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### REVERSAL OF ACQUITTAL ON APPEAL: FACT FINDING AND THE RIGHT TO BE HEARD\*\*

*ABSTRACT. The recent pronouncement of the European Court of Human Rights in the case Maestri v. Italy elevated the examination of the defendant on appeal to an indispensable step before overturning an acquittal into a conviction. It was ruled, in fact, that a mere chance to be heard is not enough, but a specific summons to appear before the Court of Appeal to make the examination is necessary; otherwise, the decision is unjust. One must ask oneself, then, what significance this rule assumes in the perspective of a legal conception of evidence of European matrix. If, that is, the defendant's right to be heard takes on the value of a procedural defence guarantee as enshrined in Article 6 ECHR, or if, rather, it becomes something more: an epistemological rule addressed to the judge to ensure the reliability of the judgement. When reconstructed as an epistemological rule, the right of the accused to be heard by the appellate Court escapes the balancing game with the other guarantees, also established by the European Court in its holistic view of a fair criminal trial. However, due account must be taken of the risk that such a cognitive function of this right may lead to negative inferences being drawn from the silence of any defendant who does not wish to undergo the examination. This feeling of unease, which is confirmed by the jurisprudence of the European Court, should, however, be allayed by the recent directive on the presumption of innocence, which expressly prohibits drawing evidential indications from the silence of the defendant.*

**CONTENT.** 1. New developments in European case law on the renewal of the trial evidentiary hearing on appeal – 2. The right to be heard as an epistemological rule in second instance proceedings – 3. The right to silence: a double-edged sword – 4. The necessary examination of the defendant: a new 'appetite for confession'?

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## 1. *New developments in European case law on the renewal of the trial evidentiary hearing on appeal*

In the eyes of the Italian procedural-criminalist, reflecting about criminal evidence from the perspective of the European Court of Human Rights implies reserving privileged attention to the renewal of the trial evidentiary hearing on appeal.

The importance of such a focus of investigation is immediately explained in the light of the considerable jurisprudential and regulatory repercussions which, in Italy, have been witnessed, in recent times, with reference to the institute of the renewal of the evidence on appeal, in the event of overturning the first instance judgement which acquitted the accused.

In compliance with the well-known European ruling on the case *Dan v. Moldova* of 2011, according to which «those who have the responsibility for deciding the guilt or innocence of an accused ought, in principle, to be able to hear witnesses in person and assess their trustworthiness»<sup>1</sup>, first the Italian Court of Cassation<sup>2</sup> and then the legislator<sup>3</sup> have, in fact, established that the appellate judge can only reform the acquittal after a renewal of the testimony, if the appeal concerns the evaluation of that oral evidence.

The basic idea is to prevent that a defendant acquitted at first instance at the outcome of a full cross-examination trial, based on the oral hearing of the evidence, can be convicted for the first time on appeal by merely re-reading the papers contained in

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<sup>1</sup> ECHR, 5 July 2011, *Dan v. Republic of Moldova*, in *www.echr.coe.int*; similarly see, ECHR, 28 February 2017, *Manoli v. Republic of Moldova*, *ivi*, p. 5; Id., Sez. I, 29 June 2017, *Lorefice v. Italy*, in «Cass. pen.», 2017, p. 4556. Among the scholars, see H. BELLUTA, *Overturning the acquittal in appello e giusto processo: la Corte europea esige la rinnovazione della prova*, in «Riv. it. dir. proc. pen.», 2017, p. 886 ss.; A. CAPONE, *Dopo Dan c. Moldova. Per un processo di parti nell'appello penale*, in «Riv. dir. proc.», 2015, p. 1007 ss.; A. GAITO, *Verso una crisi evolutiva per il giudizio di appello. L'Europa impone la riassunzione delle prove dichiarative quando il p.m. impugna l'assoluzione*, in «Arch. pen.», 2012, 2, p. 1 ss.

<sup>2</sup> See, Cass., Sez. Un., 28 April 2016, Dasgupta, in «Cass. pen.», 2016, p. 3203; Id., Sez. Un., 19 January 2017, Patalano, in «Cass. pen.», 2017, p. 2666; Cass., Sez. Un., 4 April 2019, Pavan, in «CED Cass.», rv. 255112.

<sup>3</sup> Reference is made to Law No. 103 of 2017, which inserted into the Italian Code of Criminal Procedure paragraph 3-bis of the Code of Criminal Procedure in Article 603, pursuant to which: «in the event of an appeal by the public prosecutor against a judgment of acquittal on grounds relating to the assessment of declaratory evidence, the judge shall order the renewal of the trial investigation».

the trial file. To borrow the words of the European Court, in fact, such a conviction, without direct hearing of witnesses, would be unjust ‘as a matter of fair trial’. Furthermore, because of the structure of the appellate remedies in the Italian criminal system, the convicted person on appeal would find himself deprived of the possibility of submitting his conviction to a new examination of the merits<sup>4</sup>. The latter could only be challenged on grounds of legitimacy before the Court of Cassation, which cannot review the facts and the evaluation of evidence carried out by the lower court.

The adherence shown by the Italian system to the cornerstones of European case law on the subject of the orality of evidence on appeal was not, however, sufficient to spare Italy from further reproaches by the Strasbourg judges.

With the *Maestri* judgment of 8 July 2021, the European Court of Human Rights condemned the Italian State for violating Article 6 § 1 of the Convention, as the domestic Court of Appeal failed to renew the examination of the defendants acquitted at first instance and then convicted at second instance.

More specifically, the complaint made by the Strasbourg Court relates to the alleged insufficiency of the summons of the defendants to appear at the appeal hearing, as a means of enabling the defendants to be heard before the Court of appeal.

In the interpretation of the European Court, in fact, if the defendants do not appear at the trial, this does not amount to a tacit waiver on their part of the right to be heard before the appellate court. On the contrary, in the words of the Court, «the fact that a defendant had waived the right to attend the hearing did not in itself release an appellate court that conducted a full assessment of guilt or innocence from its duty to carry out a direct assessment of the evidence given in person by the defendant where the latter wished to maintain his or her innocence and had not explicitly waived the right to address»<sup>5</sup>. To this end, it becomes incumbent on the judicial authorities to adopt «all positive measures needed to guarantee the examination of the defendant»; first and foremost, the setting of a hearing, with a summons to the defendant, to hear the

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<sup>4</sup> On this point, see BELLUTA-L. LUPÁRIA, *La parabola ascendente dell'istruttoria in appello nell'esegesi "formante" delle Sezioni Unite*, in «Dir. pen. contemp. - Riv. Trim.», 3/2017, p. 159.

<sup>5</sup> See ECHR 16 July 2019, *Július Þór Sigurþórsson v. Island*.

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defendant even if he did not appear at the first hearing, did not ask to speak and did not oppose – through his defence counsel – that the Court of Appeal should decide on the merits of the case.

This is the only way, according to the European Courts, to fully guarantee the right of defence. For the effective protection of the latter, in adherence with the guarantees of a fair trial laid down in Article 6 ECHR, the mere opportunity offered to the defendant to speak last and make, if he wills, spontaneous statements is not sufficient. Such an institution, being left to the free initiative of the defendant, would not be even remotely comparable to the examination of the defendant by the trial court. The mere possibility for the defendant to make spontaneous statements does not, in fact, satisfy the court's obligation to hear the person concerned in person on facts and issues decisive for the ascertainment of his possible guilt.

## **2. *The right to be heard as an epistemological rule in second instance proceedings***

Such an obligation placed on appellate judges makes it interesting to ask, then, what is the meaning to be attributed to the defendant's hearing in the legal conception of evidence at the European level.

It seems clear, in fact, that the supranational court has here gone far beyond the limits of a reconfirmation of its own case law on the procedural fairness guarantees of the trial, in the broad sense connected with the physical presence of the defendant at his trial.

It is true that, in *Maestri v. Italy*, it is emphasized that the defendant's choice of not being examined must not be equivocal. This choice, like any determination by the defendant concerning his participation in the hearing, must also be, according to the Court, conscious and explicit. This refers back to that conception of the European fair trial as a subjective guarantee of the defendant<sup>6</sup>, the basis of which is precisely the

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<sup>6</sup> See S. QUATTROCOLO, *Partecipazione al processo e contraddittorio*, in <[www.laegislazionepenale.eu](http://www.laegislazionepenale.eu)>, 19.10.2020,

defendant's right to participate physically in the trial and to be heard by the judge<sup>7</sup>.

It is equally undeniable, however, in the perspective favoured by the ruling under consideration, that the hearing of the defendant also takes on a new and unprecedented value, which places it in direct relation with the judicial decision; therefore, becoming an indefectible step for the appeal judge called upon to overturn the acquittal into a conviction. Even before being a right of the accused, the hearing of the latter during the appeal proceedings represents an epistemological rule for the exercise of second instance jurisdiction. It is valid, that is, «as a rule imposing on the fact finder a certain cognitive attitude»<sup>8</sup>.

The proof is the link established by the European Court between the judge's obligation to proceed to summon the defendant for examination and the reliability of the ascertainment of the subjective elements of the crime charged. In this regard, it is pointed out that to correctly reconstruct the *suitas* of the criminal conduct, as an element of the allegation of guilt, it is necessary to verify the defendant's intention with respect to the facts charged against him<sup>9</sup>. This implies directly examining the accused person, so as to allow him to express his views on circumstances that are decisive for the correct formation of the judge's free conviction on the issue of liability<sup>10</sup>.

The change of step is of no small moment: the cognitive function attributed to the right to be heard opens, in fact, new horizons in the perspective of the European judgement of procedural fairness, on which our panel today is called upon to discuss.

We are well aware that, in recent years<sup>11</sup>, the holistic approach to the assessment

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p. 109.

<sup>7</sup> Above all, see ECHR 12<sup>th</sup> february 1985, *Colozza v. Italy* and ECHR 1<sup>st</sup> march 2006, *Sejdic v. Italy*. For a case-law overview, see A. PROCACCINO, *Informazione e consapevolezza dell'imputato per la presenza al suo processo. Suggestioni europee e problemi nazionali*, in <www.lalegislationepenale.eu> 16.2.2020.

<sup>8</sup> In these terms, F. PICINALI, *The Presumption of Innocence: a Deflationary Account*, in «Modern Law Review», 84, n. 4, 2021, p. 738.

<sup>9</sup> The link here is to the judgement ECHR, 22<sup>th</sup> November 2011, *Lacadena Calero v. Spain*, § 47.

<sup>10</sup> M. CAIANIELLO-S. TESORIERO, *Diritto di difesa e appello penale: vecchie e nuove coordinate dalla giurisprudenza della Corte Edu (a proposito di Maestri e altri contro Italia)*, in «Cass. pen.», 2021, p. 4091

<sup>11</sup> ECHR 15<sup>th</sup> december 2011, *Al-Khawaja e Tahery v. UK*, with notes by I. DENNIS, *Al Khawaja and Tahery v. United Kingdom, Commentary*, in «Criminal Law Rev», 2012, p. 376 ss.; in the same perspective see also ECHR 15<sup>th</sup>

of the individual case submitted to the Strasbourg Court has changed dangerously<sup>12</sup>. From being a criterion used to assess the presence of a violation of fairness in the light of the specific characteristics of the case, the ‘as a whole’ test operated by the Court has turned into a technique aimed at remedying an already established violation of the rights enshrined in Article 6 ECHR<sup>13</sup>. This is possible whenever, precisely in the light of the holistic assessment of fairness, the individual right violated is adequately compensated for by other conventional guarantees.

From this perspective, the rights recognised to the accused by Article 6 ECHR enter a balancing game: even in the face of a breach of fairness in the procedure, the existence of other guarantees for the defendant provided for by domestic law succeeds in saving the overall fairness of the case.

This approach is hardly reassuring in terms of the effective protection of procedural rights. Without mincing words, we run the risk of tolerating the loss of a fundamental guarantee merely because the defendant has been able to exercise a different one<sup>14</sup>. A risk that becomes even more severe if one goes so far – and the European Court has already done that<sup>15</sup> – as to balance the rights of the defence against requirements of a different nature, such as those protecting the interests of justice in the repression of criminal phenomena. To pose these latter requirements as compensatory factors for the infringement of a defense guarantee means, in fact, to legitimate a complete annihilation of the individual’s guarantees before the exercise of public powers. This, according to a logic distorting the very function historically exercised by the judges of the European Court, namely that of guardians of the individual against undue pressure and arbitrariness on the part of the State<sup>16</sup>.

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december 2015, *Schatschaschwili, v. Germania*; ECHR, 10<sup>th</sup> november 2020, *Dan v. Republic of Moldova n. 2*, with comment by A. MANGIARACINA, *Dan v. Moldavia 2: la rinnovazione in appello tra itinerari sperimentati e cedimenti silenziosi*, in «Arch. pen.», 2020, p. 711 ss.

<sup>12</sup> See CAIANIELLO, *You Can't Counterbalance What You Want*, in «European Journal of Crime, Criminal Law and Criminal Justice», vol. 25, 2017, p. 285.

<sup>13</sup> See R. KOSTORIS, *Per una “grammatica” minima dell’equità processuale*, in «Riv. it. dir. proc. pen.», 2020, p. 1677.

<sup>14</sup> See, again, KOSTORIS, *ibid.*

<sup>15</sup> ECHR 15<sup>th</sup> december 2011, *Al-Khawaja e Tahery v. UK*, cit.; ECHR, 15<sup>th</sup> december 2015, *Schatschaschwili v. Germania*, cit.; ECHR 13<sup>th</sup> september 2016, *Ibrahim et others v. UK*.

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Within such a scenario, then, one can well understand the innovative scope of a conception of the right to be heard as an epistemological rule, rather than as a guarantee understood in a subjective sense: consequently, it is removed from the game of balancing the guarantees pertaining to the European fair trial. Any breach of it, far from being justified by compensatory factors relevant to the holistic assessment of the fairness of the procedure, would sanction its injustice once and for all.

### **3. *The right to silence: a double-edged sword***

The transformation of the right to be heard from an individual guarantee to an epistemological rule calls for mistrust on the part of the Italian jurist.

Perhaps because of our habit of coming to terms with an ‘omnivorous’ vision of the judge’s role<sup>17</sup>, typical of the mixed system founded on the myth of the search for material truth<sup>18</sup>, we are inclined to view with suspicion any attempt to make the individual’s guarantees objective.

It is difficult, in fact, to shake off the heavy tradition of those doctrines which, at the time of the 1930 Code of Criminal Procedure, affirmed that the right to remain silent does not entail a limitation on the principle of the judge’s *intime conviction*. And, indeed, they went so far as to recognise the silence of the accused as having real probative value, whenever the latter, being able to provide information useful to his defence, refused to cooperate<sup>19</sup>.

On closer inspection, this is a concern that remains current, even in the aftermath of the transition from a mixed-inquisitorial system to a system that tends to

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<sup>16</sup> See A. BOLDRIN, *Approccio compensativo e overall fairness nella giurisprudenza della Corte edu, tra relativismo delle garanzie e altre derive*, in <www.lalegislazionepenale.eu>, 26.10.2021.

<sup>17</sup> F. CORDERO, *Diatribes sul processo accusatorio*, in *Ideologie del processo penale*, 1966, p. 201.

<sup>18</sup> See M. NOBILI, *Il principio del libero convincimento del giudice*, 1974 and G. DE LUCA, *La cultura della prova e il nuovo codice di procedura penale*, in *Studi in onore di Giuliano Vassalli. Evoluzione e riforma del diritto e della procedura penale*, vol. II, edited by M.C. Bassouni, A.R. Latagliata, A.M. Stile, Giuffrè, Milan, 1991, p. 201.

<sup>19</sup> L. MARAFIOTI, *Scelte autodifensive dell’indagato e alternative al silenzio*, Giappichelli, Turin, 2000, p. 317 ss.

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be an adversarial one. Proof of this can be seen in the parabola that has affected, in the new code, the rules of cross-examination: born as a right of the parties, it has gradually transformed into an essential component of judicial activity, to the point of representing a veritable method of ascertaining the facts in the trial. A transformation that has, however, risked – and still risks – to crush the suspect’s right to silence, transforming it, in turn, from an individual’s instrument of guarantee into an «odious and mocking privilege»<sup>20</sup>, which hinders the demands of truth.

Bear in mind that it is rare for a ruling to go so far as to openly deny the procedural value of *nemo tenetur se detegere*. Nor does jurisprudence ever openly affirm the existence of a burden of cooperation on the part of the suspect with respect to the reconstruction of the fact. As a matter of principle, in fact, it is reiterated that the defendant has the right to remain silent and to lie, and that the exercise of the right to silence can never take on negative value. However, sometimes emphasising the agonistic component of cross-examination and the active role reserved for the parties in the new code, it is then stated that it is in the interest of the suspect to contribute to the presentation of alternative hypotheses to that formulated by the prosecution and that, therefore, the judge’s conviction may be based on evidence in respect of which silence may serve as corroborating element or take on circumstantial value.

Here in the background it seems possible to glimpse the *trait d’union* that links the inquisitorial tradition (which saw silence as an implicit admission of guilt), with the mixed trial and the ‘Italian-style’ adversarial model: a tradition that never manages to free itself entirely from the ‘double-edged’ value of silence (or, as the Germans say, from its *zweischneidig* nature).

In other words, our tradition has difficulty departing from the common-sense maxim – whose fortune is due to the influence of the doctrine of civil procedure<sup>21</sup> –

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<sup>20</sup> MARAFIOTI, *Scelte autodifensive dell’indagato e alternative al silenzio*, p. 369.

<sup>21</sup> See, in particular, A. CARRATTA, *Il principio della non contestazione nel processo civile*, Giuffrè, Milan, 1995. On the influence of such procedural theories in our system, especially in the summary trial, E. AMODIO, *Il modello “accusatorio” statunitense e il nuovo processo penale italiano*, in *Il processo penale negli Stati Uniti d’America*, edited by Amodio and Bassiouni, Giuffrè, Milan, 1988, XLII; G. PAOLOZZI, *Il giudizio abbreviato*, Cedam, Padua, 1991, p. 79; D. SIRACUSANO, *La decisione allo stato degli atti: un pesante limite del giudizio abbreviato*, in *Introduzione allo studio del nuovo processo penale*, Giuffrè, Milan, 1989, p. 220; E. SOMMA, *Il giudizio abbreviato*, in *I riti differenziati nel nuovo*



according to which «he who does not contest the accusation implicitly recognises the truth of the adversary's assertions», as well as from the empirical datum according to which 'as a rule, the fact that is not contested is true».

One must be very careful on this point: to assign appreciable meanings from a legal point of view to negative or neutral elements, such as the lack of reaction to the allegations of others, is to transform the 'non-contestation' into an instrument influencing the judge's decision and the silence of the accused into an instrument of proof. This makes, in some ways, current the historical path of the *ficta confessio*<sup>22</sup>, which from being an essential basis for the Enlightenment reaction against torture, ended up, over time, replacing its probative scope without recourse to any physical torment. In short, even in this case, a theoretical approach that originated as an obvious guarantee for the defendant has, in the end, turned into its opposite. And the negative effects of this tendency have persisted even in the current reality of criminal proceedings and well beyond national borders.

#### **4. *The necessary examination of the defendant: a new 'appetite for confession'?***

When I say that this problem transcends national borders, I am not only referring to the possibility that attitudes similar to those denounced in our system might occur in other more markedly adversarial systems. Already 30 years ago, John H. Langbein reminded us how the early adversary system was little respectful of the right to silence and favoured the «accused speaks trial» model, in which the accused, to be acquitted, necessarily had to face the jury<sup>23</sup>. Things have obviously changed, and that model has been replaced by what Langbein calls 'testing the Prosecution theory»; a model that has now become commonplace in European countries. The example given

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*processo penale (Atti del Convegno)*, edited by Dalia, Jovene, Naples, 1989, p. 122. See also MARAFIOTI, *La giustizia penale negoziata*, Giuffrè, Milan, 1992, p. 359 ff.

<sup>22</sup> See P. MARCHETTI, *Testis contra se. L'imputato come fonte di prova nel processo penale dell'età moderna*, Giuffrè, Milan, 1994, p. 202 ff.

<sup>23</sup> See J.H. LANGBEIN, *The Origins of Adversary Criminal Trial*, Oxford University Press, Oxford, 2003.

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by the great American scholar sounds, however, as a warning to pay the utmost attention to erosions – overt and covert – of the right to silence, regardless of the legal traditions and trial models adopted in a given country.

If we then raise our eyes to the European Court of Human Rights, we have no difficulty in realising that the scepticism of the Italian jurist becomes the scepticism of the European jurist.

Attention goes, more appropriately, to the Court's ambiguous orientations on the issue of the protection of the right to silence and, more generally, on the *nemo tenetur se detegere* guarantee. It is true that, on a number of occasions, the Strasbourg judges have followed guarantee principles, denying that probative indications or punitive consequences can be drawn from the silence or non-cooperation of the defendant<sup>24</sup>. But it is equally true that on numerous occasions the Court has tolerated limitations on the right to silence, especially when the facts and circumstances brought before the court required – one might say imposed – a response from the defence.

Emblematic in this perspective is *Murray v. United Kingdom*<sup>25</sup>, where the Court stated: «It [...] obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution»<sup>26</sup>.

Statements such as the one enunciated in the Murray case bring to mind those old positions of German doctrine of the last century, which recognised in the head of the parties a burden of “taking a position”<sup>27</sup>, sometimes seen as an expression of the

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<sup>24</sup> ECHR, 25 February 1993, *Funke v. France*, § 44; ECHR, 3 May 2001, *J.B. v. Switzerland*, § 63-71; ECHR, 5 April 2012, *Chambaz v. Switzerland*, §§ 50-58.

<sup>25</sup> ECHR, 8 February 1996, *John Murray v. United Kingdom*, § 49. On the same line, ECHR, 17 December 1996, *Saunders v. United Kingdom*, § 68; ECHR, 13 September 2016, *Ibrahim v. United Kingdom*, cit., § 274; ECHR, 29 June 2007, *O'Halloran e Francis v. United Kingdom*, §§ 53-55; ECHR, 21 December 2000, *Heaney e McGuinness v. Ireland*, §§ 54-55; ECHR, 10 March 2009, *Bykov v. Russia*, § 92.

<sup>26</sup> On this topic see A. ASHWORTH, *Self-incrimination in European Human Rights Law – A Pregnant Pragmatism*, in «30 Cardozo L. Rev.» (2008-2009), p. 751.

<sup>27</sup> It is the well-known *Einlassungslast* theory, which is due to J. GOLDSCHMIDT, *Der prozess als Rechtslage: eine Kritik des prozessualen denkens*, Springer, Berlin-Heidelberg, 1925, p. 99.

dispositive power connected to the substantial situation brought before the court<sup>28</sup>. Positions – it must be clearly stated – that are now obsolete even in the field of civil proceedings and that certainly cannot find their way into the field of criminal proceedings<sup>29</sup>.

The reference to situations requiring a response from the defence, however, opens up a wide scenario of hypotheses in which the defendant is in a privileged position regarding the knowledge of certain circumstances. One thinks of the contribution of the defendant to the reconstruction of the fact, when the issue to be ascertained is the subjective element of the crime – as in the *Maestri* case – or a cause of justification; or one thinks, again, of the delicate issue of *alibi* proof. All situations in which the defendant's cognitive contribution may be valuable or decisive, because of his 'closeness to the evidence'. And it is difficult to imagine that such elements could emerge at trial outside the defendant's allegation or declarative contribution.

However, one should never confuse the defendant's burden of attaching exculpatory evidence with the legal burden of proof on the prosecution. In fact, it is one thing to recognise that the defendant has an interest in alleging circumstances useful to his defence or to the reconstruction of the fact (burden of production)<sup>30</sup>; it is quite another to shift onto him the burden of proving the truth of the fact alleged (burden of persuasion) or, indeed, his innocence.

Such reversals of the burden of proof fatally clash with the presumption of innocence, which places the entire burden of proving the constituent elements of guilt 'beyond any reasonable doubt' on the prosecution. The sharing of burdens in the criminal trial, according to the cornerstones of the presumption of innocence, therefore responds to obvious political reasons, demanding the highest possible standard for the assertion of guilt in order to avoid the risk of an innocent person being convicted<sup>31</sup>.

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<sup>28</sup> For useful references, see CARRATTA, *cit.*, p. 109.

<sup>29</sup> For an in-depth study of the topic, MARAFIOTI, *Scelte autodifensive*, *cit.*, p. 324 ss.

<sup>30</sup> See E.M. CATALANO, *La prova d'alibi*, Giuffrè, Milan, 1998, p. 67 ss. On the allocation of evidential burdens as a risk allocation technique, see A.A.S. ZUCKERMAN, *The Principles of Criminal Evidence*, Clarendon, Oxford, 1989, p. 105 ff.

<sup>31</sup> See F. CAPRIOLI, *L'accertamento della responsabilità penale "oltre ogni ragionevole dubbio"*, in «Riv. it. dir. e proc.

This is, on closer inspection, an apportionment that is not insensitive to the difficulties that the prosecution may encounter in proving what we in Italy call ‘impeding facts’ (such as, for example, a cause of justification). With a view to demanding a proactive demeanour from the subject who is generally in the best position to prove the existence of a given fact, the activation of the person concerned is required. This is a form of empowerment of the subject considered closest to the evidence, which would, however, violate the presumption of innocence if the standard required for this type of fact were equated with the standard concerning guilt<sup>32</sup>.

What, then, are the ways out?

The fears aroused by the examination of the case law of the European Court of Human Rights, which resurfaced following the *Maestri* case, could be mitigated, within the Union, by the rules contained in Directive 2016/343/EU on the presumption of innocence, the final stage of a reform path that, in our country, has been hailed as a new deal of the criminal trial guarantee<sup>33</sup>.

It reassures, in fact, the clear statement expressed in Article 7(5), according to which: «The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned».

However, further criticism can be made. Although the preambles of a EU act do not have binding legal force, as they cannot derogate from the provisions of the act itself, one cannot remain indifferent to the statements contained in preamble 28, which, after re-proposing the exact same wording as Article 7(5), specifies, however: «This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected».

It is clear, in fact, that such a clause runs the risk of reviving, in derogation of

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pen.», 2009, vol. I, p. 75; CATALANO, *Ragionevole dubbio e logica della decisione*, Giuffrè, Milan, 2016, p. 204 ff.; O. MAZZA, *Il ragionevole dubbio nella teoria della decisione*, in «Criminalia», 2012, p. 359 ff.; G. PIERRO, *Accertamento del fatto e colpevolezza al di là di ogni ragionevole dubbio*, Aracne, Rome, 2011, p. 30 ff.

<sup>32</sup> See G. GAROFALO, *La diversificazione degli standard di prova nel processo penale e nel rapporto fra giurisdizioni*, in «Cass. pen.», 10/2020, p. 3897.

<sup>33</sup> In these terms, O. MAZZA, *Presunzione d'innocenza e diritto di difesa*, in «Dir. pen. proc.», 12/2014, p. 1401.

what is provided for in the text of the Directive, those same rules that allow evidentiary inferences – direct or indirect – to be drawn from the silence of the defendant, whenever a response from him is to be expected. Or, again, those worrying distinctions between ‘proper’ and ‘improper’ coercion<sup>34</sup>, which risk legitimising a sort of ‘appetite’ for cooperation on the part of the accused, which bring to mind Michel Foucault’s fine reflections on the appetite for confession that pervades modern justice systems and which join inquisitorial and adversarial tradition and the adversarial model<sup>35</sup>.

Indeed, the great French philosopher reminds us of the existence of three fundamental reasons why the need for the accused’s contribution never loses its relevance and transcends geographical boundaries. The confession represents, in fact, an act of recognition of the sovereignty of the institution called upon to judge; a ‘contract of truth’ that allows the judge to know by virtue of indubitable knowledge; a punitive commitment, through which the accused accepts the punishment inflicted. Reflections that lead us – thanks to the chance given by this conference and the European Court of Human Rights – to reflect once again on the relevance of that Aristotelian paradox, which has been the subject of much discussion by American scholars<sup>36</sup>, which casts doubt on the real voluntariness of an action performed «out of fear of greater evils or in view of some good»<sup>37</sup>.

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<sup>34</sup> See G. LASAGNI, *Prendendo sul serio il diritto al silenzio: commento a Corte cost., ord. 10 maggio 2019, n. 117*, in «Dir. pen. cont.», 2/2020, p. 141.

<sup>35</sup> M. FOUCAULT, *Mal fare, dir vero. Funzione della confessione nella giustizia. Corso di Lovanio (1981)*, ed. F. Brion-B.E. Harcourt, transl. Zini, Einaudi, Turin, 2013. For extensive reflections on the French philosopher’s text, see Luparia-Marafioti (eds), *Confessione, liturgie della verità e macchine sanzionatorie. Scritti in occasione del Seminario di studio sulle ‘Lezioni di Lovanio’ di Michel Foucault*, Giappichelli, Turin, 2015. On the reasons for the enduring relevance of the confessional phenomenon, see LUPARIA, *La confessione dell’imputato nel sistema processuale penale*, Giuffrè, Milan, 2006, p. 1 ff.

<sup>36</sup> See. THOMAS III-BILDER, *Aristotle’s Paradox and Self-Incrimination Puzzle*, «Journ. Crim. L. & Crimin.», 82, 1991, p. 243.

<sup>37</sup> ARISTOTELE, *Etica nicomachea*, in *Opere*, vol. VII, Laterza, Bari, 1993, III, 49, 1, 1110a.

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