

GOOD PRACTICES FOR PROTECTING VICTIMS

inside and outside the criminal process

*Strengthening the position of victims of crimes
within the European criminal justice systems*

BOOKLET N. 3
JUNE 2013 - SEPTEMBER 2013

Monitoring and updating of the Research Project

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Project Coordinator
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ARPE



WHAT'S NEW...

**Welcome to a new member of the action,
awarded with a research fellowships within the Project**

Dr. Stefania Martelli

Senior Researcher

UNIVERSITY OF BOLOGNA

STEFANIA MARTELLI (University of Bologna), GUIDO TODARO (University of Bologna) and MARTINA CAGOSSI (University of Milan) are the three young people who have been awarded with research fellowships within this project.

We strongly believe that investing in young talents is the right way to add value to our action.

This is our third booklet, focused on the next Conference of the project, which will be held in Seville on November 7th 2013.

Other important contributions on the topics will be uploaded on our website.

We will publish the other booklets during the two years of research, in order to offer frequent updating on the development and activities of the Project.

SUMMARY

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Crime is a wrong against society as well as a violation of the individual rights of victims.

La criminalité est un dommage infligé à la société et une violation des droits individuels des victimes.

Un reato è non solo un torto alla società, ma anche una violazione dei diritti individuali delle vittime.

El delito constituye un injusto contra la sociedad y una violación de los derechos individuales de las víctimas.

Recital §9 of Directive 2012/29/EU

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CONFERENCE SCHEDULE

La Protección de la Víctima en la nueva Directiva de la UE y su Estatuto Procesal

The protection of victims within the new EU Directive and their procedural Statute

SEVILLE 7TH NOVEMBER 2013

I Session: *La determinación de los derechos de la víctima en la justicia penal*

Chair: **Miguel Polaino Navarrete**

9.00 Welcome speech - **Miguel Polaino Navarrete**, Director of the Department of Criminal Law and Procedural Law (University of Seville) and **José Joaquín Gallardo Rodríguez** (President of the Bar Association of Seville)

9.15 **Luca Lupária** (Professor of Criminal Procedure at the University of Milan) Coordinator of the Project *Good Practices for protecting victims inside and outside the criminal process*

9.30 **Antonio M^a Lorca Navarrete** (Professor of Procedural Law, *Universidad del País Vasco, San Sebastián*)
Personación y acusación de las Víctimas

10.00 **Juan Burgos Ladrón de Guevara** (Professor of Procedural Law at the University of Seville and director of the Spanish research unit within the project *Good practices for protecting victims*)
La protección de la víctima en el borrador del nuevo Código Procesal Penal

10.30 **Agustín. J. Perez-Cruz Martín** (Professor of Procedural Law at the University of La Coruña)

La confrontación visual en el proceso penal de la víctima y el infractor

11.00 **Mar Jimeno Bulnes**

(Professor of Procedural Law at the University of Burgos)

La mediación penal y la tutela judicial de la víctima

11.30 *Coffe- break*

II. Session: *Tratamiento de la víctima y los sistemas comparados, con especial referencia a Francia e Italia*

Chair: **Giulio Illuminati** (Professor of Criminal Procedure Law at the University of Bolonia)

12.00 **Julie Alix**

(ARPE - *Association de Recherches Pénales Européennes* – member of the project *Good practices for protecting victims*)

La posición de la víctima en Francia, perspectiva sustancial y procesal

Discussant: **Juan Antonio Martos Nuñez** (Professor of Criminal Law at the University of Seville)

12.45 **Silvia Allegrezza** (Professor of Criminal Procedure Law at the University of Bologna and director of the research unit of Bologna within the project *Good practices for protecting victims*), **Stefania Martelli** (Senior Researcher at the University of Bologna) and **Marco Maria Scoletta** (Senior Researcher at the University of Milan)

La posición de la víctima en Italia y la nueva directiva europea, perspectiva sustancial y procesal

Discussant: **Myrian Herrera Moreno** (Professor of Criminal Law, University of Sevilla)

III. Session: El Sistema Español y la nueva directiva europea

Chair: **Jose Ignacio Ugalde González** (Professor of Procedural Law at the University of Seville)

15.30 **Antonia Monge Fernandez** (Professor of Criminal Law at the University of Seville)
La victimización secundaria

16.00 **Angel Tinoco Pastrana** (Professor of Procedural Law at the University of Seville)
Importancia de las asociaciones de víctimas para el cumplimiento de las penas

16.30 **Carmen Requejo Conde** (Professor of Criminal Law at the University of Seville)
Víctimas especialmente vulnerables

17.30 *Coffee-break*

IV. Session: La aplicación práctica en la tutela de la víctima

Chair: **Luca Marafioti** (Professor of Criminal Procedure Law at the University of Roma Tre)

18.00 **Guido Todaro** (Senior Researcher at the University of Bologna)
Buenas y malas practicas en el sistema italiano: una análisis sistemática de la jurisprudencia relevante in Italia

18.30 **Enrique Pedros Fuentes** (Fiscal Delegado de Víctimas. Audiencia Provincial de Sevilla)
Resultados en la protección de las víctimas

19.00 **Francisco Manuel Gutierrez Romero** (Magistrado Juzgado Violencia de Género nº 2, Sevilla)
Las buenas prácticas para las víctimas de violencia de género

19.30 **Ana Ochoa Casteleiro** (Lawyer specialized in victimology in Seville)
La víctima en la ejecución de la sentencia penal

20.00 **Joaquín Perez Peña** (Especialista Policía Judicial. in Seville)
La Cooperación policial y judicial

The protection of the victim in the new Spanish Criminal Procedural Code

Abstract of the speech - Prof. JUAN BURGOS LADRÓN DE GUEVARA

The author will discuss the purpose and the content of the Victim procedural statute, in particular dealing with judicial protection and mediation in criminal proceedings.

First of all, in the Spanish system, the victim of any crime is entitled to promote prosecution. That is the reason why a general catalogue of procedural and extra procedural rights for victims of crime is needed, as well as Special Offices giving assistance to victims, placed in all Spanish Autonomous Communities and Provinces.

Moreover, in the draft of the new Criminal Procedure Code, voluntary criminal mediation is established in order to facilitate attempts to solve conflicts between offender and victim before going to trial, i.e. by explaining the fact, asking for forgiveness and granting compensation. These newly introduced services, together with the Directive 2012/29/UE, are giving a new perspective in the Spanish Criminal Procedure Law.

Restorative justice always gives the victim a priority role. Hence the importance of the Protocol about criminal mediation promoted by the General Council of the Judiciary on January 28th 2010, which states when mediation can occur during the different phases of the criminal proceedings.

Spanish version

El autor analiza los fines y contenidos del Estatuto procesal de la Víctima, a través de la tutela judicial efectiva y la mediación en el marco del proceso penal.

Por ello, considera a la víctima de cualquier delito que pueda constituirse en parte acusadora, para lo que es necesario un catálogo general de Derechos Procesales y Extraprocesales en todas las víctimas de delito, que cumplen en España las Oficinas de asistencia a las víctimas que existen en todas las Comunidades Autónomas y Provincias.

Destaca como en el Borrador del nuevo Código Procesal Penal de España, se establece la mediación penal, al posibilitar la utilización voluntaria, de este mecanismo de solución de conflictos entre infractor y víctima, mediante la explicación del hecho, la petición de perdón y una pronta reparación. Encontrándonos ante los servicios de justicia reparadora, comportando su introducción legal por el Borrador- al igual que en la nueva Directiva 2012/29/UE del Parlamento y Consejo de Europa-, una nueva perspectiva en el Derecho Procesal Penal.

Justicia restaurativa, donde siempre, la víctima debe tener un singular protagonismo. De aquí la importancia del "Protocolo de mediación penal" del Consejo General del Poder Judicial de 28 de enero de 2010, donde se indica cuando puede tener lugar actualmente la mediación en las diversas fases del proceso penal.

Criminal mediation and judicial protection of victims

Abstract of the speech - MAR JIMENO BULNES

The new Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2013 establishing minimum standards on the rights, support and protection of victims of crime (OJ 14.11.2012, L 315, p. 57) has strongly increased the role that victims may play in criminal proceedings in comparison with the previous Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 22.3.2001, L 82, p.1).

This new approach can be analyzed in relation to specific fields, such as those that come under the title of this paper.

As regards criminal mediation, the new regulation entails two important consequences. First of all, thanks to the broader scenario provided for by a 'restorative justice' approach, such as family group conferencing and sentencing circles (Preamble, par. 46), criminal mediation is no longer the unique mechanism able to enforce the so-called "alternative justice".

Secondly, a more detailed regulation of this new panorama of restorative justice is included under Article 12, which contains guidelines that address national legislation concerning further implementation of the European regulation. These provisions involve special safeguards and conditions

applicable to such methods, that must be considered like minimum standards.

Last but not least, the new Directive also introduces judicial protection of victims in criminal proceedings, which was not contemplated in the previous Framework Decision.

In this context, the Directive establishes minimum rules concerning the procedural and substantial rights of victims in criminal proceedings, such as the right to be heard (Art.10), the right to review a decision denying to prosecute (Art.11), and right to legal aid (Art.13), as well as the right to property restitution (Art.15), and to obtain compensation from the offender (Art.16).

The above mentioned procedural and substantial rights protects the standing of the victim in criminal proceedings, and their maintenance must be compulsory for all the judicial authorities of Member States.

The secondary victimization within the Spanish criminal system and the Directive 2012/29/EU

Abstract of the speech - ANTONIA MONGE FERNÁNDEZ

The present paper deals with the study of the secondary victimization in the Spanish criminal justice system, especially according to the Directive 2012/29/EU.

It begins with an analysis of the concept of victimization and its classes (primary, secondary and tertiary), making a review of the main areas in which the so-called 'revictimización' shows up more frequently (trafficking in human beings, terrorism, organized crime, violence in the context of personal relationships, sexual violence or exploitation, gender-based violence, motivated crimes of hate).

Spanish version

En el presente artículo se aborda el estudio de la "victimización secundaria" en el sistema penal español y especialmente en la Directiva 2012/29/UE. Se comienza con un análisis sobre el concepto de victimización y sus clases (primaria, secundaria y terciaria), haciendo una revisión de los principales ámbitos en los que la llamada "revictimización" se manifiesta con más frecuencia: trata de seres humanos, terrorismo, delincuencia organizada, violencia en el marco de las relaciones personales, violencia o explotación sexual, violencia de género, delitos por motivos de odio.

The importance of the victims' associations in the execution of criminal sentences

Abstract of the speech - ANGEL TINOCO PASTRANA

This paper analyzes the participation of the Association of Victims in the criminal process as "accuser", as well as several rights recognized by the laws to certain associations (**Law 29/2011, Recognition and Protection of Victims of Terrorism** and **Royal Decree 671/2013, Recognition and Integral Protection of Victims of Terrorism**)

Spanish system is facing an issue expressly regulated by rule 67 of the **Draft Criminal Procedure Code**, that not only respects the minimum rights conferred by the **Directive 2012/29/UE European Parliament and the Council**, but provides for additional rights. The prosecution in criminal proceedings carried on by victims' associations

established for the purpose, similar to certain legal persons, is a controversial issue causing major problems in a Criminal Procedure Code that has no clear rules on the matter, as in its current configuration by Act nineteenth.

Thus, the explicit recognition by rule 67 of the Draft is certainly an improvement that allows victims' associations and legal persons authorized to act in defense of the someone else rights, to appear as a single part. The most important aspects to consider are the determination of material truth outside the institutions that respond to the principle of opportunity, and the State monopoly on punishment enforcement, that not allow citizens to have

the State impose a particular penalty. A process with a large number of accusers, in fact, can obviously constitute a serious obstacle to these goals.

From another point of view, neither the victim nor specific legal associations have the capacity to take part in the proceedings regarding the enforcement of a criminal conviction. Although, according to both the current Criminal Procedure Code and the regulation of the draft (v. gr. rule 656), they do have a right to be kept informed about a number of procedural events, such as the suspension of the punishment.

Spanish version

*En esta exposición se aborda por una parte la participación de las Asociaciones de Víctimas en el proceso penal como parte acusadora, y por otra parte distintos derechos reconocidos por el ordenamiento a determinadas asociaciones, como la **Ley 29/2011, de Reconocimiento y Protección a las Víctimas del Terrorismo** y el **Real Decreto 671/2013, de Reconocimiento y Protección Integral a las víctimas del terrorismo**.*

*Por otro lado estamos ante una cuestión regulada expresamente en el artículo 67 del **Borrador de Código Procesal Penal**, que no sólo respeta los derechos mínimos reconocidos por la **Directiva 2012/29/UE del Parlamento Europeo y del Consejo**, sino que nuevamente, al igual que sucede en general con la capacidad para ser parte de la víctima en el proceso penal, otorga derechos adicionales, del mismo modo que sucede en el actual proceso penal español. La acusación en el proceso penal por asociaciones de víctimas constituidas ad hoc, del*

mismo modo que la de ciertas personas jurídicas, constituye una cuestión controvertida que provoca importantes problemas en un proceso que, tanto en su configuración actual por la decimonónica Ley de Enjuiciamiento Criminal, como en un futuro proceso penal inspirado en el adversary system, pueden dificultar sus fines, al no existir disposiciones legales que obliguen a las víctimas que litiguen unidas.

El reconocimiento expreso por el artículo 67 del Borrador, constituye sin duda un paso adelante al permitir que las víctimas asociadas y personas jurídicas a las que el ordenamiento reconoce legitimación para actuar en defensa de derechos ajenos, puedan comparecer como una única parte. La averiguación de la verdad material, al margen de las instituciones que responden al principio de oportunidad, y el monopolio estatal en el ejercicio del Ius Puniendi, por el que el ciudadano carece del derecho subjetivo a que el Estado imponga una determinada pena, constituyen los factores más importantes a tener en cuenta. Un proceso con un elevado número de partes acusadoras evidentemente puede constituir un serio obstáculo a estos objetivos.

Desde otro punto de vista, ni la víctima ni las asociaciones o personas jurídicas específicas, poseen capacidad para ser parte en el proceso de ejecución penal, al margen del derecho de información que tienen en determinados actos procesales como por ejemplo en la suspensión de la condena, donde incluso serán oídas, tanto en el actual proceso penal como en la regulación del borrador de Código Procesal Penal (v. gr. artículo 656).

Victims especially vulnerable

Abstract of the speech - CARMEN REQUEJO CONDE

The requirements of EU law on the protection of the victim has led the Spanish legislature to articulate a specific text of guardianship of the victim in the criminal procedural rules, a protection increasingly reinforced for vulnerable and particularly vulnerable victims.

This reform includes the "*Statute of the victim*" under the proposal of "*Criminal Procedure Code*", predictable successor to the current Spanish Procedural Law in Articles 59 to 68. The proposal is inspired by the provisions of *Directive 2012/29/UE European Parliament and of the Council of 25 October 2012, laying down minimum standards on the rights, support and protection of victims of crime, and which replaces the Framework Decision 2001/220/JHA*.

The purpose of this reform is, among others, to establish legal assistance and more protection for victims, vulnerable victims, and especially vulnerable victims, due to their nature or to the seriousness of the committed crime.

Art. 22 of the Directive, entitled "*individual assessment of victims to identify their special protection needs*", urges Member States to ensure a timely and individual evaluation of the victim in order to dispense a special protection in criminal proceedings and avoid secondary or repeated victimization, intimidation or retaliation.

This particular evaluation will take into account several criteria:

- a) personal characteristics of the victim, especially for persons with disabilities and children;
- b) the type or nature of the crime;

c) circumstances of the event.

Specifically: 1) crimes of particular gravity
2) hate crimes or discrimination
3) crimes in which the victim is a dependent relationship with the offender,
4) and in particular, all the victims of the crimes of terrorism, crime organized, human trafficking, gender violence, sexual exploitation, or hate crimes and discrimination.

The Spanish Procedural Law was not the only field that has echoed this victim protection through its own Statute.

In fact, also Criminal Law has been dispensing an increasingly forceful tutelage of the victim, vulnerable victim, and particularly vulnerable victim. Endogenous (age, disease, gender) and exogenous (kinship, origin, location) factors contribute to form the concept of "*particularly vulnerable victim*", as well as it caters to the nature of the offense.

In this sense, the rules defining crimes of gender violence and habitual abuse in family, sex crimes, human trafficking, sexual and labor exploitation, terrorism and other organized crime, strengthen the protection of vulnerable and especially vulnerable person. In these cases, they are considered as victims of a particular crime, or vulnerability itself is part of that crime, as an aggravating circumstance or because the abuse is a mean to commit the crime.

In these crimes (which are a *numerus clausus*), the Spanish Criminal Law redefined the abuse of superiority, and further made any form of discrimination on

belief, ethnicity, gender, or disability, an circumstance aggravating criminal liability. Finally, expressions such as "*especially vulnerable, because of age, sickness, disability, status*" and "*disabled persons in need of special*

protection" increasingly focus the attention of Spanish criminal legislator not only concerning personal but also economic crimes.

The victim in the criminal sentence execution

Abstract of the speech - ANA OCHOA CASTELEIRO

Particularly in criminal process, the new Directive 2012/29/UE from the European Parliament and the Council, October 25, 2012, replacing the Resolution 2001/220/JHA of the Council, establishes a law of minimum standards related to rights, support and protection of victims of crimes that Member States must respect, and that can be expanded, in order to achieve a higher level of protection for victims.

In Spanish law, after the last legislative reforms, interests and rights of the victims are having an increased consideration in the execution phase of the criminal judgment. In fact, in Spain several rights are provided, like the right to bring civil actions in criminal proceedings related to the right of compensation for damage, restitution of the res and compensation for damages suffered as a result of a criminal offence. These rights are not only guarantees for the victim, but also conditions for granting the convict alternative measures, such as suspension of the execution of punishment or its replacement, together with other benefit prisons. Even if other measures for the protection of the victim after the judgment are provided, still there is the need to increase all the appropriate mechanisms in order to ensure a greater level of protection.

Spanish version

Particularmente en el proceso penal, la nueva Directiva 2012/29/UE del Parlamento Europeo y del Consejo de 25 de octubre de 2012, que sustituye a la Decisión Marco 2001/220/JAI del Consejo, establece normas de carácter mínimo sobre los derechos, el apoyo y la protección de las víctimas de delitos que los Estados Miembros de la Unión Europea deben respetar, y pueden ampliar, a fin de conseguir un nivel más elevado de protección a las víctimas.

En el ordenamiento jurídico español, tras las últimas reformas legislativas, cada vez tienen mayor consideración los intereses y derechos de las víctimas en la fase de ejecución de la sentencia penal, regulándose el derecho a ejercitar las acciones civiles en la vía penal en relación con el derecho a la reparación del daño, restitución de la cosa e indemnización por los perjuicios sufridos como consecuencia de una infracción penal no solo como derecho de la víctima, sino también como requisito para la concesión al penado de formas alternativas al cumplimiento de la pena, como la suspensión de la ejecución de la pena o su sustitución y otros beneficios penitenciarios, así como otras medidas encaminadas a la protección de la víctima tras el dictado de la sentencia, aunque resulte necesario aumentar los mecanismos y medios oportunos para conseguir un mayor nivel de dicha protección.

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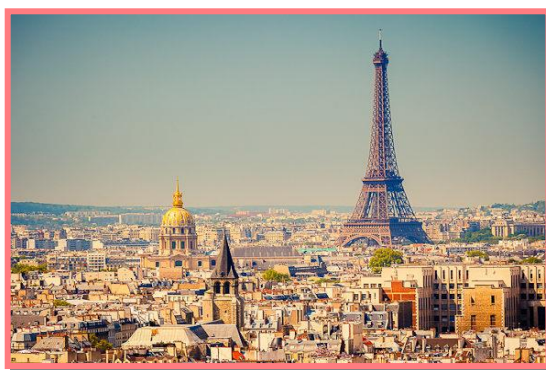


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AGENDA

Third Conference of the Research Project



FRIDAY
28TH MARCH 2014

PARIS

For more information about the Conference and the registration procedures,
please visit our website

www.protectingvictims.eu or contact us at info@protectingvictims.eu