



## European network of legal experts in gender equality and non-discrimination

### FLASH REPORT

<b>Country:</b>	Spain
<b>Title:</b>	The Supreme Court revokes the judgment of "La Manada" that established that there is no rape when the victim does not expressly and clearly oppose the sexual aggressor.
<b>Date:</b>	2 July 2019
<b>Expert:</b>	Maria-Amparo Ballester-Pastor
<b>Update of flash report:</b>	<a href="#">Spain - Recent ruling from the Provincial Court of Navarra shows inconsistencies between the Spanish criminal code and the Istanbul Convention (PDF 108 kB)</a>
<b><u>Context</u></b>	
<b>Issue at stake:</b>	The ruling of the Supreme Court of 21 of June 2019, appeal number 396/2019, states that sexual assault in which the victim did not expressly opposed to the offenders given the intimidating situation must be qualified as rape (and not as simple sexual abuse)
<b>Grounds of discrimination:</b>	Gender
<b>Field of application:</b>	Violence against women
<b>Source:</b>	National court decision
<b>Applicable law:</b>	Articles 177, 178, 179, 180 and 181 of Spanish Criminal Code <sup>1</sup>

### **Content**

**Case Law:** The judgment of the Supreme Court of 21 June 2019 has revoked the judgment of the Provincial Court of Navarra 30/2018, of 20 April 2018 that was known as the judgment of "La Manada".<sup>2</sup> The aggressors recorded the events so there was proof of their acts and the subsequent response of the victim. The judgment of the Provincial Court stated that the woman never accepted to have sex with the five men, and that she always maintained a passive and submissive attitude. The complainant and the public prosecutor considered that the woman had been victim of a sexual assault (or rape) which is prohibited by Articles 177, 178, 179 and 180 of the Criminal Code. According to these articles, sexual assault exists when a person is forced to have sex with the use of violence or by intimidation. On the other hand, the defendants considered that there was no sexual assault because the complainant consented to the sexual activity. The judgment of the Provincial Court of Navarra stated that sexual relations without express consent cannot be considered rape, but qualified as sexual abuse in cases where express and clear violence and intimidation were absent. This judgment triggered a massive social reaction opposing to the judgment, because it implicitly considered a woman responsible for being assaulted unless she showed clear and express opposition, forcing her to put her life at risk. The decision of the Provincial Court of Navarra was challenged before the Superior Court of

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<sup>1</sup> <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>.

<sup>2</sup> [https://www.eldiario.es/norte/navarra/DOCUMENTO-sentencia-integra-manada\\_0\\_765024296.html](https://www.eldiario.es/norte/navarra/DOCUMENTO-sentencia-integra-manada_0_765024296.html).

Justice of Navarra, which confirmed it.<sup>3</sup> The judgment of the Superior Court of Justice of Navarra was challenged before the Supreme Court which, in its judgment of 21 of June 2019, revoked the ruling of the Provincial Court and condemned the five assailants for rape. The ruling of the Supreme Court does not admit appeal.

**Decision of the court:** The judgment of the Supreme Court of 21 of June 2019 considers that the victim was in a highly intimidating situation that led to an attitude of submission, so she did what her assailants told her to do. The victim was pushed to a narrow place, with no possibility of escape, where five men subjected her to acts against her freedom. The ruling emphasizes that this interpretation is the only correct, according to doctrine already consolidated by the Supreme Court itself and that both the Provincial Court of Navarre and the Court of Justice of Navarre erred in their interpretation by demanding for the qualification of rape an express and clear opposition of the victim and not the simple lack of consent. Thus, the Supreme Court in this judgment does not establish a change of doctrine, but simply clarifies the concept of intimidation in terms that, as expressly stated, had already been achieved in other previous judgments for other cases. The ruling of the Supreme Court applied two aggravating factors to the crime of rape: degrading treatment to the victim and joint action by two or more persons. As a consequence, the judgment of the Supreme Court sentenced four of the five aggressors to fifteen years in prison for rape, and one of them to seventeen years in prison for rape and robbery, since he took the victim's mobile phone with intimidation.

**Key points of analysis:** The main point of interest of the judgment of the Supreme Court of 21 June 2019, is that it clearly clarifies that the acts constitute rape despite the fact that there was no clear evidence of opposition from the victim, but the facts show that there was no consent either. It is also interesting to note that this judgment of the Supreme Court has established this interpretation from the current wording of articles 179 and following of the penal code, also establishing that the previous judgments of the other Tribunals to the contrary were contrary to the provisions of those precepts. After the interpretation given by the judgments of the Provincial Court of Navarra and of the Superior Court of Navarra it could be considered that the Spanish Criminal Code was not in compliance with the Istanbul Convention because it, according to those Courts, does not consider that every sexual assault without the consent of the victim must be considered rape, but only those acts that have been perpetrated with violence or intimidation qualify as rape. Indeed, article 36.2 of the Istanbul Convention establishes that "Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances". After the Supreme Court judgment of 21 of June 2019 it seems that the Spanish Criminal Code is actually in compliance with the Istanbul Convention, since sex in the absence of mutual consent qualifies as rape.

**Internet link source:** The judgment is still not available in the Spanish official repertoire of jurisprudence, but the Supreme Court has issued a statement in which it sets out the arguments of the judgment, <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/Comunicado-de-la-Sala-Segunda-del-Tribunal-Supremo-sobre-el-recurso-de-casacion-396-2019>.

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<sup>3</sup> Judgment of the Superior Court of Navarra of 30 of November 2018, appeal number 7/2018, <http://www.poderjudicial.es/search/openDocument/60bf15c7c174cf73>.