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An analysis of factors in the policymaking process that enabled prison sentence decreases
through the 2022 Organic Law of Comprehensive Guarantee of Sexual Freedom/La Ley Del
Solo Sí es Sí in Spain

Cambron Wade

Independent Study Project

SIT Spain: Policy, Law, and Regional Autonomy in Europe

May 12, 2023

Independent Study Project Overview

Project title: An analysis of factors in the policymaking process that enabled prison sentence decreases through the 2022 Organic Law of Comprehensive Guarantee of Sexual Freedom/La Ley Del Solo Sí es Sí in Spain

Research question: What factors in the Spanish policymaking process enabled prison sentence decreases through the implementation of 2022 Organic Law of Comprehensive Guarantee of Sexual Freedom/La Ley Del Solo Sí es Sí?

Disclaimer: This project is the product of one month of research for undergraduate academic purposes and is not an accredited scholarly paper.

Abstract

To follow through on their ratification of the Istanbul Convention and public outcry after La Manada case, the Spanish Government passed the Organic Law of Comprehensive Guarantee of Sexual Freedom, also known as the law of only yes is yes (or la ley del solo sí es sí) - which came into effect on October 7, 2022. This law changed the Criminal Code by removing the distinction between sexual assault and sexual abuse, which previously caused victims to endure the difficult process of proving that there was violence and intimidation. By moving all sexual acts without consent under the category of sexual assault, the fusion of a previously two-category system caused the range of sentences to expand. This change reduced certain sentence minimums, allowing incarcerated sexual offenders to obtain sentence reductions through Article 2.2 of the Criminal Code. Specifically, as of April 14th, 978 sexual offenders have had their sentences reduced, and 104 have been released from prison. Therefore, this paper aims to

comprehensively explain why la ley del solo sí es sí subsequently enabled sentence reductions for convicted sexual offenders. Through analyzing recent newspaper coverage and interviewing those familiar with the topic, this paper concludes that the reductions in the minimum penological framework, in combination with the lack of an explicit transitory provision, enabled judges to apply the law differently depending on if they followed Article 2.2 of the Criminal Code or the transitory provision of 1995, 2010, and 2015. Finally, this paper concludes by explaining the future of the law, specifically the recent reform and upcoming Supreme Court plenary session set to resolve the legal debate.

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Introduction

The Organic Law of Comprehensive Guarantee of Sexual Freedom in Spain (La Ley Orgánica de Garantía Integral de la Libertad Sexual), known as the law of only yes is yes (la ley del solo sí es sí), came into effect on October 7, 2022.¹ Through this law, the government prioritized the importance of consent by removing the previous distinction between sexual abuse and assault – which previously caused victims to endure the difficult process of proving that there was violence and intimidation. By removing this distinction, the government moved all sexual acts without consent under the classification of sexual assault. Through this change, 978 sexual offenders have had their sentences reduced, and 104 have been released from prison – according to the latest data from the General Council of the Judiciary as of April 14, 2023.²

¹ Agencia Estatal Boletín Oficial del Estado, “Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual,” <https://www.boe.es/buscar/act.php?id=BOE-A-2022-14630>

² Angela Martialay, “La ley del 'solo sí es sí' beneficia ya a 978 agresores sexuales y deja en libertad a 104 de ellos,” El Mundo, <https://www.elmundo.es/espana/2023/04/12/6436a4adfc6c83366b8b45b2.html>, April 2023

After first learning about la ley del solo sí es sí and the subsequent sentence reductions during orientation week, I became very interested in understanding what factors in the policymaking process enabled the reductions that became antithetical to the purpose of the law itself. As a student interested in public policy implementation and execution, I was fascinated by researching the mechanisms behind this change. Moreover, as my program learned more about the Spanish political system and policymaking process, I became even more interested in this topic. Therefore, this research paper aims to answer the research question of what factors in the Spanish policymaking process enabled prison sentence decreases through the implementation of la ley del solo sí es sí?

Structurally, this paper will first explain the historical context behind the law through understanding the impact of the Istanbul Convention and La Manada Case. Secondly, this paper will chronologically guide readers through the creation of the law. Thirdly, this paper will move to the primary research section, which explains the factors that enabled sentence reductions. Fourthly, this paper will explain the progression of the subsequent reform. Finally, this paper will look ahead to the future of the law and the Supreme Court's upcoming plenary session to determine legal doctrine. Overall, this paper aims to provide readers with a comprehensive explanation for why implementing la ley del solo sí es sí subsequently enabled sentence reductions for convicted sexual offenders.

Therefore, this paper will find that reductions in the minimum penological framework, in combination with the lack of an explicit transitory provision, enabled judges to apply the law

differently depending on if they followed Article 2.2 of the Criminal Code or the transitory provision of 1995, 2010, and 2015.

Methods

As the law only came into effect this past October and coverage of sentence reductions only started in November, one finds most information on this topic in newspapers such as El País, El Mundo, El Confidencial, El Diario, and Público. Because of this, I mainly used newspaper articles from all major news outlets in Spain to research the recent history of the law. Along with newspaper articles, I also conducted four structured interviews with experts in the field – Interviewee X, Doctor Dolores Morondo, Doctor Miren Gutiérrez, and Doctor Guiomar Rovira. Based on each interviewee's specialization and research field, I asked different questions and used their answers to investigate the history of the law and subsequent sentence reductions.

Literature Review

As sentence reductions through la ley del solo sí es sí are very recent, academic scholarship in this research area is sparse. Specifically, I found only one academic article about la ley del solo sí es sí - published by a law degree student at the University of the Basque Country. However, as the student published their paper on November 15, 2022, when newspapers first began reporting on sentence reductions, the scope of their research did not extend to explaining the causes of sentence reductions. Therefore, I could not find accredited scholarly articles or journals that explicitly researched the factors that enabled sentence reductions through the law.

Historical Context Behind La Ley del Solo Sí es Sí

Pre-Istanbul Convention

Before la ley del solo sí es sí, the Spanish Criminal Code regulated sexual criminal offenses through two categories: the lower category of sexual abuse (abuso sexual) and the higher category of sexual assault (agresión sexual):³

Lower category of sexual abuse

Articles 181 and 182 of the Criminal Code defined sexual abuse as an attack against a person's sexual freedom or indemnity without violence or intimidation and without consent. Unconscious victims, due to intoxicating substances or a mental disorder, fell under this category. The sentences for the lower category of sexual abuse ranged between one and three years or an 18-24 month fine – except in cases of penetration, which raised sentences to four to ten years.

Higher category of sexual assault

Article 178 of the Criminal Code defined sexual assault as an attack against sexual freedom with violence or intimidation and without consent, punishable with one to five years of prison. Rape was a type of sexual assault with penetration, punishable by six to 12 years of prison. For every crime, aggravating circumstances could raise the sentence.

³ Pilar Castillo Bernal and María Luisa Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” 2022, *Asparkia* (41): 87-113, p92. doi:10.6035/asparkia.6223. www.scopus.com.

Criticism of the Criminal Code

Critics of the Spanish Criminal Code argued that the need to prove violence and intimidation to obtain a higher sexual assault sentence disproportionately burdened the victim. Specifically, they argued that the system defined consent through the victim proving that they said no to the sexual act, for example, through yelling, physically resisting, and asking for help.⁴ In other words, the process of proving that the sexual act was not consented fell to the victim. According to Isaac Guijarro's, co-founder of Olympe Lawyers:

“Proving violence and intimidation is hellishly complicated. This also makes it necessary to focus the entire procedure on asking the victim, through a legal inquisition, what made the attack violent, as well as demanding that she prove it. And how do you test an arm twist, a hair pull, a physical lockout martial art hold, slam into the wall and immobilize yourself, grab your clothes so you can't move? The victim has the feeling that the procedure revolves around her, as a victim, and not around the aggressor. This creates a huge secondary revictimization.”⁵

Istanbul Convention

In 2011, Spain joined the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, also known as the Istanbul Convention. By ratifying

⁴ Isaac Guijarro, “Law of only yes is yes, a paradigm shift,” Pikara Magazine, <https://www.pikaramagazine.com/2023/02/ley-del-solo-si-es-si-un-cambio-de-paradigma/>, February 2023

⁵ Guijarro, “Law of only yes is yes, a paradigm shift”

the corresponding human rights treaty in 2014⁶, Spain became bound to the Article 36 of the treaty, which states:⁷

“Parties shall take the necessary legislative or other measures to ensure that engaging in non-consensual acts of a sexual nature with a person are criminalized.”

“Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”

Therefore, to comply with the Istanbul Convention, Spain needed to eventually change their criminal code and base their legal definition of sexual violence on the lack of consent freely given by the victim – rather than if the victim could prove that there was violence or intimidation.

La Manada (The Wolfpack) Case

In 2016, an 18-year-old girl was raped by a group of five men (around 30 years old) during the San Fermín festival in Pamplona. According to her testimony, the victim engaged in a conversation on public roads with one of the men. The group of five offered to walk her to her friend’s car, where she planned to sleep. On the way to the car, the victim and one of the men began to kiss, and soon the five men made the woman enter a nearby doorway. Every member of the group raped the victim. The group recorded the episode on their phones and shared the videos on their WhatsApp group called “La Manada” or “The Wolfpack.” The group then stole

⁶ Council of Europe, “Istanbul Convention – Spain,” <https://www.coe.int/en/web/istanbul-convention/spain>

⁷ Council of Europe, “Istanbul Convention - Text of the Convention,” <https://www.coe.int/en/web/istanbul-convention/text-of-the-convention>

the woman's phone, and she was found in a state of dismay by a couple who were on the street nearby where the incident occurred.⁸

After the victim reported the attack, the five men were taken into preventive custody and were initially charged with the higher offenses of sexual assault and robbery with assault. When the trial began at the Provincial Court of Navarra, the victim explained that "she did not resist given the numerical and physical superiority of the defendants, a situation that made her go into shock and only wish that everything would end as soon as possible."⁹ At the trial, the private accusation asked for 24 years of prison time, while the city council and regional government asked for 25 years – all under the higher category of sexual assault.¹⁰

In 2018, the Provincial Court of Navarra sentenced the accused to nine years of prison for the lower offense of sexual abuse, five-year probation, and 50,000 euros to the victim as compensation.¹¹ The sentence included undue advantage as an aggravating circumstance as the perpetrators committed an abuse of power. To justify the lower offense of sexual abuse, the

⁸ BBC World, "'La manada': the case of the group of 5 young people who sexually abused a girl in the Sanfermines that causes outrage in Spain," <https://www.bbc.com/mundo/noticias-internacional-43907559>, April 2018

⁹ BBC World, "'La manada': 5 keys to the controversy in Spain over the sentence for sexual abuse of five young people," <https://www.bbc.com/mundo/noticias-internacional-43932079>, April 2018

¹⁰ BBC World, "Case 'La manada': more than 30,000 people go out to protest against the controversial sentence for sexual abuse in Spain," <https://www.bbc.com/mundo/noticias-internacional-43940999>, April 2018

¹¹ Bernal and Rodríguez Muñoz, "The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland," p92

Court stated that there was no proof of physical violence or intimidation that justified a sexual assault sentence. Specifically, even though the judges considered that the victim was in a situation of disadvantage, this was not enough to prove intimidation or violence.¹² Moreover, according to Interviewee X, “The magistrate Ricardo González issued a dissenting opinion calling for the acquittal of the five defendants on the grounds that the young woman agreed to have sex with the defendants and claimed to see “an atmosphere of revelry” in the videos.”¹³

Later in 2018, the Superior Court of Justice of Navarra maintained the same sentence but instructed the Provincial Court to include charges of violation of privacy – as the group recorded the victim while forced. When justifying their maintenance of the sentence, the Superior Court noted that intimidation requires an objective action by the perpetrator and is independent of the victim’s reaction or fear. Specifically, the Superior Court stated, “The corresponding judgment does not identify any explicit act of force by the accused to achieve their purpose, even if some of the phrases may be ambiguous, such as the references to them pulling her hair or putting their hands around her neck.”¹⁴

In 2019, the Supreme Court of Spain ruled against the prior verdicts and increased prison time from nine years to 15 years for the crime of rape (sexual assault with penetration), with two aggravating circumstances of degrading treatment and joint acts committed by two or more

¹² Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p104

¹³ Interview with Interviewee X

¹⁴ Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p104

people.¹⁵ Specifically, the Supreme Court concluded that the existence of a group can cause an environment of intimidation for the assaulted person – allowing them to rule for sexual assault. Specifically, the Court stated: “The specific reference to consent in the Istanbul Convention as the manifestation of the free will of a person depending on the context makes clear the impossibility of interpreting the absence of physical resistance as such a will, such will must be shown as an express consent or be clearly deduced from the circumstances surrounding the fact.”¹⁶

The Effect of La Manada Case

Therefore, La Manada Case exactly exemplified the criticism of the Spanish Criminal Code as the victim needed to prove that there was violence and intimidation and that she said no to the sexual act. Because of this Criminal Code, the Superior Court of Justice of Navarra could interpret the victim’s testimony of experiencing a “situation of anguish, intense distress, and unease which made her embrace a situation of submissiveness and passivity”¹⁷ as, in the Court’s words, “explicitly declaring that she was led in without violence or intimidation and that the expert opinion does not identify any sign of violence.”¹⁸ In the words of Patricia Faraldo Cabana in her article titled “Toward a reform of sexual crimes with a gender perspective,” published in the collection of essays “Women and Criminal Law: Need for Reform from a Gender Perspective?”:

¹⁵ Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p92

¹⁶ Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p106

¹⁷ Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p105

¹⁸ Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p105

“The sentence is the perfect example of the sexist application of an outdated regulation of sexual crimes, excessively focused on consent—which requires a detailed analysis of the behavior of the alleged victim—and on a distinction between assaults and sexual abuses that supposes that this second offense (*sexual abuse*) serves as a catch-all because the degree of violence or intimidation required to elevate the conduct to the category of sexual assault, as has occurred in the case of La Manada, is interpreted restrictively by jurisprudence. It is necessary to dispense with the current distinction between abuse and sexual assault on the basis of the presence or absence of violence or intimidation.”¹⁹

According to Pilar Castillo Bernal and María Luisa Rodríguez Muñoz in their comparison of sexual offense court rulings in Spain, Germany, and Ireland, “The uproar in the Spanish society in the face of this decision was immense, demonstrators gathered in all major cities of the country chanting ‘No es abuso, es violación’ (It is not abuse, it is rape).”²⁰ However, in the following interview spotlights, Interviewee X and Doctor Guiomar Rovira, Research Director of the Public Law Department at the University of Girona (specializing in political and administrative science) and expert in online global feminist actions, emphasize the depth of the public reaction to the La Manada case:

¹⁹ Patricia Faraldo Cabana, “Toward a reform of sexual crimes with a gender perspective,” in “Women and Criminal Law: Need for Reform from a Gender Perspective?,” (Barcelona: J.M. BOSCH EDITOR, 2019), ELibro, <https://elibro-net.proxy-oceano.deusto.es/es/ereader/univdeusto/121220?page=255>, p273+277

²⁰ Bernal and Rodríguez Muñoz, “The Translation of Sexual Offences in the EU: A Comparison of Court Rulings in Spain, Germany, and Ireland,” p103

Interview Spotlight: Interviewee X²¹

In response to the question, “How do you think the public’s reaction to the sentencing in the La Manada case shaped the creation of la ley del solo sí es sí?”

“The Manada case was transcendental because it educated society on how the normative framework operated in the prosecution of non-consensual sexual relations and brought the issue of consent into the public debate.

It was an unprecedented demonstration because of its unity in terms of its *raison d'être* (absolute indignation shared in terms of the qualification of the facts), massive in terms of participation, intergenerational in nature (it united adolescents and older women in an evident harmony) and geographically omnipresent because it was reproduced on a national scale. It should also be noted that this public reaction came in waves, in several episodes of varying magnitude throughout the judicial process of La Manada.

These protests marked a turning point in society, which began to take on board feminist demands for a justice system that lived up to its name with regard to crimes against women's sexual freedom. But the outburst was unstoppable when the Superior Court of Justice of Navarra confirmed the sentence for sexual abuse, and not for rape (*sexual assault with penetration*), despite the dissenting vote of two of its five members. The main reason for such a public reaction of rejection of the judicial decision was that it was not understood (we did not

²¹ Interview with Interviewee X

understand) how it was possible not to appreciate the requirement of intimidation for the qualification of the crime as sexual assault, leaving it as mere sexual abuse. All of this generated a collective social critique of consent and the requirements of violence or intimidation necessary for the qualification of sexual aggression (*sexual assault*) in the Penal Code (*Criminal Code*).”

Interview Spotlight: Doctor Guiomar Rovira, Research Director of the Public Law Department at the University of Girona (specializing in political and administrative science) and expert in online global feminist actions²²

In response to the question, “How do you think the Istanbul Convention and the public’s reaction to the sentencing in the La Manada case shaped the creation of la ley del solo sí es sí?”

“I think above all that la ley del solo sí es sí has been pushed through the streets and social mobilizations after the sentence of La Manada. What really marked a change was that all the Spanish women knew about the sentence of La Manada. It was such a tremendous scandal because it became clear that five adult men attacked an 18-year-old girl, and that this was classified as abuse and not rape.

That indignation circulated and also has a lot to do with social media. There was already a cultivated ground (*of activism*) at that time because the first La Manada sentence appeared in

²² Interview with Doctor Guiomar Rovira over Zoom on April 27, 2023

2018 and we already had very important social mobilizations. This wave of connected, transnational, feminist multitudes had been growing - from #NiUnaMenos in Argentina to #MeToo in the United States. In early 2018, the sentence of La Manada appeared, and all this was on the surface – the collective sensitivity, this connected feminist crowd, women already taking to the streets, the international women's strike for March 8th. There was a very strong mobilization, and this was like throwing a fire, a spark, onto completely dry ground.

In addition, the very important hashtags of #Cuentalo (Tell it) and #YoSíTeCreo (I do believe you) appeared. #YoSíTeCreo was precisely saying how it is possible that the word of the victim was useless. #YoSíTeCreo is very important because it generated empathy in networks of women that achieved an aggregate force of tremendous indignation.”

Moreover, by invalidating the prior verdicts, the Supreme Court’s decision to change the sentence from sexual abuse to sexual assault demonstrated the need to center the definition of consent not on how the victim said no, but on how the aggressors obtained a yes.²³ Additionally, in their decision, the Supreme Court based their justification on the Istanbul Convention’s definition of consent - “the manifestation of the free (sexual) will of a person must be shown as an express consent or be clearly deduced from the circumstances surrounding the fact.” Because of this, the public became even more convinced that Spain needed to follow through on their ratification of the Istanbul Convention and create a new criminal code where sexual offenses are judged by a system based only on consent.²⁴ In other words, Spain needed to change the system

²³ Guijarro, “Law of only yes is yes, a paradigm shift”

²⁴ Interview with Interviewee X

previously based on “no is no” (the victim proving that they said no to the aggressor) into one based on “yes is yes” (the aggressor proving that the victim said yes).²⁵

The Creation of La Ley del Solo Sí es Sí

Timeline

During the controversial verdicts by the Provincial Court of Navarra and the Superior Court of Navarra in 2018, the Parliamentary Group Unidos Podemos-En Comú Podem-En Marea, who was not in Government at the time, registered a bill that responded to the public outcry and debate over La Manada. Specifically, their bill proposed to create a specific penal type for crimes of collective sexual assault – such as La Manada. However, this idea eventually fell apart.²⁶

In December 2019, Partido Socialista Obrero Español/PSOE (Spanish Socialist Workers Party - the socialist party) and Unidas Podemos (United We Can – the left-of-center progressive party) reached an agreement to form a coalition government. In this document, the two parties agreed to create an iron-clad agreement in the criminal code that only yes is yes. Through this, the two parties agreed to comply with the Istanbul Convention and create a comprehensive law that guarantees that consent of the victim is key in sexual crimes. According to El Salto, this agreement ensured that “If a woman does not say yes, everything else is no. That is, ‘only yes is yes.’”²⁷

²⁵ Guijarro, “Law of only yes is yes, a paradigm shift”

²⁶ Patricia Reguero Ríos, “Así se ha fraguado (y ha cambiado) la ley del solo sí es sí,” El Salto, <https://www.elsaltodiario.com/congreso-de-los-diputados/ley-solo-si-es-si-libertad-sexual-congreso-cronologia-cambios>, May 2022

²⁷ Ríos, “Así se ha fraguado (y ha cambiado) la ley del solo sí es sí,”

In March 2020, the previous Ministry of Justice, held by PSOE, drafted the law on sexual violence and determined the different maximum and minimum sentencing requirements.²⁸ The Council of Ministers then approved the preliminary draft of the law on sexual violence – what would become *la ley del solo sí es sí*. This draft reformed the Criminal Code by first changing the definition of consent to “It will only be understood that there is consent when it has been freely expressed through acts that, in view of the circumstances of the case, clearly express the will of the person”²⁹ - in accordance with the Istanbul Convention. Secondly, the draft removed the difference between sexual abuse and sexual assault. Specifically, by removing this distinction, the Government moved all sexual acts without consent under the classification of sexual assault³⁰. Additionally, the draft expanded the scope of the Criminal Code by including different types of sexual violence, such as sexual femicide, sexual harassment, and sexual violence committed in the digital sphere.³¹ In this draft, sentences could increase through aggravating circumstances. With this change, violence and intimidation became one more element, no longer the determining factor.³²

²⁸ Interview with Doctor Dolores Morondo via Zoom on April 25, 2023

²⁹ Ríos, “Así se ha fraguado (y ha cambiado) la ley del solo sí es sí,”

³⁰ Guijarro, “Law of only yes is yes, a paradigm shift”

³¹ Guijarro, “Law of only yes is yes, a paradigm shift”

³² Guijarro, “Law of only yes is yes, a paradigm shift”

In December 2020, the Ministry of Equality released the second draft of the law. This draft changed the scope of the law's application from being only for women from 16 years up to being a law for women, girls, and boys.³³

In March 2021, the General Council of the Judiciary (CGJ) issued its mandatory but non-binding report on the law to the Government. In this report, the CGJ explained that by removing the distinction between sexual abuse and sexual assault and only having the category of sexual assault, the range of penalties will expand. Through this expansion, the CGJ found that the maximum limits of some sentences would be reduced.³⁴ The CGJ warned that the reduction of maximum limits could be a problem because Article 2.2 of the Spanish Criminal Code orders that new legislation that is beneficial to a prisoner's case can be applied retroactively³⁵:

Article 2.2: "Those criminal laws that favor the accused will have retroactive effect, even if a final sentence had been handed down when they entered into force and the subject was serving a sentence. In case of doubt about the determination of the most favorable law, the defendant will be heard. The acts committed under the validity of a temporary

³³ Noemí López Trujillo, "Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote", Newtral, <https://www.newtral.es/cronologia-ley-solo-si-es-si/20230428/>, April 2023

³⁴ Trujillo, "Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote"

³⁵ Beatriz Parera and Pablo Gabilondo, "The Attorney General's Office orders the rejection of some discounts to violators of the Montero law", El Confidencial, https://www.elconfidencial.com/espana/2022-11-21/fiscalia-general-ordenara-mantener-las-penas-que-aun-puedan-imponerse-con-la-nueva-ley_3526498/, November 2022

Law will be judged, however, in accordance with it, unless expressly provided otherwise.”³⁶

Because of this, the CGJ warned that reducing maximum limits for certain sentences could cause prisoners with sentences already at the maximum under the current criminal code to ask for reviews when the new law comes into effect.³⁷ For example, if a prisoner has a maximum sentence of 10 years for their charge under the current law, and the maximum sentence for the equivalent charge changes in the new law to 8 years, then the prisoner could ask for their sentence to be reduced. According to interviewee Doctor Dolores Morondo, Lawyer, Principal Investigator at the Institute of Human Rights at the University of Deusto, and Spanish Representative in the European Network of Legal Experts on Equality and Non-Discrimination, the Government took note of this warning and modified the penological framework so that maximum limits were not reduced, and potential sentence reductions were prevented.³⁸

In July 2021, the Council of Ministers approved the final text of the draft of the law. The draft became a bill that was then sent to the Congress of Deputies.³⁹

³⁶ Martialay, “La ley del 'solo sí es sí' beneficia ya a 978 agresores sexuales y deja en libertad a 104 de ellos,”

³⁷ Trujillo, “Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote”

³⁸ Interview with Doctor Dolores Morondo via Zoom on April 25, 2023

³⁹ Trujillo, “Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote”

In May 2022, the Congress of Deputies approved the bill and sent the bill to the Senate.⁴⁰

In August 2022, after the Senate approved the bill, Congress officially passed the bill into law.⁴¹

In September 2022, the new law was published in the Official State Gazette and entered into force one month later, on October 7th, 2022.⁴²

Paradigm Shift in La Ley del Solo Sí es Sí⁴³

For this research paper, the most important part of the law is how it reformed the criminal code by eliminating the distinction between sexual assault and sexual abuse. However, beyond reforming the criminal code, the new law represented a paradigm shift in how the government protects and defends sexual violence victims. Specifically, the new law also included the following provisions:

- The creation of a 24-hour sexual violence crisis in each province of Spain to provide psychological, legal, and social care for victims. For victims who are not yet ready to file a complaint, the services are accessible to victims without having to file a complaint. The centers unify the institutional response (previously spread across police stations and hospitals) and minimize the victim's confusion and disorientation.

⁴⁰ Trujillo, "Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote"

⁴¹ Trujillo, "Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote"

⁴² Trujillo, "Timeline of the 'only yes is yes' law: key milestones of the first regulation that divided the coalition vote"

⁴³ Guijarro, "Law of only yes is yes, a paradigm shift"

- Victims of sexual violence who earn less than the minimum interprofessional wage will receive financial aid equivalent to six months of unemployment benefits. As the psychological and physical trauma of sexual violence without support can cause many victims to reduce working hours, take leave, or even quit, this financial umbrella will help victims recover with less difficulty than before.
- The law also provides free legal assistance (lawyer and solicitor) to all victims of sexual violence, regardless of their income. Through this, victims of sexual violence will no longer be responsible for their legal fees when exercising private prosecution against the aggressor.
- Sexual offenders are disqualified from holding a position as a public authority, teacher, worker in contact with minors, and prison officers.
- For sexual offenders who committed sexual assaults against their children, the law imposes special disqualifications from exercising parental authority, custody, and guardianship.
- Sexual education will be mandatory in all educational stages and university careers related to teaching, health, and judicial fields. Additionally, sexual offenders will have to receive mandatory sex education.⁴⁴

Explaining Subsequent Sentence Reductions

However, a month after the new law came into effect on October 7, 2022, newspapers around Spain began reporting that incarcerated sexual offenders were obtaining sentence reductions

⁴⁴ BBC News World, " "Only yes is yes": what is the new and controversial law of sexual consent in Spain?", <https://www.bbc.com/mundo/noticias-internacional-62694510>, November 2022

through the new criminal code under the new law. Specifically, on November 15, El Mundo reported that a man sentenced to six years in prison for raping a friend who had let him sleep at her house had his sentence reduced to four years. His previous sentence of six years corresponded to the minimum in force for his crime before entry of the new law (six). However, when the minimum sentence corresponding to his crime under the new law was reduced to four years, he successfully petitioned to have his sentence reviewed and reduced.⁴⁵ Similarly, on November 21, El Confidencial reported that a man convicted of sexual assault without penetration carried out by two or more people had his sentence reduced from five years to two, which implies the immediate release of the prisoner. His sentence corresponded to the minimum in force before the new law. However, when the new law changed the minimum sentence for his corresponding crime to two years, he successfully petitioned for his reduction and subsequent release.⁴⁶ According to the latest data from the General Council of the Judiciary (as of April 14, 2023), 978 sexual offenders have had their sentences reduced, and 104 have been released from prison. Therefore, this change leads to this paper's research question, what factors in the Spanish policymaking process enabled sentence decreases through the implementation of la ley del solo sí es sí?

⁴⁵ Manuel Marco, "First sentence reductions by the 'only yes is yes' law: a prisoner released by reducing his sentence for child abuse by five years," El Mundo, https://www.elmundo.es/espana/2022/11/15/637343e0e4d4d8fd4c8b4593.html?cid=BESOCYE M01&utm_source=twitter&utm_medium=social_besocy&utm_campaign=BESOCYEM01, November 2022

⁴⁶ Parera and Gabilondo, "The Attorney General's Office orders the rejection of some discounts to violators of the Montero law"

The Reduction of Minimum Sentences

To understand why la ley del solo sí es sí caused sentence reductions, one must first understand how the law changed the sexual criminal code in Spain and its effect on minimum sentences. As explained above, before the new law, the criminal code differentiated between sexual criminal offenses through two categories: the lower category of sexual abuse (without violence or intimidation and without consent) and the higher category of sexual assault (with violence or intimidation and without consent). The new law removed the distinction between sexual abuse and sexual assault and moved all sexual acts without consent under the classification of sexual assault with the two subtypes of without or with penetration.

Before la ley del solo sí es sí	After la ley del solo sí es sí
<p>Sexual abuse = without violence or intimidation and without consent</p> <ul style="list-style-type: none"> • Without penetration • With penetration <p>Sexual assault = with violence or intimidation and without consent</p> <ul style="list-style-type: none"> • Without penetration • With penetration (rape) <p>Aggravating circumstances could increase sentences in every crime</p>	<p>Sexual assault = all sexual acts without consent</p> <ul style="list-style-type: none"> • Without penetration • With penetration (rape) <p>Aggravating circumstances can increase sentences in every crime</p>

By merging the two categories into one, the range of sentences expanded, and the law drafters needed to ensure that the new range of sentences was proportional to the old system. According to Doctor Dolores Morondo, through merging the two categories together:

“The new law had to have sentences that were lower than for rape. Because of this, if the new minimum penalty for rape is four years, the sentence for touching or other forms of sexual aggression must be lower because of the principle of proportionality.”⁴⁷

Moreover, Manuel Cancio, Full Professor of Criminal Law at the Autonomous University of Madrid and permanent member of the General Codification Commission, further explains:

“There is not a mere reduction in the legal penalty for the same crime, but the fusion of two different crimes into a single one.” Because of the elimination of the duality of the crimes of abuse and assault, he explains that “The minimum penalty for a crime of rape with violence and intimidation according to the old regulation cannot be the same as that of a new crime that integrates less serious modalities.”⁴⁸

Because of this, the original draft reduced the minimum and maximum limits of some sentences. As explained above, the General Council of the Judiciary (GCJ) only warned that reduction of maximum limits could cause retroactive reductions for prisoners with sentences already at the maximum limit (according to Article 2.2 of the Criminal Code). Subsequently, the Government

⁴⁷ Interview with Doctor Dolores Morondo via Zoom on April 25, 2023

⁴⁸ Manuel Cancio, ” The review of sentences after the reform of sexual crimes,” El País, <https://elpais.com/opinion/2022-11-17/la-revision-de-condenas-despues-de-la-reforma-de-los-delitos-sexuales.html>, November 2022

modified the penological framework so maximum limits would not be reduced. However, the GCJ did not provide the Government with any warnings that reductions in minimum sentences could cause sentence reductions. Consequently, the Government did not modify the penological framework of minimum sentences. For example, this change can be illustrated by an explanation from José Luis Díez Ripollés, Professor of Criminal Law at the University of Malaga:

“They created a single penal framework where before there had been two. So, if before, sexual aggression (sexual assault) with penetration had been punished with six to 12 years and sexual abuse with penetration with four to 10 years, now all those crimes were subject to four to 12 years.”⁴⁹

Using Professor Díez Ripollés’ example, the Government listened to the GCJ’s warning and decided not to change maximum limits. Because of this, they kept the higher maximum limit for sexual assault in the old law (12) as the maximum limit for the entire sentencing bracket in the new law (12). However, because the GCJ did not warn about minimum limits, they did not keep the higher minimum limit for sexual assault in the old law (six). Instead, they used the lower minimum limit for sexual abuse in the old law (four) as the minimum limit for the entire sentencing bracket in the new law (four). Therefore, the maximum limits for certain charges were not reduced, but some minimum limits were.

⁴⁹ Lisa Abend, “She Spearheaded Feminist Laws in Spain. Now the Government Is in Crisis,” Time Magazine, <https://time.com/6255792/irene-montero-interview-spain-gender-equality/>, February 2023

The Lack of an Explicit Transitory Provision

As the GCJ warned that reductions in maximum limits could cause retroactive sentence reviews, the Ministry of Equality and Ministry of Justice (who stewarded the passage of la ley del solo sí es sí) also independently considered potential problems caused by reductions in minimum limits. As explained above, new legislation that is beneficial to a prisoner's case can be applied retroactively (according to Article 2.2 of the Criminal Code). Therefore, it would be possible for prisoners with sentences at the minimum limit under the old law to petition to have their sentence reviewed if the new law lowered the minimum limit for their corresponding crime. However, the Ministry of Equality and the Ministry of Justice thought that they could avoid the implications of Article 2.2 on minimum limits through what they thought was sufficient legal jurisprudence. Specifically, the two Ministries relied on reforms of the Criminal Code in 1995, 2010, and 2015 which included the following transitory provision:

The transitory provision in 1995, 2010, and 2015 reforms: "In custodial (prison) sentences, this Law (the reform of the Criminal Code) will not be considered more favorable when the duration of the previous sentence imposed on the fact with its circumstances is also taxable in accordance with this reform of the Code."⁵⁰

According to Maldita.es, this transitory provision effectively stated that "if someone was serving a prison sentence whose sentence was within the limits of the new criminal code (and could have their sentence reviewed through Article 2.2), they would continue to serve it even though a lower

⁵⁰ Maldita.es, "Law of 'only yes is yes': would it have been settled with a provision or was there already jurisprudence? how has it been done other times?", <https://maldita.es/malditateexplica/20221118/ley-solo-si-jurisprudencia-disposicion/>, November 2018

sentence corresponded to it according to the new law.”⁵¹ From the perspective of the Ministry of Equality and the Ministry of Justice, they thought that this transitory provision, most recently included in the 2015 reform, was still in force in the Criminal Code and would be used by judges and prosecutors if someone attempted to have their sentence reduced through the new law.⁵² For example, before the first sentence reduction was announced on November 15th, the Minister of Equality, Irene Montero, denied the possibility of sentence reductions through the new law. Specifically, Montero said:

“Both the Attorney General’s Office and the jurisprudence in our country are clear that if the penalties imposed fall within the new range of penalties, the new range of penalties that come out of the new law, there is no review of penalties”⁵³ - referring to the transitory provision.

Because of this, the Ministry of Equality and Ministry of Justice did not include the same transitory provision explicitly in la ley del solo sí es sí, because they thought that the transitory provision

⁵¹ Maldita.es, ”Law of 'only yes is yes': would it have been settled with a provision or was there already jurisprudence? how has it been done other times?”

⁵² Maldita.es, ”Law of 'only yes is yes': would it have been settled with a provision or was there already jurisprudence? how has it been done other times?”

⁵³ Maldito Feminism, ”The law of 'only yes is yes': reductions in sentences, what the judges are based on, the position of Equality and what the experts say”, <https://maldita.es/feminismo/20221117/ley-solo-si-es-si-rebajas-condenas/#:~:text=La%20ministra%20de%20Igualdad%2C%20Irene%20Montero%2C%20tambi%C3%A9n%20tach%C3%B3%20la%20posibilidad%20de%20que%20hubiera%20revisiones%20de%20condenas%20con%20la%20nueva%20ley%20de%20%22propaganda%20machista%22.%20Asegur%C3%B3%20que%20la%20jurisprudencia%20era%20muy%20clara,> November 2022

from the 1995, 2010, and 2015 reforms were still in force. However, according to Interviewee X, further due diligence was required to ensure that the jurisprudence was 100% clear and in line with the Ministry of Equality and Ministry of Justice's perspective:

“When it comes to reforming the Criminal Code, the legislator knows perfectly well that the rules relating to the retroactivity of criminal rules that are more favourable to the offender come into play. And this issue is so transcendental due to the potential consequences in terms of revised sentences that it requires an exhaustive analysis of possible scenarios after the reform and the anticipation of any undesired interpretation in order to amend it before it comes into force... With such a reform, with so much pressure in the midst of a very polarised society on these issues, any potential risk of interpretation that would produce results contrary to the sense in which the ‘solo sí es sí’ law was conceived should have been avoided.”⁵⁴

The Legal Debate

Without an explicit transitory provision included in the new law, judges and prosecutors disagreed on how to apply the law. Consequently, a legal debate arose between the following two sides:

Judges should use Article 2.2

This side approached la ley del solo sí es sí as a criminal code reform – the same as the reforms in 1995, 2010, and 2015. Because of this, they believed that the new law needed to include the same transitory provision as the previous reforms to prevent Article 2.2 from applying in every case. Without this explicit provision, they did not think the most recent transitory provisions in

⁵⁴ Interview with Interviewee X

1995, 2010, and 2015 could count as sufficient jurisprudence. As the Ministry of Equality and Ministry of Justice did not include such an explicit provision in the law, prosecutors and judges on this side believed that they had no other choice but to follow the law, only apply Article 2.2, and grant sentence reductions when the new law was more favorable.

Judges should use the previous transitory provision

This side believed that the transitory provisions in 1995, 2010, and 2015 were still in force and counted as sufficient jurisprudence. Because of this, they believed it was logical not to include an explicit transitory provision as it is already in force in the Criminal Code and would apply to the new law. As such, they believed that prosecutors and judges should use this as jurisprudence and reject sentence reductions in cases where the previous sentence falls within the range of penalties under the new law – prioritizing the transitory provision over applying Article 2.2 only. For example, according to Interviewee X, the President of the High Court of Justice of La Rioja, Javier Marca, considered that the transitory provision was applicable regardless of the fact that the ‘solo sí es sí’ law does not have a similar provision of its own.⁵⁵

Consequences of the Legal Debate

Because of this legal debate, prosecutors and judges applied the new law differently – using Article 2.2 or the transitory provision. On November 16th, the day after the first reduction was announced, Irene Montero explained to the press:

⁵⁵ Interview with Interviewee X

“What is happening here is that there are judges who are not complying with the law. The United Nations, the CEDAW Committee [Committee for the Elimination of Discrimination against Women], already alerts us to this situation and tells us that stereotypes and machismo can compromise the impartiality and integrity of justice systems and that these same stereotypes, this machismo, can cause there to be judges who apply the law wrongly or who apply it in a defective way.”⁵⁶

Responding to Montero’s comments, the GCJ, representing the Judiciary, made a statement saying:

“The Council shows its firmest rejection of the intolerable attacks made in recent hours against members of the Judiciary by some political leaders, which are opposed to the proven commitment of the judicial career to the protection of victims of crimes against sexual freedom...The Council recalls the prisoner’s right to have the most favorable law applied when legislation changes constitute a basic principle of Criminal Law, derived from Article 9.3 of the Constitution and 2.2 of the Criminal Code. The judicial resolutions known in recent days and issued as a result of the entry into force of the new

⁵⁶ Elsa Garcia de Blas and Jose Marcos, ” Irene Montero accuses the judges of "machismo" and of "breaking" the "law of only yes is yes" for lowering sentences,” El País, <https://elpais.com/espana/2022-11-16/irene-montero-acusa-a-los-jueces-de-incumplir-la-ley-por-machismo-al-rebajar-penas-por-la-ley-del-solo-si-es-si.html>, November 2022

law result, therefore, from the strict application of these precepts by the members of the Judiciary.”⁵⁷

Effectively, the Ministry of Equality and Justice believed that judges should use the previous transitory provision and were incorrectly applying Article 2.2 only. Meanwhile, the GCJ believed that judges could strictly apply Article 2.2 and were correctly applying the new law.

Because of different applications of the new law, the State Attorney General’s Office responded to this legal debate on November 21st by issuing an obligatory compliance decree for all members of the Public Prosecutor’s Office. In this decree, the State Attorney General mandated that when public prosecutors report in favor or not of a sentence reduction, they must follow the transitory provision that the State Attorney General’s Office believes is still in force from 1995, 2010, and 2015 - if the sentence imposed according to the old law can also be imposed according to the new law, it should not be reduced.⁵⁸ In response, according to Interviewee X, the Supreme Courts of Castilla y León, Andalusia, and the Balearic Islands overturned decisions of the Provincial Courts of these communities in line with the criteria of the State Attorney General’s Office.⁵⁹

⁵⁷ Reyes Rincon, ” The Judicial Power repudiates the "intolerable attacks" of Minister Irene Montero on judges,” <https://elpais.com/espana/2022-11-16/el-poder-judicial-repudia-los-intolerables-ataques-de-irene-montero-a-los-jueces-por-la-rebaja-de-penas-del-si-es-si.html>, November 2022

⁵⁸ Parera and Gabilondo, ”The Attorney General's Office orders the rejection of some discounts to violators of the Montero law”

⁵⁹ Interview with Interviewee X

However, as the State Attorney General's decree only applied to public prosecutors, the decree had a non-binding effect on judges who hear the cases and make sentence review decisions.⁶⁰ Because of this, judges in provincial courts were still able to decide whether to use Article 2.2 or the transitory provision. For example, judges in the Provincial Court of Navarra decided to follow the transitory provision and not reduce sentences for sexual offenders if the sentence imposed with the previous law can also be applied with the new law.⁶¹ However, judges in the provincial courts in Madrid, Bizkaia, Granada, Zaragoza, Córdoba, and Málaga decided to apply the criteria most favorable to the prisoner and use Article 2.2.⁶² Therefore, despite the State Attorney General's decree, sentences were still being reduced for sexual offenders across Spain.

Comprehensive Explanation

Therefore, after explaining all the factors that led to sentence reductions, this paper will comprehensively explain why *la ley del solo sí es sí* eventually caused sentence reductions. Firstly, by merging the sexual assault and sexual abuse categories into one, the range of sentences expanded because the law drafters needed to ensure that the new range of sentences was proportional to the old system. Because of this, the minimum and maximum limits for certain corresponding sentences were lowered. However, the CGJ only warned the Government that reductions in maximum limits could cause sentence reductions through Article 2.2 of the Criminal Code. Article 2.2 states that new legislation that is beneficial to a prisoner's case can be

⁶⁰ Parera and Gabilondo, "The Attorney General's Office orders the rejection of some discounts to violators of the Montero law"

⁶¹ JJ Galvez, "The Court of Navarra will not reduce sentences for sexual offenders when they can be imposed with the new law," <https://elpais.com/espana/2022-11-28/la-audiencia-de-navarra-no-rebajara-penas-a-agresores-sexuales-cuando-estas-puedan-imponerse-con-la-nueva-ley.html>, November 2022

⁶² Galvez, "The Court of Navarra will not reduce sentences for sexual offenders when they can be imposed with the new law,"

applied retroactively. Consequently, the Government did not reduce maximum limits for certain sentences but did reduce minimum limits for some. However, the Ministry of Equality and Ministry of Justice thought that the majority of prisoners with minimum sentences under the old system would not be able to obtain sentence reductions because they relied on their belief that the transitory provision in the reforms of the Criminal Code in 1995, 2010, and 2015 was still in force and would apply to the new law. The transitory provision states/stated (depending on either side of the legal debate) that judges should reject sentence reductions in cases where the previous sentence falls within the range of penalties under the new law. Because of this, the Ministry of Equality and the Ministry of Justice did not include an explicit transitory provision in the new law. However, when the new law came into force, some prosecutors and judges approached it as a criminal code reform requiring its own transitory provision to prevent Article 2.2 from applying in every case. As sentence reductions began to increase, the State Attorney General's Office issued a decree requiring all public prosecutors to follow the transitory provision rather than only Article 2.2. However, as this decree had a non-binding effect on judges, judges could continue to follow Article 2.2 and grant sentence reductions.

The Reform of La Ley del Solo Sí es Sí

In response to the social alarm generated by la ley del solo sí es sí, Pedro Sánchez, the President of Spain, apologized to the victims for the “unwanted effects” of the application of the law.⁶³

⁶³ The Country, "Pedro Sánchez apologizes to the victims of the "law of only yes is yes" for its "unwanted effects"", El País, <https://elpais.com/espana/2023-04-16/pedro-sanchez-pide-perdon-a-las-victimas-por-los-efectos-indeseados-de-la-ley-del-solo-si-es-si.html>, April 2023

Pedro Sánchez leads the coalition government between PSOE and Unidas Podemos. The two parties introduced la ley del solo sí es sí together – with PSOE leading the Ministry of Justice (under Pilar Llop) and Unidas Podemos leading the Ministry of Equality (under Irene Montero). Therefore, to respond to social alarm, Sánchez entrusted Justice and Equality to seek a joint solution to reform the law.⁶⁴ However, from the beginning of the reform process, no reform could reverse sentence reductions already reviewed and reduced by judges – per the Criminal Code. The new reform would only affect sentencing for people convicted of sexual offenses after the reform came into force.⁶⁵

After weeks of negotiation, Justice and Equality could not agree on a proposal to reform the law. In February 2023, PSOE unilaterally registered its reform proposal – without support from its coalition partner Unidas Podemos.⁶⁶ In its reform, PSOE proposed to maintain the unification of crimes (sexual assault and abuse) and the definition of consent. However, the reform reintroduces the previous distinction between a sexual offense with or without violence and intimidation. With this, PSOE maintains the basic type of sexual assault with a penalty of one to

⁶⁴ Elena Herrera, "The keys to the 'only yes is yes' reforms analyzed by criminal lawyers: consent, penalties and proportionality", El Diario, https://www.eldiario.es/politica/claves-reformas-si-si-analizadas-penalistas-consentimiento-penas-proporcionalidad_1_10121608.html, April 2023

⁶⁵ Marisa Kohan, "Dolores Morondo (jurist): 'The reform of the 'only yes is yes' law is putting wrong solutions to a badly posed problem'", Public, <https://www.publico.es/mujer/dolores-morondo-jurista-reforma-ley-poner-soluciones-erroneas-problema-mal-planteado.html>, April 2023

⁶⁶ Jose Enrique Monrosi and Alberto Ortiz and Elena Herrera, "The PSOE registers the reform of the 'only yes is yes' law without United We Can after failing to reach an agreement between partners," https://www.eldiario.es/politica/psoe-registra-lunes-reforma-ley-si-si-unidas-no-lograr-acuerdo-socios_1_9927109.html, February 2023

four years. However, PSOE reintroduces the higher sentencing range of one to five years when the assault is committed using violence and intimidation – what was in the penal code before la ley del solo sí es sí.⁶⁷ According to interviewee Doctor Miren Gutiérrez, Doctor in Communication, Researcher at the University of Deusto, Principal Investigator of the Analysis of Anti-Feminist Resistance Research Program, and Research Associate at the London based Overseas Development Institute, “The Minister of Justice, Pilar Llop, has defended PSOE’s reform.” Specifically, Doctor Miren Gutiérrez shared:

“The Minister of Justice Pilar Llop maintains that explicit consent is still very much in the picture (Penal Code article 178.1) and that, in any case, acts of sexual content that are carried out using violence, intimidation, abuse of a position of superiority or on unconscious persons are considered aggression (assault) (or rape) (Penal Code article 178.2). She argues that when these circumstances occur, the victim does not have to prove in criminal proceedings that she did not consent.”⁶⁸

However, Irene Montero, the Minister of Equality, criticized that this reform would bring back the penal framework prior to la ley del solo sí es sí and would eliminate consent as the key aspect

⁶⁷ Alberto Ortiz and Raúl Sánchez and Ana Requena Aguilar, “What separates PSOE and Unidas Podemos to modify the law of ‘only yes is yes’”, https://www.eldiario.es/politica/separa-psoe-unidas-modificar-ley-si-si_1_10107909.html”, April 2023

⁶⁸ Interview with Doctor Miren Gutiérrez via Email on April 20, 2023

of the law.⁶⁹ Specifically, Montero argues that reintroducing violence and intimidation reintroduces the previous distinction between sexual assault (required violence) versus abuse (did not require violence). With this, the focus will return to the victim, where they will have to prove whether there was violence or intimidation to achieve a higher sentence for the crime committed against them – precisely what *la ley del solo sí es sí* tried to eliminate.⁷⁰ For example, according to Doctor Miren Gutiérrez:

“Montero considers that this change distorts the spirit of the norm because it will pivot the procedures on the existence of violence and intimidation and not on consent. The amendment, she says, dilutes the message that who is silent and nonresponsive is saying “no,” because you need an explicit “yes” to consent.”⁷¹

Beyond Irene Montero and the Ministry of Equality, around a hundred people rallied in front of the Ministry of Justice in Madrid, and more than 2,000 people and 150 organizations signed a manifesto denouncing PSOE’s reform.⁷²

In April 2023, Unidas Podemos presented their alternative proposal, which maintained unified crimes and kept consent at the center of the law. However, unlike PSOE’s reform, Unidas

⁶⁹ Marisa Kohan, “Jurists affirm that the PSOE reform of the ‘only yes is yes’ law puts the focus back on the victim and not on the aggressor,” *Público*, <https://www.publico.es/mujer/juristas-afirman-reforma-psoe-ley-vuelve-poner-foco-victima-no-agresor.html#analytics-buscador:listado>, February 2023

⁷⁰ Andrea Garcia Baroja, “Feminist rallies to protest the reform of the ‘only yes is yes’ law,” <https://elpais.com/sociedad/2023-04-20/concentraciones-feministas-para-protestar-por-la-reforma-de-la-ley-del-solo-si-es-si.html>, April 2023

⁷¹ Interview with Doctor Miren Gutiérrez via Email on April 20, 2023

⁷² Andrea Garcia Baroja, “Feminist rallies to protest the reform of the ‘only yes is yes’ law”

Podemos' reform only called for violence to be considered one more aggravating circumstance when determining sentences – to prevent the reintroduction between assault and abuse. However, Unidas Podemos' reform drew criticism from PSOE because it entailed greater sentence increases that would lead to disproportionate sentences.⁷³

On April 20, 2023, the Congress of Deputies voted to approve PSOE's reform, which had support from Partido Popular/PP (People's Party), Partido Nacional Canario/PNC (Canarian Nationalist Party), and Junts per Catalunya/Junts (Together for Catalonia), and opposition from Unidas Podemos, Esquerra Republicana de Catalunya/ERC (Republican Left of Catalonia), and Euskal Herria Bildu/EH Bildu (Basque Country Bildu). To pass their reform, PSOE relied on votes from the Partido Popular.⁷⁴

Political Context Behind the Reform

However, it is important to note that the controversy around sentence reductions caused by la ley del solo sí es sí is happening before the municipal elections in May 2023. Because of this, some argue that PSOE felt pressured to distance itself from Unidas Podemos, who was still publicly defending the law, and make it clear that they wanted to avoid any future sentence reductions.⁷⁵

⁷³ Herrera, "The keys to the 'only yes is yes' reforms analyzed by criminal lawyers: consent, penalties and proportionality"

⁷⁴ The Country, "This is how we have told you about the approval of the socialist reform of the 'law of only yes is yes' in Congress with the vote of the PP and the rejection of Podemos," <https://elpais.com/espana/2023-04-20/el-congreso-debate-la-reforma-de-la-ley-del-solo-si-es-si.html>, April 20 2023

⁷⁵ Marisa Kohan, "The Supreme Court will set its criteria in June on the reduction of sentences by the law of 'only yes is yes'," <https://www.publico.es/politica/tribunal-supremo-fijara-junio-criterio-rebaja-condenas-ley.html#analytics-noticia:relacionada>, April 2023

Therefore, although PSOE understood the previous rationale for removing the violence/intimidation distinction, they still were willing to create this reform and work with Partido Popular to get it approved by Congress. For example, according to Interviewee X:

“PSOE has acted hastily (due to the social alarm but also because we are in the run-up to the elections, something that has undoubtedly influenced the urgency with which they have acted) and ignoring the fact that this new reform will not be able to prevent sentence reductions resulting from reviews of convictions prior to the entry into force of the law.”⁷⁶

Moreover, according to Doctor Dolores Morondo, there has not been enough information on the reductions and releases from prison to enact such a reform. For example, before enacting the reform, there was no information on the percentage of reductions in relation to the total number of reviews or the specific reductions in sentence years.⁷⁷ Moreover, in Doctor Dolores Morondo’s recent interview with Público, she shared that:

“We do not know if the revisions that have led to reductions are because we have different interpretations criteria on transitory norms. Or if they refer to certain types of offenses or certain modalities of the crime. Or to the fact that courts in Spain tend to adhere to minimum penalties in the odd cases of sexual abuse and many cases of sexual aggression. Or what has been the impact of the mechanism of the conformity judgment (when the victim and accused agree on a penalty.)...The way sentencing used to happen before the new law might have had an impact on the reduction of sentences, but we do not know anything about them because there is no data....For a problem for which there is

⁷⁶ Interview with Interviewee X

⁷⁷ Interview with Doctor Dolores Morondo via Zoom on April 25, 2023

so little data and so little analysis, the emergency procedure (of passing the reform in a short period of time) is like putting an elephant in a china shop.”⁷⁸

The Future of La Ley Del Solo Sí es Sí

During this time, the Supreme Court has received twenty appeals filed by the Prosecutor’s Office against judges’ orders that have lowered firm sentences through la ley del solo sí es sí. With this, the Supreme Court has set a plenary session for June 6 and 7, 2023, to unify criteria and establish doctrine on the application of la ley del solo sí es sí (for cases before the new PSOE reform comes into force). According to El Mundo, the particularities of each case will make it a difficult task to unify criteria and establish a comprehensive doctrine.⁷⁹

According to Doctor Dolores Morondo⁸⁰, for people who committed crimes before la ley del solo sí es sí came into force, the Supreme Court will establish how the criteria in the criminal code must be applied when reviewing sentences that were already final (effectively resolving the Article 2.2 versus transitory provision debate). For people who committed crimes during the period when la ley del solo sí es sí was in force before the reform, prisoners can ask for la ley del solo sí es sí to be applied in their case. For people who commit crimes in the future, their sentences will be determined by the new PSOE reform, which will enter into force in May.

⁷⁸ Marisa Kohan, ” Dolores Morondo (jurist): ”The reform of the 'only yes is yes' law is putting wrong solutions to a badly posed problem””

⁷⁹ Angela Martialay, ” The Supreme Court sets a plenary session in June to unify doctrine on the revision of sentences of the 'only yes is yes'”, <https://www.elmundo.es/espana/2023/04/11/64356ef1e4d4d8937d8b4582.html?intcmp=relacionadosizq>, April 2023

⁸⁰ Interview with Doctor Dolores Morondo via Zoom on April 25, 2023

Conclusion

To conclude, this paper set out to answer the question of what factors in the Spanish policymaking process enabled prison sentence decreases through the implementation of *la ley del solo sí es sí*? Therefore, the comprehensive explanation concludes that the fusion of the two categories of sexual assault and abuse expanded the range of sentences. Because of this, the minimum and maximum limits for certain corresponding sentences were lowered – due to the principle of proportionality. However, this created a potential problem as Article 2.2 of the Criminal Code states that new legislation that is beneficial to a prisoner’s case can be applied retroactively – allowing prisoners to have their sentences lowered. However, the General Council of the Judiciary (GCJ) only warned that reductions in maximum sentences could be a problem. Consequently, the Government only lowered the penological framework for minimum sentences. To prevent prisoners with minimum sentences under the old law from obtaining reductions, the Ministry of Equality and Ministry of Justice relied on their belief that the transitory provision in the reforms of the Criminal Code in 1995, 2010, and 2015 was still in force. This provision states/stated (depending on either side of the legal debate) that judges should reject sentence reductions in cases where the previous sentence falls within the range of penalties under the new law. As the Ministry of Equality and Ministry of Justice did not include an explicit transitory provision, prosecutors and judges applied the new law differently when reviewing petitions made by prisoners by either applying Article 2.2 or the transitory provision. Although the State Attorney General’s Office mandated that public prosecutors follow the transitory provision, there was no binding effect on judges who continued to apply Article 2.2 and grant sentence reductions.

However, as Doctor Dolores Morondo has explained, data on the sentence reductions is limited, making it difficult to fully understand the causes and scope of the reductions. Consequently, as seen in the literature review, scholarly research and analysis of the reductions are currently underdeveloped. Moreover, given that the Supreme Court has yet to determine legal doctrine on the criteria for sentence reductions in June, this situation is still in flux. Therefore, this paper is currently at the forefront of specific research on the causes of sentence reductions through la ley del solo sí es sí. However, as data collection grows and researchers conduct further analysis, new conclusions are sure to be reached and shared among the research community. As this process develops, the conclusions reached in this paper could be potentially revised and re-evaluated. Because of this, researchers must continue this process to better understand how and why la ley del solo sí es sí eventually enabled sexual offenders to obtain decreased sentences. In doing so, researchers work to ensure that future criminal code reforms, for example, in countries that ratified the Istanbul Convention, can prevent similar sentence reductions that become antithetical to the purpose of the law itself.

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Appendix

Appendix A – Participant Informed Consent Form

PARTICIPANT INFORMED CONSENT FORM

Title of the Study: An analysis of factors in the policymaking process that enabled the sentence decrease loophole in *la ley del solo si es si* in Spain.

Researcher Name: Cambron Wade

My name is Cambron Wade, and I am a student with the SIT Spain: Policy, Law, and Regional Autonomy in Europe program based in the University of Deusto. (<https://studyabroad.sit.edu/program/spring-2023-spain-policy-law-and-regional-autonomy-in-europe/>) I would like to invite you to participate in a study I am conducting as part of the SIT Study Abroad program's Independent Study Project (25–45-page research paper). Your participation is voluntary. Please read the information below, and ask questions about anything you do not understand, before deciding whether to participate. If you decide to participate, you will be asked to sign this form and you will be given a copy of this form.

PURPOSE OF THE STUDY

The objective of this study is to understand what factors in the Spanish policymaking process enabled the sentence decrease loophole in *la ley del solo si es si*.

STUDY PROCEDURES

Zoom Interviews:

Your participation will consist of answering five questions in a Zoom interview. This will require approximately 45 minutes of your time.

Email Interviews:

Your participation will consist of answering five questions on a Word Document and sending this document back to me via email. This will require approximately 45 minutes of your time.

POTENTIAL RISKS AND DISCOMFORTS

La ley del solo sí es sí a sensitive topic and you can stop the interview at any point.

There are no foreseeable risks to participating in this study and no penalties should you choose not to participate - participation is voluntary. When answering the questions, you have the right not to answer any questions or to discontinue participation at any time.

POTENTIAL BENEFITS TO PARTICIPANTS AND/OR TO SOCIETY

There are no anticipated benefits to the participant.

CONFIDENTIALITY

Zoom Interviews:

Data Storage: Please highlight the box below that corresponds to your recording preference:

- ☐ I will record the interview through Zoom and will store the video and audio recordings in my OneDrive and laptop which are both password protected. No photos will be taken during the interview. I will destroy both recordings six months after the conclusion of my research project.
- ☐ I will not record the interview and will only take notes on a Word document that I will store in my password protected OneDrive and laptop. I will destroy this document six months after the conclusion of my research project.

Anonymity: Please highlight the box below that corresponds to your anonymity preference:

- ☐ I will keep your identity anonymous. In my paper, I will only identify you as Interviewee X, Y, Z and will not include your professional title.
- ☐ I will not keep your identity anonymous. In my paper, I will identify you through your full name and professional title.

Email Interviews:

Anonymity: Would you like your identity to be kept anonymous (only identify you as Interviewee X, Y, Z)? If not, I will identify you through your full name and professional title.

Please check the box that corresponds to your preference:

- ☐ Yes, I want my identity to be kept anonymous
- ☐ No, I do not want my identity to be kept anonymous. You may identify me through my full name and professional title.

Publication:

- After my paper is completed, I must present my findings in a presentation to my program group (seven students, their respective advisors, and host families).
- After this, I will publish my paper on SIT's website. In my introduction, I will be very clear that my paper is the product of one month of research for an academic program and that it is not an accredited scholarly article.
- Additionally, I may use my paper as a writing sample for job applications in the future.
- If you would like your identity to be kept anonymous, no identifiable information will be used when the paper is presented, published, or used as a writing sample.

RESEARCHER'S CONTACT INFORMATION

If you have any questions or want to get more information about this study, please contact me at (cambron.wade@mail.sit.edu) or my advisor at (maria.pilar@deusto.es)

RIGHTS OF RESEARCH PARTICIPANT – IRB CONTACT INFORMATION

In an endeavor to uphold the ethical standards of all SIT proposals, this study has been reviewed and approved by an SIT Study Abroad Local Review Board or SIT Institutional Review Board (IRB). If you have questions, concerns, or complaints about your rights as a research participant or the research in general and are unable to contact the researcher please contact the Institutional Review Board at:

School for International Training
Institutional Review Board
1 Kipling Road, PO Box 676
Brattleboro, VT 05302-0676 USA
irb@sit.edu
802-258-3132

PARTICIPATION AND WITHDRAWAL

Your participation is voluntary. Your refusal to participate will involve no penalty or loss of benefits to which you are otherwise entitled. You may withdraw your consent at any time and discontinue participation without penalty. You are not waiving any legal claims, rights or remedies because of your participation in this research study.

“I have read the above and I understand its contents and I agree to participate in the study. I acknowledge that I am 18 years of age or older.”

Please sign below:

Participant's signature _____ *Date* _____

Researcher's signature Cambron Wade _____ *Date* _____

Appendix B – Interview Questions

Research Project Background

La ley del solo sí es sí or the Organic Law of Comprehensive Guarantee of Sexual Freedom, came into effect on October 7th, 2022. According to the latest data from the General Council of the Judiciary (as of April 14), 978 sexual offenders have had their sentences reduced, and 104 have been released from prison (the loophole).

My research question is, what factors in the policymaking process enabled the sentence decrease loophole in *la ley del solo sí es sí* in Spain?

I hope to develop a research paper that walks readers through the progression of *la ley del solo sí es sí*, the subsequent loophole, and the law's future in the Spanish legal system.

Interview Questions

(All interview questions included)

- How do you think the public's reaction to the sentencing in the La Manada case shaped the creation of *la ley del solo sí es sí*?/ How do you think the Istanbul Convention and the public's reaction to the sentencing in the La Manada case shaped the creation of *la ley del solo sí es sí*?
- Before the new *solo sí es sí* law was approved, the General Council of the Judiciary had already issued a non-binding report warning the government of potential sentence decreases for prisoners previously convicted for sexual abuse and assault. Why did the government not consider this warning before continuing to advance the bill through several layers of legal/policy screening?
- The government also knew that the Spanish Penal Code gives prisoners the right to have their sentences reduced if a new law is more favorable to their case. Knowing that *la ley del solo sí es sí* lowered minimum sentences for certain charges (for example, before the new law, sexual assault with carnal access was punishable by between six and 12 years, and now it from four to 12 years), why did the government not include a provision to prevent or limit the possibility of lowering sentences for previously convicted prisoners?
- Would you be able to share any other factors that contributed to the creation of the loophole in *la ley del solo sí es sí* and the subsequent sentence reductions?
- Today (Thursday, April 20), the Congress of Deputies will vote on PSOE's reform of the Solo Sí es Sí law, which has support from PP, PNV and Junts, and opposition from Unidas Podemos, ERC and EH Bildu. Given that PSOE and Unidas Podemos supported the initial *solo sí es sí* law together, why do you think their respective reforms eventually came into conflict?

- Do you see any differences between how different waves or generations of feminism in Spain have reacted differently to the *solo sí es sí* law and the subsequent sentence reduction controversy?
- I understand that the *solo sí es sí* law removed the distinction between sexual abuse and assault and moved all sexual acts without consent under the classification of sexual assault. Through this change, the new law lowered minimum sentencing requirements for certain charges. For example, before the new law, sexual assault with carnal access was punishable by between six and 12 years, and now it from four to 12 years. Could you please explain how this change lowered minimum sentencing requirements?
- I understand that PSOE's reform does not have the power to reverse or change sentence reductions because Spain's penal code dictates that the most favorable law must be applied. At the same time, the Supreme Court has scheduled a plenary session for June to establish doctrine on the application of the *solo sí es sí* law. When this happens, how will the Supreme Court's new doctrine and PSOE's reform work together to determine the future of the law?