Gender and the criminal justice system: Comparing forcible rape law in Colombia and Chile

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Abstract 1

Sexual violence is a pervasive global phenomenon that perpetuates gender inequality and the subordination of women. Contributing to the literature on comparative criminal law and criminal procedure law, this chapter examines the problem of sexual violence and how the Colombian and Chilean legal systems have sought to confront it through criminal law. Through a comparison of forcible rape law and some judicial decisions of both countries, this chapter argues that Colombia and Chile's different regulatory models of forcible rape have generated similar practical results. Some judgments recreate stereotypes about women and rape, while others have incorporated a gender perspective that attends to the circumstances surrounding sexual violence and protects women's rights.

I. Introduction

Sexual violence is a serious global problem and constitutes a severe violation of human rights in which women are disproportionately the victims. Legal systems worldwide have tried to deal with this phenomenon in different ways. One of them has been the criminalisation of behaviour related to this form of violence since a key function of criminal law is the protection of legal goods or interests (*bienes jurídicos*), such as sexual freedom and integrity, physical and mental integrity, and privacy, among others. 2

This chapter briefly analyses the problem of sexual violence and how the Colombian and Chilean legal systems have sought to confront it through criminal law. With a focus on forcible rape law, the following sections examine the debates on force, violence and consent concerning this type of crime. Crucially, this chapter details how the Colombian and Chilean legal systems regulate forcible rape and how judicial applications of their respective law regarding forcible rape compare between these two countries. 3

4 Colombia and Chile are relevant case studies based on the criteria of the principle of prototypical cases.[1] Chile's criminal justice reform is well-recognised as a successful example in Latin America and has influenced other countries' reforms.[2] The Chilean judicial branch has promoted a gender approach in the justice system[3] while women advocates are very active throughout the country. The latter is typified by the Chilean women's collective, Las Tesis, that wrote 'A rapist in your path',[4] a globally popular protest song that criticises the response of State institutions, including the judicial system.

5 Colombia offers much in terms of studying sexual violence and women's rights for two reasons. First, Colombian law extensively incorporates human rights and women's rights at the domestic level, primarily because of vigorous feminist activism and the progressive jurisprudence of the Constitutional Court. Secondly, some institutions have formulated gender policies and designed protocols, handbooks, guidelines and training sessions to incorporate a gender approach in the justice sector.[5] Likewise, the Constitutional Court, some laws as well as a number of decrees have established an obligation to apply a gender perspective.[6]

6 The functional method of comparative law[7] is the guiding framework for this chapter. According to this approach, "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concept of one's

1 Ran Hirschl, 'The question of case selection in comparative constitutional law' (2005) 53 The American Journal of Comparative Law 125.

2 Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 Am J Comp L 617, 656.

3 https://eurosocial.eu/wp-content/uploads/2019/06/2_CHILE_experiencia-destacada-Genero.pdf

4 https://www.theguardian.com/society/2020/feb/03/the-rapist-is-you-chilean-protest-song-chanted-around-the-world-un-iolador-en-tu-camino

5 See, e.g., https://escuelajudicial.ramajudicial.gov.co/noticia/herramientas-pedagogicas-para-incorporacion-de-perspectiva-de-genero-en-decisiones-judiciales; https://www.fiscalia.gov.co/colombia/protocolo-violencia-sexual/.

6 See, Section 2.1.

7 On the functional method in the field of comparative criminal law, see, Kai Ambos, 'The Current State and Future of Comparative Criminal Law – A German Perspective' (2020) 24 UCLA J Int'l L Foreign Aff 9, 27–29.

own legal system."[8] This approach allows lawyers from different countries to discuss similar issues from a broader perspective beyond national legal concepts, which use to be contingent and instrumental.[9]

Some authors critique this method as reductionist and overly rule- 7
centred.[10] Consequently, they argue that the method overlooks the broader framework (cultural, historical, socioeconomic, etc.),[11] cannot address individual institutions conditioned by the system[12] and disregards causal explanations.[13] Graziadei states that "contemporary criticisms of the functional method insist on the complexity of the 'law' as a phenomenon while, at the same time, stressing the importance of doing justice to such complexity when comparing laws".[14] Against the background of this kind of criticism, Ambos suggests possible adaptations of the functional method, such as going beyond the law on the books and understanding legal institutions in their respective sociocultural context. However, this author cautions against embarking on overly ambitious comparisons of cultures in their totality.[15] Despite the inherent limitations of the functional method,[16] it can be a

8 Konrad Zweigert and Hein Kötz, *An Introduction to comparative law* (3rd edn, Oxford University Press 1998) 34.

9 Michele Graziadei, 'The functionalist heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative legal studies: traditions and transitions* (Cambridge University Press 2003) 105,106.

10 Ibid,110.

11 Oliver Brand, 'Conceptual comparisons: towards a coherent methodology of comparative legal studies' (2006) 32 Brook J Int'l L 405, 418. Graziadei (n 10) 111.

12 Brand (n 11) 417.

13 Ibid, 417.

14 Graziadei (n 10) 114.

15 Ambos (n 7) 12, 32.

16 Comparative law comprises a variety of methods other than functionalism to explore different questions, such as comparative legal history, the study of legal transplants, and the study of legal cultures, among others. A significant body of comparative law literature has developed cultural approaches, which propose understanding legal concepts, rules, and institutions within the cultural context; some concentrate on the legal culture, while others focus on a broader context; for example, see Pierre Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 Maastricht J Eur & Comp L 111; see also Roger Cotterrell, 'Comparative law and legal culture' in Mathias Reimann and Reimann Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2019). Some contextual approaches explore the transformation of transferred legal ideas, rules, or institutions at the receiving sites. For instance, Langer proposed the legal translation metaphor to reassess the "legal transplant" metaphor. The metaphor of legal translation highlights that the decisions of "translators" (legal reformers) or structural differences between the sets of meaning of the systems (languages) can explain the transformation of the transferred legal

useful starting point for comparative law research as it facilitates analyses of legal rules and institutions based on their functions and the study of practice through the examination of judicial decisions.[17]

8 To accomplish its aims, this chapter is divided into four sections. Section 1 examines the problem of sexual violence without specific references to the Colombian and Chilean legal systems. Section 2 describes how the Colombian and Chilean legal systems seek to address the problem of sexual violence by regulating the crime of rape; this description focuses on forms of rape that involve forcible compulsion. Section 3 compares examples of judicial decisions handed down in both legal systems, illustrating that their different regulatory models regarding forcible rape have generated similar practical results. Some of the analysed judgments recreate common stereotypes about women and rape that affect the prosecution and sentencing of this type of crime, while others incorporate a gender perspective that attends to the circumstances surrounding sexual violence and protects women's rights. The final section presents some conclusions.

1. Contextualising the problem of sexual violence

9 Sexual violence is a pervasive global phenomenon that helps to perpetuate gender inequality and the subordination of women. According to 2018 data, in the Americas, 25 % of ever-married or partnered women aged 15–49 have been victims of physical and/or sexual violence by a current or former husband or male partner at least once in their lifetimes since the age of 15. This percentage is slightly lower than the global average (27 %). In the Americas, 6 % of women aged 15 years and older have been subjected to sexual violence not involving a (former) partner at least once in their lifetimes since the age of 15, which is double the global average (12 %).[18]

10 Gender-based violence has risen to prominence as a major social problem in the last forty years. Beginning in the 1970s, local and national movements on gender violence emerged in many parts of the world, often

concepts and institutions. Máximo Langer, 'From legal transplants to legal translations: The globalization of plea bargaining and the Americanization thesis in criminal procedure' (2004) 45 Harv Int'l LJ 1.

17 Brand (n 11).

18 World Health Organization, *Violence against women prevalence estimates, 2018* (2021).

influencing each other and, by the 1990s, these movements began to coalesce into an international human rights movement.[19]

11 During the 1980s and 1990s, women's movements used international conferences to solidify the definition of violence against women (VAW), establish that VAW in public and private spheres was a serious human rights violation and promote the fight against these forms of violence.[20] For example, in 1985, the UN's Third World Conference on Women in Nairobi noted that VAW is a human rights concern and, in 1992, General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) indicated that VAW is a form of discrimination that the CEDAW Convention prohibits. In 1994, the Inter-American System of Human Rights adopted the Convention on the Prevention, Punishment and Eradication of VAW (The Convention of Belém do Pará).

12 As a form of gender-based violence, sexual violence is a critical dimension of the subordination of women and has a devastating impact on women's lives. International human rights instruments and organisations have established international standards to investigate and prosecute cases of VAW. The general obligations set out in Articles 8 and 25 of the American Convention on Human Rights are complemented and reinforced by the obligations derived from the Convention of Belém do Pará (Art. 7). States must exercise due diligence to investigate and punish VAW to avoid impunity and the repetition of such acts.[21] State authorities must initiate *ex-officio* a serious, impartial, immediate, exhaustive and effective investigation using all available legal means. States must also adopt comprehensive protection measures and strategies designed to eliminate or limit risk factors and strengthen institutions to provide an effective response to cases involving VAW.[22]

13 Feminist activists and women's NGOs have also made efforts to affect International Criminal Law (ICL) from a gender-sensitive approach since

19 Sally Engle Merry, *Gender Violence: A Cultural Perspective* (Wiley-Blackwell 2009) 1, 21.

20 Ibid. Sally Engle Merry, *Human rights and gender violence: translating international law into local justice* (University of Chicago Press 2006).

21 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, par., 172. *Garibaldi v. Brazil*, Judgment of 23 September 2009, par. 141. *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, par. 179. *González et al v. Mexico*, Judgment of 19 January 2009.

22 IACtHR, *Favela Nova Brasília v. Brazil*, Judgment of 16 February 2017.

the 1990s. They engaged with new international institutions such as the UN's ad hoc tribunals for Yugoslavia and Rwanda as well as the International Criminal Court (ICC). They have succeeded partially in influencing the nature of crimes, rules of evidence for rape and other forms of sexual violence, the form of the indictments of such crimes as well as the strategies and legal argumentations in the proceedings.[23] Notably, the Rules of Procedure and Evidence of the ICC establish principles of evidence for cases of sexual violence, including descriptions of consent and coercion.[24]

14 Women's rights advocates have invoked Human Rights Law (HRL) within domestic legal mobilisation to combat VAW. Presenting acts such as domestic violence as rights violations has made visible long-term and often socio-culturally entrenched unjust situations. Moreover, women's claims in terms of human rights have shifted the forum from the local to the national and international levels. Therefore, human rights discourses have proven to be a powerful resource for women's advocates to demand social justice in domestic law reform processes.[25]

15 Since the early 1990s, most Latin American countries have approved laws to protect women's rights and address VAW.[26] 'First generation' laws focused on violence suffered in the private sphere (intrafamily, domestic or intimate violence). Based on the framework of the Convention of Belém do Pará, some countries in the region have enacted comprehensive laws on VAW, known as 'second-generation' laws. These laws include various forms of VAW perpetrated in private and public spheres: for example, economic or patrimonial violence, violence in different places (e.g., streets, transportation systems, recreational spaces and education facilities) as well as violence in the context of armed conflicts. Some 'second-generation'

23 Rhonda Copelon, 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000) 46 McGill LJ 217; Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 American Journal of International Law 778; Louise Chappell, 'Women, gender and international institutions: exploring new opportunities at the International Criminal Court' (2003) 22 Policy and Society 3.

24 International Criminal Court, Rules of Procedure and Evidence, Rule 70, Principles of evidence in cases of sexual violence.

25 Merry, *Human rights and gender* (n 20); Beth A. Simmons, *Mobilizing for human rights: international law in domestic politics* (Cambridge University Press 2009).

26 The Gender Equality Observatory for Latin America and the Caribbean's repository of violence laws contains relevant legal instruments from 38 countries, see: https://oig.cepal.org/en/laws/violence-laws

laws adopt an intersectionality[27] approach that considers the interaction of multiple sources of oppression (e.g., gender, class, race, etc.) and also emphasise the care that should be provided to the victims/survivors as well as their getting access to justice and reparation.[28]

16 The Committee of Experts (CEVI) of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) emphasised that laws on women's rights "must be accompanied by public policies aimed at eradicating violence and take into account the reality of the diversity of the women in the region and the persistence of socio-cultural patterns that entrench the perspective of hegemonic power through historically accepted discriminatory behaviour".[29]

17 Despite legal reforms and the efforts of judicial bodies in the region, international organisations, civil society actors and judges have identified multiple obstacles that women victims face in accessing justice and participating effectively in criminal proceedings. In particular, the Inter-American Commission on Human Rights (IACHR) claims that "States lack a sweeping vision or a comprehensive institutionalised policy for preventing, prosecuting and punishing acts of violence against women and providing redress".[30] Consequently, most sexual offences still go unpunished and women's rights remain unprotected.[31] This degree of impunity has negative impacts on women and society as it sends the message that VAW is still largely tolerated and accepted, a situation that facilitates and promotes

27 Intersectionality is a conceptual framework that shows how several forms of inequality (e.g. gender, race, class or immigrant status) interact and exacerbate each other. Therefore, it shows the relationship between multiple systems of power and oppression. See Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) Stanford Law Review 1241.
The "overlapping of various layers of discrimination – or intersectionality – leads to a form of deepened discrimination." (IACHR, *Indigenous women and their human rights in the Americas* (2017) para. 38).

28 UNDP and UN Women, *From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean. Regional Analysis Document*, 2017) 15–26.

29 MESECVI, *Third Hemispheric Report on the Implementation of the Belém do Pará Convention: Prevention of violence against women in the Americas. Paths to follow* (2017) par. 93.

30 IACHR, *Access to justice for women victims of violence in the Americas* (2007) par. 7.

31 Ibid, par. 294; MESECVI, *Third Hemispheric Report* (n 29).

the perpetuation and social acceptance of the phenomenon, leaves women feeling insecure and fosters their lack of confidence in judicial systems.[32]

18 The ineffectiveness of the region's criminal justice systems is partly attributable to discriminatory socio-cultural patterns that influence the behaviour of State representatives at all levels.[33] Thus, women's movements, international organisations and State representatives from some Latin American countries have advocated incorporating a gender and intersectionality perspective in the various national justice systems.

19 Furthermore, the Committee of Experts of the MESECVI claims that a review of the constituent elements of sexual violence crimes and their interpretation by administrators of justice systems in the region is essential. A critical component is a clear understanding of the concept of consent in cases of sexual violence, understood as the ability of women to indicate a willingness to engage in the act. As such, the CEVI has recommended that penal codes include the criteria to determine the absence of consent in a sexual act that ICL has developed.[34]

2. Forcible rape law in Colombia and Chile

a) The crime of violent carnal access in Colombia

20 The CEVI has recognised Colombia's efforts to adapt its legislation to the Convention of Belém do Pará through a broad legal framework concerning VAW. Among other actions, Colombia's Congress has approved a 'second-generation' law, namely the Law on VAW in 2008 (Law 1257). The CEVI also highlighted that Colombia has sought to develop appropriate elements for dealing with cases of VAW through guidelines and protocols designed to assist victims and effectively carry out judicial proceedings.[35] Furthermore, the Colombian judicial system has promoted the incorporation of

32 MESECVI, *Third Hemispheric Report* (n 29) par. 470; IACtHR, *González et al v. Mexico*, Judgment of 19 January 2009, par., 400. *Veliz Franco et al. v. Guatemala*, Judgment of 19 May 2014, par. 208; IACHR, Report 141/19, Case13.080, *Angulo Lozada v. Bolivia*, 28 September 2019.

33 IACHR, *Access to justice for women victims of violence in the Americas* (n 30) par. 8.

34 Committee of Experts of the MESECVI, *General Recommendation No. 3: The Concept of Consent in cases of Gender-Based Sexual Violence Against Women* (2021).

35 MESECVI, *Colombia Informe de Implementación de las Recomendaciones del CEVI. Tercera Ronda – Fase de Seguimiento* (2020) par. 9, 51.

the gender perspective, especially in cases of VAW.[36] Notably, in 2016, the Attorney General's Office formulated the Protocol for Investigation of Sexual Violence, an instrument that employs a gender and intersectionality approach[37].

Despite these efforts, the CEVI indicates that the gap between normative 21
standards and the effective observance of women's rights in Colombia persists. Statistics show a persistently high, and indeed increasing, number of cases of violence against women and girls as well as a high degree of impunity, all of which suggests an enduring tolerance of VAW by State representatives.[38]

The Colombian Penal Code (Law 599, enacted in 2000) establishes 22
sexual crimes in Title IV "Crimes against sexual freedom, integrity and formation." In the previous Colombian Penal Code (Decree 100, issued in 1980), the protected legal good in sexual crimes was sexual freedom and modesty. Various other countries also established sexual modesty or sexual honesty as protected legal goods by criminalising sexual crimes, which reproduced and preserved gender roles and privileged specific conceptions of sexual morality.[39]

Law 360, which was enacted in 1997, modified the 1980 Penal Code by 23
establishing sexual freedom and dignity as the legal goods protected by sexual crimes. Considered a success of the legislator for moving away from subjective and arbitrary concepts such as sexual modesty, some sectors, nonetheless, criticized human dignity with a view to the legal good / interest protected. Because the 1991 Constitution recognised human dignity as a pillar of the social and democratic rule of law, they argued that the entire criminal law system should protect human dignity, not just a specific title.

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36 In Colombia, the Attorney General's Office and Superior Council of the Judiciary have formulated gender policies and have designed protocols, handbooks, guidelines and training sessions to incorporate the gender approach into the judicial system. Likewise, some judicial decisions, decrees and laws have established the obligation to apply the gender perspective (e.g., Law 1098, enacted in 2006, Law 1448, enacted in 2011, Law 1709, enacted in 2014; Decree 1710, issued in 2020; Colombian Supreme Court of Justice, Judgment STC2287–2018, 21 February 2018; Colombian Constitutional Court, Judgments T-145 of 2017, T-590 of 2017, T-095 of 2018, T-462 of 2018, T-878 of 2014).

37 https://www.fiscalia.gov.co/colombia/wp-content/uploads/Protocolo-de-investigacio%CC%81n-de-violencia-sexual-cambios-aceptados-final.pdf

38 MESECVI, *Colombia Informe de Implementación* (n 35) par. 51.

39 Adela Asua Batarrita, 'Las agresiones sexuales en el nuevo Código Penal: imágenes culturales y discurso jurídico', *Análisis del Código Penal desde la perspectiva de género* (Emakunde – Instituto Vasco de la Mujer 1998).

Consequently, the Penal Code of 2000 (hereinafter CoPC) adopted a new conception by establishing sexual freedom, integrity and formation as the legal goods protected by the sexual crimes regulated in Title IV.

24 Title IV includes three classes of such crimes: i) Rape: violent carnal access (Art. 205), violent sexual acts (Art. 206), and carnal access or a sexual act inflicted on a person rendered unable to resist (Art. 207); ii) Abusive sexual acts: abusive carnal access with a minor under 14 years old (Art. 208), sexual acts with a minor under 14 years (Art. 109), carnal access or an abusive sexual act with someone unable to resist (Art. 210) and, lastly, sexual harassment (Art. 210A); iii) Sexual Exploitation (Chapter IV).

25 In recent years, Congress has approved multiple amendments to Title IV of the CoPC, including creating new criminal categories (e.g., sexual harassment) and increasing the penalties for these crimes through Law 890 (enacted in 2004) and Law 1236 (enacted in 2008). Additionally, Congress enacted the Law on VAW (Law 1257 issued in 2008) and Law 1918 (in 2018) related to penalties for sexual violence against minors. Moreover, Law 1719 (enacted in 2014) added multiple crimes that affect sexual freedom, integrity and formation in the context of an armed conflict. For this reason, they appear in Title II of the Code under the heading of "Crimes against persons and property protected by International Humanitarian Law."

26 This chapter focuses on violent carnal access (Art. 205), considering it is the highest rule regarding the protection of sexual rights in the Colombian Penal Code and given that intense debates regarding violence and consent revolve around this crime.

aa) Protected legal good through the crime of violent carnal access

27 The crime of violent carnal access protects the legal good of sexual freedom in Colombia. Although the 1991 Constitution does not expressly recognise autonomy or sexual freedom, these have constitutional bases in fundamental rights such as personal integrity, freedom, privacy and the free development of personality.

28 According to the Colombian Supreme Court of Justice, sexual freedom is "the right that every human person has to choose, reject, accept and self-determine sexual behaviour, whose limits will be the ethical postulates on which the community is founded and respect for the correlative rights of others. In other words, sexual freedom is the right that a person has to

self-determine and self-regulate her sexual life. Thus, sexual crimes violate the right of the person to dispose of her own body."[40]

Moreover, judges have indicated that the crime of violent carnal access may also affect the legal good of sexual formation since females older than 14 years can be victims of this crime and they are entitled to the protection of this legal good.[41] The Supreme Court has defined the legal good of sexual formation as an ability to make self-determinations about sexual matters in the future, so this only protects minors.[42] 29

bb) Objective and subjective elements, perpetrators and victims

The prohibited conduct is carnal access to another person through violence (Art. 205 CoPC). Article 212 of CoPC defines carnal access as anal, vaginal or oral penetration by the male organ as well as vaginal or anal penetration by any other part of the human body or other objects.[43] 30

Torres Tópaga argues that this definition of carnal access expands criminal actions and the protection of the legal good, namely sexual freedom. However, he criticises the definition by arguing that "it is not the same from the point of view of the crime and the injury to the legal good to perform a carnal access with a plastic penis than a real one, nor can penetration with a finger have the same punitive response as penetration with a male organ".[44] This criticism overlooks a fundamental truth that the rule recognises: rape with objects and non-penile body parts can be as traumatic as penile rape. 31

According to the Colombian Constitutional Court, violent carnal access is a crime of conduct and, as such, any anal, vaginal or oral penetration through violence satisfies the elements of the offence and, notably, there is not a required result element.[45] 32

40 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 18455, Judgment of 7 September 2005.Translated by the author.

41 Superior Tribunal of Medellín, Process 2006–00071, Judgment of 3 September 2008.

42 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 29117, Judgment of 2 July 2008.

43 For more information, see, Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 23790, Judgment of 7 September 2006. Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 22203, Judgment of 23 May 2007.

44 William Torres Tópaga, 'Delitos contra la libertad, integridad y formación sexuales', *Lecciones de Derecho Penal: Parte especial* (3a ed., Universidad Externado de Colombia 2019) 476, 477. Translated by the author.

45 Colombian Constitutional Court, Judgment C-674 of 2005.

33 The CoPC requires intention (*dolus*) as a prerequisite for criminal liability in cases of violent carnal access. Regarding the subjective element, the conduct must be aimed at attacking the legal good of sexual freedom. The Colombian Supreme Court of Justice has clarified that there is not an additional subjective element, such as a libidinous, lubricious or lascivious mood.[46]

> "The intention to violate the legal good, however, cannot be derived from the verification of an internal purpose or psychological data in the perpetrator of the conduct (such as the desire to satisfy sexual desires or inclinations), since the proof of intent is based on a judgment of correspondence between the facts externalised in the physical world (criminal law of act) and certain elements of a subjective nature (knowing and wilful conduct)."[47]

34 The CoPC includes any gender of victims and perpetrators within the violent carnal access crime. In contrast, within the framework of the previous Penal Code (Decree 100, issued in 1980), most legal experts argued that only men could commit this crime because it only included forcible male penile penetration.[48]

cc) Defining the material element of violence

35 Article 212A of the CoPC defines the material element of violence for sexual crimes of Title IV in the following terms:

> "Violence shall be understood as: the use of force; the threat of the use of force; physical or psychological coercion, such as that caused by fear of violence, intimidation; illegal detention; psychological oppression; the abuse of power; the use of coercive environments and similar circumstances that prevent the victim from giving her free consent." [Translated by the author].

46 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 32872, Judgment of 24 February 2010.

47 Ibid. Translated by the author.

48 Jorge Enrique Valencia, *Delitos contra la libertad y el pudor sexuales: examen dogmático* (Forum Pacis 1993) 32, 33. Torres Tópaga (n 44) 474.

In 2014, the legislator added this rule to the CoPC to incorporate the definition of violence developed by the Colombian Supreme Court of Justice as well as the elements of Article 7 (1) (g)-1 num. 2 of the ICC Elements of Crime.[49] With this rule, the CoPC began to include a consent-based approach. 36

The Colombian Supreme Court of Justice has highlighted that violence in cases of sexual crimes may be physical or moral.[50] The Court has also established that violence exists when the means used are sufficient to bend the will of the victim.[51] This doctrine has raised key questions about how one determines whether the means were suitable to bend the will of the victim. 37

Furthermore, Colombian law establishes that physical resistance is not required on the part of the victim to demonstrate violence. Law 1719, enacted in 2014, establishes that "the determination of the occurrence of the act of sexual violence shall not be conditioned on the existence of physical evidence" (Art. 19). Similarly, the Colombian Supreme Court of Justice indicates that "it is absurd to think that in all the cases regarding Article 205 of the CoPC, the victim is obliged to act in a certain way to infer that the perpetrator's action was violent. The main point in these situations is to establish what the will of the victim was, regardless of her reactions or the absence of these".[52] The Court added that demanding action from the victim would imply requiring an element that the legal description of the crime of violent carnal access (Art. 205 CoPC) does not require. 38

a) The crime of rape in Chilean law

The CEVI has noted the somewhat faltering progress of the Chilean State to advance the legal framework of protection, respect and guarantee of the right of women to a life free of violence in accord with the Belém do Pará Convention. The CEVI has highlighted that while the bill on women's right 39

49 Explanatory Memorandum of Bill 037 of 2012 Chamber of Representatives, Congressional Gazzette 473 of 2012, p. 21,

50 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 20413, Judgment of 23 January 2008.

51 Ibid.

52 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 34514, Judgment of 9 September 2015. Translated by the author.

to a life free of violence, a second-generation law, has yet to be passed,[53] there are policies and strategies for incorporating the gender perspective in the judicial system, especially in cases of VAW.[54]

40 The original text of the Chilean Penal Code typified most sexual crimes under Title VII "Crimes and simple crimes against family order and public morality." In 2004, Law 19,927 modified the heading of that title to "Crimes and offences against family order, public morality and sexual integrity". Some drafts of the penal code have proposed to change this current title to eliminate traditional concepts of family order and public morality while retaining concepts of sexual integrity and/or including sexual freedom. These changes in the protected legal goods seek to eliminate the existing moral criteria from the code and break down the stereotypes and social roles associated with gender.[55]

41 In the last decades, Chile has adopted several legal reforms related to sexual crimes, some of which have expanded crimes and increased penalties. Guzmán Dalbora has criticised these reforms, arguing that they lack a doctrinally consistent guiding thread, criminological support and political orientation.[56]

42 The Chilean Penal Code (hereinafter ChiPC) establishes various crimes of sexual violence in Title VII "Crimes and offences against family order, public morality, and sexual integrity as follows:

43 Proper rape is carnal access to a person over fourteen years of age, vaginally, anally or orally, when some of the following circumstances occur: i) when force or intimidation is used; ii) when the victim is deprived of consciousness or when her inability to oppose is taken advantage of; iii) when the alienation or mental condition of the victim is abused (Art. 361 ChiPC).

44 Improper rape is carnal access to a person under fourteen years of age through the vagina, anus or mouth (Art. 362 ChiPC).

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53 MESECVI, *Chile Informe de Implementación de las Recomendaciones del CEVI. Tercera Ronda – Fase de Seguimiento* (2020).

54 In Chile, there are some examples of gender-sensitive strategies and policies, such as the creation of the Technical Secretariat for Gender Equality and Non-Discrimination, the Gender Equality and Non-Discrimination Policy, the Good Practices Booklet to incorporate the gender perspective in sentences, and the Protocol of Action for attention in justice with a gender and sexual diversity approach.

55 Luis Rodríguez Collao, 'Sobre la regulación de los delitos contra la integridad sexual en el Anteproyecto de Código Penal ' (2006) 1 Política Criminal.

56 José Luis Guzmán Dalbora, 'Evaluación y racionalización de la reforma de los delitos contra la libertad sexual' (2016) Revista de Ciencias Sociales.

Sexual abuse is a sexual activity other than carnal access with someone over fourteen years of age (Art. 366 ChiPC). This sexual activity includes any act of sexual significance and relevance carried out through bodily contact with the victim, or that has affected her genitals, anus or mouth, even when there is no bodily contact with her (Art. 366ter ChiPC). 45

Article 361 ChiPC establishes three circumstances that indicate a victim's lack of will but where the description of the crime does not include the lack of consent as an element of the crime. The three circumstances include both forcible and non-forcible forms of rape, however, this chapter will focus on forcible rape, that is, rape by force or intimidation (Art. 361 num. 1 ChiPC) and will briefly examine the debates on the use of force, intimidation and consent related to this crime. 46

aa) Protected legal good through the crime of proper rape by force or intimidation

Sexual violence crimes seek to protect the legal goods of sexual freedom, integrity and indemnity. The Chilean Constitution does not include such legal goods as constitutional rights, however, these legal goods have a connection with the right to life and the right to physical, psychological and moral integrity.[57] 47

There are debates about the legal goods protected by sexual crimes in Chilean literature. The traditional view suggests that sexual crimes are divided into two categories based on the age of the victim: i) crimes that protect the legal good of sexual freedom or autonomy of a victim who is at least 14 years of age, and ii) crimes that protect indemnity or sexual intangibility where the victim is under 14 years of age. The rationale here is that a person under 14 years of age would be incapable of an autonomous exercise of her sexuality, so the protection of sexual freedom is only applicable to victims more than 14 years of age.[58] In this scheme, the rape established in Article 361 would seek to protect the legal good of sexual freedom or autonomy. 48

57 Jean Pierre Matus and María Cecilia Ramírez, *Manual de derecho penal chileno: Parte especial* (Tirant lo Blanch 2021) 185.

58 Juan Pablo Mañalich Raffo, 'La violación como delito contra la indemnidad sexual bajo el derecho penal chileno: Una reconstrucción desde la teoría de las normas' (2014) 20 Ius et Praxis 21.

49 On the other hand, Mañalich proposes a monistic thesis that suggests that the crimes of Articles 361 and 362 seek the protection of a single legal good: sexual indemnity. This legal good is the situational propriety exhibited by a person not currently engaged in any sexual contact with one or more persons.[59]

50 Furthermore, Matus and Ramírez argue that the legislator refers to the set of crimes of sexual violence as crimes against sexual integrity to establish a shared point among them: the reification or instrumentalisation of another person to satisfy one's own sexual desires is a punishable offence.[60]

bb) Objective and subjective elements, perpetrators, and victims

51 Under Art. 361 num. 1 ChiPC, carnal access to persons over the age of 14 is not punishable because of the sexual activity itself but because of the use of force or intimidation. This rule penalises carnal access to anyone over age 14, vaginally, anally or orally and, as such, victims can be of either gender.

52 According to a traditional interpretation of this rule, the word access only refers to active behaviour, so only a man could be the perpetrator of rape since only he can access with his penis.[61] Potential perpetrators of this crime could also be persons with masculine gender identity or intersex persons, who have a penis or a functional equivalent to a penis.[62]

53 This interpretation claims that women cannot be direct perpetrators of this crime, since proper rape under Article 361 num. 1 does not penalize a person who is accessed. Having said that, sexual attacks perpetrated by persons who force a man to access them can be classed as sexual abuse under Articles 365 bis and 366.[63]

54 Furthermore, sexual abuse in Chile includes any sexual activity that introduces any object into the vagina, anus or mouth, or involves the sexualised use of animals, according to Art. 365 bis. This article establishes a common aggravation of special effect for all cases of sexual abuse.[64]

59 Ibid.
60 Matus and Ramírez (n 57) 185.
61 Chilean Supreme Court, Judgment of 7 August 2008, Docket number 5576–2007.
62 Ibid 189, 190. Mañalich Raffo, 'La violación como delito contra la indemnidad' (n 58).
63 Matus and Ramírez (n 57) 189, 190.
64 Ibid 214.

A number of legal scholars have noted that limiting the interpretation of the potential perpetrator in Article 361 to men results from excessive formalism and grammatical interpretation. These scholars propose considering the protected legal good using a teleological interpretation which suggests that the prohibited conduct involves all behaviour aimed at carrying out intercourse, regardless of whether the perpetrator is the one who gains access or who is carnally accessed.[65] In contrast, another group of scholars argues that an extensive interpretation that expands the natural and obvious meaning of the legal terms to cover cases that are not regulated literally is unacceptable, since this expansive interpretation breaches the legal rules of interpretation and violates the prohibition of extensive analogy.[66] 55

Proper rape requires direct intention (*dolus directus*) regarding the sexual act and the circumstances involved. Legal intention (*dolus eventualis*) is applicable for knowledge of the underlying factual objective assumptions of Article 361.[67] 56

cc) Defining the material element of force or intimidation

Force is the exercise of physical violence on the victim to annul or defeat her will contrary to the sexual act.[68] Force can be exercised by whoever carnally accesses the offended person or by another person who assists the accessor, who could be a man or a woman. The force used does not need to be continuous or maintained throughout the rape, nor does it need to be resisted.[69] 57

Intimidation is a serious, credible, plausible and immediate threat of grave damage to achieve carnal access against the will of the passive subject. The seriousness of the threat refers to the type of damage to the safety and personal integrity of the passive subject or a third-party present with whom the victim has affective ties. Awe alone does not constitute intimidation nor is fear experienced by the victim without the author having communicated the damage that the victim would face.[70] Furthermore, there is also no 58

65 Raúl Carnevali Rodríguez, 'La mujer como sujeto activo en el delito de violación: Un problema de interpretación teleológica' (2001) 250 Gaceta Jurídica 13.
66 Matus and Ramírez (n 57) 190.
67 Ibid, 189.
68 Matus and Ramírez (n 57) 144, referencing SCA San Miguel 24.11.2008, RLJ 323.
69 Matus and Ramírez (n 57) 191.
70 Chilean Supreme Court, Judgment of 10 March 2003, Docket number 4115–2002.

intimidation if the threat made involves unattainable damage. The personal conditions of the victim and the objective circumstances of the individual case are essential for judging whether the threat could overcome her will.[71]

59 The immediacy of the threat is the actual or imminent nature of the threatened damage, which must be directed at people present while the sexual demand must also be immediate. Consequently, a threat of future harm does not constitute intimidation.[72]

60 Notably, the case law of the Chilean Supreme Court indicates that to prove the exercise of intimidation, it is not necessary to demonstrate resistance by the victim. In this regard, the Court has determined that is sufficient to verify the lack of will and the existence of psychological violence using the threat of severe and imminent damage to a victim or individuals with which the latter has affective ties.[73]

61 In the last decades, in various countries, there has been a reform movement that has sought to base regulatory models of rape on the notion of a lack of consent, thereby displacing the coercive aspects of rape.[74] In this context, in 2018, some women deputies promoted a bill to modify Article 361 to incorporate a more consent-based conception. The proposal suggests that the ChiPC is not very rigorous with the treatment of consent and the traditional criminal dogmatic requires the victim to at least attempt to repel the aggression. In the traditional view, the lack of verbal opposition or the absence of physical resistance from the victim generates a principle of consent, assuming that women are always available for sexual relations unless they express otherwise. In contrast, the proposal is designed to make it clear that "no means no" and silence, inaction or lack of resistance from a victim can never be considered a manifestation of consent.[75]

71 Matus and Ramírez (n 57) 192.
72 Ibid, 193.
73 Chilean Supreme Court, Judgment of 5 January 2005, Docket number 3640–2004.
74 Juan Pablo Cox Leixelard, 'El nomen iuris "violación" como demanda reivindicativa: Notas sobre la necesidad de reconocimiento de la agencia sexual de las mujeres' (2019) 25 Ius et Praxis 307.
75 Karol Cariola Oliva, *Modifica el Código Penal en materia de tipificación del delito de violación. Boletín N° 11714–07* (2018).

3. Comparing judicial decisions about forcible rape law in Colombia and Chile

In recent decades, the Colombian and Chilean legal systems have undertaken reforms related to crimes involving sexual violence, following the standards put forward by the HRL and ICL. Progress in this regard is evident from the Colombian Congress enacting the Law on VAW and the discussion in Chile pertaining to a bill on women's right to a life free of violence. Both States have promoted incorporating a gender perspective in their respective legal systems and passed reforms that, for example, seek to change traditional conceptions of women, gender roles and rape. 62

This chapter focuses on two crimes, namely violent carnal access (Colombia) and proper rape by force or intimidation (Chile). The material element is violence in the first crime, while force or intimidation is the material element of the second. Although these concepts are different, there are similarities in how each legal system deals with them. For example, Chilean and Colombian courts' case law indicates that these concepts include physical or psychological violence and there are no requirements for a victim to manifestly resist. Notably, in both countries, some actors have promoted reforms to base regulatory models of rape on the notion of lack of consent, thereby displacing the coercive view of rape. The Colombian Penal Code has adopted a definition of violence that includes a lack of consent approach based on international standards whereas in Chile a similar reform is yet to be passed. 63

Both countries' different regulatory models of forcible rape have generated similar practical results. As this section will illustrate, some judicial decisions recreate traditional approaches and stereotypes about women and rape in both justice systems, while other judicial decisions have incorporated a gender perspective. 64

a) Stereotypes about rape and women influence some judicial decisions

This sub-section analyses some examples of judicial decisions from Colombia and Chile that illustrate the influence of stereotyping of women and rape in prosecution and sentencing of sexual offences. 65

- *Colombia*[76]

66 On 23 August 2015, M.O.H.A.,[77] at the time over 70 years old, accompanied her older sister to the office of Carlos Enrique Ávila Barbosa, an acupuncturist in the city of Tuluá. In the waiting room, Ávila Barbosa approached M.O.H.A., who told him that she suffered from pain in her neck, which Barbosa suggested he could treat with a massage. During therapy, the defendant began to caress M.O.H.A.'s private parts then, after covering her mouth with one hand and asking her to be silent, he penetrated her vaginally.

67 The trial judge acquitted the defendant, arguing that the complainant offered contradictory versions, the episode could not have occurred because the victim's sister and the accused's mother were close by and it was hardly credible that the accused could have carried out the conduct using one hand. The judge concluded that, according to his experience, it was beyond common sense to conclude that a sexual assault occurred under these circumstances and the victim was either perjuring herself or her memories are confused. Furthermore, the judge held that there is no evidence of extreme violence, either physical or moral. M.O.H.A. freely agreed to be massaged by the accused, who followed alternative science techniques without using any form of coercion that prevented her from avoiding sexual intercourse, either getting up from the massage table or verbally manifesting opposition.

68 The tribunal of appeals upheld the first instance ruling, finding no relevant contradictions in the testimony of M.O.H.A. However, the tribunal maintained reasonable doubts about whether this carnal access was committed by the accused through physical or moral violence. The woman's account did not demonstrate that she manifested any serious physical resistance that revealed her opposition to the sexual encounter nor did she communicate a clear verbal message to the accused indicating non-consent.

69 The judicial decisions of the judge and the tribunal require evidence of extreme violence (physical or moral), serious physical resistance, or some behaviour by the victim to prevent the attack, contrary to the law and the Colombian Supreme Court of Justice precedent described in Section 2.1.

76 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 51936, Judgment of 12 May 2021. In this judgment, the Court reconstructs the judicial decisions of the trial judge and the tribunal of appeals.

77 Pseudonym for the victim's name.

The reasoning in both judgments involves common stereotypes about rape and violence, such as rape almost always involves physical violence, or it is not rape unless the victim fights or physically resists.[78]

- *Chile*[79]

On 25 September 2017, the accused drove with D.A.R.G.,[80] his 15-year-old victim who was approximately five months pregnant at the time, through Los Guindos alley towards the banks of a river. He parked the vehicle and began touching the victim's breasts before putting his hands between her legs, touching her vagina and throwing himself on top of her. She told him to stop and defended herself by scratching his face. He managed to remove her clothes and penetrate her vaginally before leaving her near a railway line. 70

The defence argued that the sexual relationship was consensual, claiming that the victim had filed the complaint to justify to her mother and partner why she had left her house that night. The tribunal accepted this stereotyped allegation, pointing out that the circumstances allow us to consider the possibility that, to justify her absence, she falsely informed the authority or misrepresented the facts. Additionally, the tribunal concluded that she did not offer resistance, arguing that the emergency care information indicated no signs of injury, violence or force on the victim's body and that the victim's description included no descriptions of disputes or physical resistance to the aggressor. 71

This judicial decision shows how the tribunal doubted the victim's credibility, arguing that it was a false accusation. The reasoning also highlights the lack of resistance by the victim and the absence of signs of injury, violence, or force on the victim's body, focusing on physical violence. These elements involve common rape myths or stereotypes about women and 72

78 For more information about rape myths and stereotypes about women, rape and violence, see for example, Martha R. Burt, 'Cultural myths and supports for rape' (1980) 38 Journal of personality and social psychology 217; Amy Grubb and Emily Turner, 'Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' (2012) 17 Aggression and violent behavior 443; Olivia Smith and Tina Skinner, 'How rape myths are used and challenged in rape and sexual assault trials' (2017) 26 Social & Legal Studies 441; Morrison Torrey, 'When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions' (1990–1991) 24 UC Davis Law Review 1013.

79 Tribunal of Oral Criminal Trial of Curicó, Judgment RUC No. 1700895751–7, 3 May 2019.

80 Pseudonym for the victim's name.

violence, such as women often lie about being raped to cover up their actions, women often say "no" when they mean "yes," and rape involves visible physical injuries.[81]

73 These examples of recent judicial decisions from Colombia and Chile illustrate that stereotypes about rape and women influence the judicial decisions in some cases in the respective criminal justice systems. They show how stereotypes and discriminatory prejudices may be present in the evaluation of the evidence.[82]

74 Furthermore, such judicial decisions show that perceptions about the credibility of women victims among those who work within criminal justice systems may impact the prosecution and conviction of sexual offences. Law enforcement authorities, prosecutors and judges are cautious about entertaining potential false accusations and the actual motivations of female victims. The primary cause of this phenomenon is rape myths that suggest that women often falsely allege rape to get revenge, hide consensual sex, overcome the guilt of a sexual encounter they regret, etc.[83]

75 In addition, these judicial decisions illustrate the operationalisation of common stereotypes about rape that limit the definition of 'real rape' to a sexual assault perpetrated by a stranger who uses irresistible force and/or inflicts physical injury.

> "At one end of the spectrum is the "real" rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law, judges, statutes, prosecutors and all generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight,

81 For references about rape myths and stereotypes about women, rape and violence, see, 78.

82 Julieta Di Corleto and María Luisa Piqué, 'Pautas para la recolección y valoración de la prueba con perspectiva de género' in José Hurtado Pozo (ed), *Género y derecho penal* (Instituto Pacífico 2017).

83 Lynne Henderson, 'Rape and responsibility' (1992) 11 Law and Philosophy 127; Sisma Mujer, *Obstáculos para el Acceso a la Justicia de Mujeres Víctimas de Violencia Sexual en Colombia* (2011); Morrison Torrey, 'When will we be believed? (n 78).

> the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman."[84]

The definitions of violence and force applied are based on a male-oriented perspective, considering the male notion of what constitutes a fight.[85][86] In practice, this means that resistance was offered and physical injury was incurred become essential elements for prosecutors and judges to establish that a rape had been committed,[87] even though Colombian and Chilean courts have already established that existing laws do not require these elements. In some cases, State representatives and the public judge the victim's behaviour or accuse her of provoking or failing to prevent the attack.[88] 76

b) Some judicial decisions incorporating a gender approach

The Colombian and Chilean judicial systems have promoted the incorporation of the gender perspective in the administration of justice. In this context, some judicial decisions in both countries have incorporated a gender perspective in cases involving sexual violence. 77

For example, in the case analysed in Section 3.1, the Colombian Supreme Court of Justice indicated that a gender approach eliminates stereotypes that oblige women victims to act in a specific way. The Court highlighted, following its precedent in this matter, that the crime description does not require proof of any pre-set behaviour or level of resistance by a victim.[89] 78

84 Susan Estrich, 'Rape' (1986) Yale Law Journal 1087.

85 Ibid.

86 Feminist scholars have attempted to redefine rape, coercion, and consent. See, e.g., Martha Chamallas, 'Consent, equality, and the legal control of sexual conduct' (1987–1988) 61 Southern California Law Review 777; Catharine MacKinnon, 'Rape redefined' (2016) 10 Harv L & Pol'y Rev 431.

87 Carolina Báez and others, *La situación de las mujeres víctimas de violencias de género en el sistema penal acusatorio* (Corporación Humanas 2008) 104. Asua Batarrita (n 39) 64.

88 IACHR, *Access to justice for women victims of violence in the Americas* (n 30).

89 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 51936, Judgment of May 12, 2021.

79 A judgment of the First Tribunal of Oral Criminal Trial of Santiago presents a similar example of legal reasoning from a gender perspective.[90] The facts of the case are the following: On 5 November 2018, the defendant assaulted the victim, his spouse and the mother of their two children, climbing on her back, violently tearing off her clothes and then penetrating her vaginally and anally repeatedly against her will.

80 The tribunal analysed the context of these facts, arguing that gender-based violence resides in the asymmetry in power relations between men and women and perpetuates women's subordination. Considering this framework, the tribunal recognised the situation of the vulnerability of the victim, emphasising that the victim stated that she felt forced into sexual relations with the accused on other occasions. Additionally, this vulnerability was compounded by family and friends who advised her that her role as a spouse obliged her to put up with her husband's behaviour.

81 The tribunal argued that the gender perspective seeks to avoid applying gender stereotypes rooted in societal norms and prevents analysis based on such stereotypes which, in turn, would affect the evaluation of evidence, generate secondary victimisation, demand additional behaviour by the victim and place undue blame on her for the circumstances of her own victimisation.

82 The judicial decisions analysed in Section 3 illustrate that, in some cases, judges apply stereotypes to women and rape while in other cases they incorporate a gender approach. This means that the Colombian and Chilean justice systems have not effectively materialised a gender approach in a transversal manner. Indeed, some courts have recognised that in certain cases, women experienced institutional violence in their quest for justice because of gender discrimination and stereotypes of women and the sexual violence they were subject to.[91]

II. Conclusions

83 This chapter has shown that several legal reforms on VAW in Colombia and Chile seek to adapt each State's legal system to international standards. The

90 First Court of Oral Criminal Trial of Santiago, Judgment RUC 1801079622–5, February 19, 2020.

91 See, e.g., Colombian Constitutional Court, Judgments T-462 of 2018, T-735 of 2017; Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 53547, Order of 17 March 2020.

chapter has also established that a key relevant factor in explaining these changes in forcible rape law is the impact that HRL and ICL are having on domestic legal orders.

84 One of the ways in which the Colombian and Chilean legal systems have sought to deal with VAW is by regulating sexual crimes. This chapter focused on violent carnal access and proper rape by force or intimidation, which are functional equivalents. In the context of these two types of crime, and despite the differences in legal rules and institutions, the two legal systems compared have achieved similar practical results to date. The analysed cases illustrate that some judicial decisions involve common stereotypes about women and rape while others effectively incorporate a gender perspective to avoid such pitfalls. In other words, the protection of the rights of the victims of VAW still depends to some degree on the individual judge presiding over the case.

85 As such, the systemic embrace of a gender approach in the justice systems of these two countries remains a necessary but to date unachieved goal. To reach this milestone, it is vital to create an institutional perspective that protects women's rights and is not dictated to by the personal mindset of individual officials.

Further Reading

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