

Questionnaire "Expediting efforts to eliminate all forms of violence against women and girls" - Note DGOCI-DG-MIRE-2020-06711 of the Directorate of International Organizations and Conferences of the Ministry of Foreign Affairs of the Republic of Panama, sent by the Special Rapporteur on violence against women, its causes and consequences.

- **Questionnaire on the criminalization and prosecution of rape**

Definitions and scope of criminal law provisions

1. Provide information on the provision(s) on rape or (or similar forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing complete transcripts and translations of the relevant articles of the penal code and code of criminal procedure.

Article 174. Anyone who, by means of violence or intimidation, has carnal knowledge of a person of either sex, using his or her genital organs, shall be liable to imprisonment for a term of five to ten years. This penalty shall also be imposed on anyone who makes himself or herself carnally available on equal conditions. The same penalty shall be imposed on anyone who, without the consent of the person concerned, performs oral sex on him or her or inserts, for sexual purposes, any object or part of his or her non-genital body in the anus or vagina.

The penalty shall be ten to fifteen years' imprisonment in any of the following circumstances:

- 1. When the rape causes the victim a psychological disorder that limits or prevents his or her functionality.**
- 2. When the act causes the victim physical damage that results in a disability of more than thirty days.**
- 3. If the victim becomes pregnant.**
- 4. When the perpetrator is a minister of worship, educator or is in charge, in any capacity, of his or her custody, upbringing or temporary care.**
- 5. If the act is committed with abuse of authority or trust.**
- 6. When the act is committed with the assistance of two or more persons or before observers.**
- 7. When the sexual access is made using denigrating or humiliating means.**

The penalty shall be twelve to eighteen years, if the rape is committed with knowledge of the situation by a person who is ill or is a carrier of an incurable sexually transmitted disease or acquired immune deficiency virus.

Article 175: The conduct described in the preceding article, even if it does not involve violence or intimidation, shall be punishable with imprisonment of twelve to eighteen years if the act is committed:

1. With a person under fourteen years of age.
2. With a person who is deprived of reason or sense or who has a physical or mental disability that prevents him or her from consenting or who, for any other reason, cannot resist the act.
3. By abusing his or her position, with a person who is in custody or entrusted to the perpetrator to take custody of him or her or carry him or her from one place to another.
4. In a person who, because of his or her age, cannot consent to or resist the act".

2. Based on the text of these provisions, please inform whether the definition of rape is:

- Gender-specific, covering only women: NO
- Gender-neutral, covering all people: YES
- Based on the victim's lack of consent: YES
- Based on the use of force or threat: YES
- Any combination of the above: YES
- Does it only cover vaginal rape?: NO
- Does it cover all forms of penetration? YES. Please specify: vaginal, anal, orogenital, also introducing fingers, hand, closed fists, objects of different quality and shapes and animals.
- Is marital rape explicitly included in this provision: NO.
- Is marital rape omitted from the law? NO.
- Is marital rape covered in the general provisions or by legal precedent, even if it is not explicitly included? YES.
- Is marital rape excluded in the provisions, or is marital rape not considered a crime: It is not excluded. It is a crime.

3. To what extent does your country's legislation exclude the criminalization of the perpetrator if the victim and the alleged perpetrator live together in a sexual relationship/have a sexual relationship/have had a sexual relationship??

A.: NO, to no extent.

4. What is the legal age of sexual consent? 18 years. However, among both partners who are minors, the perpetrator is subject to psychoeducational measures, except in more serious crimes, such as rape, which can reach up to 9 years, which is the maximum according to Article 140, paragraph 3 of Law 40 of 1999); it could be longer, if this conduct is concurrent with

another equally punishable offence, by way of actual concurrence of offences, for example, kidnapping or femicide (case law is not yet uniform throughout the country in this regard).

5. Are there different provisions for sexual activity among adolescents? If so, please provide them. **Article 8 of Law 40 distinguishes between two age groups: between 12 and 14 years old who have not turned 15 and between 15 and 17 years old who have not turned 18, which is when they are criminally liable for their punishable acts. In the first group, because of these proven behaviors, social reeducation measures are applied only under the supervision of the National Secretariat for Children, Adolescents, and the Family.**
6. Provide information on prescribed criminal sanctions and their duration criminalized forms of violation.

Unqualified rape (art. 174, first and second paragraphs, of the Penal Code) records three modes of consummation of the conduct: 1. Carnal access via the genitals; 2. Making themselves accessible (penetration, anal or vaginal); 3. Oral sex acts (without the victim's consent). The crime here carries a prison sentence of 7 to 12 years. In a fourth paragraph, aggravated rape is contemplated and carries a penalty of 10 to 15 years. Finally, the same article 174 of the Penal Code, punishes with a penalty of 12 to 18 years of imprisonment, rape committed by a perpetrator who with knowledge of his or her illness or condition of being a carrier of an incurable STD, or of the VIRUS of IMMUNE DEFICIENCY ACQUIRED. [S/C]

Article 175 of the Penal Code provides for a mode of rape that occurs even when there is no violence or intimidation as circumstances violating the sexual freedom of the adult victim or the sexual integrity of the minor, since he or she is not able to consent to or resist the act for various reasons (under 14 years of age; with abuse of authority, of trust, is in police custody; is related to the perpetrator; has a mental or sensory disability, because of his or her age, or any other equivalent reason, is unable to exercise the right to sexual freedom, to consent or to refuse.

7. What does the law in your country provide in terms of reparation to the victim of rape and/or sexual violence after the conviction of the perpetrator?

A.: The sentence is constituted as an enforceable instrument to claim by civil means the reparation that it considers appropriate, but also during the criminal process, the victim can designate a public defender paid by the State and this person can present a Complaint by means of which he or she claims compensation for the damage that has been caused to the victim as a result of the crime, by way of reparation. The State does not provide reparation to victims of rape. This is responsibility derived from the crime for which the accused has been found guilty by a final and enforceable sentence. In this condition, he or she must respond to the civil action for reparation requested with the criminal complaint or before the civil jurisdiction.

➤ **Aggravating and mitigating circumstances**

8. Does the Law provide for aggravating circumstances when sentencing rape cases? If so, what are they?

A.: YES, they are read in transcription of articles 174 and 175 of the Penal Code, above.

a. Is rape by more than one perpetrator an aggravating circumstance? YES. Article 174, paragraph 6. When it is committed with the participation of two or more persons or before observers.

b. The rape of a particularly vulnerable individual is an aggravating circumstance or the imbalance of power between the alleged perpetrator and the victims (e.g. doctor/patient; teacher/student; age difference): YES. Article 175, paragraphs 1 to 4.

c. Is rape by a spouse or intimate partner an aggravating circumstance? YES. Article 174, paragraph 4 (close relative by affinity, if they are married or constitute a couple as such within the meaning of article 200 of the Penal Code) and 5, when committed with abuse of trust.

9. ¿Does the Law provide for mitigating circumstances for the purposes of punishment? Yes. If so, please explain. In fact, those so-called "common" circumstances which are provided for in article 90 of the Penal Code and which are transcribed below:

"1. Having acted for noble or altruistic reasons.

- 2. Not having had the intention of causing harm of such gravity as that which occurred.**
- 3. The physical or psychological conditions that placed the agent in an inferior position.**
- 4. Repentance, when by acts subsequent to the execution of the action, the agent has diminished or tried to diminish its consequences.**
- 5. The effective collaboration of the agent.**
- 6. Having committed the crime in conditions of diminished illegal liability.**
- 7. Any other circumstance not preestablished by law which, in the opinion of the Court, should be appraised”.**

A. In our experience, the mitigating factors that have been recognized in cases of rape are those referred to in paragraph 4, cases of profuse bleeding or genital hemorrhage, and the perpetrator has provided assistance by taking him or her to a medical center. Some may say that wearing a condom when raping a person is a way of lessening or trying to lessen the consequences of the action. I do not know of any case law in the country in this regard, but it could be considered, mainly if the subject is known to be a carrier or sick with an incurable STD or is HIV positive. Regarding effective collaboration, it could be applied when we have a case of sexual assault in a group and the authorities need to know the identity of all those who have participated, even if they were present as observers, thus contributing to increase the environment of environmental intimidation that represents the group that he or she can imagine will sexually assault him or her by "turns". On diminished legal liability, it certainly applies in cases where the subject has been drugged or drunk, but not deliberately thereby, would determinedly or premeditatedly rape anyone. This is a controversial figure. It could be a person with intellectual disability, whose libido is exacerbated and in the absence of his or her medication, fall into a state of uncontrolled excitement, even raping whoever is within his or her reach. Finally, number 7 used to be invoked for people without criminal records, however, under the current accusatory penal system, this is no longer a mitigating circumstance for the criminal responsibility of the accused, therefore, the reduction in the sentence referred to in article 92 of the Penal Code would not be applicable to him or her.

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

a.) Regardless of the law, is reconciliation allowed in practice? What is the practice in this regard? We will explain below.

A.: Reconciliation between two adults, victim, and victimizer, is permitted, rather the law cannot prohibit it, it is part of every person's right to autonomy of will. However, no legal effect on the count of rape charged/accused or proven to the perpetrator is recognized to such a manifestation of reconciliation.

Reconciliation between victim and offender is not part of the general catalogue of mitigating factors, nor is forgiveness. The mitigating circumstance of repentance (art. 90, paragraph 4), for example, demands that the perpetrator take action to diminish the damage caused immediately or at least try so that a reduction of the penalty that the accused would face in court can be justified, as we explained earlier).

In practice, we could concede that if a rape has occurred, we could think that if the victim has been beaten or physically abused, causing serious bleeding from his or her genitals, the accused knowing that he or she may die, takes him or her to a hospital. There the accused drops him or her off at the emergency room and leaves. This conduct could be a circumstance modifying the criminal responsibility of the accused in that he or she will still have to face trial unless he or she enters into a plea agreement with the Prosecutor's Office. Even more so if the victim, who had been his or her friend or partner, who was raped, expresses to the competent authorities that he or she has been forgiven and they have reconciled, this single manifestation does not produce any effect on the process of impeding its course to take the presumed perpetrator of the crime to trial. Even if, in this scenario, he or she accepts the acts committed to the detriment of the victim, declares remorse and offers some amount of money in compensation, he or she may well aspire to an early termination of the process, as we have already mentioned, in the Plea Agreement (art. 220 of the Code of Criminal Procedure), through negotiation with the Public Prosecutor's Office, duly represented in his or her interests, by the defence. This plea agreement may represent a reduction of up to 1/3 of the sentence that the accused would face if his or her state of innocence had been overcome in the oral proceedings. However, it does not exonerate him or her from the sentence, in his or her criminal record, the antecedent for rape and the sentence to which he or she was convicted, generally that of prison, are recorded..

It should be made clear that in Panama there are alternative penalties to the main one, such as community work (article 50, paragraph 2), which is applicable even in cases of rape with a prison sentence of not more than 5 years when the victim is of legal age, but this decision is within the power of the Compliance Judge. It is not legally feasible to grant it, in cases of sexual crimes with minor victims since Law 21 of March 20, 2018. (art. 2, amending article 65 of the Penal Code).