is the lack of access to justice and ineffectiveness of the system that brings as a consequence impunity, an aspect that leads to re-victimization and multivictimization of the victims, when they go to demand their rights. The Venezuelan justice system, in the face of violence against women, continues to act with

inefficiency or indifference what constitutes in itself a discrimination against women in their access to justice. The lack of research is already a form of discrimination based on gender. There are no effective mechanisms to prevent, investigate and punish crimes committed against women. That is, there are problems of a structural nature, where women and girls are totally unprotected by the system of justice, where impunity reigns. In crimes of sexual violence committed against women, the patriarchal justice treats offenders with such a degree of tolerance that, in most cases, appear as holders of a form of patent to commit them, it is the most similar to a type of "right" that does not allow them to be prosecuted guilty or criminals.

**17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? NO**

**18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.** Yes. The testimony of the victim is not considered a fundamental element of proof; the order of the Prosecutors Office (Fiscalia) is required, so that the forensic medicine take the forensic medical exam.

**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? YES/NO. If yes, please specify.** NO

**War and/or conflict**

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

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

**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**

Venezuela, ratified the Rome Statute on June 7, 2000, thus becoming the first in Latin America and the eleventh worldwide. The Bolivarian Republic of Venezuela, is a State party to the Rome Statute of the International Criminal Court, which was adopted as a Law of the Republic by Law approval of the Rome Statute of the International Criminal Court published in Gazette Official No. 5,507 Extraordinary of December 13, 2000.

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

Venezuela does not keep statistical data on these cases; in fact there exist international resolutions and sentences where the Venezuelan State is required act with due diligence in order to produce said statistics in order to generate favorable public policies.

#### 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.**

In Venezuela, there are both institutional as well as social obstacles, since the victims of sexual violence are seen infringed due to the lack of knowledge on the part of the police agencies to address and investigate these crimes. In most cases the authors of these crimes are not prosecuted because there is no suitable means to investigate and punish those responsible. On the other hand, the Venezuelan State does not have public policies aimed at education, training and education of police officers, to investigate these crimes. Although there is a legal provision, such as the Organic Law of Violence Against Women, that establishes these unlawful acts, it becomes ineffective by virtue of the lack of expertise on the part of our law enforcement officials in addressing these facts. On repeated occasions the victims are re-victimized by the sole fact of presenting themselves to report before a police body. Many of the complaints do not reach the trial stage, due to the inexperience on the part of police officers, prosecutors and even judges, instead of providing the due attention to the victims, there is a constant revictimization of those who need protection.