

# teoría & derecho

REVISTA DE PENSAMIENTO JURÍDICO

## PROSTITUCIÓN, DERECHO Y SOCIEDAD

### SUMARIO

#### DEBATE

Prostitución, derecho y sociedad

Artículos de:

Francisco Oliva Blázquez

Eduardo Gamero Casado

José Núñez Fernández

Kerman Calvo

Alberto Penadés

#### ESTUDIOS

Víctima del delito y Europa (Juan-Luis Gómez Colomer)

Relato y justificación. En el corazón deliberativo de un jurado (a propósito de Twelve angry men)

(José Manuel Cabra Apalategue)

Metateoría jurídica analítica del siglo XXI: teorías monistas y pluralistas en el estudio del derecho

(Nicolás López Pérez)

#### TEMAS DE HOY

Señas de identidad de la reforma penal de 2015: política criminal e ideología

(José L. González Cussac)

#### VARIA

Ars iuris en el ideal del perfectus orator en la obra de Cicerón De Onatore libri tres (José Miguel

Piquer Marí)

Animales y derecho (Crítica bibliográfica de Oriol Caudevilla)

De ciencia, sabios y juristas: reflexiones sobre la investigación y los investigadores del derecho

(Margarita Castilla Barea)



tirant lo blanch

INCLUYE ACCESO  
A LA VISUALIZACIÓN  
ONLINE DEL FONDO  
COMPLETO DE LA  
REVISTA

17/2015  
REVISTA SEMESTRAL. JUNIO

# SUMMARY

## DISCUSSION

### Prostitution, law and society

Introduction.....	11
<i>Francisco Oliva Blázquez</i>	
Prostitution and contractual illegality: a reflection in a contemporary key .....	18
<i>Francisco Oliva Blázquez</i>	
Prostitution: Public Legal Issues .....	40
<i>Eduardo Gamero Casado</i>	
Prostitution of the handicapped and the underage in the Criminal law: Some problematic aspects before and after the Organic Law 1/2015, March, 30th, pertaining to the reform of the Criminal Code.....	56
<i>José Niñez Fernández</i>	
Attitudes towards the legalization of prostitution in Spain: an approach from survey data .....	78
<i>Kerman Calvo y Alberto Penadés</i>	

## STUDIES

Victim of crime and Europe .....	100
<i>Juan Luis Gómez Colomer</i>	
Story and justification. At the deliberative heart of a jury (regarding Twelve angry men).....	130
<i>José Manuel Cabra Apalategui</i>	
Legal Analytical Theory of the XXI Century: monism and pluralism to the study of law.....	146
<i>Nicolás López Pérez</i>	

## TODAY'S ISSUES

The Identifying Features of the 2015 Spanish Criminal Code Reform: Criminal Policy and Ideology .....	168
<i>José L. González Cussac</i>	

## VARIA

Ars iuris within the ideal perfectus orator in Cicero's De Oratore libri tres.....	181
<i>José Miguel Piquer Marí</i>	
Animals and Law. Book Review.....	191
<i>Oriol Caudevilla</i>	
About science, sages and jurists: reflections on legal research and scholars.....	197
<i>Margarita Castilla Barea</i>	
Author Guidelines .....	213
Ethical Guidelines .....	221

# PROSTITUTION AND CONTRACTUAL ILLEGALITY: A REFLECTION IN A CONTEMPORARY KEY

*Francisco Oliva Blázquez*  
*Universidad Pablo de Olavide*

## ABSTRACT

Contracts of prostitution are usually deemed as illegal, because its object or cause is contrary to mandatory law or morality (arts. 1271 and 1275 CC). Hence, the prostitution does not exist for the Law *a priori* (*quod nullum est, nullum effectum producit*), with all the consequences that this entails in terms of loss of rights for the prostitute. However, the facts prove that prostitution is a real economic activity that enjoys some kind of recognition in our legal system, and this reality is opposed to the idea that is an utterly illegal and immoral behavior. Under this author's opinion, it is necessary to undertake an interpretation of the concept of "current moral", as a limit to personal freedom, that closely matches to the reality of the society in which it is invoked, and that also respects the set of values, principles and constitutional rights, as well as the rest of our laws and regulations. In this way, it will be possible to overcome a legal interpretation that denies any right to the prostitute and makes invisible the weakest part of prostitution.

## KEY CONCEPTS

Prostitution, Contracts, Requirements, Cause, Object, Illegality, Moral, Freedom.

## PROSTITUTION: PUBLIC LEGAL ISSUES

*Eduardo Gamero Casado*

*Universidad Pablo de Olavide*

### ABSTRACT

The legal system has only two options with regard to prostitution: either it expressly prohibits, or regulates this activity in order to preserve the assets and values strongly committed in its exercise. What does not fit under any circumstances is indifference, translated in a total lack of regulation. If not prohibited, the three aspects in which it is involved the administrative law «and that are studied in this paper», are: prostitution in establishments open to the public; prostitution on streets; and the strength of social services to assist persons exposed to the risks of prostitution. This analysis reveals that there are valuable precedents, but clearly insufficient, to regulate the matter with the adequate protection of underlying public interests.

### KEYWORDS

Prostitution, Opening License, Citizen coexistence, Social Services

PROSTITUTION OF THE HANDICAPPED AND THE UNDERAGE IN THE CRIMINAL LAW: SOME PROBLEMATIC ASPECTS BEFORE AND AFTER THE ORGANIC LAW 1/2015, MARCH, 30TH, PERTAINING TO THE REFORM OF THE CRIMINAL CODE

*José Núñez Fernández*

*Universidad Nacional de Educación a Distancia*

ABSTRACT

This paper analyses the article of the Spanish Criminal Code according to which those who induce, promote, favor or facilitate the prostitution of a handicapped or an underage person or else solicit, obtain or accept a sexual relationship with these subjects in exchange of a remuneration or a promise, commit a criminal offence. The study is intended to reveal certain problems of the regulation derived from the Organic Law 5/2010, June 22nd, and the correspondent provisions comprehended in the Organic Law 1/2015, March 30<sup>th</sup>, in force since the first of July of 2015. Both legislations breach the principles of legality and proportionality. Moreover, they cover an interest that is not worth of protection within the Spanish constitutional framework.

KEY WORDS

Prostitution, Underage and handicapped persons, Legality, Proportionality, Sexual autonomy.

# ATTITUDES TOWARDS THE LEGALIZATION OF PROSTITUTION IN SPAIN: AN APPROACH FROM SURVEY DATA

*Kerman Calvo*

*Universidad de Salamanca*

*Alberto Penadés*

*Universidad de Salamanca*

## ABSTRACT

This paper investigates a very little explored but relevant topic: namely, social attitudes in Spain towards the legalization of prostitution. Using quantitative techniques, and drawing from nation wide survey data, this article seeks to identify those groups that are more (and less) in favor of this legalization. The analysis confirms previous work in the psychology and social work literature: Spanish society supports legalization. This support is however lower among women, foreigners, conservative people and, also, the lower classes. As expected, consumers of prostitution clearly favor legalization.

## KEYWORDS

Prostitution, Social attitudes, Moral policies.

## VICTIM OF CRIME AND EUROPE

*Juan-Luis Gómez Colomer*  
*Universidad Jaume I de Castellón*

### ABSTRACT

Particularized study of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, and of the case law of the European Court of Human Rights regarding victims of crime. The Spanish Parliament is currently discussing the transposition of this Directive (Draft Law of the Legal Statute of Victims of Crime).

It is going to produce unrequired changes, given that in Spain, unlike in the rest of European countries, the victim can become a party in the criminal procedure (private prosecutor), as well as other necessary adjustments. However, it will not affect what is most important: The modification of some attitudes of public authorities related to the investigation of crimes with vulnerable victims, the reconsideration of the limited evidentiary value of the statements of victims who are witnesses, and the effectiveness of protective measures when victims are in real danger.

### KEYWORDS

Victims of Crime, European Union, Directive, European Court of Human Rights, Criminal Procedure, Procedural Rights

STORY AND JUSTIFICATION. AT THE DELIBERATIVE HEART OF A JURY (REGARDING  
TWELVE ANGRY MEN)

*José Manuel Cabra Apalategui*  
*Universidad de Málaga*

ABSTRACT

Sidney Lumet's *Twelve angry men* is considered a master works of legal cinematography. Despite its outstanding austerity of material and narrative means, the film is enormously intriguing from different points of view (psychological, legal, critical). This paper focuses on the argumentative aspect of the trial deliberation, underlining two issues: first, the deconstruction of the prosecution's story from an epistemic perspective, as well as in its narrative dimension; second, the relation between the context of discovery an the context of justificación in legal argumentation.

KEY WORDS

Legal argumentation, Context of discovery / Context of justification, Rationality, Narrativist theory of law.



# LEGAL ANALITICAL THEORY OF THE XXI CENTURY: MONISM AND PLURALISM TO THE STUDY OF LAW

*Nicolás López Pérez*  
*Universidad de Chile*

## ABSTRACT

This research will offer a metatheoretical understanding of the problem inside analytical legal philosophy of the twentieth-one century about the choice of a theory which gives account of the legal practice, purposing two discursive blocks: in one hand the theories which represent the monism, in the other which ascribe to pluralism. The aim of this plan is to conclude that is preferable choice a pluralist theory. For that purpose the analysis will support three discussion levels. First exposing triple distinction methodology of this research, this is directed to the intellectual division between monism and pluralism. Second in section III will examine the most relevant theories of the twentieth century analytical tradition of philosophy of law in the latter discussion level. Third in section IV will evaluate the problem of epistemic value or merits of theories about law, related with the possibility of establish an argumentative conception that enriches the understanding of nowadays metaphilosophical debates.

## KEYWORDS

Theory, Pluralism, Monism, Analytic tradition, Nature of Law

# THE IDENTIFYING FEATURES OF THE 2015 SPANISH CRIMINAL CODE REFORM: CRIMINAL POLICY AND IDEOLOGY

*José L. González Cussac*

*Catedrático Derecho Penal*

*Universidad de Valencia*

## ABSTRACT

The 2015 Criminal Code Reform is so intense and wide that it could be seen as a broad-new Criminal Code. Not only has it been enacted with grave proceeding irregularities, but also with little debate and without any consensus from the other political forces. The most critical aspects are: an involution in the catalogue of penalties, with an extraordinary rise of its severity as well as of the jail penalty key-role-position; a terminology mutation for the less serious offences (from the Spanish "*faltas*" to "*delitos leves*"); a lowering of the legal security principle exigencies; a generalised moving in front of the punitive intervention; and an imperfect legal technique. A Criminal Policy not based on Statistics, but on prejudices, on particular-economic-groups interests, on media owners and on a radically repressive ideology.

## KEY WORDS

Criminal Policy, Ideology, Legal Security / Legal certainty, Catalogue of penalties, Legislative technique