

Phenomenology of General Theory of Criminal Law: Between BARD's Evolution and Dialectical Synthesis

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Abstract

The expression “justice and punishment” considers the entire way that brings a verdict of innocence or guilty. The verdict is a result of an algorithmic sequence of acts. This is the logic of process and its essence is finding in the dialectical form between crime procedure and punishment. Criminal law is a fusion between two aspects: substantive law and procedural law in which this dialectical synthesis doesn't always implement because of the presence of the reasonable doubt. This paper wants to evidence the particular principles and reasons about a General theory in the civil law and common law. A general theory of law should include not only work focused on criminal law doctrine but also the role of the state in drawing its power to criminalize such as the justification for state of punishment. Criminal law is a product of the state. It's a creation of political community and the trial recovers political function, not only juridical. It's necessary researching in two theories the key to know the real face of the criminal science. In fact Theory of Trial and Theory of Punishment are the conditions for the dialectical conception of criminal law, that appears in three forms: Crime-Procedure(Justice)-Punishment. Criminal law depends on economic, social and political changes. Its function fails when law isn't useful for teaching people what is right or wrong to do under the threat of punishment. But in this case legal certainty is decisive for the application of penalty. In fact the difference between the legal systems of civil law and common law, respectively Italian and American, is based on the fact that Italian tradition has founded its thought also in an abstract language, much influenced by the Greek and Latin tradition. The Anglo-American systems instead think concretely and relate their every consideration with all that is perceptible with the senses. This conception necessarily affects the legal sector of a country, in particular the social sciences. The principles in the Constitutions of many countries in the world, are among the highest endowed with a level of humanity, but the risk of a real disease of the process generates a distrust of the law in the citizens. A question arises: if substantive and procedural law changes according to historical reality, is the problem the man or the system?

Keywords: precedent, reasonable doubt, legal certainty, punishment, human rights, reasonableness, rule of law

1. Introduction

Although Italy is a Country of Civil Law, the Court of Cassation fulfills a regulatory function² beyond the simple meaning of the norm, and its interpretations take and base that jurisprudential right that belongs to the common law systems³, with the relative differences. The greatest failure of a juridical system can be seen at a time when justice cannot balance the rights and interests violated thus to restore the social divide created, and as a consequence the human beings, with actions that are just as illegitimate towards other men, cause new rifts understood as a feeling of claiming those rights that aren't protected by justice.

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² This function, called Nomofilachia, is also performed by other courts of legitimacy such as the Council of State and the Court of Auditors which must comply with the constitutional principles and those established by the Constitutional Court. See art 65 Royal Decree-Law n. 12/1941 e C. Cost. n. 271/1991

³ G. Canzio, Nomofilachia e Diritto giurisprudenziale, in *Diritto penale contemporaneo*, n. 1/2017, pp. 1-6

General theory of criminal law⁴ is based on the assumption that substantive criminal law and procedural criminal law are closely linked by a dialectical synthesis between crime-trial and punishment⁵. This dialectic is implemented because of reasonable doubt⁶. The process brings to life what is only abstractly foreseen by the substantive penal law, makes it concrete, implements it and explains its effects. And this “vivification” takes place in an atmosphere without time and space such as the procedural ritual with its formalities and solemnities⁷. Time and space, which this dialectic reproduces only in the acts, which are performed to conform to the need for a reasonable duration of the process and for a more immediate protection of one's rights⁸. In fact, the process takes the form of a sequence of logically preordained acts in the double spatial and temporal dimension through the canon of reasonableness⁹.

2. The precedent

In order to understand this difficult feeling, but which man has always possessed as a selfish and solitary creature by nature¹⁰, it is necessary to formulate a general theory that is common to civil law and common law. The theory's premise is that the binding precedent fulfills the function of legal certainty. First of all, it has the merit of underlining in the decision the sensitivity and the degree of humanity of a judge and a jury, unlike a colder technicality of civil law systems that can also be considered a blind positivism or rationalism. Secondly, it is what comes closest to the concept of justice. If we were based in fact on the regulatory function of civil law would arise more and more complex interpretative problems that would not stick to the reality of the facts, but only to a masterful demonstration of legal reasoning, therefore purely theoretical and without concrete developments. Not to mention above all the Italian system, the procedural delays that make the Italian system perceived as the most complex in the world and the consequence is a risk for civil liberties¹¹. In the light of these considerations the penal discipline can also be considered empathy, psychology, emotionality, not only a set of written rules but also the result of binding jurisprudence¹² arising from the application of a principle in different circumstances or cases¹³.

3. Reasonable doubt: procedural doctrine

The example of this consideration is in the reasonable doubt (and in its most extreme reflexes in scientific proof) and in the different conception that the two systems have of it. In Italy, B.a.r.d.'s rule is more about the process, while in the US system it is more concerned with substantive law. This is confirmed by the well-known academic Alan Dershowitz and his example of the hunter. The hunter sees a distant object, which seems to be an animal. The hunter takes aim, but then begins to feel a strange feeling of discomfort in the bottom of the stomach: he does not know why, but he hesitates; Something tells him not to pull the trigger.

While he is trying to decide what to do, the distant object moves and the hunter sees that is a child. The example of Dershowitz is illuminating from the perspective of the General Criminal Theory and the component

⁴ The justification of criminal law is the imposition of a penalty, whose functions depend on the moral requirements that the laws of each legal system possess. “Legitimacy punishment is a question about legitimacy and limits of state power”. See Alice Ristoph, *The Thin Blue Line from Crime to Punishment*, 108 J. Crim. L. & Criminology 305 (2018), pp.329 ss.

⁵ The punishment always exists even in the case of acquittal of the accused, due to two concepts according to which the process can take the form of a punishment and the second of a more ethical value according to who unjustly blames must suffer a sanction, or according to who has the reasons to see that convicted person, in case of acquittal of the latter, will suffer a real penalty, understood as psychological and moral pain.

⁶ Cfr Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. Crim. L. & Criminology (2015), Hugo Adam Bedau, Bentham's Utilitarian Critique of the Death Penalty, 74 J. Crim. L. & Criminology 1033 (1983)

⁷ Regarding time, a premise is necessary. The legal event is a phenomenon that does not belong to space and time. We are in a process, in a ritual in which the subjects work in practical operations according to the practical procedure and the outcome depends on the technical rules applied. See F. Cordero, *Procedura penale*, nona edizione, Giuffrè, Milano, 2012, pp.305 ss

⁸ Sec. A. Longo, *Il sindacato di ragionevolezza in materia penale. Brevi riflessioni a partire da alcune ordinanze di rimessione alla Corte Costituzionale*, in *Archivio Penale*, n. 3/2017, pp. 1-18, G. M. Flick, *Costituzione e processo penale tra il principio di ragionevolezza ed uno sguardo verso l'Europa*, in *Astrid online*, 2009

⁹ S. Patti, *Ragionevolezza e clausole generali*, Milano, Giuffrè, 2016, p. 19 ss.

¹⁰ J. Rousseau (edited by Giacomo perticone), *Il contratto sociale*, Milano, Mursia, 2018, pp. 142

¹¹ G. Pecorella, *Una crisi annunciata. Lettera ad un giovane avvocato sul processo penale*, in *Archivio Penale* n. 3/ 2019, pp. 1- 10

¹² The Italian doctrine is quite agreed that between the two systems there is no longer a difference so abysmal because the precedent is common to both systems with the difference that in common law there is a use of written law, while in civil law of jurisprudence. See *Rivista Trimestrale di procedura civile*, *DeJure*, n. 3/2007 p.709 ss.

¹³ F. Bellomo *Il Metodo Scientifico*, in *Rivista Diritto e Scienza*, n. 1-2/2015

of the will. Reasonable doubt is therefore linked to feeling, emotion and reasoning. This is the point of synthesis between substantive law and procedural law. It is not only a procedural rule in evidence development as in Italy, but it concerns the emotional nature of the verdict, of the sentence.

If in the USA the judge has to worry about avoiding acquiring in the process dangerous evidence for the emotions of the jurors, in Italy we have to worry only about the correct respect of the procedural rules. If on the one hand we look beyond logic¹⁴, in Italy the evidence is the result of a logical-rational process that leaves no room for the feeling of humanity that the American juror can prove¹⁵. Emotionality and logic are two contradictory elements that can flow into the probative dialectic and the fate of punishment¹⁶. The situation of Italian legal system is more complex¹⁷, because lay judges can only participate in the judgments of the Court of Assizes¹⁸. The great confidence and authority that the figure of judge holds in Italy, is testified by his duty to state reasons for his decisions, and by the grounds of the judgments subject to a double degree of appeal, among which the appeal by Cassation.¹⁹

4. BARD's rule: the dialectical key

The evolution of the b.a.r.d. and its infinite applications have generated new questions: where is the punitive font of the criminal law? Is the process already configured as a penalty that the defendant is serving? The answer is affirmative and reasonable doubt is the only way to tend towards the defendant's freedom or salvation²⁰. At the base of this conception there are some principles. First of all, a criminal proceeding / process²¹ continues to exist even after a final sentence²² (therefore in the execution phase of the sentence) because the procedure must always justify extraordinary legal remedies such as "revision"²³. Therefore this is essential to preserve the criminal prosecution (i. e. the criminal prosecution of Public prosecutor) within the irrevocable sentence, for a hypothetical revision. So from a technical-literal point of view, the process is painful. On the other hand, if we rely on a temporal perspective, the process is already a punishment even if later on the accused will be considered innocent. Thus the process performs a function of revitalizing the substantive law, since on it tends to impose the penalty, but also it ascertains the fact qualified by the public prosecutor as a crime. In these two precise moments criminal law shows its concrete reality, through the trial and its oral phase.

Furthermore, the process, that in the technical jargon is called justice²⁴, can be a penalty for the same victim, even in the case of acquittal of the accused, as he would suffer a "retaliation". The process is technical and the real difficulty is in representing and re-proposing the truth of the real event that happened, in front of a judge or a jury. The process is not truth, but it must be the place where the most skilled part in the process between the

¹⁴ A. Dershowitz, *Reasonable Doubts, The Criminal Justice System and Case O. J. Simpson*, trad. en, Milano, 2007, p. 65, C. Conti, *Ragionevole dubbio e scienza delle prove: la peculiarità dell'esperienza italiana rispetto ai sistemi di common law*, in *Archivio penale* n. 2/2012, pp. 1-19

¹⁵ See L. Laudan, *Is reasonable doubt reasonable?*, in *Legal theory*, Volume 9, Issue 4, 2003, pp. 295-331

¹⁶ F. M. Iacoviello, *Lo standard probatorio al di là di ogni ragionevole dubbio e il suo controllo in Cassazione*, in *Cassazione Penale* 2006, pp. 3861-3875. In the Italian system the legal method of proof sets a standard of evidence contrary to what happens in the American system. Italian jurisprudence tends to form a legal method of probative evaluation through the application of inference criteria to the assessment of the fact..

¹⁷ See AA. VV *L'omicidio di Meredith Kercher*, in M. Montagna, *Il ruolo della giuria nel processo penale italiano e americano*, Aracne, Rome, 2012

¹⁸ See M. Pisani, *La Corte d'assise e il giudizio di appello*, in *Rivista italiana di diritto e procedura penale*, 1/2010

¹⁹ One of the grounds of appeal provided by art 606 of Italian criminal procedure code is the illogicality and contradictory nature of the judge's reasoning. The reasoning of the judgment serves to legitimize the authority of the Italian court in implementing the principle of legality as also established by articles 25, 101 of the Italian Constitution and in implementing the principle of equality of citizens established by article 3 of the Italian Constitution.

²⁰ Starting from the assumption that the justification of the punishment is its re-educational function at least in the legal systems that do not adopt the death penalty as the maximum penalty, the process assumes the cathartic phase traits for the condemned or the accused. See G. Spangher, *Ragionamenti sul processo penale*, Giuffrè, Milano, 2018, pp. 125 e ss

²¹ This expression underlines the difference between proceedings in a broad sense, which indicates both the phase preceding the exercise of the criminal action and the subsequent one. See F. Cordero, *op. cit*

²² "Believing that the sentence runs out of penal judgment is one of the worst superstitions that have adorned our science". See F. Carnelutti, *Il problema della pena*, Tumminelli, Milano, 1945, which underlines the total unity of the phase of cognition and penal execution.

²³. See F. Cordero, *op. cit*, pp.1081-1109

²⁴ About this, the positivist conception of justice emerges as the correct application of procedural rules and rules that may aim at ethical or moral goals or pursue interests of power or convenience, See J. Guzman de Albornoz, a cura di G. Fornasari, A. Macillo, *Elementi di filosofia giuridico penale*, Collana Università degli studi di Trento, ESI, Napoli, 2015

public prosecutor or lawyer, is able to discover the veil²⁵ on reasonable doubt about the innocence or guilty of defendant.

The procedural truth is given by the ability of lawyers to form evidence during cross-examination. Procedural truth is decisive proof understood as the most convincing for the application of b.a.r.d's rule²⁶. In this precise moment the synthesis takes place between the general theory of the crime and the general theory of the process from which the penalty can derive.

5. Crime and penalty: the dialectical's boundaries between reasonable doubt and trial.

The implementation of criminal law takes place through three phases. A phase constituted by the abstract prediction of the criminal case or the fact of crime; a "vivification" of this abstraction in the criminal process; and finally by its concrete implementation through the imposition of the penalty only if the guilty is ascertained through the formation of the evidence during hearing of the case, beyond a reasonable doubt. Therefore, in this algorithm every single phase must be clear and coordinated. Criminal science is a philosophical science that must not remain inert in the face of blind positivism²⁷. If, therefore, the first and second phases relate to a substantive right that serves to prevent future repetitions of unlawful behavior, the actual re-educational function of the sentence is discussed. The penalty in criminal law has as its maximum effect the deprivation of personal liberty, or in any case its limitation in the legal systems in which the death penalty is not provided. Well before exposing a possible general theory of the penalty a reference to the concept of freedom is necessary. The problem of punishment is a problem of freedom²⁸. The law, in particular the criminal law is something concerning human because he is at the same time the punishment size, and the law's goal²⁹. This last idea gives us a humane point of view of criminal law providing the punishment³⁰. Thus, two important principles emerge: the right punishment has to valorized human and it could not hurt the innocent's life³¹. Only with the law man can perceive the natural order of the universe and this is also true in the field of criminal law. So the crime is disorder, as a violation of a law that has the task, instead, of maintaining the balance of causes and effects, indispensable for implementing the nature's order. The crime gives rise to a reaction (of the legal system) of forces to restore the violated order whose consequences are attributable to the penalty. What we found is a force reaction, built by legislation, to re-establish the break order which consequences are founding in the punishment. So what is the difference between crime and punishment? It could therefore be said that they are two sides of the same coin, in that the crime and the penalty must be annulled, that is to say the crime must correspond to a proportionally equal penalty, or better to say with this formula crime = punishment, without falling into the contradiction of the law of retaliation ("legge del taglione")³². The equation expresses a hidden truth: the penalty is such only if it is not wanted by those who suffer it. The existence of free will is a necessary condition, those who express a will through actions or omissions, in turn manifest a freedom; instead who doesn't want, couldn't be considered free³³. Only if this principle comes truth the most important punishment's goal is pursued: the restricted freedom or the death penalty³⁴.

But when are you really free? It has been said that free will makes us free in resistance to right or wrong choices: freedom manifests itself in the capacity to want, with the concrete possibility of choosing the good³⁵. There is no crime without free will without the freedom of choice between good and evil, right or wrong, that is, what the law allows or prohibits. The crime exists when the freedom is lost, that is when the resistance to not committing the evil is lost, despite having the possibility to resist in committing it. Thus, the principle of free will is a fundamental principle for the general theory of crime because it grounds substantive criminal imputability. So why are crime and punishment the same? They are linked by the element of subjection³⁶.

²⁵ A. Incampo, *Metafisica del processo. Idee per una critica della ragione giuridica*, Cacucci Bari, 2010, p.398

²⁶ See L. Laudan, *Is Reasonable Doubt Reasonable?*, in *Legal Theory* 9/2003

²⁷ See J. L. Guzman, *op cit*

²⁸ F. Carnelutti, *Il discorso della libertà*, *Colloqui sul Vangelo di Giovanni*, Sansoni, Firenze, 1960

²⁹ F. Carnelutti *Teoria generale del reato*, Cedam, Padova, 1933, p. 355

³⁰ AA. VV, a cura di R. Marra, *Filosofia e sociologia del diritto penale*, Giappichelli, Torino, 2006

³¹ F. Cavalla, *Il problema della pena. Il superamento della concezione razionalistica della difesa sociale*, Cedam, Padova, p. 256

³² In fact, equality must in any case be subject to the logical principles of identity, i.e. crime = crime and punishment = punishment, to respect for the fundamental rights of the individual; and the principle of non-contradiction

³³ F. Carnelutti, *Lezioni di diritto penale*, vol. 1, *Il reato*, Giuffrè, Milano, 1943, p. 341

³⁴ See F. Corleone, A. Pugiotta, *Il delitto della pena. Pena di morte ed ergastolo, vittime del reato e del carcere*, Ediesse, Roma, 2012, p.284

³⁵ F. Carnelutti, *Figure del Vangelo*, Sansoni, Firenze, 1958, p. 25

³⁶ In the American common law system there is a presumption of innocence (or rather of not guilt), as in the Italian civil law system, but there is a difference: the sentence of first instance is immediately enforceable in the United States, despite the possibility of an appeal and this would "to deny the presumption of innocence itself" adopted by the US state. It could be

The offender does not know how to want and makes the body prevail, while the punished can no longer want because his freedom is limited. Is it possible to state a general theory of punishment? The answer is relative. Criminal law is linked to morality and the philosophy of law, but the concept of punishment is connected not only to the principles obtainable from international conventions, but also to the legal and judicial system of each state. In the US common law system, for example, there is a substantial difference between criminal law and criminal procedural law which is brilliantly underlined with the expression "From the crime to the punishment"³⁷: the trial is the place where the accused is punished if his guilt is proved beyond reasonable doubt based on the evidence provided by the parties. The penalty presupposes a judgment, but also a hypothesis of a crime made by the public prosecution without which the trial cannot be started. Therefore, the penalty justifies the existence not only of the crime, but also of the criminal trial and this is the dialectical synthesis³⁸.

6. The trial: the dialectical's heart

Many questions can be asked about the nature of the process, but the trial can be considered the place where justice must appear. Justice is in fact an absolute expression. In fact, man is a finite creature and certainly cannot absorb the absoluteness of Justice, but he can tend to it. It's like the postulate in mathematics: "Two parallel lines meet to infinity". The postulate is certain, true, but man cannot actually and concretely demonstrate that the parallel lines meet to infinity, because he is an ended creature³⁹. Time and Justice are therefore the two limits that man encounters in his life, apparently indomitable. The general theory of law has to firmly seek the truth that lies in these limits. The task of the general theory of law is the interpretation, the attempt to discover this mysterious veil that blinds us to legal and moral questions⁴⁰. Natural law has to be the principle of positive law. Positive law therefore currently manifests itself in most legal systems with rules that above all protect the inviolable rights of life and health. Is there a Time of Justice? From the procedural point of view, the answer is affirmative, and more often than not the inexorable passage of time, in addition to wearing down the subjects involved, frustrates and quenches the thirst for justice that distinguishes man. From the substantive point of view, the answer is negative, because Justice can manifest itself in every moment. It is up to the man to search for it with the most appropriate means and with a procedure code suitable for establishing contact with it. The procedure's rules are configured as a translation code of the principles of justice, it is a way of communicating with it. The example of the disease of the process is clarifier. In Goethe's *Faust*, there is the conception that law is transmitted in an eternal disease of the process, a real contagion. Contagion that leaves no escape to Richard Carstone, character on which the novel by Dickens *Bleak House*, is built.

The cause that animates this speech is that of Miss Flite who, not having to claim any right to the Court, continues to walk to the corridors of the chancellery as if the disease of the process had been present since she was young because she was never satisfied by Justice. And this "slow and unjust" Justice, will bring about the death of Carstone after lengthy trials. So the process survives the character, even if in a metaphysical sense. Suffice it to say that in the criminal proceedings the death of the accused produces the extinction of the process itself. Criminal law is a legal algorithm that evolves in dialectics as it arises from a real fact that in the process is abstract if it is not proven. This abstraction is inferred from institutions such as archiving from the sentence not to proceed or from the acquittal sentence, which is more evident in the Italian system. The evidence is the key to exonerate the accused or to impose the penalty by recognizing him as guilty, and then condemn him. The sanction is the extreme synthesis of this dialectic, although parallel to the process, precautionary measures can be applied that are justified by probative requirements, but which in fact take on the features of a real penalty.

risked that the presumption of innocence exists in the US only in procedural and non-substantive law. See A. Mura, A. Patrono, *La giustizia penale in Italia: un processo da sbloccare. La lezione americana*, Padova 2011, very interesting the book review on <<www.dirittopenalecontemporaneo.it>>, di S. Erbani, 20 marzo 2012

³⁷ A. Ristoph, *The blue line from crime to punishment*, op. cit

³⁸ The criminal trial exists when there is a triadic relationship with the third and impartial top judge, an accuser and an accused (defendant). See Siracusano Tranchina Zappalà, *Diritto processuale penale*, Giuffrè, Milano, 2018, Gaito Spangher *Procedura penale*, Cordero, op. cit

³⁹ Only through mathematics can one attempt to logically demonstrate this postulate in the formulation of non-Euclidean geometry, but not in factual reality. See *Il mistero delle rette parallele*, in *Repubblica*, 8th August 2004

⁴⁰ In Carnelutti's opinion the penal ritual is based on something hidden and judicial sensitivity is the only way to avoid falling into judicial error and thus compromising the life of the accused. See F. Carnelutti, *Principi del processo penale*, Morano, Napoli, 1960, p. 361, M. Cattaneo, *il Problema filosofico della pena*, Editrice Universitaria, Ferrara, 1978

Moreover, the inexorable length of the process (especially in the Italian system) further aggravates this critical framework⁴¹, which is already made up of penalties such as life imprisonment (in its most extreme measure is called “ostativo”⁴²) and the death penalty⁴³, present in many legal systems in the world especially in some American states. The humanization of punishment is too abstract a concept in a positivist system like that of most world systems. Then this reflection emerges. If the penalty tends to the recovery of the condemned with the intent to make him recognize his own humanity also towards the other men, then who makes to recognize to the punishment the sense of humanity?

7. Reasonable doubt: the destiny of the proof and the destiny of the punishment

A) Principles

The reasonable doubt, borrowed from the US system, in Italian law is absorbed by two rules in particular: the article 27.2 of the Italian Constitution, that is the presumption of innocence⁴⁴ and the article 533 of the Italian Criminal procedure code. Regarding the first rule, a probationary rule is established: the Public prosecutor must prove the facts constituting the crime beyond the reasonable doubt. The defendant will only need to insinuate a doubt about the existence of impeding elements even if only by creating a situation of uncertainty necessary to substantiate the reasonable doubt about his accusation⁴⁵. It should be noted that paragraph 2 expresses the principle of the presumption of not guilty/ innocence (not only of innocence which is a more daring interpretation): in fact the defendant is not considered guilty until a final sentence is handed down. This has made the defendant an intermediate subject whose freedoms are limited due to the imputation in the trial, as he is neither a culprit nor an innocent. Principle that the Constitutional Court, in Italy, reiterates in sentence n. 124/1972 establishing that the not guilty does not identify with the innocent. The not guilty is a presumption of procedure that serves the judge to formulate a ruling that adheres to the highest canons of reasonableness and impartiality⁴⁶. Therefore, reasonableness⁴⁷ is a canon of judgment constituted by a sequence of denials and formulations of counter-hypotheses concerning the robustness of the accusation and defense thesis on the fact, with a Cartesian logic, whose only certainty is doubt.

B) Doubt's evidence

The problems are now two: when is the doubt reasonable? What is the time of its formation and implementation? It is in the statement during the counter-examination of witnesses and experts sued by the parties in which gaps and contradictions may emerge. Two cases are emblematic in this sense: the first O.J. Simpson⁴⁸, the second Amanda Knox⁴⁹. The mental state of the judge in Italy is irrelevant, it counts the motivation unlike the US in which the jury issues an unjustified verdict whose procedural consequences are considerable, in fact the appeal will focus only on the reasons of law and legitimacy and not on the merits⁵⁰. This explains that there is no need for a logical explanation from the examination of the evidence and the externalization of the passages of this evaluation. The reasonable doubt can be born from sensations and from reasoning and proof of this consideration

⁴¹ It is caused by the poor number of magistrates whose introduction to regular position is put into a second-tier state examination (the law degree is not enough) which result is uncertain and discretionary and it hasn't a practical structure, but theoretical. See M. D'Ambrosio, *La selezione dei magistrati ordinari*, in *Confronto*, n. 6/1985

⁴² Latest developments can be found in a European Court of Human Right's sentence referred to the case of Viola c. Italia. See M.S. Mori, V. Alberta, *Prime osservazioni sulla sentenza Marcello Viola c. Italia (n.2)*, in life imprisonment issue, in *Giurisprudenza penale web*, 2019/6; R. Tartaglia. *La sentenza della Corte EDU sull'ergastolo ostativo ci pone un problema importante, che però siamo preparati a risolvere. Dalle presunzioni assolute a quelle relative*, in *Giurisprudenza penale web*, 2019/10.

⁴³ See Brandon L. Garrett, Alexander Jakubow, and Ankur Desai, *The American Death Penalty Decline*, 107 *J. Crim. L. & Criminology* 561 (2017).

⁴⁴ Article 48 of the European Convention on Human Rights, article 14 of the International Covenant on Civil Rights, the doctrine agrees that the defendant is in an intermediate state between the presumption of not guilty and the presumption of innocence

⁴⁵ This is demonstrated by the acquittal sentence for lack of evidence, article 530.2 of the Italian code of the criminal procedure.

⁴⁶ The Italian doctrine confirms the presumption of innocence(or not guilt) as a parameter of seeking truth in court, also because the lack of legitimacy issues raised by the constitution wouldn't be demonstrated

⁴⁷ See E. M. Catalano, *il concetto di ragionevolezza tra lessico e cultura del processo penale*, in *Diritto penale e processo*, vol. 17, 1/2011, pp. 85-98

⁴⁸ See A. M. Dershowitz, *Dubbi ragionevoli*, op cit

⁴⁹ See AA.VV., *L'assassinio di Meredith Kercher*, in M. Montagna, *Il ruolo della giuria nel processo penale italiano ed in quello statunitense*, Aracne, Roma, 2012

⁵⁰ In particular, they may concern the ways in which the judge gave instructions to the jury or the ways in which certain means of proof were assumed or rejected.

is the article 1096 of California's penal code "the reasonable doubt is that situation that after all the appearances and considerations of the evidence leaves the minds of the judges in the condition in which they cannot say to prove an unshakable conviction of the truth of the accusation".

Moreover, the Supreme Court checks the correctness of the indications given by the judge to the jury when he explains the canon in dubio pro reo to the jury as a principle of civilization and justice. It is clear that the reasonable doubt in the US is perceived as a concept linked to substantive law and therefore to the humanitarian conception of the penalty, understood as a focus on freedoms and fundamental rights, even though many states still foresee death as the maximum penalty⁵¹.

C) Legal or moral nature?

In Italy the reasonable doubt is a procedural and probative rule⁵²; it is a law of evidence, but also a probative rule, while in the United States it is a probative standard that establishes the limit above which a conviction is legitimate and below which it is illegitimate. It is clear that the relationship between reasonable doubt and proof is obvious. The evidence is the only tool that reduces the risk of erroneous beliefs about the subject of the process. First of all it is unequivocal that the reasonable doubt is based on factual and not from moral elements⁵³. The explanation derives from the fact that for reasons of certainty of the interpretations of the judicial body it is necessary to have a single point of view regarding moral questions. Furthermore, the limitation of the procedural functions would go against the purpose of the penalty, that is to make the citizens respectful of the law. Furthermore, in the presence of excessive moral interpretations, the judge or jury may be conditioned and excessively influenced, based on their respective ethical aspiration. This would therefore not respect the procedural dialectic, which unlike substantive law needs a rationality, a technicality, an objectivity. Morality and ethics belong to the philosophical field and in this case it is indispensable for a general theory of crime and punishment. The process, however, cannot replace the penalty but ascertains or is aimed at ascertaining whether a given fact has occurred, is illegal and if a person has committed it. The penalty is only the consequence of the ascertainment of a preexisting truth within the procedure or depends on the outcome of the process aimed at producing a specific judgment of fact and responsibility. The nature of reasonable doubt is the result of a dialectical choice between normative and moral factual elements. The typical formulations that prove this dialectic are some considerations on the interpretation of reasonable doubt, understood as a doubt that manifests itself in the case of "proof of lack of evidence"⁵⁴ and as a condition, a requirement on moral certainty regarding the truth of the accusation, on which a veil of indeterminateness hovers.

It is clear that the first definition must be taken into greater consideration because it relates to factual, normative elements and therefore to prove, the only parameter to be taken into consideration for the fate of the penalty in a positivist system, such as the procedural one⁵⁵.

8. The legal systems' reasonableness

"Nomofilachia" is the best definition of civil law in the Italian legal system, because there is the attempt of the legal order to make calculable and rationalist, the law⁵⁶. The relationship between "nomofilachia" and common law passes from legal syllogism⁵⁷ and from the inflation of precedents.⁵⁸

8.1 The nomofilachia and common law

⁵¹ See Michael L. Radelet, Ronald L. Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & Criminology 1 (1996-1997)

⁵² It indicates the dialectic of doubt as a tool for evaluating evidence and hypotheses of the fact.

⁵³ Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. Crim. L. & Criminology (2015), pp. 1-39

⁵⁴ See evidence conception such as prime instrument for reducing risk of convictions resting on factual error "Winship Court", in Y. Lee, *Reasonable doubt and moral elements*, op. cit

⁵⁵ The procedural law changes with the changing needs of the State, for example inquisitorial trials in totalitarian regimes See F. Carrara *Programma per un corso di diritto criminale*, Cammelli, Firenze, 1924, in which a development of substantive and procedural criminal law already emerges.

⁵⁶ The article 65 of Italian R..D. n. 12/1941 ensures exact observance and uniform interpretation of the law, and the unit of national objective law.

⁵⁷ M. Weber, *Economia e società*, Donzelli, Roma, 2016, p752.. The law is based on a case in point that pursues legal certainty through rationality and the logic of syllogism. This logic is increasingly in crisis due to the post-modern complexity and plurality that requires a more elastic and not blindly mathematical formal structure, despite being an exact science See N. Irti, *La crisi della fattispecie*, in Riv. Dir. Proc.,1/2014, p. 1-8

⁵⁸ See G. Canzio, *Crisi della nomofilachia e prospettive di riforma*, in AA. VV., *Atti del convegno Cassazione e Legalità penale*, Dike Giuridica, 2017

In civil law, syllogism is only technical: it finds an ethical and moral justification in B.a.r.d.'s procedural rule. In US common law there is the presence of a technical syllogism especially in criminal proceedings (as the judge is the master of the trial and instructions).

However, this syllogism, is also constituted by the human factor as brilliantly demonstrated by the presence of a jury that reasons and reflects with the feeling, the good sense or the reasonableness always focused on the ethical and moral certainty of its decisions. In fact the degrees of certainty in the USA are two: certainly guilty as absolute degree, certainly moral, as the highest degree of certainty after the absolute one for the human's mind⁵⁹. It is understood that in any case there isn't the ethic of the process⁶⁰ (such as the best discretionary solution of the process), but it doesn't mean that it is no longer human. First of all, the nomofilachia must be the ethics of speech: it must be based on the strength of arguments. The technical-mathematical lexicon therefore contrasts with jurisprudence law understood as soft science, because it must follow a more humanistic path. We need to distinguish between precedent⁶¹ (used for a case) and case law (used for a variety of decisions in specific cases). This differentiation raises doubts, because they both have a stabilizing effect on the law, but the precedent deals with the common law. In fact the judge is creator of the same precedent because he analyzes the historical facts justifying the "ratio decidendi"⁶². In civil law (Italian case) the judge (in the role of court of legitimacy, such as Court of Cassation, Council of State, Court of Auditors and Constitutional Court) "says but he doesn't create right". A clear example in the Italian system is provided by the Office of the Supreme Court of Cassation⁶³ which sets out the principle, it regulates it, but the comparative analysis of the facts is missing. It is understood that the analysis of the facts opens to a better application of the B.A.R.D.'s rule, as decisive variable of the criminal dogmatic.

Moreover, in Italy the precedent is only persuasive, that is only guidance for the legislator who will be able to abide to the decisions of the Courts of legitimacy without constraints. It is different in common law where the precedent is binding and the Courts create right.

8.2 The reasonableness of the decision

The problem of the difficult relationship between nomofilachia and common law can be seen from the element of reason in various aspects. First of all we need to consider the "ratio decidendi"⁶⁴, principle of law applied by a judge to decide a case similar to that to which now the same or another judge must pronounce; and the "obiter dictum"⁶⁵, which is not directly related to the facts of the case and it cannot be applied as a precedent (as a rule) but it may herald future case-law on other disputes in which such hypothetically settled and hypothetically contemplated legal issues are qualified as the facts at issue. The precedent exists when there are at least two successive decisions concerning identical or similar cases. This is confirmed by the function of responding to the principles of equal judicial treatment and legal certainty for the uniformity of jurisprudence. Moreover, the precedent has the function of monitoring the correctness of the actions of the judge who has to justify a different interpretation and application of the same provision in the same case in order to guarantee the citizens' right. Finally, it stimulates the judicial reasoning of the court, which gives new reasons about the preceding grounds⁶⁶. The key element is however given by reasonableness, which can be understood in a twofold sense:

⁵⁹ The criterion to be adopted for the application of Bard, whether quantitative-percentage or qualitative, was discussed. In the first case it is objected to the fact that if 99% is required, a risk of 1% of condemning an innocent person would be implicitly accepted. So there would be no absolute certainty. See, F. Stella, *Giustizia e modernità*, Giuffrè Milano, III edizione, p. 629

⁶⁰ See L. Corso, *Giustizia senza toga. La giuria e il senso comune*, in *Criminalia*, 2008, pp. 1-36

⁶¹ It provides the universalizable rule applicable as a subsequent criterion depending on the identity or analogy between the facts of the first case and the second case. It is not "in re ipsa", but it is judged on a case by case basis, based on elements of identity or difference between the two cases.

⁶² This analysis justifies the application of the ratio decidendi in the second case, about the ratio decidendi applied to the first case; the former is therefore effective and can determine the decision of the second case

⁶³ The office of the "Massimario" performs the function of correct realization of the effect of the previous one with the formulation of the maxim, which has the effect of a persuasive precedent, through the classification of appeals, the preliminary study of the most complex ones and the relationship of conflicting questions of the jurisprudence. See Franceschelli *Nomofilachia e C. Cassazione*, in *Giustizia e costituzione*, 1986, *Inzitari Obbligatorietà e persuasività del precedente giudiziario*, in *Contratti e impresa*, 1988

⁶⁴ Independent and distinct reason from the others enough to support logically and legally the decision.

⁶⁵ Principle of law enunciated by the sentence in an incidental way, the juridical question is proposed hypothetically and resolved in the argumentative discourse of the motivation.

⁶⁶ G. Sbisà, *Certezza del diritto e flessibilità del sistema. La motivazione della sentenza in common e civil law*, in *Contratti e impresa*, 1988

criterion or canon of appraisal according to the behaviors; and fundamental requirement of the reasoning regarding the judgements and the normative interpretation.

This suggests that in common law the concept of reasonableness⁶⁷ is an argumentative technique that assesses whether that conduct is lawful or unlawful, while in civil law the reasoning is structured⁶⁸, because the applicable rule is identified and then the act is qualified to restrict and to identify the scope protected by the same rule.

9. The “reasonableness” of the doubt

The criminal dialectic is founded on reasonableness, that is, a canon of judgment and instrumental rationality based on a compromise, on a tolerant reason open to quantitative needs. This definition encompasses an almost mathematical language and is right on the one hand because it provides a rational logical scheme to be followed for any procedural activity, but on the other hand risks precluding many elements necessary for the evidential destiny and punishment. In fact the reasonable doubt may be born of sensations and reasoning⁶⁹. This consideration emerges for this purpose. The Italian legal system, unlike the American one, is based on the legal method of proof through the selection of the evidentiary material for the truth and not of the probative standard that establishes at what level it can be considered to have reached the truth. This is therefore the cause of the different structure of the judging body in the trial and of the different way of evaluating the evidence.

10. Conclusion

The problem of the legal order of Italy derives from the blind rationality of the law and of the legislator, generating an excessive generalist scope of the norm. Every economic and social legal situation of a person, of a citizen is never the same as the other. It is therefore impossible to imagine that those who interprets laws and passes them, doesn't imagine the possible repercussions even for those who doesn't commit those acts sanctioned or punished by law. This situation is a risk that compromises the package of guarantees possessed by citizens. The US legal system is different, hiding contradictions, but also solutions and a wave of guarantees, despite harsh criticism of doctrine. A system that mitigates the rationality of civil law, because of the flexibility of the precedent binding that is the result of the ability of the legal order to adapt to every situation, guaranteeing legal principles adaptable to every need of protection.

The B.a.r.d.'s rule., specifically reasonableness, is the key of application and knowledge to solve the intricate relationship between persuasive precedent, typical of the Italian civil law system, and binding precedent of Anglo-American matrix. The criterion b.a.r.d. thus fulfills the function of a continuous search for the truth and legal certainty indispensable to keep alive the ontology of the legal system. Starting from the condition of fallibility, law is constantly evolving over time to become infallible and to approach the sense of justice, in such a way that there is a correct application of the legislation according to the needs of the surrounding reality. If the law recognizes the “suias” of conduct (i.e. the free will) to the legal entity, that is the man as a person and citizen, for reciprocity it must also possess a own will and one own conscience/acquaintance of self in order to reach a goal deserving of constitutional and natural protection. The general criminal theory wants to reduce the distance that exists in the application of the b.a.r.d.'s rule in civil and common law systems so as to tend to a correct idea of justice, understood as in the Latin formula "to give each his own", of Ciceronian style. The criterion b.a.r.d. is the shaping element of the dialectical synthesis of the general criminal theory. The b.a.r.d. rule in this way it fulfills the function of a continuous search for certainty (of law), indispensable for keeping the ontology of the legal system alive. Starting from the condition of fallibility, the law continually evolves over time to become infallible and approach the sense of justice, so that there is a correct application of the law based on the needs of the surrounding reality and above all of the single person. If the law recognizes the “suias of conduct” to the men and citizens, also the law must have own will and his own conscience / self-knowledge in order to achieve a purpose worthy of constitutional and natural protection. The b.a.r.d.'s rule therefore ensures the dialectical synthesis of the general criminal theory which rightly culminates in the punishment which must be certain and reasonable. Certainty and reasonableness bind man and his inviolable, fundamental rights. However, the humanization of punishment is still a long process. On the other hand, the criminal law must be conceived as a criminal right since the penalty must not be the parameter that attributes the meaning to this discipline, but rather the sanction must constitute a demand in a manner to respond to the principles of compensation and above all re-

⁶⁷ With the globalization of law, the term was incorporated into the common law systems, see S. Patti Ragionevolezza e clausole generali, Giuffrè, Milano, 2016, pp. 7-30

⁶⁸ G. P. Fletcher, The Right and the Reasonable, 98 Harvard Law Review, 949 (1985), the act is lawful in the civil law only when it can represent a formally legitimate exercise of law.

⁶⁹ A. M. Dershowitz, op. cit

educative of criminal law. Therefore, the solution for a more dynamic future will be to find the right balance between the rehabilitative conception for the offender and the reparative conception for the victim, inspired by the principles of liberal criminal law.