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Tackling Bias Against Women Victims of Sexual Assault in the Chilean Judiciary: A Case Study

Abordando los sesgos contra las mujeres víctimas de agresión sexual en el Poder Judicial chileno: un estudio de caso

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Abstract: Women victims of sexual assault encounter several hurdles when seeking justice in Chilean legal institutions. However, recent efforts by the Chilean Supreme Court to fight bias against underrepresented groups have foregrounded the importance of applying a gender perspective in court trials. In light of the publication by the Chilean Supreme Court in 2019 of a handbook on how to judge with a gender perspective, I analyze the court ruling of a 2004 rape case that led *Corporación Humanas*—a feminist NGO—to file a petition before the Inter-American Commission on Human Rights. Given the ruling's egregious biases, the NGO holds Chile responsible for the violation of several victims' rights specified in international human rights treaties. Based on the written court ruling, I examine how the judges and other legal actors failed to deliver justice with a gender perspective. I analyze how the judges, the prosecutors, and the defense attorneys resorted to the following types of gender bias: 1) gender stereotypes and rape myths; 2) credibility discounting (Tuerkheimer, 2017); 3) assessment of the evidence without a gender perspective; 4) requirement of bodily injury to give credence to the hypothesis of rape by force; and 5) discussion of the victim's sexual history. In light of the different categories of gender bias detected in the case, I assess whether the Chilean handbook would have been an effective tool to prevent them. Finally, based on this case, I determine the handbook's limitations and suggest potential improvements.

Keywords: Judiciary, Chile, gender perspective, sexual offenses, court ruling

Resumen: Las mujeres víctimas de delitos sexuales enfrentan varios obstáculos cuando buscan justicia en las instituciones judiciales chilenas; sin embargo, esfuerzos recientes de la Corte Suprema de Chile para combatir los prejuicios contra grupos minoritarios han puesto de relieve la importancia de aplicar una perspectiva de género en los procesos judiciales. A la luz de la publicación en 2019 por la Secretaría de Género de la Corte Suprema de un cuaderno de buenas prácticas sobre cómo juzgar con perspectiva de género, analizo la sentencia judicial de un caso de violación del año 2004 que llevó a Corporación Humanas —una ONG feminista— a presentar una petición ante la Comisión Interamericana de Derechos Humanos. Dados los

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ostensibles sesgos de la sentencia, la ONG responsabiliza al estado de Chile por la violación de varios derechos de la víctima especificados en tratados internacionales de derechos humanos ratificados por el estado de Chile. Con base en la sentencia judicial, examino cómo los jueces y otros actores legales no impartieron justicia con perspectiva de género. Para ello, analizo cómo los jueces, fiscales y defensores recurrieron a los siguientes tipos de sesgos de género: a) estereotipos de género y mitos sobre la violación, b) descuento de credibilidad (Tuerkheimer, 2017), c) valoración de la evidencia sin perspectiva de género, d) requisito de lesiones corporales para dar crédito a la hipótesis de violación por la fuerza y e) discusión de la historia sexual de la víctima. A la luz de las diferentes categorías de sesgos de género detectados en el caso, evalúo si el cuaderno de buenas prácticas chileno hubiera sido una herramienta eficaz para prevenirlos. Finalmente, con base en este caso, determino las limitaciones de dicho cuaderno y sugiero posibles mejoras.

Palabras clave: Poder Judicial, Chile, perspectiva de género, delitos sexuales, sentencia

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I. INTRODUCTION

Over the last ten years, the Chilean Supreme Court has developed strategies to promote gender-sensitive judging and improve women's access to justice, particularly in relation to sexual assault. In 2018, the Chilean Supreme Court created the Technical Secretariat for Gender Equality and Non-Discrimination (from now on, *Secretariat*).[1] Among other initiatives, in 2019 the Secretariat published a good practices handbook on how to judge with a gender perspective (*Cuaderno de Buenas Prácticas para incorporar la perspectiva de* género en *las sentencias*) and has offered gender-sensitive training for judges. Yet bias against women victims of sexual assault continues to be a problem in the Chilean legal system (Secretaría Técnica de Igualdad de Género y No Discriminación,

1 Secretaría Técnica de Igualdad de Género y No Discriminación.

2020). In light of this diagnosis, I examine the gender biases present in a 2004 rape case that led *Corporación Humanas*—a Chilean feminist NGO—to file a petition before the Inter-American Commission on Human Rights. I investigate to what extent the Secretariat's handbook would have tackled the gender biases present in this sexual assault case and, based on it, I determine the handbook's limitations and suggest potential improvements. I have selected this particular case as it offers many biases that may concurrently appear in a court ruling.[2]

In this article I analyze how the judges, the prosecutors, and the defense attorneys resorted to: 1) gender stereotypes and rape myths; 2) credibility discounting (Tuerkheimer, 2017); 3) assessment of the evidence without a gender perspective; 4) requirement of bodily injury to give credence to the hypothesis of rape by force; and 5) discussion of the victim's sexual history. Arguably, most of the biases detected in the case could qualify as "assessment of the evidence without a gender perspective," yet I prefer to isolate certain categories for a more detailed analysis. In this article, I understand the term "gender bias" to mean "discriminatory behavior that, though not necessarily consciously recognized by the perpetrator, is sexist" (Mello & Jagsi, 2020, p. 1385). This definition is useful as an umbrella term for all the categories of gender bias I present in this article, as I do not make any claims about the legal actors' intentions, but only about how their analyses had a discriminatory effect. Before analyzing the biases present in the court ruling and assessing the Chilean good practices handbook, I review scholarship on sexual assault in Chile; determine what gender-sensitive judging entails; examine court rulings as a discourse genre; discuss the contested facts in the case; and describe my research methodology. Subsequently, I offer an assessment of the handbook and my conclusive remarks.

II. BIAS AGAINST WOMEN VICTIMS OF SEXUAL ASSAULT IN THE CHILEAN LEGAL SYSTEM

Feminist scholars in the Global North (Cook & Cusack, 2010; Crenshaw, 1991; MacKinnon, 1989) and in Latin America (Facio & Fríes, 1999; Lemaitre, 2009; Segato, 2003) have long argued that the law is a patriarchal system that reinforces women's societal subordination through multiple structures and practices. More specifically, scholars have criticized the prevailing rape laws in Chile and elsewhere for their narrow understanding of sexual consent (MacKinnon, 1989; Pineau, 1996; Rodríguez, 2000); their stringent requirements (Burgess-Jackson, 1996); and their regulation of women's bodies (Du Toit, 2009; Zúñiga, 2018).

2 Decided by the sole panel of the Oral Crime Court in Coyhaique, 29 Aug. 2004. Ruling ID No. 12-2004 (Ante la Sala Única del Tribunal de Juicio Oral en lo Penal de Coyhaique. Rol Único Interno No. 12-2004).

In general, rape and sexual violence create controversies that are absent from other legal issues—for instance, when it comes to property rights, the standard is that victims are presumed to be credible (Tuerkheimer, 2016, p. 33). The judiciary is not immune to a number of gender stereotypes and rape myths that are deeply ingrained in society at large (Bryden & Lengnick, 1997; Gotell, 2002; McGlynn & Munro, 2010; Page, 2008). Judges, prosecutors, police officers, defense attorneys, and other legal professionals tend to show skepticism towards sexual assault survivors and subject them to victim-blaming, particularly when they do not fit the stereotype of the ideal victim, or belong to marginalized communities (Crenshaw, 1991, p. 1279). While there is extensive research on bias against women victims of sexual assault in the legal systems of Europe and the United States, such research is relatively scarce within the Latin American context.[3] In particular, Chilean legal scholarship has traditionally focused on dogmatic and technical issues (Wilenmann *et al.*, 2022), while largely neglecting issues related to legal sociology and institutional bias, although the situation is gradually improving.

In Chile, women victims of sexual assault encounter several hurdles when seeking redress from the legal system. Lidia Casas and Alejandra Mera conducted a major study (2004), in terms of both depth and breadth, addressing how the new criminal procedure reform was addressing sexual crimes. The authors studied 61.5% of the Oral Criminal Court sentences in sexual assault cases during the year 2002 and interviewed several professionals involved in sexual assault cases.[4] Their research tracked all the different stages that women go through after suffering a sexual assault in Chile and they gathered that bias is rooted in all of them through law enforcement and the medical and legal systems. From their analysis of court documents, they concluded that judges tend to apply opaque standards to dismiss victims' testimonies when they do not fit the myth of the "ideal rape victim." A crucial element raised in their study is that credibility tests are very common in sexual assault cases, which is problematic because they entail skepticism towards the victims[5] and are not required when other legal issues, such as violations of property rights, are involved. Moreover, they argue that there is no clear standard in Chile for the evidence required to secure a conviction in a sexual assault case.

Another study on bias against women victims of sexual assault in Chilean case law concluded that the Chilean higher courts (the Supreme Court

3 This is why in this article I mostly cite foreign scholarship written in English.

4 Specifically, the authors addressed 61.5% of the court rulings in those regions where the reform had already been implemented, since it was a gradual process.

5 For an analysis of the different types of credibility tests used in Chile and the controversy around them, see Condemarín and Macurán (2005) and Meriño (2010).

and the Court of Appeals) require standards beyond those specified by the law to secure a conviction in rape trials (Cabal *et al*., 2001). For example, a lack of visible injuries in the hypothesis of rape by force suggests that the defendant will be acquitted (2001, pp. 140-141). More recently, in their Senior Thesis, Alejandra Fischer and Claudia Díaz (2017) analyzed 24 court rulings in rape cases in two Santiago courts during the period 2015-2016. Their analysis sheds light on how judges usually ignore the broader context and the power dynamics embedded in sexual violence cases. In this sense, case law traditions tend to interpret rape law in a constrained and stringent manner that negatively impacts victims. In 2019, the Secretariat commissioned a study to evaluate women's access to justice in family and criminal courts (Secretaría Técnica de Igualdad de Género y No Discriminación, 2020). Among other methods, the researchers conducted an analysis of 142 sexual offense cases. They detected that about one-fifth of the court rulings incorporated gender stereotypes and one-fifth of the questions addressed to the victims in court included gender biases. Although the topic has not received substantial attention from Chilean scholars, institutional actors are becoming more involved, although the impact of their efforts remains to be determined.

III. THE DEVELOPMENT OF A GENDER PERSPECTIVE IN LEGAL SYSTEMS ABROAD AND AT HOME

What exactly is gender-sensitive judging, or judging with a gender perspective? Although currently several national courts are making an effort to promote a gender perspective (Fuentealba Carrasco *et al*., 2020), gender-sensitive judging was initially developed within the sphere of international law. In the late 1990s, the International Criminal Court, the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court for the Former Yugoslavia (ICTY) began to develop "indicators" of gender-just judging (Grey & Chapelle, 2019). For instance, they interpreted seemingly neutral crimes on the basis of how they affected women and girls: the ICTY and the ICTR have specified that acts of sexual violence can be categorized as genocide and torture (Grey, 2016, p. 326). These Courts have also developed case law establishing that inconsistencies in victims' testimonies should be assessed taking into consideration the impact the crime has had on them and have demanded that evidence of gender violence be produced —particularly in cases in which prosecutors were reluctant to present it and investigate it (Grey & Chapelle, 2019).

Within the Americas, during the last 25 years the Inter-American Court of Human Rights (IACHR) has also undergone a change in its

case law on sexual violence and gendered crimes (Tramontana, 2011).[6] The court has argued that assessing evidence with a gender perspective entails a modification of evidentiary standards. Scholars refer to these changes as "evidentiary breadth" (Di Corleto, 2018) or "feminization of evidentiary standards" (Zelada & Ocampo, 2012). For instance, these new standards specify that the testimony of victims of sexual assault be given enhanced value, which under certain circumstances may be enough to secure a conviction. IACHR case law also specifies that all evidence should be analyzed in a systematic manner, so that all threads of evidence and the interrelations between them may be examined. That is, indirect evidence should not be discarded and, in some cases, such evidence and expert testimony may be enough to secure a conviction even in the absence of the victim's testimony (Di Corleto, 2018, p. 4)[7].

According to Zelada and Ocampo (2012), the 2006 case *Penal Miguel Castro Castro v. Perú* [*Miguel Castro Castro Prison v. Peru*] was the first case in which the IACHR Court took gender into consideration by arguing that war affects women and men differently, since women are often victims of sexual violence within these contexts. A subsequent case decided in 2009, *Campo Algodonero v. México* [*Cotton Field v. Mexico*], became the cornerstone for the new standards, as the Court assessed the evidence by examining the "*indicios*" (signs) of the crimes of sexual assault and femicide committed in Ciudad Juárez. For instance, when two girls were found dead and, among other "signs," half-naked, the Court determined that sexual violence had very likely taken place. This case also foregrounded the relevance of investigative work, and how the gender biases and stereotypes harbored by police officers and prosecutors may lead to botched investigations. In the subsequent 2010 cases of *Inés Fernández Ortega* and *Valentina Rosendo Cantú,* the IACHR reiterated the importance of assigning enhanced value to the testimony of victims of sexual violence by acknowledging the difficulty of producing evidence in these cases. The Court also stated that inaccurate recollections or inconsistencies following the initial statements are to be expected, and that this should not discount the credibility of their testimonies.

IACHR case law directly impacted Chile with its 2012 ruling on the *Atala Riffo v. Chile* case, in which the Court demanded that Chilean judges incorporate a gender perspective in their judicial praxis (Fuentealba Carrasco *et at*., 2020). However, it was only after the Ibero-American Judicial Summit held in Chile in 2015 that the judiciary became strongly committed to doing so. In 2017, the Supreme Court established the

6 For additional analysis of the case law of the Inter-American Court of Human Rights on sexual violence cases, see Maria Sjöholm (2018, pp. 300-330).

7 According to Mayanja (2017), indirect—or circumstantial—evidence is "evidence of facts or circumstances from which the existence or non-existence of a fact in issue may be inferred. It is any evidence that requires some reasoning or inference in order to prove a fact. It is evidence which strongly suggests something but does not exactly prove it." (p. 27).

Secretariat, which published a policy on gender and non-discrimination for the judiciary that same year, and in 2019 elaborated the 159-page good practices handbook on how to judge with a gender perspective. The handbook includes a conceptual framework (pp. 21-65) and a legal framework (pp. 67-87) for incorporating a gender perspective, and a description of international initiatives aimed at judging with a gender perspective (pp. 109-145). The annexes (pp. 153-159) include a technical glossary, a list of selected international case law on gender perspective and human rights, and other support information. Moreover, the handbook provides a matrix (pp. 88-107)—a more practical instrument—to help judges to identify the context of the cases, the victims' belonging to minority groups, situations of intersectionality, power relations among the legal actors, and sexist roles, beliefs, and stereotypes that the parties or the judge may resort to.

The Chilean handbook defines a gender perspective as "a method or tool of analysis designed to study the cultural constructions and social relations between men and women, identifying all those forms of interaction that create gender inequality and discrimination" (Technical Secretariat for Gender Equality and Non-Discrimination, 2019, p. 60). The handbooks and protocols aimed at promoting gender-sensitive judging developed in other Latin American legal systems provide similar definitions which either complement it or highlight other aspects. For instance, the Guatemalan protocol (Oacnudh, 2015, pp. 8) defines gender perspective as an "interpretive horizon" for judges to strive for gender equality, whereas the Mexican protocol (Suprema Corte de Justicia, 2020, pp. 62-70) describes a gender perspective as an intersectional methodology that questions the paradigm of a white, cisgender, heterosexual, able-bodied male as the universal, neutral subject. Thus, gender-sensitive protocols usually define gender perspective as a *method* that provides judges with various strategies for examining legal instruments, evidence, expertise, contexts, and testimonies in the light of gender inequalities, power differentials present in the case, and stereotypes embedded in the legal system and in society at large.

Yet, defining gender perspective as a method may be limited, since familiarity with feminist and intersectional theories is necessary to fully understand gendered power dynamics and gender discrimination. In a recent seminar addressing gender-sensitive perspectives for prosecutors, Ximena Gauché-Marchetti, a scholar who studies access to justice and gender discrimination, stated that a gender perspective should be understood as a competence (Ruda *et al.*, 2012), which entails conceptual, procedural, and attitudinal knowledge. I find this approach very useful, since in addition to the analytical skills associated with putting a method into practice, there is specific theoretical knowledge

that legal actors must possess in order to be able to apply a gender perspective. On the other hand, in patriarchal societies there are usually beliefs and feelings (attitudes) contrary to gender equality, so this is an aspect that also needs to be developed.

Academic definitions of a gender perspective emphasize different aspects of the concept. A number of authors conceptualize it both as a legal mandate—foregrounding national and international legislation such as the *Convention of Belém do Pará*—and as a tool for rendering inequalities visible (Carmona, 2015; Gauché-Marchetti *et al*., 2022; Facio, 2009; Mantilla, 2013; Maturana, 2019; Poyatos, 2019; Rivas, 2022). In the latter sense, for example, Gama (2020, p. 288) defines gender perspective as "a concept and a tool emerging from and rooted in feminism for identifying, revealing, and correcting different situations and contexts of oppression and discrimination against women and LGTTTBIQ people" (p. 288). Other scholars define it as a dimension of the concept of equality in terms of anti-discrimination law (Pou, 2021), while some scholars tackle it as a tool for modifying or adapting evidentiary standards, particularly in sexual crimes (Gama, 2020; García, 1992). Yet, some scholars emphasize that the standard of proof should be modified by the legislative power (Araya, 2020).

IV. COURT RULINGS AS A DISCOURSE GENRE

Following Parodi (2008), Agüero (2014) states that court rulings are a discourse genre. From a socio-cognitive perspective, Giovanni Parodi (2008, p. 26) argues that discourse-genre constitute "a constellation of potential discursive conventions, supported by the previous knowledge of speakers/writers and listeners/readers (stored in the memory of each subject), based on contextual, social, and cognitive constraints and parameters". The social context within which this specialized discourse genre circulates is the professional sphere of judges and lawyers. Judges' written decisions on sexual assault cases offer relevant material for analyzing and detecting gender biases, since by law they must have a specific structure that includes presentation of the facts, the judges' assessment of the evidence, and the decision on the case.[8] In the Chilean Oral Criminal Courts (*Tribunales de Juicio Oral en lo Penal*), a court ruling is a document written by one of the judges in the three-judge panel (*juez redactor* o *jueza redactora*), on behalf of another or both of the other judges. If a judge dissents from the decision of the other two, he or she writes their dissent (*voto de minoría*). In the case I analyze in this article, the panel unanimously agreed to acquit the defendant.

8 Articles 297 and 342 of the Criminal Procedure Code.

Agüero (2014) maintains that court rulings are predominantly argumentative texts, since they aim to justify judges' decisions; however, there is a variety of discursive modes in court rulings—descriptive, narrative, and prescriptive—depending on the different sections. Court rulings are organized into sections called "*considerandos*" which are not always indicative of different functions within the genre. The writing judge performs an important discursive work of reproducing what was spoken in court by providing direct and indirect quotations of the theories/arguments of the prosecution, the victim's private attorney (*abogado querellante*), and the defense, as well as all the testimonies provided. While some judges reproduce the exact wording by listening to audios of the trial, others take notes as the trial is ongoing. However, paraphrasing and partial reproduction of testimonies are very common and it can create certain problems. For instance, in a recent rape case in Linares, Chile, the Court of Appeals overrode the Oral Court's decision to acquit the defendant—among other reasons—because the Court had not included and assessed the entirety of several of the witnesses' statements.[9] The lawyer who wrote the appeal argued that the Oral Criminal Court had engaged in "deliberate omission." Indirect citation and paraphrasing provide for a margin of discretion in deciding how to reproduce discourse, which represents a challenge for the thorough assessment of evidence and the accountability of judicial reasoning, as I will show in the case under study. From an ethnographic perspective, it is important to note that a court ruling is the written analysis performed after the oral trial process, during which the judges were able to directly examine the evidence, the witnesses' statements, the prosecution's and the defense's examination and cross-examination of the witnesses, the presentation of the evidence, and the opening and closing statements, a process I did not personally attend.

V. THE CASE

Although the case I address here was not a particularly high-profile case, it has become, to some extent, part of the political and legal concerns of Chilean feminist activists, as I explain further below. After the all-male, three-judge panel of the Coyhaique Oral Criminal Court decided to acquit the defendant, the victim's private attorney filed an appeal for annulment (*recurso de nulidad*) before the Coyhaique Court of Appeals, but the appeal was rejected. Subsequently, the victim reached out to the Chilean feminist NGO *Humanas,* which decided to file a petition before the Inter-American Commission on Human Rights on the grounds that several of the victim's rights guaranteed by international

9 Decided by the First Chamber of the Oral Crime Court of Linares, 14 April 2019. Ruling ID No. XX-2019 (Sala del Tribunal de Juicio Oral en lo Penal de Linares, RIT No. XX-2019).

human rights treaties ratified by the Chilean state had been violated.[10] Among other arguments, *Humanas* stated that the judges were not impartial, displayed extreme hostility towards the victim, exaggerated the victim's inaccuracies, and deliberately dismissed all the evidence that supported her case. The NGO argued that the court violated the victim's rights enshrined in articles 1.1, 5.1, 8.1, and 24 of the *Inter-American Convention of Human Rights* and articles 3, 4, and 7b of the *Convention of Belém do Pará*. One of the judges in the three-judge panel was also part of the panel that adjudicated a very prominent femicide case. In that case, he dissented from the other two judges, arguing that the defendant should have been acquitted. When he was included in a short list to become a Court of Appeals judge, more than twenty feminist organizations protested his inclusion based on his opinions in the two other cases, which shows that feminist activists were aware of the outcome of the case at hand. Below, I provide the facts of the case as described by the lawyers, the defendant, and the victim.

The defendant was represented by the public defense office and the victim by her private attorney (*querellante*).[11] The writing judge (*juez redactor*) reproduced the facts of the case as argued by the prosecution, the victim's private attorney, and the defense. All of these versions vary in the number of details provided, the relevance assigned to the facts leading to the assault, the theory as to how the events took place, and the interpretation of the facts and the law. Subsequently, the writing judge supplied the facts as presented in the defendant's statement and the victim's testimony. The prosecution argued that the victim was raped by force as described in article 361.1 of the Chilean Criminal Procedure Code. It argued that the victim went to a discotheque and ran into the defendant, whom she previously knew. They danced and talked and, around 5 am, the defendant invited the victim to a friend's house, where they sat and talked. Then, he propositioned the victim for sex and, when she declined, he forcibly raped her. When the defendant tried to change positions, the victim ran naked into the street and sought help next door.

The prosecution argued that three mitigating circumstances applied to the case: 1) the defendant's lack of a criminal record; 2) the defendant's substantial help in the truth-finding process; and (potentially) 3) the defendant acted motivated by impulses so powerful that they naturally caused a lack of control (all of these are included in article 11 of the Criminal Procedure Code). The victim's private attorney offered a

10 The petition was declared admissible on 11/13/2012 and, as of April 2023, the Commission is still reviewing the case.

11 The parties in this case asked for the ruling not to be made public; therefore, I do not provide any identifying information, such as the names of the defendant and the victim, and include their initials as X.X.X.X.

similar description of the facts, but he did not recognize any mitigating circumstances for the defendant and demanded monetary compensation for moral damages (*daño moral*). In order to explain how the defendant had hurt the victim, the attorney described how her life had changed after the assault: she was pained and distressed by the memory of the assault and had nightmares about it. He argued that, even though she was a victim, she felt ashamed before her family and others. She also experienced various negative physical symptoms when running into the defendant or remembering the aggression.

By contrast, the defense argued that the sexual relationship was consensual based on the woman's sexual history and the fact that she was out late with a man who was not her fiancé and agreed to go to his house. Therefore, it argued, the defendant should be acquitted. According to the defense, the situation at hand was a case of hysteria or spite, not rape. The defense attorneys stressed that there were several inaccuracies in the victim's testimony and no proof of injury. Based on her alleged inaccuracies, the defense concluded that the victim tried to manipulate the Investigative Police (*Policía de Investigaciones*), the health care professionals, and the court. Relatedly, in his testimony before the court, the defendant stated that on the night in question he had plans to go to a club with his girlfriend, but she did not want to go. Some friends invited him to a discotheque, and he went with them. There, he ran into the victim and eventually danced and talked with her. According to him, she asked him for a ride home; they met in the street and agreed to go to his house to listen to music. They took a taxi in which they held hands and kissed. When they arrived at the house, they had drinks. She eventually started to caress him, and they kissed. He asked her to have sex, but she said no; he asked again, and she accepted. Eventually, while they were having sex, the victim ran away and went to the neighbors' house. He followed her there and took her clothes, as she was naked. The police arrived and he claimed that he was pressured into signing the statement that he gave them.

In her testimony, the victim stated that she was in court because she was raped. The night in question, she had had a pleasant evening with her son and her partner. She invited the latter to go to a discotheque, but, since he declined, she went with a friend instead. At the club, she ran into an acquaintance, a male military officer, who had asked her out in the past and whom she had rejected. They danced and talked, but he decided to leave because he was upset about the fact that she had turned down his invitation to dance on a previous occasion. She left the club at around 5 am, they met in the street, and she asked him why he was upset. She asked him to give her a ride home, but he invited her to his house at the military complex. They took a taxi. She stated that she just wanted to listen to music and have some drinks; had she known

his intentions, she would not have gone. The defendant told her there was no light in the house except in the bedroom, which she thought was odd. They went to the bedroom, he turned on the light, and they sat on the bed. He propositioned her for sex, but she declined. He grew angry and went on drinking. She told him to calm down and that he should find a girlfriend, but he insisted. He took off most of his clothes and told her to take hers off, or else he would kill her. The defendant kept threatening her. She took off some of her clothes, and then there was a struggle because he insisted on removing the rest. Eventually, he took off her pants by force; he tore them and broke the buttons. He threw her on the bed; they struggled, and she tore off a necklace he was wearing, thinking that this could be proof of a struggle. He raped her even though she was defending herself; she cried that she was in pain, but he did not care. Suddenly, they were standing next to the bed, and she took the opportunity to grab an empty bottle, throw it at him and run naked into the street. She asked for help next door and a couple let her in. Then, one of the neighbors asked the defendant to bring her clothes. The couple called the police and she eventually went to the hospital.

VI. METHODOLOGY

There is a range of methods and approaches that either closely overlap with or fall under the umbrella term of qualitative content analysis (Krippendorff, 1980). In this article, I implement qualitative content analysis as defined by Schreier (2012): "a method for systematically describing the meaning of qualitative material. It is done by classifying material as instances of the categories of a coding frame" (p. 1). I follow those scholars who maintain that content analysis involves a highly interpretive task in which the meaning of the text is constructed by the researcher. While some scholars define qualitative content analysis as either an inductive or a deductive endeavor (Elo & Kyngas, 2007), supporters of grounded theory argue that the process of qualitative data analysis is usually "retroductive" (Bulmer, 1979; Katz, 1988a), as it is a recursive process that involves both inductive and deductive reasoning.

The methodology deployed for this research includes both inductive and deductive stages. I first conducted several close readings of the court ruling and inductively coded different textual segments to consider potential emerging categories. I eventually identified several categories used in gender and law scholarship, such as "rape myths," "gender stereotypes," and "credibility discounting"—among others—, which I determined to best describe how the legal actors made sense of the evidence and the narrative as revealed in the court ruling. According to Krippendorff (1980), the researcher's goals and context determine how

the analysis is conducted. In this research, I am interested in the gender biases displayed by the different legal actors—judges, defense attorneys, and prosecutors—, but the main focus of the article is on the judges since the section of the court ruling dealing with the assessment of the evidence is the longest one.

Qualitative content analysis is an endeavor in which an analyst gauges meaning that may range from latent to explicit (Schreier *et al.*, 2019, p. 2). The more latent, implicit, or subtle the content, the more interpretive the endeavor. In some of the latter cases, meaning is more accurately described as indexing categories (Ochs, 1992), thereby offering an indirect or tangential relationship in which meaning is interpreted by signaling these categories, rather than explicitly instantiating them. Additionally, in the analysis I perform, meaning may arguably be interpreted in different ways and be classified as instantiating alternative categories. This is because the categories I present are closely interrelated to one another and overlap in significant ways. For instance, gender stereotypes are closely related to the credibility attributed to the victim, or "credibility discounting" (Tuerkheimer, 2017): if the victim's experiences and identities differ greatly from the stereotype of the ideal victim, her credibility is diminished. Yet, for purposes of analytical clarity, I analyze the categories separately. In the next section, I present the analysis in a linear fashion, following the structure of the court ruling.

VII. ANALYSIS OF THE CASE: GENDER BIASES IN THE RAPE COURT RULING

VII. Gender stereotypes and rape myths

According to Cook and Cusack (2010), a stereotype is "a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group" (p. 9). Yet, not all members of a group display—or wish to abide by—the traits and roles embedded in stereotypes. For instance, the idea that all women are or should be caregivers and homemakers is a gender stereotype; consequently, assigning this duty or identity to a particular woman only by virtue of her gender entails stereotyping.[12] Several gender stereotypes tend to come up in family and criminal courts, such as "the lying woman," "the good mother," and "the recanting victim," among others (Araya, 2020, p. 40). Such gender stereotypes can be based on prescriptions—how women should behave—or generalizations about behavior—how we think women behave—, although they can

12 In this sense, stereotyping a particular person is "the process of ascribing to an individual specific attributes, characteristics, or roles by reason only of her or his membership in a particular group" (Cook & Cusack, 2010, p. 12).

intermingle. Within the broad category of gender stereotypes, sexual stereotypes are those that ascribe different roles, traits, and expectations to men and women in the sexual sphere.

One sexual stereotype that comes up throughout the ruling under analysis is that women's sexuality is reserved for stable relationships, marriage, or family, but men's is not. In its opening statement, the defense begins by casting doubt on the victim for going out late at night and then leaving the discotheque with a man who was not her partner, since she had a fiancé: "What is a girl doing at a club alone without her boyfriend? Why does she accept to go to the house of a man she has just met?" (p. 2). The defense underscores that the victim is breaking family ties by going out without her fiancé and reproaches her for interacting with another man in a setting like a discotheque. By signaling the gender stereotype that women's sexuality is reserved for stable relationships, marriage, and family, and implying that women are not supposed to go to certain places without their partners, the defense upholds men's control of women's sexuality. This stereotype drives society to punish women for promiscuous behavior while ignoring the same type of behavior in men. From a conservative view of gender relations, women's sexual interactions with men other than their partners is an affront to the fabric of society that challenges hetero-patriarchal ties and the man's familial authority (Burgess-Jackson, 1996, p. 45). Yet, there was no analysis—by none of the legal actors—of the romantic ties the defendant violated by engaging in an alleged sexual encounter with the victim, although at the trial he stated that he had a girlfriend. The defendant's romantic relationship was ignored, and his girlfriend was not a relevant actor in the narrative, which reinforces the idea that women should be held to different standards than men in relation to sexuality.

Another category of analysis which is closely related to gender stereotypes is that of rape myths (Klement *et al.*, 2019). Persson and Dhingra (2022, pp. 9-28) discuss how rape myths have been addressed by scholars as stereotypes, cultural myths, and cognitive schema; some scholars also refer to them as "misconceptions" (Tidmarsh & Hamilton, 2020). Here, I address rape myths as cognitive schemas, because they allow to understand how people "fill in the blanks" when processing information, which I argue is what the legal actors did in this case. A cognitive schema "connects various types of beliefs in a wide-reaching information structure. One aspect of a schema can thus be activated by highlighting another related aspect" (Persson & Dhingra, 2022, p. 16). Understanding rape myths in this manner explains how misconceptions about sexual assault are closely interrelated and interact and overlap with one another. According to Persson and Dhingra (2022, p. 14), rape myths have been defined in ways that either highlight the falsity of the beliefs associated with them, or the effects they have on

society. These authors advocate a definition that emphasizes the latter, such as that of Bohner *et al.* (2009): "descriptive or prescriptive beliefs about rape […] that serve to deny, downplay, or justify sexual violence that men commit against women" (p. 19). Some of the most common examples of rape myths are that women "ask for it," that women can always repel sexual attacks if they so wish; that flirtatious women secretly desire to be raped; that men are subject to "uncontrollable passions"; that false allegations are pervasive; that women who have drunk alcohol predispose themselves to rape; and, that women are not assaulted by people they know (Persson & Dhingra, 2022; Schwendinger & Schwendinger, 1974).[13]

In its opening statement, the defense suggests, among other implications, that because the victim has had previous sexual experiences with other men, she consented to sex with the defendant: "She is not a young woman; she has sexual experience, since she has a son whose father is not her current boyfriend. Here we have [a case of] spite or hysteria, not rape" (Sentencia RIT No. 12-2004, p. 2). The defense invokes two rape myths: that only women who are young and virgins can be victims of sexual assault, and that women who have sexual experience and denounce rape are scorned women who make false accusations out of spite or revenge. Tidmarsh and Hamilton (2020) state that, although younger women tend to suffer higher rates of assault, surveys have shown that many women over 55 are also victims of sexual assault and, due to various barriers to reporting it, "existing prevalence estimates are likely to underestimate the true extent of victimization" (p. 10). Additionally, the defense suggests that vengeful women lie about the assault. Although research has proven that false rape allegations are rare (McMillan, 2018; Persson & Dhingra, 2022, p. 16; Tidmarsh & Hamilton, 2020), the belief that false accusations are common is pervasive in many legal systems, as it is among Chilean prosecutors and police officers (Casas & Mera, 2004, p. 41). The defense integrates these misconceptions into its narrative, which act as a framework for interpreting the facts and fill in the blanks of the unknown or contested information.

The defense stresses the fact that the victim and the defendant knew each other previously, so as to signal the likelihood of them having consensual sex: "the accused, prior to the day of the events, and even on that same day, had declared his love to her, so she went to the house of a person she already knew. One might ask: Was she going to his house just to listen to music?" (Sentencia RIT No. 12-2004,

13 In the United States and other English-speaking countries, there is extensive research on rape myth acceptance (RMA) among different social groups, such as police officers and college students. These studies show the dire consequences for victims when they face a legal system in which these beliefs are pervasive. For instance, police officers with "high" RMA rates make negative judgments about victims' culpability which may impact how they process their cases (Hine & Murphy, 2019).

p. 3). In this case, the defense attorney insinuates that, because they knew each other and went to a secluded location, it was likely that they were going to have sex and not just "listen to music." Thus, according to the defense's logic, entering a secluded location with a person one knows, precludes rape and signals consent. Knowing the attacker usually works to discredit the victim's testimony and her credibility, particularly when the victim and the defendant have had previous sexual relations; it also increases the level of victim-blaming (Persson & Dhingra, 2020). While acquaintance rape is by far the most common form of occurrence of the crime (Casas & Mera, 2004; Tidmarsh & Hamilton, 2020), there is a pervasive misconception that most sexual assaults are committed by strangers, which leads to disbelieving that rape can happen between people who know each other, as in this case. So far, the reader can see how the defense exploits several rape myths and integrates them as a common-sensical rationale for analyzing the facts and the evidence.

The rape myths invoked by the defense are closely aligned with the "ideal victim" stereotype (Du Toit, 2009; Randall, 2010; Taylor, 2022; Ussery, 2022). The ideal victim is a woman with little or no sexual experience, who did not consume alcohol on the night of the assault, was assaulted by a stranger, resisted her attacker—thus showing injuries as a result of the rape—, and whose demeanor reveals that she is deeply and visibly affected by the assault. The ideal victim is also a classed and racialized subject, as upper-middle-class white women see their credibility bolstered (Crenshaw, 1991, p. 1279). By contrast, the victim in this case had previous sexual experience, consumed alcohol on the night of the assault, and knew her alleged perpetrator, which made her more vulnerable to the defense resorting to rape myths and attacking her credibility.

Rape myths are evident not only in the defense's arguments but in those of the prosecution as well, although in a much more implicit way. Although they do not explain how this circumstance applies to the case, and they are not assertive about its application, the prosecutors argue that a mitigating circumstance in the case—as stated in article 11.5 of the Criminal Code—might be that the accused "acted on a stimulus so powerful that it naturally produced a fit of rage or a lack of control" (Sentencia RIT No. 12-2004, p. 1). Although the prosecution does not provide an explanation for this suggestion, the assumption behind the argument combines two rape myths: the "she asked for it" rape myth and the "uncontrollable passion" myth.[14] Lois Pineau (1996) explains the "she asked for it" myth metaphorically by means of contract law:

14 Mañalich (2015) analyzes the patriarchal assumptions underlying this legal category when applied to femicide—and, by extension, gendered crimes—and traces its historical roots in Chile to the common law tradition whereby men's responsibility was mitigated or excluded when they killed

by acting flirtatious or wearing provocative clothing, women would enter into a contract with men whereby they promise to engage in sexual activity. On the other hand, the "uncontrollable passion" myth suggests that in certain scenarios male sexuality is uncontrollable, that at a certain point male sexual desire becomes irrepressible, unstoppable, and that this is biological and natural. Therefore, women should not create an expectation to engage in sexual activity if they do not intend to follow through. In the case at hand, by going to a man's house late at night and drinking with him, prosecutors seem to implicitly argue that the victim created a reasonable expectation of engaging in sexual activity such that the defendant could not repress his desire to do so. However, concepts such as "reasonable" are given meaning by drawing upon our collective stock of knowledge and common sense, and may be based on sexist and patriarchal assumptions.

By the end of the court ruling, the judges appear to embrace the defense's reasoning and use of stereotypes to make sense of and interpret the testimonies and the evidence they were confronted with. At the beginning of the ruling, they argue that the victim has been described—by witnesses and by the defense attorney—as a woman of loose morals[15] but that this is not what they are judging—they are judging whether her sexual freedom was violated. In their closing paragraph, they mirror the defense's argument that, based on the victim's actions prior to the assault it was unlikely that she was raped:

> It is worthwhile to state that by the club's closing time—approximately 5:30 am—the young woman dismissed returning immediately to her home—where the man she expected to marry in September was waiting for her with her child—to go with the "respectful and passive" young man with whom she had danced, and who had additionally declared his love for her in the past, to a house—which she knew would be empty—to listen to music and drink until a taxi picked them up two hours later. Nothing seemed strange to her, not even that they started drinking at the foot of the bed in the master bedroom. And when he asked to have sex with her, she tried to leave, grabbed her coat and her purse, but—according to the defense's cross-examination—, she did not leave but stayed to try to calm him down. She claimed that she accomplished this somewhat and, although he was upset, she kept on talking to him. All of these expressions also create reasonable doubts about the foresight and subsequent significance of a real psychological pressure to subject the young woman, in this precise manner, to the will of the accused (Sentencia RIT No. 12-2004, p. 19).

their wife immediately after learning of her infidelity. Due to a recent legal change under Law 21.212 (*Ley Gabriela* (2020), this category can no longer be applied in femicide cases in Chile.

15 "Se la representa, en otras palabras, como una casquivana" (Sentencia RIT No. 12-2004, p. 4).

According to the judges' reasoning, there is an attribution of consent to the victim because of the situation she was in. They suggest that, because the victim knew the defendant and knew about his feelings for her; agreed to go to his house late at night; and, sat by a bed and had drinks, it is unlikely that she was coerced into sex. Here, we find a very pervasive rape myth within rape trials: certain situations are entered only if people are looking for sex. Additionally, in a manner similar to that of the defense, the judges focus on the victim's family ties while ignoring those of the alleged perpetrator. The mere fact of including information about her fiancé and her child, and stating that the victim *dismissed* returning to her partner and her child, signals the gender stereotype that women are caregivers and homemakers who belong in the private sphere of the family. In a paragraph-long commentary prior to their discussion of the evidence, the judges describe the victim in the following way: "On the early morning during which the events took place, she came home after dancing with friends, even though she had a partner—she even mentioned that she was getting married in September—and a three-year-old child" (p. 4). Thus, they indirectly reproach the victim for not attending to her duties as a partner and a mother. This is particularly indexed by the expression "*even though* she had a partner" (p. 19).[16]

In this case, as in many others analyzed by Fischer and Díaz (2017), the judges are skeptical about the victim's lack of consent, and infer her consent from circumstances such as time, place, relationship with the perpetrator, and familial-romantic ties. This is particularly evident in the expression "Nothing seemed strange to her," as if the circumstances surrounding her and the accused would have naturally led to sex. According to Schwendinger and Schwendinger (1974, p. 21), a series of situations such as "the acceptance of automobile rides, invitations to dinner, or entering apartments alone with a male" are usually interpreted as providing consent. Moreover, the judges not only argue that there are reasonable doubts not to convict the defendant, but they embrace the defense's theory by concluding that a consensual sexual interaction took place: "it has only been established that […] they had sexual relations on one occasion."[17] (Sentencia RIT No. 12-2004, p. 19). The judges' interpretation of the facts is guided by supposedly common-sensical assumptions of human behavior and our collective imaginary around sex, its prelude, and when, where, and with whom it happens. The role these assumptions, gender stereotypes, and rape myths play in the legal system can be examined in light of the rationalist tradition of

16 Following Cook and Cusack (2010), "[h]ostile stereotyping involves strident criticism of women who do not adhere to traditionalist norms of selfless, stay-at-home motherhood" (p. 23).

17 Jonatan Valenzuela (2018) has discussed the status of the defense's hypotheses at trials. Although the standard required to confirm the prosecution's theory is clear—beyond a reasonable doubt—, it is not clear what the standard should be for the defense's hypothesis.

evidence, which to some extent encompasses the theoretical evidentiary assumptions of both the common and the civil law traditions. While the rational approach should be followed within the context of a sound criticism (*sana crítica*) system for the assessment of evidence—the system prescribed in Chile—, procedural scholarship and judges' interpretive habits are closer to a psychological (*psicologista*) and intimate conviction system (Accatino 2019).

Feminist legal theorists and evidence scholars have criticized the epistemological assumptions underlying the rationalist tradition of evidence because of its lack of a gender perspective (MacCrimmon, 2001; Martinson *et al*., 1991; Nicolson, 1994).[18] According to Donald Nicolson (1994), this tradition embraces a realist conception of facts which implies that it is possible for humans to know and access the objective truth of the world, and that facts are value-free. Yet, language and ideology play a fundamental role in the construction and interpretation of facts, since the way in which these are discursively constructed have implications for how they are interpreted. This tradition presupposes a universal, neutral observer with a universal cognitive competence based on the idea that ordinary people are in possession of a set of reasonable generalizations about human nature and human behavior, as well as common sense, and that understanding human behavior is a matter of everyday knowledge and experience (Kinports, 1991, p. 431; Martinson *et al*., 1991, p. 37). Therefore, accordingly, presented with the same evidence, any unbiased person would reach the same conclusion. Raymundo Gama argues that, within civil law traditions such as the Chilean, generalizations fall within the sound criticism (*sana crítica*) rules for the assessment of the evidence. This system prescribes experience-based insights (*máximas de la experiencia*), established scientific knowledge, and logic, as the means to assess evidence (González, 2006). Based on the status of the judge as a rational thinker, gender stereotypes may be incorporated into judicial reasoning as *máximas de la experiencia*, since several seemingly common-sensical assumptions or generalizations—which are actually gender stereotypes or rape myths—grounded in the patriarchal worldview are likely to come up in rape trials. Yet, generalizations are dangerous because they usually exclude the perspectives and experiences of marginalized groups (Martinson *et al*., 1991, p. 38), such as the victim in this case.

VIII. CREDIBILITY DISCOUNTING

The judges in this case engaged in credibility discounting by mistrusting the victim as an informant. Throughout the court decision, they attack the

18 In a very important work on evidence scholarship, William Twining (2006) defends the rationalist tradition against skeptical criticism by arguing that critics do not break with its fundamental assumptions. However, he does not directly engage with feminist legal theory.

victim's credibility by treating the inaccuracies in her testimony with suspicion, while offering explanations for the inconsistencies of the defendant and the defense's witnesses. Following Deborah Tuerkheimer, "[a] listener engages in credibility discounting when, based upon a faulty preconception, he reduces a speaker's perceived trustworthiness or diminishes the plausibility of her account" (2017, p. 14). As the reader will see, the judges chose to believe the defendant on several accounts, to the detriment of the victim. After reproducing her statement in court, they assess her testimony and her demeanor in the following way:

> The witness' attitude was seasoned with crying without tears, hand tremors, numerous grimaces, inflection of voice, and, as a climax, a fainting performance before leaving the courtroom. There were also inaccuracies in the testimony she provided to the staff in charge of the investigation, the prosecution, and the physician (Sentencia RIT No. 12-2004, p. 7).

The judges interpret her behavior as a performance and portray her as a not credible witness. Demeanor and display of emotion are important factors in determining whether a victim is perceived as "ideal" or not. While it is difficult for me to comment on the victim's demeanor, since I was not present at the trial, legal actors tend to consider victims who display emotion as more credible than those who are unemotional, although "emotional reactions can be highly variable" in the courtroom as in everyday life (Tidmarsh & Hamilton, 2020, p. 6). The judges in this case seem to look for ways to discard all the situations in which the victim behaves like an "ideal victim" or turn them against her. As I will develop further below, the fact that the victim flees the scene of the crime is pathologized and her display of emotion is judged as false and theatrical, and thus not reflective of a person reliving a traumatic event.

The judges painstakingly analyze the inaccuracies in the victim's testimony in court by contrasting it with her statements to the police and the health care professionals. When assessing the statement of the physician who examined her, they negatively value that the version she gave him differed somewhat from the one she gave in court: "Without a doubt it is a hyperbolized narration, manipulated by the victim in relation to her capricious management of the situation" (Sentencia RIT No. 12-2004, p. 15). The judges perceive the victim's inconsistencies as indicative of her perceived false testimony and her manipulative animus. They very explicitly—and with hostile language—comment on her inaccuracies in assessing the statement given by a police officer: "The lack of sincerity and the twisted statements X.X.X.X. gave to the police, the physician, the psychologists, are evident when comparing them to those she gave in court" (p. 13). However, inaccuracies are common in the testimonies of victims of sexual assault (Tidmarsh & Hamilton, 2020;

Ussery, 2022), particularly when they have to make multiple statements. Moreover, the victim's inaccuracies are not egregious and do not contest the basic facts of the case. In her statement during the trial, she changed some of the details she had conveyed to the healthcare providers and the police. For instance, she had told a psychologist that the defendant stripped her of an intimate piece of clothing by force and at the trial she said she herself took it off. Moreover, she did not mention the insults she received in all the interviews and gave the physician information which she did not relay at the trial. Inconsistencies in testimonies should be assessed in light of how many times the victim has to repeat her testimony (Di Corleto & Piqué, 2017, p. 429) and, as *Humanas* argued, how much time passes from one declaration to the other. This is a crucial point in this case, since all of the judges' commentaries about the victim's inconsistencies are linked to a different expert witness or a witness reproducing what she told him/her. Systematically having to repeat testimony is not only a form of revictimization, but also increases the possibility that the facts will be narrated differently or that the victim may recall additional details.[19]

The defendant and the defense witnesses also presented inaccuracies in their testimonies, yet their credibility was not questioned. According to two Investigative Police officers, the defendant confessed to the crime when they took his statement. However, the judges argue:

> But also, at this point in the proceedings, what the accused declared in trial makes sense and is reliable. He was pressured to declare against his will and accommodate his statement to what the plaintiff had said in her testimony to the Investigative Police officers (Sentence RIT No. 12-2004, p. 13).

This practice is repeated with the taxi driver who drove the woman and the accused to his house, since he also presented inconsistencies in his narrative. In his initial deposition, he stated that he saw the victim and the defendant kissing in his taxi; but at the trial he said he had not seen them kiss. However, the judges assess him and other defense witnesses in a positive light: "These witnesses seem sincere, particularly the taxi driver, who did not know the accused and did not recognize him at the trial" (p. 17). Since the difference between how the victim on the one side, and the defendant and the taxi driver on the other, are treated is

19 In this context, case law from the Spanish Supreme Court—which has had much international visibility and even case law impact in some countries—states that, in order to assess the credibility of a victim of sexual assault, there should be three criteria: absence of secondary gain, plausibility of the testimony, and persistence of the declaration in time (Gama, 2020, p. 296; Lousada, 2020, pp. 218-219). The victim in this case, as will be evident throughout the analysis, meets all of these criteria: there is no evidence that she may obtain any gain from the judicial process, her testimony is corroborated by evidence and expert witnesses, and she told the same basic version through time.

not based on the extent of their inaccuracies, the reason why they are assessed differently by the judges lies in their social identity.

As Karen (2001) Jones explains: "Testifiers who belong to 'suspect' social groups and who are bearers of strange tales can thus suffer a double disadvantage. They risk being doubly deauthorized as knowers on account of who they are and what they claim to know" (p. 67). The victim in this case not only belongs to a group which is systematically considered suspicious in the legal realm—women victims of sexual assault—, but her experience is that of a woman who is not an "ideal victim" and who found herself in a scenario in which patriarchal "common sense" assumes that consensual sex took place. Therefore, credibility discounting as a phenomenon is closely tied to the gender stereotype of the "ideal victim." Because the situation does not fit an "ideal" image of how rape occurs and to whom, the victim's credibility is questioned. According to Randall (2010):

> 'Bad' victims —those women whose lives, backgrounds, and characteristics depart from the narrow confines of 'ideal victims' in sexual assault cases— are the women whose accounts are subject to the most scrutiny, whose credibility is most attacked, and who are seen to be less deserving of the law's protection (p. 140).

As the reader will see, the judges do not just meticulously scrutinize the victim's testimony, but all of the evidence and the testimonies that would corroborate it. The judges empathize with the defendant's explanations of his behavior, while proposing alternative theories to the explanations provided by the victim in relation to hers. The defendant went to his neighbors' house after realizing that the victim had gone there and waited until the police arrived. The judges interpret the actions of the accused as not matching the actions of a criminal, since, as they argue, guilty parties usually flee or are nervous after committing a crime. They accommodate their interpretation of the facts to the defendant's testimony, considering his actions to be common-sensical and logical:

> The accused—after the woman flees his house—maintained a quiet conduct, approached the house where X.X.X.X. temporarily sought help, asking to talk to her, remaining in that place until the police arrived, which does not seem the conduct of someone who has just committed a crime (Sentencia RIT No. 12-2004, p. 19).

Although it is likely that in other crimes—such as robbery with violence—the perpetrators usually flee after the fact, this is not necessarily the case in sexual crimes involving people who know each other, especially since the defendant was at his friend's house.

In contrast, the victim's conduct and the rationality of her actions are called into question, since the fact that she ran naked from the defendant's to the neighbors' house is considered a possible symptom of a psychiatric disorder by the judges. Even though there is no basis for attributing a mental pathology to the victim, the judges give equal weight to psychiatric disease, drunken behavior, or her own explanation as the cause for her running into the street on the day in question. In order to counter a psychologist's testimony that the victim presented symptoms of post-traumatic stress disorder, the defense speculates —without any evidence—that the victim may have inherited a mental illness from someone in her family. Taking this speculation seriously, the judges argue that an expert's intervention is necessary to understand why she fled the house naked:

> X.X.X.X.'s episode of running naked into the street required an expert opinion, because the origin of this conduct may have many sources and many explanations, and may even contribute to proving the rape. If the causes may be diverse, so are the effects, especially if a person may suffer from a pathology (Sentencia RIT No. 12-2004, p. 9).

Yet, if the victim were trusted as an informant, it would be commonsensical to believe that she ran to escape a sexual assault, instead of coming up with alternative explanations for her behavior. Potential explanations could have also been offered for the defendant's action of not running away, but the judges did not look for them because they chose to believe him. Ultimately, the judges did not trust the victim as a credible witness. They perform a scathing analysis of her testimony's inaccuracies and speculate that she might have fled for a reason other than being sexually assaulted. Yet, conversely, in their assessment of the testimony, they explain the defendant's and the taxi driver's inaccuracies and believe the defendant when he recounts his actions.

IX. ASSESSMENT OF THE EVIDENCE WITHOUT A GENDER PERSPECTIVE

The title of this section refers to a very broad category that arguably encompasses many of the other forms of gender bias discussed in this article, but I specifically address how the judges ignored indicative evidence (*prueba indiciaria*) and failed to analyze all the threads of evidence as a whole, as prescribed by IACHR case law when it comes to sexual assault and other gendered crimes. My main focus is on the testimony of professionals (two psychologists and a physician) and the material evidence (a broken necklace and torn pants). The judges dismissed not only the victim's testimony but all the evidence in her favor presented by the prosecution that rendered her testimony reliable (photographs, torn clothing, a broken necklace, and testimony from

witnesses and expert witnesses). Among other reasons, the judges argue that the expert witnesses who provided testimony did not have the authority to diagnose post-traumatic stress disorder (PTSD) and that the evidence presented by the prosecution was of low quality. All of the professionals who are witnesses for the prosecution—two psychologists and a physician—stated that the victim seemed credible and deeply affected,[20] and offered concrete examples of her emotional, mental, and physical state, and yet the judges looked for ways to discard their accounts.

The first psychologist to declare, who had been treating the victim for some time, diagnosed the victim with PTSD because of persistent symptoms that were an effect of the sexual assault. She described that, whenever the victim was in therapy and had to talk about what had happened, she would develop certain symptoms that would also come up whenever she was near army buildings, since the victim associated it with what she had experienced, as her attacker was in the army. The judges paraphrase her testimony as follows: "She thinks [the victim] was telling the truth, because her testimony is coherent with what happened and her symptoms are derived from it" (Sentencia RIT No. 12-2004, p. 8). This psychologist did not wish to testify as an expert witness because, as she stated in court, she felt that her role was to treat the victim and not question her veracity. The judges discard this psychologist's account by arguing that she was not completely impartial because, as the victim's therapist, she would not question her. They discard her authority to diagnose PTSD based on their reading of an article published in the *Revista Chilena de Neuro-Psiquiatría* [*Chilean Journal of Neuro-Psychiatry*] which they do not cite. I read all the articles addressing PTSD in the said journal published before the trial and found the one dealing with the diagnosis of PTSD (Carbonell, 2004). Yet Carbonell explicitly states that she is describing the functioning of a particular hospital where patients in mental-health-related cases first need to be diagnosed by a psychiatrist, who then refers them to a psychologist if necessary and that, at other primary care health facilities, it is a psychologist who first performs the diagnosis (private communication).[21]

The second psychologist—who worked at the Prosecution's Victims and Witnesses Unit—testified as an expert witness. After conducting at least two interviews with the victim, he concluded that she had PTSD, since she re-experienced a traumatic event through intrusive memories, nightmares, inability to remember dates, and distal muscle tremors. Yet,

20 Two of them testify as expert witnesses, but the victim's therapist chose not to do so.

21 A professor of forensic psychology told me in an interview that psychologists regularly diagnose PTSD and provide expert testimony in relation to it at trials. The problem seems to lie in a legal and medical culture that grants more authority to psychiatrists than psychologists, but this is to the detriment of the victims and against legal standards.

later in his testimony, he seemed to nuance his diagnosis: "To determine if the victim has PTSD, ideally it would be necessary to wait one month to be sure, but what he observed could be PTSD" (Sentencia RIT No. 12-2004, p. 15). Paradoxically, this is what the first psychologist, who diagnosed the victim with PTSD after treating her for some time, did, but this fact was ignored by the judges. The second psychologist's further stated that: "His assessment of the victim is that she is a woman with a normal intellectual level, who is visibly affected by her emotional state. What predominates are feelings of anxiety, defenselessness, shame, and self-blaming for what happened" (p. 14). The psychologist concluded that the victim was raped in a situation of defenselessness because the attacker was a known person who assaulted her in a recreative context that abruptly changed to one of violent subjugation. Moreover, "[the victim] seemed credible, because her discourse was coherent, there was a connection between what she said, the event, and the effects" (p. 15). He also offered some analysis that contradicted the prosecution's theory, such as stating that there was no use of force but that the victim was intimidated.

The judges negatively evaluate this testimony because the victim herself is the source of all of his analyses. Yet, expert witnesses have been a quintessential part of the judicial system when it comes to assessing victims' credibility and damage, although the practice of presenting expert witnesses to address victims' credibility is slowly fading. They also negatively assess the fact that, according to the psychologist, the victim had been intimidated rather than forced, which contradicts the prosecution's theory. However, although this appears to be an inconsistency, one might argue that, based on the victim's testismony, both force and intimidation were at play in her assault. The judges ultimately assess his testimony in the following way: "In conclusion, this testimony is not a relevant contribution to clarify the facts, but mere speculations or approximations" (p. 15). The judges further state that the psychologist said the victim's symptoms were not caused by PTSD, that she had a personality disorder, and that a psychiatrist should have diagnosed her. But the expert said nothing of the sort, at least not in what the judges reproduce as his testimony. Casas and Mera (2004) argue that it is common for judges to misinterpret expert witnesses' testimony and use it to argue the opposite of what they declare, which, in my opinion, is partly related to the discretion they apply to their discursive work of paraphrasing and partially reproducing testimony (p. 83).

The victim was also examined by a physician who concluded that she was sexually assaulted: "based on what the patient told him and the injuries described, he [the physician] concluded that there was sexual abuse" (Sentencia RIT No. 12-2004, p. 15). But the judges ignore this

part of his testimony and do not assess it in the written ruling. They refer to his deposition to highlight his lack of assertiveness when arguing that the victim was under emotional shock: "He concluded that *he thought* [my emphasis] the victim was experiencing emotional shock" (p. 14)[22]. Although judges tend to prefer forensic testimony provided by physicians from the Medical Legal Bureau (Casas & Mera, 2004), in Chile any licensed physician can legally provide forensic analysis (Meriño, 2010, p. 95). Additionally, the defense did not provide any forensic or expert witness testimonies that might challenge those provided by the prosecution. That is, the judges perceive with skepticism all the expert and professional testimonies that might bolster the victim's credibility and painstakingly scrutinize even the slightest traces of subjectivity in them. These findings are consistent with research which shows that expert testimony in sexual assault cases tends to be assessed with the highest level of skepticism and scrutiny as compared to other crimes (Duce, 2018). Thus, although three professionals stated that the victim was credible and two of them substantiated their testimony with her symptoms, the judges simply ignored their conclusions.

In regards to the material evidence, the victim stated that the defendant tore her pants and broke the buttons when he undressed her by force. The pants were shown to the victim at the trial, and she recognized them: "She offers a description of the pants that the defendant pulled off and tore, which were black with a zipper and two buttons that the defendant broke" (Sentencia RIT No. 12-2004, p. 5). The judges conclude that the pants were old and the fabric was low-quality, so: "It is concluded that it does not correspond to an act of violence by the accused" (p. 6). One of the Investigative Police officers who interviewed the victim at the hospital saw her pants in the Emergency Room and stated that: "They had signs of force. They were black pants, which were torn on the sides" (p. 12). The expert witness from the Investigative Police who photographed the scene of the crime also took pictures of the pants at the hospital. He stated that they were torn at the crotch, which "seemed to [him] to have been caused by the energy of dragging or pulling, without the intervention of any sharp element" (p. 13). The judges react negatively to this statement, which they say could "misleadingly influence these judges" (p. 13). Thus, while the victim states that her pants were torn by the force with which the defendant pulled them, and two other witnesses from the Investigative Police say that they saw signs of force, the judges state that they were torn because they were old and low-quality. Here, they not only ignore the victim's statement, but the perceptions of two other witnesses. Additionally, the victim stated that, as the defendant was trying to subdue her, she tore his necklace, thinking it could be used

22 Emphasis added.

as proof of a struggle. The judges paraphrase her testimony as follows: "[She said that] she was defending herself, and she cut a necklace he was wearing, since she thought she could report him with it" (p. 15). Yet, they do not give any value to her testimony and choose to believe the defendant:

> In relation to the material evidence consisting of a necklace, which would have been cut by the actions of the plaintiff, who would have torn it from his neck, this is not conducive evidence, since the defendant says he himself cut it off as he was taking off his sweater (p. 6).

A holistic reasoning that considered all the indicative evidence, encompassing all of its threads, would at least cast some doubt on the defendant's statement.Recent Inter-American Court of Human Rights (IACHR) case law establishes that to assess evidence with a gender perspective entails assessing all the evidence in a holistic manner (Di Corleto, 2018; Zelada & Ocampo, 2012), paying attention to indicative evidence or "clues" of the crime. That is, the evidence should be assessed as a whole, examining how the various threads relate to and bolster one other (Di Corleto, 2018, p. 4)—as the Court stated in the *Caso de los Niños de la Calle v. Guatemala [Case of the Street Children v. Guatemala]* (1999)—, while victims' statements should be given enhanced value. In this case, the judges failed to perform a general analysis of how the evidence as a whole pointed to the possibility of sexual assault by dismissing the testimony of three professionals who argued that the victim was credible and two who maintained that she showed symptoms of PTSD as a result of the assault. The judges ignored clues such as the broken necklace and the torn pants, which were signs of struggle and force, as detected by the Investigative Police, and believed the defendant's explanation for the broken necklace. For instance, in the *Caso Algodonero* (2009), the judges analyzed various clues that pointed to sexual violence and concluded that it had taken place, whereas in the case under study the judges ignored all the indirect evidence. In addition to this evidence, they had the victim's statement saying that she was assaulted, a victim who, moreover, ran next door, naked and crying, immediately after the assault. By focusing exclusively on the physician's and the psychologist's nuances about emotional shock and PTSD, and ignoring their assertions about the likelihood of a sexual assault, they failed to value expert testimony altogether and to analyze it in light of the police's statements, the victim's testimony, and other indicative material evidence.

X. REQUIREMENT OF BODILY INJURY TO GIVE CREDENCE TO THE HYPOTHESIS OF RAPE BY FORCE

As developed in the previous section, women victims of sexual assault see their credibility questioned in court. One factor that increases legal actors' skepticism is that the victims do not present certain physical traces of violence. Extensive research has shown that sexual assault often does not leave any visible injuries; yet, as Hlavka and Mulla (2021) assert, there is an ingrained "presumption of injury" in the legal realm when it comes to rape, another of the many rape myths that come up at trials. Huda (2022) argues that there is a "science of disbelief" against women victims of sexual assault, which involves considering penetration as consensual or questioning the victim when she does not present any bodily injuries. By considering medico-legal evidence as the main proof of rape, in the absence of visible injuries victims see their credibility diminished. According to Hlavka and Mulla (2021), "[m]ost sexual assaults have no witnesses and leave no visible injuries. And yet, in a court of law, corroboration is often expected and required, and evidence of physical injury" (p. 5), while, according to Tidmarsh and Hamilton (2020), "[i]njury rates during sexual assault are variable, however, and rape victims may or may not experience injury. Some research has found very low rates of injury during rape or sexual assault" (p. 5). Moreover, these authors note that genital injury is often non-conclusive, because it is difficult to determine whether it is the result of consensual or non-consensual sex.

The study conducted by Casas and Mera (2004) stresses that not all sexual assault leaves a trace. Yet, even when it does, the study shows that there are significant problems and biases in the Chilean medico-legal sphere when it comes to properly documenting it. According to some of the researchers' sources, forensic doctors do not document injuries in girls and female adolescents appropriately, while they exaggerate them in boys (p. 35). Similarly, hospital doctors are reluctant to examine victims and usually underemphasize their injuries. Yet, Tidmarsh and Hamilton (2020) stress that the most important aspect to bear in mind is that "the credibility of rape victims should not be made based on whether or not they experienced injury" (p. 6). In this case, as mentioned in the previous section, there was enough indicative evidence to convict the defendant, yet the judges ignored it.

The crime of rape is codified in article 361 of the Chilean Criminal Code, where it is defined as a crime that occurs when penetration takes place under three possible circumstances: 1) when using force or intimidation; 2) when the victims are unconscious or the defendant takes advantage of their inability to resist; and 3) when the defendant takes advantage of

the victim's mental disorder.[23] Activists, and increasingly academics as well, argue that these definitions of rape leave out many situations in which the victims do not give their consent (for instance, when a victim is asleep or incapacitated by alcohol), and advocate that notions of affirmative consent be codified into law (Burgin, 2019; Halley, 2016; Pérez, 2016; Tuerkheimer, 2016). Particularly in cases of rape by force, there is an expectation that the victim present injuries as a result of the assault. This requirement is closely tied to the demand that the victim resist her attacker, since the former is usually considered proof of the latter. According to Rodríguez (2000), from a politico-criminal perspective, this requirement distorts the scope of protection provided by rape laws since it puts the victims' bodily integrity and life in danger, particularly given that resistance is not required in other violent crimes. This scholar argues that the requirement that the victim resist her attacker to prove the hypothesis of rape by force is widely accepted in traditional Chilean scholarship (pp. 191-192), although Chilean law does not specify it. Research conducted by Cabal *et al.* (2001) similarly shows that lack of visible injury in the hypothesis of rape by force suggests that the defendant will be acquitted (pp. 140-141). In this sense, traditional case law and scholarship curtail women's access to justice.

Throughout the written ruling of the case at hand, the judges highlight that several witnesses declared that they saw no injuries on the victim's body and employ it to dismiss the use of force.[24] Yet, these witnesses also provided very important information as to how they saw the victim at different time frames after the assault (either immediately after or the same day). This is perhaps one of the few traits of the "ideal victim" that the woman in this case meets, since she reported the assault immediately after; however, the judges also ignored this fact. One of the witnesses was the woman who sheltered the victim at her house when she ran away from the defendant. Besides stating that "she did not have any visible injuries on her body" (Sentencia RIT No. 12-2004, p. 6), this woman specified that, while she was profoundly asleep around 7 am, she heard "horrible screams and opened the door

23 Below I provide the exact wording of article 361 of the Chilean Criminal Code that regulates the crime of rape:
"ART. 361.
La violación será castigada con la pena de presidio mayor en su grado mínimo a medio.
Comete violación el que accede carnalmente, por vía vaginal, anal o bucal, a una persona mayor de catorce años, en alguno de los casos siguientes:
1º Cuando se usa de fuerza o intimidación.
2º Cuando la víctima se halla privada de sentido, o cuando se aprovecha su incapacidad para oponerse.
3º Cuando se abusa de la enajenación o trastorno mental de la víctima."

24 The judges reproduce the testimonies of these witnesses by paraphrasing them. They offer them as if they were uninterrupted and as if the witnesses had spontaneously brought up the absence of injuries. I speculate that all the questions about bodily injury were asked by the defense, yet the judges do not specify whether these witnesses are replying to questions by the prosecution or the defense, except in the case of the first Investigative Police officer, where they state that the defense asked the question about the injuries.

and a naked girl came in; she threw herself on the floor and said she had been raped and needed help; she kept crying and she could not calm her down" (p. 7). Additionally, two police officers who went to the scene of the crime stated that they saw no injuries on the victim's body. One of them also stated that she was crying "hysterically," while the other is paraphrased as saying that "there was a semi-naked girl crying and screaming, beside herself. When the ambulance came, the victim took his hand so as not to be alone" (p. 10). Moreover, two Investigative Police officers went to the hospital to interview the victim. While they also stated that they saw no injuries on the victim's body, both of them said they found her to be "deeply affected" (pp. 12).[25] Thus, while the judges used all of these testimonies to conclude that there was no use of force, they ignored all the witnesses' statements that bolstered the victim's credibility.

The final witness to declare in relation to bodily injury—the physician who examined the victim—stated that he began to interview her about what had happened, but it was very difficult "because she would not stop crying" (p. 13). He thought she was suffering from emotional shock. The physician offered somewhat contradictory testimony about whether he saw injuries on her body. The judges say that the physician stated: "She did not present bodily injuries; she had an erosion on her right or left hand" (p. 14). Subsequently, when asked by the prosecution, he added that the victim had "ecchymosis on her wrist and her hip, and a hematoma on her knee" (p. 14). At the end of his deposition, the physician is quoted by the writing judge as saying: "He concluded that he saw minor injuries and sexual abuse" (p. 14), reproducing what he indicated in his urgent care report (*comprobante de atención de urgencia*). In their assessment of the physician's testimony, however, the judges state that the only injury that could be attributed to the defendant is the one by the wrist and that the doctor said he did not know for sure what had caused it.

Based on the physician's and the other witnesses' statements, the judges conclude that there was no use of force: "She did not present bodily injury, so at least on her body force was not used to subdue her" (p. 7). While rape law does not specify that bodily injury is *the sine qua non* requirement to convict for rape by force, or even a requirement at all, the judges—following the "presumption of injury" (Hlakva & Mulla, 2021) rape myth—establish a cause-effect relationship between the hypothesis of rape by force and the presence of bodily injury: "According to the alleged victim's testimony in court, if she had been forced by the defendant X.X.X.X., the force should have been apparent in an objective way, either as bodily injury or damage to her clothing" (Sentencia RIT

25 On this point, see also Sentencia RIT No. 12-2004 (p. 11).

No. 12-2004, p. 18). Yet, as mentioned at the beginning of this section, many victims of sexual assault—including rape by force—do not present injuries. One prosecutor I interviewed during 2023, who specializes in sexual crimes, stated that often force does not leave a trace. While it is ideal to be able to prove force in some way, it sometimes has to be deduced from the victim's statement and the rest of the evidence. In this case, if the judges had trusted the victim, the use of force could have been inferred from her statement, the broken necklace, the torn pants, and the expert witness testimony.

XI. DISCUSSION OF VICTIMS' SEXUAL HISTORY

Discussion in court about previous sexual experiences is one of the most nerve-racking moments for victims of sexual assault. Due to patriarchal views whereby women's sexuality should be reserved for stable relationships and marriage, women can be shamed for having had previous sexual encounters, especially with men who were not their partners. Oftentimes, defense attorneys exploit victims' previous sexual experience to suggest that it is unlikely that they were assaulted, implying—among other things—that only women with no sexual experience can be assaulted (Flowe *et al.*, 2007; Zúñiga. 227). While in the United States and other countries with the common law system, rape shield laws that prohibit discussing victims' previous sexual experience have been at the forefront of the debate around rape trials (Easton, 2000), in Chile there are no formal rules or intense scholarly debates about its pertinence.[26] Feminist groups in Chile, particularly in high-profile cases, denounce and protest when victims being interrogated about previous sexual partners in court since it has a revictimizing effect, as they did in a recent case in which the victim committed suicide as a result of the sexual assault (*Caso Pradenas*) and the defense attorney made comments about her former romantic partners.

The issue has recently emerged in Chile in relation to a bill on protective measures about violence against women (*Ley de Violencia Integral*). Article 47 of the bill specifies that it is prohibited to discuss a victim's sexual history during the legal process, unless the court, the defense, or the prosecution consider it to be essential for the case. And should the topic be discussed, the article specifies that it should be done without resorting to gender stereotypes. Article 24 also establishes this duty for the prosecution.[27] Yet, even if these articles are approved in the final

26 However, this is not the case in other Latin American countries. The Colombian and Mexican Supreme Courts established decades ago that a victim's sexual history is irrelevant to determine consent (Lemaitre, 2001, p. 592). Additionally, the Colombian Constitutional Court declared in 2005 that it is *prima facie* unconstitutional to present evidence about victims' sexual history in trial since it is a violation of their right to privacy.

27 "En los casos de violencia contra las mujeres, el silencio, la falta de resistencia o la historia sexual previa o posterior de la víctima no podrán ser valorados como demostración de aceptación o

version of the bill, research done by linguistic anthropologists in the United States has shown that legislation barring the explicit discussion of victims' sexual history does not always preclude defense attorneys from using innuendo and subtle comments that signal their previous sexual experience (Matoesian, 2001). Furthermore, other studies have shown that rape shield laws are ineffective due to multiple causes related to legal culture, unclear definitions of relevance, and the lack of enforcement by judges and prosecutors, among others (Kulshreshtha, 2023); specifically, an adversarial legal culture in which "judges are anxious to demonstrate their neutrality and prefer to remain passive" (Kulshreshtha, 2023, p. 9).[28]

In certain cases, a victim's previous sexual history may lead to a rationale used to acquit the defendant. This is why in common law systems with rape shield laws there are specific situations in which a victim's sexual history can be discussed (Flowe *et al.*, 2007)—for instance, when a judge considers it to be relevant or when it relates to previous sexual interactions with the defendant. Yet, in the case I am analyzing, the defense attorneys offered no rationale to justify discussing the victim's previous sexual experience other than suggesting that she was a licentious woman and, therefore, sex with the defendant was consensual. The defense presented seven witnesses: the taxi driver and six men who were all army acquaintances of the defendant. The taxi driver stated that he picked up the victim and the defendant at around 5 am and took them to a certain address. He mentioned he knew the woman, because she usually went to discotheques, and he often drove her. The judges write that the taxi driver was asked a question, and he replied that it seemed to him that the victim and the defendant acted as a couple. Then he was asked another question and "[t]o the question that he was asked, he replied that the lady went to different addresses, with different men after going to the discotheque" (Sentencia RIT No. 12-2004, p. 16). There is no record of the question that was asked, most likely by the defense attorney, so it cannot be determined if he directly asked about the victim's sexual history or, as suggested by Matoesian (2001), asked an indirect question that would yield this result. Either way, whenever questions that may lead to discussing a person's sexual experiences without offering a clear rationale for it, judges and prosecutors should intervene.[29]

consentimiento de la conducta."

28 Relatedly, Zúñiga (2018) speaks of "patriarchal pacts" that continue to operate in practice even after legislative change (p. 230).

29 A recent legal change introduced by Law 21.523 (*Ley Antonia*, 2022) offers victims of sexual violence several protective measures against revictimization.

The second witness was a colleague of the defendant, who lent him his house so he could go there with his girlfriend. He spoke of the victim in the following terms:

> he knows her from a couple of years ago, from partying, when he went dancing[;] he even dated her because he thought she was pretty. Once she was at his house, in his bed, both of them with another couple. She was only wearing a nightgown and nothing more. There was no sex because he felt self-conscious (Sentencia RIT No. 12-2004, p. 17).

The third and fourth witnesses merely attested to undisputed facts in the case: that they saw the defendant and the victim at the club on the day in question. The fifth witness said he knew nothing about the events on the day in question, but that he knew the victim:

> He knows nothing about the facts, but he knows X.X.X.X., he has seen her at the discotheque and also at an army party. Gossip about her is that she is an easy girl and even—his brother-in-law told him—that X.X.X.X.'s former partner left her because she slept around (p. 18).

The sixth witness was a non-commissioned army officer who said he knew the victim from spending time at the discotheque; he testified that "she was uninhibited and drank a lot. She would always come to parties with different men" (p. 17). The seventh witness was an army cook. He testified that he knew the victim because she

> would always go to the army cafeteria, with different companions. Once he was at the disco and she was with a group of people having beer; she approached him and asked for US$100 and he asked how she would pay it back to him, and she said: 'How do you want me to pay you back? If you want, I can pay you with sex.' He did not give her the money and it seemed to him that she was a prostitute (p. 18).

The second, fifth, sixth, and seventh witnesses did not offer any relevant information regarding the disputed facts: it seems that they merely declared—at least as reproduced by the judges—o portray the victim as a promiscuous, licentious woman who often engaged in sexual relationships with strangers. One of them explicitly likened her to a prostitute. Presenting four witnesses who mostly testify to discuss the victim's previous sexual history suggests that the defense's implicit strategy was to infer consent from a promiscuous lifestyle and, by not intervening, the judges allowed this revictimization for issues unrelated to the case. Moreover, instead of assessing these testimonies with a gender perspective in their written ruling, they reinforce their probative

value by stating that "[t]hese witnesses seem sincere, particularly the taxi driver, who did not know the accused and did not recognize him at the trial" (p. 17). As previously stated, the taxi driver had changed his testimony but, unlike the victim, was not chastised for it.

XII. AN ASSESSMENT OF THE GOOD PRACTICES HANDBOOK: WOULD THE CASE HAVE TURNED OUT DIFFERENTLY IF THE HANDBOOK ON HOW TO JUDGE WITH A GENDER PERSPECTIVE HAD BEEN IN PLACE IN 2004?

Since 2015, leadership at the Supreme Court has strived for the Chilean Judiciary to become an institution that embraces a gender perspective in its practices. Within this context, the Supreme Court's Secretariat asked two human rights lawyers specializing in gender issues to elaborate a handbook on how to judge with a gender perspective. The bulk of the document consists of explanations of concepts such as access to justice, intersectionality, violence against women, and gender stereotypes, and exemplary IACHR case law on these concepts. Perhaps the most useful section for the adjudication process is a schema—referred to as "matrix to apply the principles of equality, non-discrimination, and gender perspective in court rulings" [*Matriz para aplicar los principios de igualdad, no discriminación y perspectiva de género en las sentencias*]—(2019, p. 89) with various suggestions for analyzing the proceedings with a gender-sensitive lens.

The schema proposes six stages for case analysis which are broken down into several steps. I will detail the most relevant aspects of each step in relation to the case under study and, therefore, I will not include all the information associated with each one. The first stage—characterization of the case—requires judges to describe the case in detail by examining its context. It suggests that they identify the geographical and cultural context in which the events took place; the parties' belonging to racial, sexual, linguistic, or religious minorities, among others; which victim's rights were violated and who was supposed to ensure them; and whether protective measures in relation to the danger of the situation. The second stage—analysis and development of the case—asks judges to act diligently to secure that the investigation and the proceedings are not delayed and that the victims are heard; identify power relations in the case; identify stereotypes that may emerge from the judges and the parties; and whether there are situations of intersectionality.

The third stage is assessment of the evidence. This stage has only one step, which involves taking into consideration the particular dynamics of gendered violence when assessing the evidence. For instance, victims of gendered violence who retract their testimony are not to be

considered inconsistent witnesses, since they may not want to follow through out of fear or financial dependency. Additionally, it suggests that judges confer particular relevance to a victim's first statement and consider it as relevant proof. Finally, it suggests that judges avoid revictimization. The fourth stage concerns legal analysis. The first step specifies that the legal framework for adjudication is broad, since it includes international treaties and international obligations the State has incurred, while the second step specifies that judges should scrutinize the presumed neutrality of legal norms. The fifth stage—in its single step—suggests reviewing national and international case law related to gender inequality, discrimination, and violence. Finally, the sixth stage concerns the court ruling. It includes three steps: judges should write a court ruling that exposes power asymmetries and stereotypes and does not engage in revictimization; has a pedagogical and transformational effect; and offers reparation measures.

Taking into consideration the structure of the matrix and the rest of the content in the handbook, I will now assess it in relation to the case under study. The handbook has several strengths. Its conceptual framework explains gender stereotypes in clear, accessible language. The handbook offers case law in which the rights of LGBT and indigenous peoples, among others, were violated, including cases in which situations of intersectionality were relevant. One very important aspect of the handbook evinced in the matrix is that—as exemplified in the case I am analyzing—it shows how bias can appear at different stages of the proceedings. Thus, the document provides consistent, clear, and well-developed insight into stereotypes and discrimination. Overall, if the handbook had been available in 2004 and the written ruling had considered its suggestions, several aspects of the latter might have been improved.

The handbook's various insights on stereotypes and gender roles might have discouraged the judges from focusing exclusively on the victim's behavior and family ties when interpreting the facts. In step three of stage four, the matrix indicates that judges need to analyze whether gender stereotypes, myths, and biases are included in the parties' and their colleagues' interventions. It explicitly highlights the stereotype of the "good mother" and the "inattentive mother" as examples of biases that may arise. Therefore, if at least one of the judges had paid attention to this step, he might have talked his colleagues out of suggesting that the victim had no place at a discotheque since she had a child whom she "dismissed" going back to. Perhaps they might have considered that reproaching the victim for going out late at night and not remaining at home involved a gender stereotype.

In stage three, it is suggested that judges pay attention to indicative evidence (*prueba indiciaria*), since direct evidence is not always available, and to the testimony of people who assist the victim right after the events. While the judges did assess the statements of the couple who helped the victim, they mostly used their testimony to emphasize that they did not detect injuries on the victim's body, while ignoring the fact that they also stated that the victim was crying and in distress, and that she got more nervous when the defendant came to the house. This indication was important and might have made the judges pay attention to how the witnesses saw the victim, rather than accepting the defense's speculation that she had a mental illness. In this stage of the schema it is also suggested that the victims' motivation for judicialization needs to be taken into consideration. If there is no secondary gain to be obtained from the proceedings, the victim's credibility should be enhanced, yet there is no analysis of this issue in the ruling. The judges' wording suggests that they perceived a spurious motivation in the victim, when they refer to her "twisted declarations." The defense made a similar suggestion when it stated that the victim "had tried to manipulate the court." Yet, the judges never offer any spurious reason as to why the victim would want to pursue the proceedings. The matrix also strongly urges judges not to revictimize victims in the rulings and, in step two of stage six, it even suggests that the ruling should have a transformational effect towards a deeper understanding of discrimination, violence, and stereotypes. However, in the ruling under analysis the judges consolidate their stereotypical interpretation of the facts, as they affirm that the victim and the defendant effectively engaged in consensual sex.

So far, I have addressed how the handbook, and its matrix in particular, might have improved the adjudication task had it been available in 2004 and had the judges taken it seriously. Yet, there are several areas in which the handbook could benefit from more detailed explanations, particularly in relation to women victims of sexual assault and assessment of the evidence. One of the shortcomings of the handbook is that—although it encourages judges to privilege the victim's first statement—it does not address inconsistencies in victims' testimonies in detail. The document only mentions such inconsistencies in a footnote describing IACHR case law in the legal framework section (p. 74, footnote 85). This is not enough to tackle such an important and recurrent aspect of testimonies by victims of sexual assault. The only related insight in the matrix is the section on recantation in stage 3, which suggests that judges must understand it within the context of financial dependency, cycles of violence, possible threats, and even reconciliation with the accused. Thus, the matrix seems to emphasize the situation of victims of intimate partner violence to the detriment of sexual assault victims. Victims' inaccuracies in cases of sexual assault should be discussed in a more

in-depth, central manner and should be included in the handbook's matrix.[30]

In stage five, the matrix specifies that judges should look at national and international case law on gender discrimination as a source of knowledge. Yet, it would have been relevant to state that there is much national case law and scholarship addressing stereotypes and outdated notions of consent and resistance in sexual assault cases. Particularly, it would be relevant for the handbook to discuss those Chilean case law and scholarship traditions that curtail the legal protection of sexual assault victims, as discussed by Rodríguez (2000), given that in the present case the hypothesis of rape by force was partly dismissed because there were no injuries on the victim's body. In step four of stage two, discussing a woman's sex life is described as sexist. However, since the discussion of victims' previous sexual history is such a recurrent issue in rape trials, it would have merited a more thorough development. In this regard, in step one of stage two, which explains judicial due diligence in detail, the matrix should have offered examples of how judges —and prosecutors—might intervene when witnesses discuss a victim's previous sexual experience with no other goal than to shame her and tarnish her reputation.

Finally, although the sentence writing stage states that an exhaustive analysis of the evidence should be made, the good practices handbook could suggest that judges develop a discursive exercise of reproducing testimony that is as faithful as possible to what was said at trial by witnesses and experts—if not a literal transcription—, and that they evaluate the totality of what was said at trial. In this way, it could prevent to some extent that certain aspects of testimonies are omitted, misinterpreted or reproduced in an unclear manner, which may affect the evaluation of the evidence and the final decision.

XIII. CONCLUSIVE REMARKS

In this article, I have offered a thorough examination of how five different types of gender bias appear in a court ruling on a rape case: gender stereotypes and rape myths; credibility discounting; assessment of the evidence without a gender perspective; requirement of bodily injury to give credence to the hypothesis of rape by force; and discussion of a victim's sexual history. In my analysis of the different categories of bias, I emphasized that they interact, overlap, and mutually reinforce each

30 By contrast, the Guatemalan protocol, based on IACHR case law and CEDAW recommendations, states, in a well-developed section of the document, that the testimony of victims of sexual assault should be given enhanced value (2015, p. 30, 2015). As defined in the Guatemalan handbook, this value involves understanding that imprecisions or inaccurate recollections may appear in the testimonies of subjects who have endured traumatic situations and that these should not diminish their credibility if they don't contest the main facts.

other; for instance, that not fitting the stereotype of the ideal victim further diminishes a sexual assault victim's credibility. The analysis shows how gender biases may come up at different stages of the oral trial—opening and closing statements, presentation of the evidence, cross-examinations, and ruling on the case—, which suggests that the legal actors at the oral trial, particularly judges and prosecutors, should be vigilant at all times. Yet, as stated by Casas and Mera (2004), women victims of sexual assault experience gender biases at every stage of the process from the moment they report the assault. The analysis of the case also showed that all the legal actors—the judges, the prosecutors, and the defense attorneys—needed gender-sensitive training. As gender biases are ingrained in society at large, it makes sense that all the legal actors resorted to them to some extent. Arguably, the case analyzed in this article is an outlier due to the large number of gender biases present in it and the explicitness of some of them, as bias often appears in more subtle ways and detecting it is not always a straightforward task.

In the final part of the article, I addressed whether the Secretariat's handbook on how to judge with a gender perspective would have been a valuable tool to prevent bias in this case had it been available in 2004. While the handbook attempts to address various types of discrimination, overall, I conclude that it should give a more prominent role to victims of sexual assault. It should offer examples of gender biases and rape myths, as well as examples of national case law on sexual violence, and include them in a thorough, well-developed manner. The protocol should also emphasize that inconsistencies are common in the testimony of victims of sexual assault, as shown by research and included in IACHR and other international law case law. In this sense, the handbook should also address how trauma affects memory and demeanor in various ways, so that judges understand that demeanor in court is not a one-size-fits-all for victims of sexual assault. Additionally, the handbook should address scholarship and case law that describes biased beliefs that are ingrained in legal education, sometimes even in the work of prestigious scholars; for instance, regarding the issue of resistance and injuries as it relates to sexual violence. Skepticism towards the victim is an overarching characteristic of the ruling analyzed; therefore, the handbook should offer more detailed examples of case law that confers enhanced value to victims' testimonies and the criteria for assessing them. As stated previously, the handbook is a comprehensive protocol that deals with non-discrimination and gender perspective, and these are very broad subjects which encompass different minority groups. Ideally, the Secretariat should produce a protocol that deals exclusively with gender perspective in cases of sexual assault, as the case under study shows that many aspects could be strenghtened.

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