

PARTE PRIMA
L'EUROPA DEI DIRITTI,
L'EUROPA DEI DOVERI

I

THE VICTIMS' RIGHTS DIRECTIVE: ORIGINS AND EXPECTATIONS

di Francisco Fonseca Morillo e Ingrid Bellander Todino

*Al fin de la batalla,
y muerto el combatiente, vino hacia él un hombre
y le dijo: «¡No mueras, te amo tanto!»
Pero el cadáver ¡ay! siguió muriendo.
Se le acercaron dos y repitiéronle:
«¡No nos dejes! ¡Valor! ¡Vuelve a la vida!»
Pero el cadáver ¡ay! siguió muriendo.
Acudieron a él veinte, cien, mil, quinientos mil,
clamando «¡Tanto amor y no poder nada contra la muerte!»
Pero el cadáver ¡ay! siguió muriendo.
Le rodearon millones de individuos,
con un ruego común: «¡Quédate hermano!»
Pero el cadáver ¡ay! siguió muriendo.
Entonces todos los hombres de la tierra
le rodearon; les vio el cadáver triste, emocionado;
incorporóse lentamente,
abrazó al primer hombre; echóse a andar...*

CÉSAR VALLEJO

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1. *Preliminary remarks.*

The aim of the European Union is to create a genuine European Area of Justice, Freedom and Security within which citizens can be assured

that their rights are recognised and protected, regardless of where they live in the Union. The protection of their rights should not be hindered when they move to study, work, travel or establish themselves outside their country of origin.

There have been advances in the area of victims' rights in Europe in previous decades, and the European Union has taken both legislative and non-legislative action to address the rights of victims; every year, on 22 February, victims are recognised across the continent on the European Day for Victims of Crime. However, real progress for victims in the area of criminal justice in Europe is relatively recent. The Treaty of Lisbon allows us to take action at the EU-level on security and justice and ensure that the Charter of Fundamental Rights is fully respected and is an integral part of each of our policies. Citizens now benefit from the tangible results of a comprehensive EU policy on justice and rights, including minimum standards for the rights of victims of crime.

The cornerstone of European criminal law is the fundamental principle of mutual recognition of judicial decisions between EU Member States, namely that judgments given by a court of one State must be effectively enforced by the courts of other States as easily as they would be at national level. For this to work, judicial authorities must be able to mutually trust and rely on each other and have confidence in the implementation of the principles of fairness and justice. This also means that citizens must have confidence in the fairness of proceedings and that their rights are well protected if they become involved in criminal proceedings – whether they are suspected or accused of having committed a crime or are victims of crime.

Indeed, full respect for the right to a fair trial implies taking into account the needs of victims of crime. Victims have an important role in the criminal justice system. Victims must be treated with dignity and respect, in a manner that does not generate any further harm, and their needs to be informed, protected, supported, involved and compensated must be met by the criminal justice systems of Member States. Victims should receive at least the same minimum standard of treatment, including non-discriminatory access to justice, in all EU Member States, irrespective of their nationality or country of residence¹. The Lisbon

¹ This non-discriminatory right of equal treatment of individuals who fall victim to crime while travelling to another Member State was established by the European Court of Justice in the case *Cowan v. Trésor public* as early as 1989 (C-186/87, judgment of

Treaty provides a clear legal base for the EU to establish minimum rules on victims' rights to facilitate mutual recognition of judgments and decisions and police and judicial co-operation in criminal matters that have a cross-border dimension.

On 18 May 2011, the European Commission presented a comprehensive legislative package on victims' rights, accompanied by a Communication² which presented the Commission's actions in relation to victims. The Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims (the Victims' Rights Directive)³, the Directive 2011/99/EU on the European protection order⁴ and the Regulation (EU) No 606/2013 on the mutual recognition of protection measures in civil matters⁵ represent a significant change in the treatment of victims and their access to justice. These laws ensure that all victims of crime in the EU receive the same level of protection, support and access to justice, wherever they are in the EU, and no matter where they come from or where they reside.

The Victims' Rights Directive is the most ambitious piece of legislation adopted so far at the EU-level on victims' rights. In this introductory chapter, we present the origins of the Directive and expectations of the improvements that can be derived from this act. We focus first on problems and underlying drivers that had hampered development of victims' rights in the European Union before the adoption of the Victims' Rights Directive, and the legal and political context which enabled its adoption. We also outline briefly some expectations that we can all

the Court of 2 February 1989). Victims' rights have also subsequently been the subject of several other preliminary rulings of the Court interpreting the Framework Decision 2001/220/JHA, including cases 16 June 2005, C-105/03, *Pupino*; 9 October 2008, C-404/07, *Katz*; 15 September 2011, C-483/09 and C-1/10, *Gueye et Salmerón Sánchez*.

²European Commission Communication "Strengthening victims' rights in the EU", COM (2011) 274 final.

³Directive 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, OJ L 315 of 14 November 2012, p. 57.

⁴Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338 of 21 December 2011, p. 2.

⁵Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181 of 29 June 2013, p. 4.

expect from the new EU rules on victims' rights and some of the main challenges arising from their implementation.

2. *The Origins of the Victims' Rights Directive.*

Before the adoption of the Victims' Rights Directive, the EU had already taken measures to address victims' rights through the Council Framework Decision on the standing of victims in criminal proceedings in 2001⁶ and the Directive 2004/80/EC relating to compensation to crime victims⁷. Most Member States already had some level of protection and support for victims. However, as showed by research, victims' needs in criminal proceedings were not sufficiently addressed in national judicial systems and major shortcomings in the protection of victims remained⁸. There were also important differences in the levels of standards between different EU countries. People falling victim to crime across Europe had no guarantee to be treated with respect or to receive appropriate support, protection or to gain access to basic elements of justice. It was, therefore, necessary to address this problem. It was clear that Member States had to raise the level of victims' rights in accordance with standards already established through international instruments and the case law of the European Court of Human Rights.

With the entry into force of the Lisbon Treaty, the Commission has been able to address these deficiencies in the area of victims' rights. Article 82 § 2 (c) t.f.e.u. states that the EU may, by means of directives, establish minimum rules on victims' rights to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border

⁶Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), *OJ L* 82 of 22 March 2001, p. 1.

⁷Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, *OJ L* 261 of 6 August 2004, p. 15.

⁸See for instance the report from the Project "Victims in Europe", APAV/Victim Support Europe (Lisbon, 2009 – the "APAV Report") and the study "Member States' legislation, national policies, practices and approaches concerning the victims of crime", Center for the study of democracy (Sofia, 2009).

dimension. Such rules shall take into account the differences between the legal traditions and systems of Member States.

The adoption of the Victims' Rights Directive would also not have been possible without a favourable political climate. In the Stockholm Programme (2010-2014)⁹, the Council of the European Union called for further action which would place the needs of victims of crime at the centre of our justice systems. This was reaffirmed in the Commission's action plan to implement the Stockholm Programme¹⁰. The European Parliament had also called upon the Council to adopt a comprehensive legal framework offering victims of crime the widest protection¹¹.

This legal and political context provided a necessary background for the Commission's Impact Assessment published in 2011¹² which prepared for the adoption of the Commission's proposal for the Victims' Rights Directive.

The Impact Assessment showed clearly that EU action on victims' rights, in order to increase mutual confidence between Member States' judicial systems, provided added value. The Commission argued that the way victims are treated and can access justice is a strong indicator of the quality of justice systems in general. Strengthening victims' rights would be a powerful means to increase confidence in national and foreign judicial systems generally.

The Commission's assessment also showed that although the objectives and the basic scope of the existing legislation were still relevant, society's views on victims had in the meantime evolved and new objectives had appeared. To prepare the assessment, the Commission consulted experts from different backgrounds including governments, law enforcement agencies, non-governmental organisations, international

⁹ "Multi-annual programme 2010-2014 regarding the area of freedom, security and justice (Stockholm programme)", European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme.

¹⁰ European Commission Communication, "Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme", COM (2010) 171 final.

¹¹ Resolution of 7 May 2009 of the European Parliament on the development of a European Union criminal justice area (INI/2009/2012).

¹² Commission Staff working paper, Impact assessment, SEC (2011) 580 final.

organisations and universities in a public consultation and asked for their views on what action the EU should take to improve the situation of victims of crime. The consultation highlighted the importance of identifying and meeting the needs of vulnerable victims, of ensuring victims' right to remedy, of ensuring access to restorative justice and minimum procedural standards, for establishing and promoting victim support organisations, for providing information, translation and interpretation for victims, and for changing practitioners' attitudes and culture through training on the needs and rights of victims.

On this basis, the Commission identified two main problems that were impeding the progress on victims' rights in the EU: (a) the existing EU legislation was inadequate to provide the necessary protection of victims' rights; and (b) the needs of victims of crime were not sufficiently addressed in Member States.

The results of both an extensive study on the legislative and practical implementation of the Framework Decision¹³ combined with the Commission's own implementation reports¹⁴ as well as the stakeholder consultations revealed a wide range of problems with the legal framework at the time. The level of Member States' transposition and implementation of the existing legislation was mixed. While the Compensation Directive was transposed by all but one Member State, the implementation of the Framework Decision was far from satisfactory. The Commission recognised that the ineffectiveness of the Framework Decision was partly due to ambiguous drafting, a lack of concrete obligations and the Commission's lack of enforcement powers against Member States¹⁵.

The Commission also identified a problem of scope. Whilst the Framework Decision covered most of the rights of victims of all types of crime, which was overall still relevant, any new action would have to cover a wider range of victims' rights and State obligations given the

¹³ APAV Report.

¹⁴ The Commission issued two implementation reports regarding the Framework Decision, in 2004 (COM [2004] 54 final) and 2009 (COM [2009] 166 final).

¹⁵ The 2001 Framework Decision was a so-called "third pillar" instrument on police and judicial cooperation in criminal matters which meant that the powers of the Commission under Article 258 t.f.e.u. (infringement procedure) were not applicable and the European Court of Justice did not have jurisdiction. The "third pillar" ended on 1 December 2014 after a five year transitional period following the entry into force of the Treaty of Lisbon.

growing awareness and changing judicial culture to address not only the rights and needs of the defendant but also those of victims.

To address such gaps, the Commission identified five categories of victims' needs that would require an adequate response in the new proposal: (1) the need to be recognised and treated with respect and dignity; (2) the need to be protected from further harm from the offender and from secondary victimisation caused by inadequate treatment of the victim during criminal proceedings; (3) the need to be informed, assisted and properly supported in the aftermath of crime and for as long as necessary thereafter; (4) the need to access justice and be able to play an active role in criminal proceedings; and (5) the need for access financial compensation and restitution.

Building on the Framework Decision and international standards on victims' rights¹⁶, the Commission proposed an instrument that seriously strengthened victims' rights in Europe. The Commission's proposal sought to ensure that the wide-ranging needs of victims of crime, which cut across a number of other EU policies, were respected and met. Thus, the proposal also complemented existing EU instruments relating to human trafficking, sexual abuse and sexual exploitation of children, violence against women, terrorism and organised crime.

Thanks to a carefully balanced, yet ambitious text to approximate Member States' substantive rules on rights, support and protection of victims of crime, the proposal was well received by the Council and the European Parliament. Nobody thought that it would have been possible to get agreement on such a comprehensive Directive in only 18 months but the negotiators managed to find a good balance between the priorities of the European Parliament and Member States, in the best interests of victims of crime. Both parties demonstrated a high degree of flexibility to reach agreement and the result is a legislative text that will clearly improve the situation of victims on the ground.

On 25 October 2012, the European Parliament and the Council adopted the Victims' Rights Directive.

¹⁶Including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power of 14 November 2006, Recommendation (1985) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure of 28 June 1985 and Recommendation (2006) 8 on Assistance to Crime Victims of 14 June 2006.

3. *The Victims' Rights Directive: expectations.*

The adoption of the Victims' Rights Directive was a great achievement. The Directive makes sure that victims will receive the same minimum level of information, support, protection and access to justice in all Member States. There are significant changes in the Directive compared to the old legal framework, for example:

– *The Directive applies to both direct and indirect victims*: for the first time, EU legislation on victims does not only apply to direct victims but also to their family members. Family members of deceased victims are defined as victims and benefit from the rights listed in the Directive. The family of surviving victims also have a right to support and protection according to their needs.

– *Victims benefit from a range of information rights and communication safeguards*: the Directive makes sure that victims receive understandable and comprehensive information about their rights and their particular case, from their first contact with the competent authorities and throughout the criminal proceedings. Victims will be notified of the time and place of the trial and the nature of the criminal charges, the final judgment and its reasons. Victims will also be informed about a decision not to proceed with prosecution and the reason for such a decision – and if they are still not happy with the decision, they will have the entirely new right to have the decision reviewed. They also have the right to be notified when the offender is released from custody or prison. If victims who actively participate in criminal proceedings do not understand the information given, they will get interpretation and translation.

– *Victims need proper support to handle the consequences of the crime*: under the Directive, Member States must ensure that victims and their family members have access to confidential and free of charge victim support services. Both general and specialist support must be provided, based on the victims' and family members' needs.

– *Victims must be protected during criminal proceedings so they are not hurt again or threatened*: the Directive reinforces the protection of victims and their family members. The victim's privacy must be respected and contact with the offender avoided. All victims must be individually assessed to determine whether they are vulnerable to secondary or repeat victimisation or intimidation during criminal proceedings. If they have specific protection needs, these will be catered for.

It is also worth mentioning that, compared to the old Framework Decision, the new rules are legally binding *and* enforceable. If Member States do not transpose or apply the Directive correctly, the Commission can bring an infringement case against that Member State at the European Court of Justice. As for any EU *acquis*, any citizen can complain to the Commission if they feel that their rights have been violated or that a State or national authority is not applying the rules correctly. Moreover, many of the new rights laid down in the Victims' Rights Directive are capable of producing a *direct effect* because they are set out in a sufficiently clear, precise and unconditional manner. As a result, citizens can invoke these rights directly before the national courts, even if the new rules are not correctly transposed into national law. All of these legal aspects make this instrument a very strong tool with which victims can enforce their rights.

Nevertheless, this law must now be put into practice. Member States had three years to implement the EU rules into their domestic legal orders and notify their national transposition measures to the Commission by 16 November 2015. However, more than one year after the notification deadline (in December 2016) there are still four Member States (Denmark, Ireland, Greece and Luxembourg) that have not yet transposed the Directive.

The Commission is committed to ensuring that the Victims' Rights Directive does not become a dead letter of law. It has, thus, started a dialogue with those Member States that have not yet transposed the Directive. If a Member State has failed to fulfil its obligations, the Commission will have the possibility to launch an infringement procedure against that State under Article 258 t.f.e.u. This procedure may result in the matter being brought before the European Court of Justice. Nevertheless, we try to solve transposition or non-compliance issues through dialogue with the Member States concerned before making use of the formal legal steps at our disposal.

Correct transposition and implementation of the Victims' Rights Directive is indeed a challenging task. It requires that Member States take legal actions to ensure transposition of the Directive into the national legal orders by binding measures, including amendments to the national codes of criminal procedure and/or enactments of separate acts dedicated to victims' rights only. They also need to adopt practical, supporting measures and provide funding to set up victims' support services, training programmes and develop tools and protocols for their

law enforcement and judicial authorities to be able to implement a wide range of provisions in practice (e.g. individual assessment).

There are some provisions that are more challenging than others to transpose and implement. Article 2 on the definition of “victim” is certainly one of them. Although a *prima facie* transposition of a definition should be straightforward, this may not be the case with this definition. The Victims’ Rights Directive provides for a broad definition which encompasses both direct victims (a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence) and indirect victims (family members¹⁷ of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that’s person’s death). We see that many Member States face difficulties when transposing the definition. The major problem relates to the fact that currently family members of deceased victims are often not considered as victims of crime. The consequences of such exclusion are very serious and would limit the scope of application of the Directive and the scope of application of victims’ rights.

The individual-centred approach taken in the Victims’ Rights Directive – that victims are individuals and have individual needs that should be recognised, respected and met in criminal proceedings – also seems to cause some difficulties for Member States. For example, the Directive places an obligation on national authorities to ensure that every victim receives a timely and individual assessment to identify their specific protection needs and to determine whether and to what extent they would benefit from special protection measures during criminal proceedings (Article 22). Although this provision leaves a large margin of discretion, each Member State must demonstrate how their national procedures would achieve the prescribed result and, at the same time, fit best into their domestic legal orders.

We in the Commission are fully aware of these challenges and have, since the adoption of the Directive, focused on assisting Member States in their implementation work. We have issued a Guidance Document on the implementation of the Directive which explains every single provision and suggests methods of implementation¹⁸. We have also organ-

¹⁷ The definition of “family members” is also broad and includes both married and non-married partners, relatives in direct line, siblings and dependants of the victim.

¹⁸ http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf.

ised several implementation workshops with Member States' experts and other stakeholders and assisted individual Member States in the implementation and interpretation of particular provisions of the Directive on a bilateral basis. The Commission is also funding projects aimed at facilitating the implementation of the EU rules (under the Justice and Rights, Citizenship and Equality Programmes)¹⁹.

It is also important to manage the expectations that have been raised through this new law. Indeed, victims of crime, victims' family members and victims' organisations rightfully expect significant progress in the way they are recognised and treated as a result from the Victims' Rights Directive. They should benefit directly from the rules if correctly implemented and applied at the national, regional and local levels. This is why it is so important to complete the transposition and implementation process at national level. In order for these rights to turn into a reality in every Member State, the rules must be applied every day for every victim.

This is indeed a challenging task, especially for those Member States which have not yet even transposed the Directive, and we know that the budgets are tight, that political priorities may change and that it requires a joint effort from Member States and the national authorities and civil society organisation as well as the Commission and other European institutions. However, supporting and protecting victims of crime is one of our European fundamental values. In a society based on the rule of law where fair trial rights are the cornerstone of our criminal justice systems, victims must be given a voice and allowed to play an active role in criminal proceedings and they must receive the help and support they need.

We also insist on the fact that strengthening the rights of victims does have a positive impact not only on individual victims but also on society as a whole. The criminal justice systems – and ultimately national, regional and/or local governments – will benefit from more reported crimes thanks to victims' increased level of trust in the system. Meeting victims' needs before, during and after criminal proceedings can also considerably reduce the overall cost of crime. This includes tangible

¹⁹ http://ec.europa.eu/justice/grants1/open-calls/index_en.htm. In 2014 and 2015, the Commission funded projects on victims' rights of a total amount of approximately € 10,5 million covering a range of actions and topics, including training, awareness raising, research, support to civil society organisations, exchange of best practices.

costs in the economic and health sector as well as in the criminal justice system, and intangible costs, such as the victim's pain, suffering and reduction of quality of life. Victims who are respected, supported and protected will recover sooner, both physically and emotionally, and are also likely to become more actively involved in the proceedings, which increases the likelihood of successful prosecution and sentencing, which in turn reduces repeat offending and impunity.

Correct implementation and application of EU rules in this area give a solid basis for victims to claim their rights. However, implementation of these rules at national level is only the first step in a much longer process which should ultimately lead to change attitudes on the role victims should play in the criminal justice systems. We have made significant progress on the rights of victims in Europe the last few years. This is a historic achievement and a strong signal that Europe is delivering on the rights of citizens. With a continued political commitment and sufficient allocation of resources, the Victims' Rights Directive will be instrumental in making victims' rights become a tangible reality for all victims and their families in Europe.

II

LA DIRETTIVA 2012/29/UE: DIRITTI MINIMI DELLA VITTIMA NEL PROCESSO PENALE *

di Marta Bargis e Hervé Belluta

SOMMARIO: 1. La costruzione di uno statuto garantistico per le vittime di reato. – 2. La definizione di «vittima». – 3. Il diritto della vittima di comprendere e di essere compresa. – 4. Il diritto della vittima di ottenere informazioni: premessa. – 5. *Segue*: le informazioni sulle tipologie di assistenza e il diritto di accesso ai servizi di assistenza. – 6. *Segue*: le informazioni sulle procedure per presentare denuncia, i diritti al momento della denuncia e il diritto di ottenere informazioni sul proprio caso. – 7. *Segue*: le informazioni sui diritti alla difesa tecnica, alla interpretazione e alla traduzione e l'ambito operativo di tali diritti. – 8. *Segue*: le informazioni sull'accesso al risarcimento e sul rimborso delle spese e i diritti in tema di rimborso delle spese, di restituzione dei beni sequestrati e di decisione sul merito del risarcimento in sede penale. – 9. *Segue*: le informazioni sui servizi di giustizia riparativa disponibili e le garanzie assicurate in tale contesto. – 10. La partecipazione della vittima al procedimento penale. – 11. *Segue*: le vittime straniere. – 12. Il diritto alla protezione: profili generali. – 13. *L'individual assessment*. – 14. Vittime con particolari esigenze di protezione e rito penale. – 15. Le vittime minori d'età. – 16. Riflessioni finali.

1. *La costruzione di uno statuto garantistico per le vittime di reato.*

La direttiva 2012/29/UE del Parlamento europeo e del Consiglio, del 25 ottobre 2012¹, che istituisce norme minime in materia di diritti, assistenza e protezione delle vittime di reato, rappresenta il più evoluto e ampio strumento normativo dell'Unione in tema di vittime. La direttiva segna certamente un fondamentale traguardo, ma soprattutto rap-

* Sebbene il contributo sia frutto della riflessione comune degli Autori, Marta Bargis ha scritto i § 3-9, Hervé Belluta i § 1-2 e i § 10-16.

¹In G.U.U.E. L 315 del 14 novembre 2012.

presenta un punto di partenza, una sfida: traguardo rispetto alla decisione quadro 2001/220/GAI, che infatti sostituisce; punto di partenza e sfida per gli Stati membri, chiamati ad una verifica, potenzialmente anche “dolorosa”, dei propri sistemi penali, onde comprendere quanto i modelli interni siano aggiornati e quanto permeabili alle esigenze di un nuovo attore della scena, la vittima².

Non si può dubitare, dati alla mano, che una buona parte dell’azione normativa eurounitaria si sia concentrata, negli ultimi quindici anni, sulla costruzione di uno spazio comune di libertà, sicurezza e giustizia gravitante intorno all’idea di riconoscere e proteggere la vittima di condotte criminali³. Il binomio libera circolazione delle persone-sicurezza, difatti, ha orientato l’asse delle priorità dell’Unione su istanze vagamente securitarie, finendo per posticipare il momento in cui dedicarsi all’ultimo componente dello SLSG, quella “giustizia” che principalmente ruota intorno alla figura e ai diritti dell’imputato⁴.

²Per un quadro generale v. L. LUPÁRIA (ed.), *Victims and criminal justice. European standards and national good practices*, Wolters Kluwer, 2015; in precedenza, G. GIUDICELLI-DELAGÉ-C. LAZERGE (eds.), *La victime sur la scène pénale en Europe*, Presses Universitaires de France, 2008.

³In argomento, S. ALLEGREZZA-H. BELLUTA-M. GIALUZ-L. LUPÁRIA, *Lo scudo e la spada. Esigenze di protezione e poteri delle vittime nel processo penale tra Europa e Italia*, Giappichelli, 2012; C. AMALFITANO, *L’azione dell’Unione europea per la tutela delle vittime di reati*, in *Dir. Un. eur.*, 2011, p. 643; D. SAVY, *La vittima dei reati nell’Unione europea. Le esigenze di tutela dei diritti fondamentali e la complementarietà della disciplina penale e civile*, Giuffrè, 2013.

⁴A valle della *Risoluzione del Consiglio del 30 novembre 2009 relativa a una tabella di marcia per il rafforzamento dei diritti procedurali di indagati o imputati in procedimenti penali* (in *G.U.U.E.* C 295 del 4 dicembre 2009), si vedano la direttiva 2010/64/UE, del 20 ottobre 2010, in *G.U.U.E.* L 280 del 26 ottobre 2010, sul diritto all’interpretazione e alla traduzione nei procedimenti penali; la direttiva 2012/13/UE, del 22 maggio 2012, in *G.U.U.E.* L 142 del 1° giugno 2012, sul diritto all’informazione nei procedimenti penali, e la direttiva 2013/48/UE, del 22 ottobre 2013, in *G.U.U.E.* L 294 del 6 novembre 2013, sul diritto di avvalersi di un difensore nel procedimento penale e nel procedimento di esecuzione del mandato d’arresto europeo. Il “blocco” di nuove direttive, poi, conferma il *trend* indicato in testo: cfr. la direttiva (UE) 2016/343, del 9 marzo 2016, in *G.U.U.E.* L 65 dell’11 marzo 2016, sul rafforzamento di alcuni aspetti della presunzione di innocenza e del diritto di presenziare al processo, la direttiva (UE) 2016/680 del 27 aprile 2016, in *G.U.U.E.* L 119 del 4 aprile 2016, riguardante la tutela delle persone fisiche in rapporto al trattamento dei dati personali da parte delle autorità a fini di prevenzione, indagine, accertamento e perseguimento dei reati, e la direttiva (UE) 2016/800, dell’11 maggio 2016, in *G.U.U.E.* L 132 del 21 maggio 2016, sulle garanzie procedurali per i minori indagati o imputati nei procedimenti penali. Da ultimo, v. la

Riguardando la decisione quadro 2001/220/GAI, pare che molto sia cambiato. Non tanto perché allora il Consiglio dell'Unione europea avesse di mira prima di tutto l'inclusione della vittima nelle dinamiche processuali, attraverso la richiesta agli Stati di riconoscerle un «ruolo effettivo e appropriato» nel proprio sistema giudiziario (art. 2 § 1)⁵; quanto perché traspariva (dai considerando) una certa fiducia nella possibilità che l'obiettivo prefissato potesse raggiungersi grazie ad uno sforzo di ravvicinamento delle legislazioni locali in materia.

Dovendo trattare «le esigenze della vittima in maniera globale e coordinata, evitando soluzioni frammentarie o incoerenti» (considerando n. 5), foriere di ulteriori pregiudizi più che di aiuto alle vittime, l'Unione sottolineava quanto fosse importante che gli Stati membri «ravvicin[assero] le loro disposizioni legislative e regolamentari», allo scopo di offrire alle «vittime della criminalità, indipendentemente dallo Stato membro in cui si trov[assero], un livello elevato di protezione» (considerando n. 4). Non solo: «ravvicinare le norme e le prassi relative alla posizione e ai principali diritti della vittima» avrebbe dovuto riguardare altresì la capacità del sistema, inteso nella sua «unità europea», di salvaguardare «la dignità, [il] diritto di informare e di essere informata, [il] diritto di comprendere e di essere compresa, [il] diritto di essere protetta nelle varie fasi del processo e [il] diritto di far valere lo svantaggio di risiedere in uno Stato membro diverso da quello in cui il reato» si fosse verificato (considerando n. 8).

Al netto dei margini minimi, tipici di uno strumento legislativo dell'ex terzo pilastro, di incidenza diretta sulle normative nazionali, l'auspicio della decisione quadro citata, pur contemplando lo strumento cooperativo tra Stati membri (art. 12), era orientato anzitutto nel senso di un mutamento culturale dei singoli legislatori, tale da favorire una progressiva penetrazione della figura e dei bisogni della vittima tra gli obiettivi della giustizia penale. Poi, nella complicata direzione di un rav-

direttiva (UE) 2016/1919, del 26 ottobre 2016, in *G.U.U.E.* L 297 del 4 novembre 2016, sull'ammissione al patrocinio a spese dello Stato per indagati e imputati in procedimenti penali e per le persone ricercate nell'ambito di procedimenti di esecuzione del mandato d'arresto europeo.

⁵ Tra altri, sul punto, v. L. LUPÁRIA-S. OROMÍ I VALL-LLOVERA, *Il diritto della vittima ad assumere un ruolo effettivo e appropriato nel sistema penale*, in T. ARMENTA DEU-L. LUPÁRIA (a cura di), *Linee guida per la tutela processuale delle vittime vulnerabili. Working paper sull'attuazione della Decisione quadro 2001/220/GAI in Italia e in Spagna*, Giuffrè, 2011, p. 7 s.

vicinamento delle legislazioni che favorisse la fiducia reciproca, il mutuo riconoscimento delle decisioni e la cooperazione, su un terreno sperimentale e meno “sensibile” di quello ancorato alle secolari tradizioni nazionali sui diritti della persona imputata.

Il fatto che – al di là delle iniziative di singoli Stati⁶ e di talune avanguardie giurisprudenziali della Corte di giustizia di Lussemburgo⁷ – la decisione quadro sia rimasta sostanzialmente inattuata conferma, dal canto suo, il fallimento, sino ad oggi, della via del ravvicinamento normativo, oscurato, come noto, dal più agile meccanismo del mutuo riconoscimento⁸.

Anche in quest'ordine di idee va letta la direttiva 2012/29/UE, alle cui spalle si collocano, oltre la decisione quadro del 2001, gli auspici del Programma di Stoccolma⁹ e la c.d. “tabella di marcia di Budapest” del 2011¹⁰, nonché (a lato) le numerose direttive del Parlamento europeo e del Consiglio che, da diverse angolazioni, hanno come obiettivo costan-

⁶Per esempio, in Francia la legge n. 2000-516 del 15 giugno 2000, «*renforçant la présomption d'innocence et les droits des victimes*» (con la quale è stato anche inserito un articolo preliminare al codice di rito penale, ove si prevede, al § 2, che «*L'autorité judiciaire veille à l'information et à la garantie des droits des victimes au cours de toute procédure pénale*») è addirittura antecedente alla decisione quadro 2001/220/GAI.

⁷Il riferimento corre alla nota sentenza Pupino (Corte giust., 16 giugno 2005, C-105/03), con la quale la Corte di giustizia, in un caso sollevato dall'Italia, ha affermato l'obbligo, per il giudice locale, di interpretare il diritto interno in modo conforme rispetto ad una fonte dell'*ex terto* pilastro. Tra molti, cfr. S. ALLEGREZZA, *Il caso Pupino: profili processuali*, in G. INSOLERA-V. MANES (a cura di), *L'interpretazione conforme al diritto comunitario in materia penale*, BUP, 2007, p. 53 s.; L. LUPÁRIA, *Una recente decisione della Corte di giustizia sull'allargamento delle ipotesi di audizione del minore in incidente probatorio*, in *Cass. pen.*, 2005, p. 3541 s.; V. MANES, *L'incidenza delle «decisioni-quadro» sull'interpretazione in materia penale*, *ivi*, 2006, p. 1150 s.

⁸Su questa linea interpretativa si pone anche M. SIMONATO, *Deposizione della vittima e giustizia penale*, Cedam, 2014, p. 90 s. Di recente, fa il punto sul principio del mutuo riconoscimento (con attenzione rivolta alla protezione delle vittime) C. AMALFITANO, *Unione europea e principio del reciproco riconoscimento delle decisioni penali*, in H. BELLUTA-M. CERESA-GASTALDO (a cura di), *L'ordine europeo di protezione. La tutela delle vittime di reato come motore della cooperazione giudiziaria*, Giappichelli, 2016, p. 21 s.

⁹Come noto, si tratta del programma quadriennale (2010-2014) elaborato dal Consiglio europeo (Un'Europa aperta e sicura al servizio e a tutela dei cittadini), in G.U.U.E. C 115 del 4 maggio 2010.

¹⁰Cfr. *Risoluzione del Consiglio del 10 giugno 2011 relativa a una tabella di marcia per il rafforzamento dei diritti e della tutela delle vittime, in particolare nei procedimenti penali*, in G.U.U.E. C 187 del 28 giugno 2011.

te quello di creare le condizioni, nell'ambiente eurounitario, per una tutela sempre più *tailored* sulle variabili figure di vittime di reato¹¹.

Pur in un quadro istituzionale alquanto evoluto, a valle del Trattato di Lisbona, e con la più efficace veste della direttiva, la fonte in esame si fa erede dell'esperienza del 2001 nell'assumere come obiettivo centrale quello di creare, intorno alla vittima di reato – la cui definizione è parte dei compiti della direttiva e si riflette sugli obblighi attuativi degli Stati membri (Capo 1, artt. 1 e 2 direttiva 2012/29/UE)¹² –, un *poker* di diritti costituito da informazione-assistenza-partecipazione-protezione, corrispondenti, grosso modo, ai primi quattro capi (dei sei) che la compongono.

Prima che con la propria struttura, la direttiva “parla” attraverso i considerando, qui alquanto numerosi e dettagliati, a testimoniare uno sforzo politico di convergenza verso *goals* non così scontati: primo fra tutti, il messaggio-simbolo della direttiva, secondo cui «un reato è non solo un torto alla società, ma anche una violazione dei diritti individuali delle vittime». Un'affermazione di carattere, che avrebbe potuto risultare persino rivoluzionaria, se solo si fosse detto che un reato lede prima i diritti individuali della vittima che lo subisce, beni fondamentali come la vita, la libertà, l'integrità o la dignità, solo dopo – essendo la persona-vittima parte di una società – trasformandosi in un'offesa collettiva.

Un ulteriore balzo in avanti rispetto al 2001 si verifica quando la direttiva 2012/29/UE, amplificandone la rilevanza, determina la corretta sequenza dei diritti di cui deve fruire la vittima: a monte della possibilità che essa si affacci alla scena penale si colloca il bisogno di essere compresa e di comprendere la lingua parlata dalle autorità e nel processo¹³. Un'esigenza profondamente radicata nell'idea stessa di fiducia nelle istituzioni, direttamente proporzionale al livello di mobilità “libera” delle persone tra gli Stati dell'Unione europea, non meno che alla sempre crescente densità dei flussi migratori (considerando n. 10 alla direttiva).

¹¹ Il richiamo investe, in particolare, la direttiva 2011/36/UE, concernente la prevenzione e la repressione della tratta di esseri umani e la protezione delle vittime (in *G.U.U.E.* L 101 del 15 aprile 2011), la direttiva 2011/99/UE, sull'ordine di protezione europeo (in *G.U.U.E.* L 338 del 21 dicembre 2011), e il regolamento (UE) n. 606/2013, relativo al riconoscimento reciproco delle misure di protezione in materia civile (in *G.U.U.E.* L 181 del 29 giugno 2013).

¹² V. *infra*, § 2.

¹³ In tema v. *infra*, § 3.

Comprensione e informazione: un binomio inscindibile che, come per qualsiasi altro attore o comparsa nel processo penale, determina in concreto le condizioni di partecipazione e soprattutto la sottostante consapevolezza dei diritti e dei poteri di cui si è titolari (considerando n. 21 e 26). Effettività che alloggia in parte nella capacità che i sistemi locali hanno di garantire agli stranieri interpretazione e traduzione degli atti e delle scadenze processuali (considerando n. 34 e seguenti). Partecipare, per la vittima, non significa solo poter essere presente (o, qualora lo preferisca, assente), ma letteralmente prendere parte, contribuire davvero allo svolgimento dei processi: ancor più determinante diviene questa esigenza se si pensa che alla direttiva non sfugge quanto le dinamiche alternative o complementari di risoluzione di conflitti interindividuali, come le diverse forme di mediazione e riparazione che affollano l'universo della *restorative justice*, debbano le proprie probabilità di successo alla consapevolezza delle decisioni da prendere e alla comprensione reciproca tra le parti (considerando n. 46).

Infine, il piano della protezione: un'esigenza, questa, in qualche misura trasversale, che si impone anche prima e al di là del processo, persino indipendentemente dall'aver presentato denuncia alle autorità competenti (considerando n. 40), ma che poi trova voce compiuta quando la direttiva tratteggia il profilo di persona con particolari esigenze di protezione. Rispetto alla decisione quadro del 2001, il cui art. 8 si occupava in generale del diritto alla protezione, individuandovi un bisogno tanto di «sicurezza» e di «tutela dell'intimità della vita privata», quanto di tutela della vulnerabilità dalla forza dei metodi dell'accertamento processuale (§ 3 e 4), il passo è davvero epocale.

Il pericolo da contenere viene identificato nella vittimizzazione secondaria e ripetuta: a valanga, dal reato alla sua reiterazione, all'intimidazione funzionale ad abortire eventuali iniziative di denuncia, alla ritorsione contro l'accesso della vittima alla giustizia. Ma esiste anche una vittimizzazione secondaria "da processo", scaturente dalla partecipazione della vittima alle dinamiche dell'accertamento penale (considerando n. 53).

In generale, la vulnerabilità presunta lascia spazio all'*individual assessment* (considerando n. 55 e seguenti), che diviene lo strumento di identificazione personale della vittima, presupposto di un altrettanto personale trattamento da parte delle autorità e dei servizi di assistenza, nonché in rapporto al processo penale. Capire a fondo chi sia la vittima serve anzitutto alla vittima, che così si sente meglio compresa e tende a