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Interview with Professor Carlos Fuertes Iglesias on the reform of sexual offence law in Spain, which came into force in 2023

Discover our interview with Professor Dr. Carlos Fuertes Iglesias from the Faculty of Law at the University of Zaragoza.

Dr. Fuertes Iglesias is an Assistant Professor in Criminal Law and the Coordinator of the Johnson & Johnson "Law and Health" Chair – directed by Dr. Miguel Ángel Boldova Pasamar, his mentor, one of the most recognized figures in contemporary Spanish criminal law. He is a member of the expert committee of the College of Criminology of Madrid and the board of directors of the Association of Criminal Law Professors of Spanish Universities (APDP), where he coordinates young professors of this association at the national level. He also coordinates the criminal law subject in the University Master's program in Advocacy and Magistracy (Abogacía y Procura) at the University of Zaragoza.

As a criminal lawyer, he practices before various Spanish and European courts. He completed his training in Health Law and Forensic Sciences at the National University of Distance Education and on child protection at the T.H. Chan School of Public Health (Harvard University). He has taught at Latin American universities (for example, in Chile or El Salvador) and is the author of several works on sexual criminal law, euthanasia, and crimes against the administration of justice, as well as on health issues such as involuntary treatment of mentally ill patients or pharmacological prescription and its limits.

In this interview, Professor Dr. Fuertes Iglesias shares his insights on the evolution of sexual criminal law in Spain, addressing recent legislative changes, their implications for victim protection, and international comparisons with other jurisdictions.

This is the English translation of the interview conducted in Spanish.

1. **In 2023, the reform of sexual offense law came into force in Spain, known as the "Only Yes Means Yes Law." This reform introduced, in two phases, significant changes to Spanish legislation, focusing on explicit consent and the expanded protection of sexual offense victims. This law has been the subject of intense debate and was enacted in response to criticisms regarding the lax judicial interpretation of sexual offenses, as well as demands from civil society for greater protection of victims' rights.**

   You are an expert on the theme of consent in criminal law, having written your doctoral thesis on the sexual consent of minors in Spanish criminal law, compared to British, American, German, French, and Italian criminal law. Although it is difficult to summarize all your work and conclusions in a brief interview, what are the main conclusions of your research, and what significant differences have you found between these jurisdictions?

From this extensive research, several important conclusions can be drawn. The first and most essential is that, in Spain, the protection provided by the Penal Code to minors is based on a dual conception of the legal interests involved: on the one hand, sexual freedom, but also an essential concept of is that sexual integrity. In general, minors in Spain under the age of 16 cannot validly consent to sexual relations with others, except

for those who are close in physical and psychological development or maturity (that is, the "Romeo and Juliet" clause, to which I have recently dedicated a monograph at Aranzadi). Following the line set by my mentor, Dr. Boldova, I propose an interpretation that favors the development of minors' sexual personality, coherent and adapted to social reality, as well as to the Penal Code itself and other legal norms in force in Spain. It is asynchronous and inappropriate to limit sexual relations until the age of 16 when criminal responsibility begins in Spain at the age of 14, the same age at which one can make a will or, even more, undergo a gender change. At the same time, I argue that in the Spanish legal system, the concept of "Only Yes Means Yes" has not found its place in positive law, as there is no model of explicit consent in the Penal Code, despite some voices pushing for an interpretation that would ultimately lead to not only disproportionate criminal intervention but one based on the consideration of adult sexual activity as a risky activity, where the absence of consent is presumed unless proven otherwise (this is, for example, the interpretation of the State Attorney General and some prominent voices in the doctrine). In contrast, I maintain that the intervention of “ius puniendi” must always be limited, and it is, of course, unacceptable to admit an inversion of the burden of proof in the accusatory field, as this would mean accepting that the accused must prove the consent of the alleged victim, which constitutes a “probatio diabólica” ("diabolical proof"), and also implies a full entry into enemy criminal law, exempting a certain type of crime from procedural guarantees compared to others.

2. **The recent revision of Spanish criminal law regarding sexual offenses has also integrated various modifications aimed at protecting minor victims. What is your opinion on this reform? Do you believe it adequately addresses the shortcomings of the previous legal framework and will improve the protection of minor victims?**

I believe that minors are neither better nor more protected since the entry into force of Organic Law 10/2022, nor by the successive reforms in sexual matters. In fact, the regulations from previous versions of the Penal Code before the reforms of 2015, 2020, and 2022, which set the age of consent at 13 years and punished sexual abuse and assault as well as abuse by deception, were, in my opinion, fully sufficient to punish the vast majority of cases. Certainly, the initial drafting of the Penal Code in 1995 offered excessively limited protection to minors—on this point, critical voices, such as that of Professor Gimbernat, had highlighted the disproportion between the severity of certain behaviors and the penal response given to them. However, once these imperfections were corrected, raising the age of consent from 13 to 16 years seems to me a poor measure for protecting the free development of minors' sexuality. Young people under 16 are not,

today as in the past, strangers to sexual development, and the legal system should not seek to criminalize these experiences, which are a preparatory stage for adult life. Moreover, the latest measures adopted do not improve intervention against potential pedophiles, as these individuals generally do not target pubescent adolescents but rather very young children, an aspect in which the Penal Code indeed protects minors, but not specifically those under 16 (whether in terms of child pornography or prostitution of minors). Finally, offenses involving new technologies (such as grooming or sexting) represent an extension of punitive boundaries that, although in some cases criminal intervention might have a general preventive effect, could have been addressed without the need for express typification, simply through appropriate exegesis of offenses of sexual assault and child pornography. On the contrary, what I observe now is a juxtaposition of figures and an overextension of criminal intervention to the point that the objective of protecting the legal interest is completely diluted (for example, in the case of realistic child pornography, when it is purely virtual and no minor is actually involved).

3. **Additionally, in your book " El derecho penal sexual español y los menores" – literally translated "Sexual Criminal Law and Minors", published in July 2024, you address relevant issues in current Spanish criminal law. Could you explain the key concepts that have shaped the current legal framework in Spain, in comparison with other foreign legislations, as well as the different doctrinal positions on the protection of minors against sexual offenses?**

The foundations of the current criminal legislation, in my opinion, are shaped by a legal response influenced by two important factors: on the one hand, the media and social networks amplify sexual offenses and, consequently, create a public opinion trend that is manipulated by misinformation. Spain is a safe country with low sexual crime rates compared to other countries in our region. However, certain political and social sectors (notably, certain identity groups) have spread truly misleading and unfounded messages, suggesting a supposed "impunity" for sexual offenders and a lack of protection for victims. This, combined with international movements such as the "Me Too" movement (whose side effects, concerning the observance of essential principles of procedural criminal law, such as the presumption of innocence or the respect for the dignity of the accused, have impacted the very essence of the legitimate claim that initially existed, and it is now doubtful whether it still retains that spirit) and media cases like “La Manada”, has led to the creation of a climate favorable to a maximalist sexual criminal law, extremely interventionist, which seeks to establish an artificial model of sexual relations, both for adults and minors. Unlike the German system, where "no means no," and where progress has been made to equate the absence of explicit consent in some cases of environmental

violence with an expressed refusal (which, in my opinion, is a correct interpretation), the Spanish system that was envisioned – and which, fortunately, even its defenders have not been able to posit beyond the current interpretations of what the law is supposed to say, but does not say – proposes an affirmative explicit consent system, for both adults and minors, that distorts the dynamics of human relationships between people who have an emotional bond, and turns sex into a contractual relationship. In this context, a principle of mistrust prevails, with the need to formalize agreements, in the manner of consumer law. This model, based on mutual distrust, contradicts human psychology and sexology.

4. **Before the reform, Spanish criminal law distinguished between "sexual abuse" and "sexual assault," with the difference mainly being the use of violence or intimidation. Sexual abuse was considered a less serious offense, often without elements of violence or coercion. This distinction was abolished by Article 178 of the Spanish Penal Code. Now, any sexual act without clear consent is classified as sexual assault, thus unifying the categories and expanding the definition to include any act where consent has not been freely and clearly given. How do you assess this change in terms of its impact on victim protection and legislative clarity?**

The equating of sexual abuse and sexual assault has undoubtedly been one of the most significant errors in the regulation of Organic Law 10/2022. This flaw had to be remedied months later with Organic Law 4/2023, a "counter-reform" that was deemed essential, not only from a penal policy perspective—due to the favorable sentence reductions that resulted from the law's enactment—but also because it is unfeasible to adequately protect sexual freedom by admitting that violence and intimidation no longer constitute more severe conduct deserving of a qualified reprimand compared to other forms of sexual freedom violations where, in the absence of consent, neither violence nor intimidation was present. Following a high-profile case in Spain, such as "La Manada" in Pamplona—an attack on a young woman's sexual freedom by a group of young men exerting environmental intimidation—a sector of feminism promoted a modification under two premises: "only yes means yes"—which was not fully implemented—and the slogan "it's not abuse, it's rape," arguing that the difference between sexual abuse and sexual assault was detrimental to the victims of sexual crimes and that the existing distinction in this area was artificial. The reality is that we now have far less technically precise categories, with frequent issues of legal overlap, and there has been a need to backtrack by reintroducing violence and intimidation as factors that aggravate criminal responsibility because the

alternative has led to a "clean slate" approach that has resulted in substantial sentence reductions, which were predictable and avoidable if the Spanish legislature had intended it.

5. **After a long political debate, the Swiss legislature amended Article 190 of the Swiss Penal Code based on the principle of "no means no." Swiss criminal law now includes a rule that considers any sexual act involving penetration of the body as rape when the victim has not consented to it. This applies even in cases of "freezing" (where the perpetrator takes advantage of a state of shock that prevents the victim from expressing their refusal).**

   This reform is less strict than that of Spain, which applies the principle of "only yes means yes." The main arguments in Switzerland against the principle of "only yes means yes" were that proving consent is difficult, sometimes impossible (it's word against word), and that, in applying the principle of presumption of innocence, the principle of "no means no" is more appropriate. In your opinion, what are the advantages and disadvantages of the Spanish system compared to the Swiss system? For minors, should the principle of "only yes means yes" always apply in all states, or is the principle of "no means no" sufficient?

I believe that the Swiss system is much more appropriate than the Spanish model, in my opinion, for adequately protecting the sexual freedom of adults, compared to our current regulation, which is far from exemplary, except in terms of legislative changes without sufficient justification. The Spanish system is not, it should be clarified, a model of "only yes means yes," but a system where, before and now, the consent of the participants in a sexual encounter is required. Non-consensual sex is a crime in both Spain and Switzerland. The problem lies in the expression of consent. Requiring a textual, literal, and affirmative expression as the legal maximum is contrary to the general theory of consent in law and also distorts the nature of sexual relations and human communication. On the one hand, because sexual interactions consist of hundreds of consents, not just one: each penetrative act, each caress, each kiss requires consent, so the sexual relationship could be broken down into simpler factors (atomized, if you will), as it is enough for one of the behaviors involved not to be consented to be within the legally relevant domain. Therefore, starting from the premise that there is not just one consent, but a continuum of communication between the participants, in a dynamic, changing, and

progressive behavior—even with the utmost rigor in human behavior, it is impossible to plan every sexual act as a legal transaction—consent is expressed verbally, but also tacitly, through the conduct of the participants. Thus, a "no means no" model seems far more reasonable to me than a "yes means yes" model, as long as it admits that there may be situations where it is impossible to express a refusal (due to environmental intimidation, the victim's shock paralysis, etc.). This also better reconciles substantive criminal law and constitutional guarantees of the presumption of innocence and the accusatory principle, which govern in all democratic countries, since it is the responsibility of the prosecution to prove the absence of consent. To claim otherwise is to subject the accused to a "probatio diabólica," as it is impossible to prove the provision of consent, even in writing, as this could be preceded by coercion of the victim. In fact, the explicit consent system could be the worst enemy of a sexual crime victim, precisely for this reason.

In the case of minors under 16 years of age, below which consent is generally not valid, except between those close in age and development or maturity, I advocate in my doctoral thesis for an interpretation that sexual relations (broadly speaking) between minors should be outside of criminal law, with a model clause with objective limits and greater legal security. In any case, I consider the current framework excessive and contrary to social reality: minors under 16 are indeed sexually active in Spain, increasingly earlier, and with people who have age differences with them that necessitate the application of the clause, considering that the criminal responsibility of minors begins in Spain at the age of 14. In other words, a 17-year-old who has a relationship with someone aged 13, for example, even with the consent of both, would be criminally liable in theory, except for the application of the "Romeo and Juliet" clause (Art. 183bis of the Spanish Penal Code). This asynchrony between the age of sexual consent (16 years) and the age of criminal responsibility (14 years), along with the limits for capturing pornographic images (18 years), poses multiple conflicts in criminal practice.

6. **Continuing with the Swiss case. Under the old Article 190 of the Swiss Penal Code, only females could be victims of rape, and an act of coercion was required. An assailant had to threaten a woman, use violence or exert psychological pressure on her, or render her unable to resist for the non-consensual sexual act to be classified as rape. Swiss law did not have a basic offense that punished non-consensual sexual acts, as these could only be considered sexual harassment. Has Spain faced similar issues before the reform?**

Before this 2022 reform, the 1995 Penal Code, following the 1999 amendments, had a protection model that I believe was more than sufficient for adequately safeguarding sexual freedom. Criminal law punished any non-consensual sexual act as sexual abuse; and those that also involved violence or intimidation as sexual assault, with rape being defined as sexual assault with penetration. Therefore, the Penal Code before the "Yes Means Yes" law was much more systematic and coherent in its approach to criminal protection of sexual freedom and integrity, and the reform marked a negative turning point by establishing legislation that, by equating abuse with assault, affected the foundation of the criminal responsibility system for sexual offenses. The fact that the law had to be reformed a few months later shows that it was a mistake.

7. **The implementation of the "only yes means yes" approach has been a controversial topic in Spain. What have been the main reactions and cultural challenges in implementing this approach? What specific improvements can be observed in terms of protection and justice for victims? Have any changes in youth behavior already been observed?**

The most favorable aspect of this law, despite all the criticisms I have raised, is that it has allowed for a reconsideration of the social debate on sexual consent. Indeed, the idea of "only yes means yes" has not prevailed, but criminal law doctrine has had the opportunity to explore the arguments surrounding sexual consent. Although my opinion on the reform is unfavorable, I believe it has led to a very fruitful intellectual debate. However, it would have been desirable for this debate to take place before such a law was integrated into positive law. The challenge posed by this law was to question our own experience of sexuality as a consensual activity: do we want a dialogued sexuality, or a contractualized and regulated one like airspace, where there is no room for improvisation or a presumed consent for certain activities within the framework of individual freedom? In simpler terms,

should the State tell citizens how to have legitimate sexual relations? Therefore, this debate is positive, if only due to the intellectual reaction of certain criminal law scholars, which has led to deep reflections on the matter, such as those of Díez Ripollés and his identification of the identity-based model in sexual criminal legislation, or those of my mentor, Boldova Pasamar, with his contributions on consent and sexual relations at a young age. Victims were protected before the reform, and unfortunately, they felt a loss of protection with it, when hundreds of sentence reductions for sexual offenders were noted. I myself, as a lawyer, had to intervene in sentence reductions, representing victims for years who were affected by this law. The risk of bringing certain ideas down from the "heaven of concepts," as Ihering said, to the pragmatic level, is precisely the impact it has on people's lives. Young people, in my view, are living with some perplexity regarding this "pressure" on consent, because the imprint of sexual morality concepts has been revived in the criminal sphere, no longer from a religious origin, but an identity-based one. This is not a good time for experimenting with the development of sexual freedom, as an idea of sex as a "risky activity" has been created, which does not reflect the vast majority of experiences.

8. **Despite the new reform, victims of sexual crimes still face challenges in judicial procedures. What are the main obstacles that victims (whether adults or minors) must overcome in the Spanish judicial system? What additional measures could be implemented to improve support and protection for victims during the judicial process?**

I believe that victims have effective support mechanisms in the legislative domain, especially since the Victims' Statute Law of 2014 and particularly after the recent amendments to the Criminal Procedure Law to favor pre-constituted evidence and telematic means in this area. However, it is a different matter to argue that the victim should be exempt from having to support the accusation during the trial, testify in court, and prove the facts constituting the accusation. Exempting this for sexual offenses is simply a case of criminal law for the author or enemy, following Jakobs, which is incompatible with a garantist model proper to any democracy that prides itself on being one. That said, beyond that, the fundamental difficulty lies in the slowness of the Spanish judicial system, which is overwhelmed and often lacks sufficient resources, where cases drag on so long that the victim's traumatic experience is perpetuated indefinitely.

This cannot be remedied simply, as was mistakenly thought, by setting limits on the investigation periods (Article 324 of the Spanish Criminal Procedure Law) that are neither clear nor precise and that lead to questionable interpretations—such as understanding,

for example, that it is impossible to prosecute a defendant if it took more than a year to obtain evidence for their indictment, even if the case was provisionally archived, which is illogical and contrary to the deadlines of Article 130 of the Spanish Penal Code. Instead, it involves creating more courts, more specialized bodies for crimes against persons, and equipping technical bodies with additional resources (e.g., Institutes of Forensic Medicine with highly specialized professionals and continuous training, more resources for police forces, etc.). The goal is to reduce timelines and provide the Spanish criminal process with high-level expert resources, but not at the expense of the defendant's guarantees or the presumptions against the accused. Doing so would break the equality of arms and, ultimately, the very procedural criminal model of a modern and garantist system.

9. **Since July 1, 2024, the Swiss Penal Code has explicitly sanctioned revenge porn and stealthing. These changes have also been introduced in Spain. In the sensitive area of sexual offenses, do you believe it is truly necessary to explicitly sanction all specific behaviors instead of allowing courts to interpret behaviors that could constitute sexual assault and be covered by more general articles (rape, sexual coercion, sexual harassment, etc.)? Is the preventive objective behind this specificity more important for minors?**

These are different issues. In the case of revenge porn, I have just published a book chapter where I analyze the matter, considering the commission through technological means and AI, in which I advocate for a specific regulation through a special penal law that adequately addresses this reality, which cannot be handled by simply "adjusting" the existing penal code.

In the case of stealthing, I believe it should be addressed as an autonomous criminal offense, separate from the current sexual assault, because it involves deceit regarding a key aspect of the consensual sexual relationship. Indeed, as with almost all forms of deceit—where one party lies or conceals the truth—this would be a determining factor in whether consent was given. However, if peripheral elements of sexual consent become central, such as – in my opinion – the identity of the participants and the sexual nature of the act, deceit on any factor would nullify consent. Recently, the Spanish Supreme Court ruled on this matter, and the solution it provided is unsatisfactory to me (including the dissenting opinion, which I find more internally coherent, despite my disagreement): it was decided to punish the removal of a condom as non-consensual sexual activity – what was previously considered abuse is now classified as basic sexual assault – but the penetration itself is considered consented to. This is a highly questionable solution, and

one I am currently working on to comment on its content and effects. The best prevention, as you suggest in your question, does not come from criminal law or the general preventive function of a pedagogical nature, but from education itself in the strict sense, in schools and within families. This is what truly addresses the root of the problem. If criminal law intervenes, it is always late and with harm to legitimate interests.

10. Although the "Only Yes Means Yes" law has introduced significant changes, what other aspects of Spanish sexual criminal law do you think should be reformed to better protect victims of sexual offenses? Are there specific areas that still require urgent legislative attention, particularly in terms of juvenile criminal law?

It is urgent, in my opinion (a minority view that I share with my mentor, Dr. Boldova Pasamar, but one that I believe is correct), to rethink the coherence between the ages of sexual consent and criminal responsibility for minors.

It is also important to review the structure and internal coherence of offenses against sexual freedom and integrity, including an express reference to this legal right, which was explicitly removed in the 2022 reform but remains present in the regulation, in order to address some detected deficiencies, such as the inconsistency in penalizing sexual assault under certain aggravated forms compared to the basic types (especially in cases of loss of consciousness and annulment of will), or to include within the scope of the Romeo and Juliet clause the consensual production of pornographic material between the participants in the sexual act to which the clause refers, since otherwise, sexual relations are allowed but it is prohibited to voluntarily create an image of the sexual act between the participants, which creates a nearly insurmountable inconsistency.

11. According to Spanish law, higher education institutions must play a crucial role in raising awareness about consent and sexual offenses. What roles can these institutions play (or are they playing) to contribute to a better understanding and prevention of these crimes among young people?

Educational institutions should be places where sexual education is offered without falling into indoctrination or ideological militancy, which are far from their role. For this, it is essential to approach sexual education as a significant part of the educational framework, not as a purely accessory issue in a few isolated classes without adequate material. Pythagoras said, "Educate children and you won't need to punish men." This idea is

crucial. Criminal law must always be restricted in its intervention, as a last resort, for the most serious violations of legal rights. Anything that exceeds this mission contradicts its principles. It is very tempting to use the immense power of punitive law, but that is what distinguishes us from totalitarianism.

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