

VICTIMS
AND
CRIMINAL JUSTICE

*European standards
and national good practices*

edited by
Luca Lupária

 Wolters Kluwer



2015

International research project “*Good practices for protecting victims inside and outside the criminal process*”, funded by the European Commission within the *Criminal Justice* program (JUST/2011/JPEN/AG/2901) - www.protectingvictims.eu.



PROPRIETÀ LETTERARIA RISERVATA

Copyright 2015 Wolters Kluwer Italia Srl

ISBN 978-88-13-34077-3

I diritti di traduzione, di memorizzazione elettronica, di riproduzione e di adattamento totale o parziale, con qualsiasi mezzo (compresi i microfilm e le copie fotostatiche), sono riservati per tutti i Paesi.

Le fotocopie per uso personale del lettore possono essere effettuate nei limiti del 15% di ciascun volume/fascicolo di periodico dietro pagamento alla SIAE del compenso previsto dall'art. 68, commi 4 e 5 della legge 22 aprile 1941, n. 633.

Le riproduzioni diverse da quelle sopra indicate (per uso non personale – cioè, a titolo esemplificativo, commerciale, economico o professionale – e/o oltre il limite del 15%) potranno avvenire solo a seguito di specifica autorizzazione rilasciata da EDISER Srl, società di servizi dell'Associazione Italiana Editori, attraverso il marchio CLEARedi Centro Licenze e Autorizzazioni Riproduzioni Editoriali. Informazioni: www.clearedi.org.

L'elaborazione dei testi, anche se curata con scrupolosa attenzione, non può comportare specifiche responsabilità per eventuali involontari errori o inesattezze.

CONTENTS

| | |
|-------------------|-----------|
| INTRODUCTION..... | pag. XVII |
|-------------------|-----------|

PART I

THE ROLE OF THE VICTIM IN CRIMINAL JUSTICE: SUPRANATIONAL INPUTS AND FUNDAMENTAL ISSUES

CHAPTER I

VICTIM'S STATUTE WITHIN DIRECTIVE 2012/29/EU

by Silvia Allegrezza

| | |
|---------------------------------------------------------------------------------------------------|--------|
| 1. Progress and setbacks in victim protection: remarks about the European regulatory context..... | pag. 3 |
| 2. General principles, definitions and objectives..... | » 5 |
| 3. Right to information and support..... | » 8 |
| 4. The victim's right of access to assistance services..... | » 12 |
| 5. The right to participate in criminal proceedings..... | » 13 |
| 6. Right to protection..... | » 17 |
| 7. Individualised protection and protection from secondary victimisation..... | » 18 |

CHAPTER II

VICTIM'S PROTECTION IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

by Mitja Gialuz

| | |
|---------------------------------------------------------------------------------------------------------------|---------|
| 1. Premise..... | pag. 21 |
| 2. Jurisprudence of the Court of Justice: the boundaries of the notion of victim..... | » 22 |
| 2.1. The position of victims in the trial and their rights.. | » 24 |
| 3. The Court of Strasbourg: seeking a balance between protection of the vulnerable victim and fair trial..... | » 26 |
| 3.1. Criminalisation and investigation obligations in safeguarding the victim..... | » 29 |

CHAPTER III

THE LANZAROTE AND ISTANBUL CONVENTIONS:
AN OVERALL PICTURE*by Stefania Martelli*

- | | | | |
|----|--------------------------------|------|----|
| 1. | The Lanzarote Convention | pag. | 33 |
| 2. | The Istanbul Convention | » | 40 |

CHAPTER IV

VICTIMS IN INTERNATIONAL CRIMINAL JUSTICE

by Chantal Meloni

- | | | | |
|----|------------------------------------------------------------------------------------------------------------------------------------------|------|----|
| 1. | The role of victims before international criminal courts in the past: remarks..... | pag. | 47 |
| 2. | Role and participation of the victims before the International Criminal Court | » | 52 |
| | 2.1. The notion of the victim pursuant to the Rome Statute..... | » | 52 |
| | 2.2. A short description of the victim participation and protection system pursuant to the Rome Statute..... | » | 57 |
| 3. | <i>Ratio</i> of the participation and role of the victims in light of the peculiar characteristics of international tribunals..... | » | 61 |

CHAPTER V

THE VICTIM AS A WITNESS

by Giulio Illuminati

- | | | | |
|----|------------------------------------------------------------------------|------|----|
| 1. | The victim as subject of the trial..... | pag. | 65 |
| 2. | The giving of evidence by the victim as a right and as a duty | » | 67 |
| 3. | Right of the victim to be heard and testimony of the victim..... | » | 68 |
| 4. | Vulnerable victim and protection measures..... | » | 70 |
| 5. | Giving evidence and secondary victimisation | » | 73 |
| 6. | “Attenuated” confrontation..... | » | 76 |
| 7. | Assessment of evidence..... | » | 78 |

PART II**VICTIM'S POSITION WITHIN THE EUROPEAN
CRIMINAL JUSTICE SYSTEMS**

CHAPTER VI

**VICTIMS PARTICIPATION IN FRENCH CRIMINAL
PROCEEDINGS: CURRENT STATUS AND FUTURE
PERSPECTIVES IN VIEW OF DIRECTIVE 2012/29/EU***by Mathieu Jacquelin*

| | | |
|-----------------------------------------------------------------------|------|----|
| 1. Foreword | pag. | 83 |
| 2. Procedural privileges | » | 86 |
| 2.1. The right to be heard and provide evidence..... | » | 86 |
| 2.2. The right to a review of a decision not to prosecute..... | » | 91 |
| 3. Financial prospects of victims | » | 93 |
| 3.1. The right to return of seized property | » | 94 |
| 3.2. The right to decision on compensation from the offender | » | 96 |

CHAPTER VII

**THE ITALIAN SYSTEM FOR THE PROTECTION
OF VICTIMS OF CRIME: ANALYSIS AND PROSPECTS***by Guido Todaro*

| | | |
|---------------------------------------------------------------------------------------------------------------------------|------|-----|
| 1. Premise | pag. | 101 |
| 2. Information obligations | » | 102 |
| 3. The participation of the victim in the trial | » | 105 |
| 4. The right to be heard: the paradox of the special evidentiary hearing (so called <i>incidente probatorio</i>) | » | 112 |

CHAPTER VIII

**VICTIM'S RIGHTS IN SPAIN WITHIN THE NEW DRAFT FOR A
LEGAL STATUTE FOR VICTIMS IN CRIMINAL PROCEEDINGS***by Juan Burgos Ladrón de Guevara*

| | | |
|--------------------------------------------|------|-----|
| 1. Introduction | pag. | 119 |
| 2. Common rights for victims | » | 121 |
| 3. Protection and recognition issues | » | 123 |
| 4. Conclusions | » | 125 |

CHAPTER IX

VICTIM'S RIGHT TO PARTICIPATE IN THE PROCESS
AND *ACUSACIÓN PARTICULAR* IN SPAIN*by Ángel Tinoco Pastrana*

| | | | |
|------|---------------------------------------------------------------------------------------------------------------|------|-----|
| 1. | Introduction | pag. | 127 |
| 2. | About private prosecution | » | 128 |
| 2.1. | Premise | » | 128 |
| 2.2. | <i>Locus standi</i> | » | 131 |
| 2.3. | Requirements for the activity | » | 132 |
| 2.4. | Costs to be incurred for the proceedings | » | 134 |
| 3. | The victim' right to be informed and to participate even though he is not <i>acusador particular</i> | » | 134 |

PART III

MINIMUM STANDARDS IN THE EU DIRECTIVE
AND NATIONAL MODELS: A COMPARATIVE ANALYSIS

SECTION 1

RESTORATIVE JUSTICE

CHAPTER X

RESTORATIVE JUSTICE IN FRANCE:
STATUS ARTIS AND FUTURE PERSPECTIVES*by Marc Touillier*

| | | | |
|------|---------------------------------------------------------------------------------------------------------|------|-----|
| 1. | Another approach of justice..... | pag. | 140 |
| 2. | Other instruments for guaranteeing justice | » | 141 |
| 3. | The absence of official recognition of restorative justice in French law..... | » | 141 |
| 4. | Expectations linked to the development of restorative justice in international and European law..... | » | 142 |
| 5. | The space given to restorative justice in the Directive .. | » | 143 |
| 6. | Approach of the problem..... | » | 144 |
| 7. | Absorption of restorative justice in French law | » | 144 |
| 7.1. | A real acceptance: the consolidation of criminal mediation..... | » | 144 |
| 7.2. | Poor usage of criminal mediation..... | » | 145 |
| 7.3. | Indirect manifestations of acceptance of restorative justice..... | » | 145 |
| 8. | An insufficient acceptance. Intrinsic shortcomings of French law | » | 146 |

| | |
|-----------------------------------------------------------------------------------------------------------------------|----------|
| 8.1. Shortcomings to be overcome in view of the content of the Directive | pag. 147 |
| 8.2. A <i>status loci</i> unsatisfactory | » 148 |
| 9. Renewal of restorative justice in French law | » 148 |
| 10. A matter of ends. The search for a balance between the purposes of restorative justice | » 148 |
| 10.1. Moving away from the obsession of a justice addressed only to the perpetrator | » 149 |
| 10.2. New paths | » 149 |
| 10.3. Avoiding excessive compassion for the victims of crimes | » 150 |
| 11. A matter of instruments. The creation of restorative justice measures | » 151 |
| 11.1. To reform criminal sanctions and execution of sentences in light of the philosophy of restorative justice | » 151 |
| 11.2. Developing professional training | » 152 |
| 12. Encouraging prospects | » 152 |

CHAPTER XI

RESTORATIVE JUSTICE EXPERIMENT
WITHIN THE ITALIAN JUDICIAL SYSTEM*by Martina Cagossi*

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------|----------|
| 1. A brief introduction on restorative justice | pag. 153 |
| 2. The existing problems in introducing mediation into the Italian criminal process | » 155 |
| 2.1. Doubts on the compliance with the Italian Constitution | » 156 |
| 3. Restorative justice cases in the Italian judicial system .. | » 158 |
| 3.1. Mediation inside the juvenile criminal justice | » 158 |
| 3.2. Attempts at conciliation before the <i>giudice di pace</i> . .. | » 159 |
| 4. The new Italian probation for adults: the term "mediation" enters for the first time inside the Italian code of criminal procedure | » 161 |

CHAPTER XII

RESTORATIVE JUSTICE IN SPAIN

by Mar Jimeno Bulnes

| | |
|-----------------------------|----------|
| 1. Introduction | pag. 163 |
| 2. Present regulation | » 167 |

- | | | |
|----|-------------------------|----------|
| 3. | Future proposals | pag. 175 |
| 4. | Concluding remarks..... | » 178 |

CHAPTER XIII

COMPARATIVE REMARKS

by Michele Caianiello

- | | | |
|----|-------------------------------------|----------|
| 1. | Common points and differences | pag. 181 |
| 2. | At the root of the problem? | » 183 |

SECTION 2

GENDER-BASED VIOLENCE

CHAPTER XIV

THE FRENCH MEASURES FOR THE PROTECTION
OF VICTIMS OF DOMESTIC VIOLENCE*by Julie Alix*

- | | | |
|----|----------------------------------------------------------|----------|
| 1. | Introduction | pag. 189 |
| 2. | The fundamentals of the measures | » 190 |
| | 2.1. The sociological context..... | » 190 |
| | 2.2. The juridical context..... | » 192 |
| 3. | The content of the protection provision in French law .. | » 196 |
| | 3.1. Protection via restraint..... | » 197 |
| | 3.2. Protection through the deprivation of freedom.... | » 201 |

CHAPTER XV

VICTIMS OF DOMESTIC VIOLENCE
IN THE ITALIAN JUDICIAL SYSTEM*by Silvia Allegranza and Stefania Martelli*

- | | | |
|----|------------------------------------------------------------------------------------------------------|----------|
| 1. | Cultural barriers and contemporary difficulties towards a criminal victim-centric policy? | pag. 203 |
| 2. | Criminal protection of the victim: analysis of the amendments made to essential criminal law..... | » 206 |
| 3. | The framework of amendments to procedural criminal law | » 209 |

CHAPTER XVI

GENDER VIOLENCE AND CRIMINAL JUSTICE IN SPAIN

by Carmen Requejo Conde

| | |
|------------------------------------------------------------------------------------------------------------------------------------|----------|
| 1. Introduction | pag. 217 |
| 2. Treatment of victims of domestic violence in the Spanish penal code | » 217 |
| 3. Victims of domestic violence in the draft of an organic law modifying the Spanish penal code | » 225 |
| 4. Protection of gender violence's victims in 2012 EU Directive and in the Spanish draft of a legal Statute of crimes victims..... | » 228 |

CHAPTER XVII

COMPARATIVE REMARKS

by Luca Lupária

| | |
|-------------------------------------------------------------------------------------------------------------------------------|----------|
| 1. Gender-related violence: a laboratory for protection of the victim or a factor of imbalance for the criminal system? | pag. 231 |
| 2. Points of contact and distances that cannot be filled among European models in light of the comparative analysis | » 234 |
| 3. Concluding remarks..... | » 237 |

SECTION 3

PARTICULARLY VULNERABLE VICTIMS

CHAPTER XVIII

VICTIMS WITH SPECIAL NEEDS (NAMELY CHILDREN)
IN FRENCH LEGAL SYSTEM*by Sabrina Delattre*

| | |
|-------------------------------------------------------------------------------------------------------------------|----------|
| 1. Foreword | pag. 239 |
| 2. Aspects in which France has good grades | » 242 |
| 2.1. French provisions in compliance with the Directive | » 242 |
| 2.2. French provisions providing additional protection compared to the “minimum standards” of the Directive | » 244 |

| | | |
|------|----------------------------------------------------------------------------|----------|
| 3. | Aspects requiring changes or improvements to implement the Directive | pag. 245 |
| 3.1. | Limited scope of application of French regulatory framework | » 245 |
| 3.2. | Towards child-friendly judicial proceedings? | » 246 |
| 4. | Conclusion: good practices..... | » 248 |

CHAPTER XIX

PROTECTION OF PARTICULARLY VULNERABLE VICTIMS
IN THE ITALIAN CRIMINAL PROCESS*by Hervé Belluta*

| | | |
|----|----------------------------------------------------------------------------|-------|
| 1. | Photograms of a dynamic system | » 251 |
| 2. | Protection of the vulnerable source during preliminary investigations..... | » 255 |
| 3. | The <i>incidente probatorio</i> | » 257 |
| 4. | The trial: between readings and verbal character | » 259 |
| 5. | Protection of the victim from the defendant | » 262 |

CHAPTER XX

CHILDREN VICTIMS OF SEXUAL ASSAULT AND ABUSE
IN VIEW OF THE SPANISH PENAL REFORM*by Antonia Monge Fernández*

| | | |
|--------|----------------------------------------------------------------------|----------|
| 1. | Introduction | pag. 267 |
| 2. | Abuse and sexual assault of minors under fifteen years of age | » 271 |
| 2.1. | Sexual assault | » 273 |
| 2.2. | Sexual abuse..... | » 273 |
| 2.2.1. | The question of bodily contact..... | » 275 |
| 2.2.2. | The absence of violence or intimidation | » 276 |
| 2.2.3. | The consent of the victim..... | » 276 |
| 3. | The determination of the minor to engage in a sexual encounter | » 279 |
| 4. | Child grooming..... | » 279 |

CHAPTER XXI

COMPARATIVE REMARKS

by Raphaële Parizot

1. Who shall be intended as a victim with specific protection needs? pag. 283
2. How should we consider the victims with specific protection needs? » 285

SECTION 4

VICTIMS' COMPENSATION

CHAPTER XXII

CRIME VICTIMS' COMPENSATION IN FRANCE

by Isabelle Sadowski

1. Introduction pag. 289
2. Presentation of the French system of victims' compensation » 292
 - 2.1. The crime victims' compensation milestone: the FGTI » 292
 - 2.2. A system aligned with victims' expectations » 295
3. Compliance with European requirements? The first European texts on victims' compensation » 296
 - 3.1. Recent achievements and the Directive of 25 October 2012 » 297
4. A major challenge: the effectiveness of the victims' right to compensation » 298
 - 4.1. The role of victim support organisations » 299
5. To conclude » 301

CHAPTER XXIII

COMPENSATION OF DAMAGE FROM CRIME IN THE ITALIAN SYSTEM COMPARED WITH EUROPEAN CONSTRAINTS

by Marco Maria Scoletta

1. Compensation obligations in regulatory sources of the European Union pag. 303
2. The provision for compensation of damage from crime in the Italian criminal system » 304

3. The effectiveness of compensatory protection and the policy of solidarity funds..... pag. 306
4. Implementation of Directive 2004/80/EC and doubts of discrimination ‘in reverse’ in the compensatory discipline » 308
5. The mechanisms that reward encouragement of compensation of damage caused by crime » 310

CHAPTER XXIV

COMPENSATION OF THE VICTIM
IN THE SPANISH CRIMINAL PROCEDURE*by Ana Ochoa Casteleiro*

1. Introduction pag. 319
2. Right of the victim to compensation during criminal proceedings..... » 320
3. Civil responsibility deriving from a crime in Spanish law. » 320
 - 3.1. Procedural aspect of such civil responsibility » 321
 - 3.2. Essential aspects. Content of civil responsibility. » 322
 - 3.2.1. Quantification of damage..... » 323
 - 3.2.2. Other persons responsible » 324
4. Execution of civil responsibility » 326
5. Civil responsibility and victims protection within the Spanish penitentiary regulation » 326
6. Conclusion » 327

Chapter XXV

COMPARATIVE REMARKS

by Juan Burgos Ladrón de Guevara

1. Comparison between the examined legal systems..... pag. 329
2. Conclusions » 331

Chapter XXVI

CONCLUSIONS

WHICH GOOD PRACTICES IN THE FIELD
OF VICTIM PROTECTION?*by Luca Lupária and Raphaële Parizot*

1. A premise on the method..... pag. 333

| | | | |
|------|--------------------------------------------------------------------|------|-----|
| 2. | In search of good practices from a comparative point of view | pag. | 334 |
| 2.1. | Information and victim support | » | 336 |
| 2.2. | Participation of the victim in criminal proceedings..... | » | 337 |
| 2.3. | Public opinion and victim of the crime | » | 339 |
| 3. | Conclusions | » | 341 |