

# Negotiations ‘on Evidence’ and Negotiations ‘on Sentence’

Adversarial Experiments in Italian Criminal  
Procedure

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## Abstract

*In Italy, procedures based upon concessions to the defendant in exchange for cooperation with the prosecution were first established in 1981, but were organically laid out only in 1988, when an adversarial Code of Criminal Procedure came into force. Little of the original versions of the ‘summary proceeding’ and ‘application of a penalty upon request’ (the Italian equivalent of plea-bargaining) has survived the swinging reforms of the 1990s. Such reforms, driven at times by concerns of public interest and, at other times, by the endorsement of the fundamental rights of the accused, have culminated in the 1999 fair trial amendment to the Constitution. Negotiated justice also received constitutional legitimacy, albeit in an acutely controversial form. Despite the acknowledged indispensability of consensual means of conflict resolution for reasons of procedural expediency, Italian commentators still struggle to reconcile the very concept of negotiated justice with engrained constitutional principles. Negotiations in Italian law can now be profitably grouped into two categories: negotiations ‘on the evidence’ upon which the court may base a judgment, and negotiations ‘on the sentence’ that the court may serve on the defendant.*

## 1. Introduction

Concerns of procedural economy and predictability of decision making have always led legislators, courts and parties in judicial proceedings to experiment with ways to simplify trials. Inquisitorial systems, however, have traditionally been reluctant to submit the judge to the will of the parties. If negotiations between the parties were

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allowed to prevail, then the court would be deprived of the power to determine the punishment not by virtue of predetermined criteria, but because of discretionary decisions of counsel. This reluctance may also be seen as a corollary of the 'hierarchical' nature of European criminal procedures, in which greater authority is given to the judge and more emphasis is placed on reasons of public interest than in the Anglo-American world.

The contemporary European movement from 'imposed law' towards 'negotiated law' derives from multiple factors. First, a preference for negotiation reflects the contemporary rejection of the Welfare State; as society becomes more egalitarian, more complex and less coherent, regulation based on an authoritarian model has lost part of its legitimacy.<sup>1</sup> Secondly, *over-criminalization* has highlighted a problem of capacity: while the demand for efficient criminal justice is increasing, supply is simultaneously shrinking. Thirdly, the obligation of Member States to comply with the 'reasonable time' requirement of the European Convention on Human Rights (ECHR) has put legislators under a great deal of pressure: trial avoidance mechanisms must be established to minimize the courts' workload and ensure speedy decisions.<sup>2</sup>

American-style plea-bargaining has played the greatest influence in the discourse and reforms surrounding negotiated justice in Europe. Nonetheless, it would be inaccurate to describe reform trends purely as the outcome of the 'Americanization' of criminal justice. The American model has not been transplanted: instead, each European jurisdiction has adopted its own procedure that entails differences, 'either because of decisions by the legal reformers ... or because of structural differences between American criminal procedure and the criminal procedures of the civil law tradition'.<sup>3</sup>

The Italian approach to negotiated justice is particularly interesting: there, in 1988, a Code of Criminal Procedure inspired by adversarial principles was inserted into an inquisitorial legal culture. Italy may then serve as a model country in an attempt to test the resistance of continental systems of criminal procedure against market-oriented ideas and contract-like relations. Moreover, Italy probably has the 'biggest backlog and the slowest pace of litigation'<sup>4</sup> in all Western jurisdictions; one would expect that concerns of procedural expediency inspire any sensible reform of justice.

In this paper, the phrase 'negotiated justice' describes situations in which the mode and outcome of the criminal conflict are subject to the agreement reached by the prosecution and the defendant. The definition proposed by Professor Damaška has been broadened because, at present, Italian law still does not require any 'act of

1 Cf. F. Tulkens, 'Negotiated Justice', in M. Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002), 646.

2 Overburdening of the national judiciary is not recognized as an excuse by the Strasbourg organs; cf. *Dobbertin v France*, ECHR (1993) Series A, No. 256-D, 117.

3 M. Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure', 45 *Harvard International Law Journal* (2004) 1–64, at 3.

4 M. Fabri, 'Theory Versus Practice of Italian Criminal Justice Reform', 77 *Judicature* (1994) 211–215, at 211.

self-condemnation<sup>5</sup> from the defendant as part of the negotiating process – not even when he or she files an application for a bargained penalty. The following sections outline the development of procedures of negotiated criminal justice in Italian statutory law and attempt to define the contribution of Italian jurisprudence to an international discourse on the subject.

## 2. Origin and Developments of Negotiated Justice

### *A. 1988: The Statutory Birth of Negotiated Criminal Justice*

In 1988, Italy faced the ideological conflict between ‘hierarchical’ and ‘coordinated’ models of justice, by overhauling its 1930 Code of Criminal Procedure. This was a French-influenced document that emphasized crime control to the detriment of the rights of the accused and subscribed to the inquisitorial model of procedure. After two decades of vibrant debate, 16 February 1987 marked the departure from tradition. On that day, the Parliament delegated the Government to draft a new Code of Criminal Procedure (hereinafter CPP); the delegating Statute<sup>6</sup> listed 105 criteria based upon adversarial principles to which the CPP was to conform. The CPP came into force on 24 October 1989 – a date that stands out as a turning point in the history of Italian law. The events behind the rise of the new Code have been reported elsewhere<sup>7</sup> and cannot be considered at length here. In essence, the CPP maintained trial by court but discarded the model of the *instruction*. It abolished the examining magistrate, who was previously the supreme director of the investigations. The responsibility for investigations now vests in the public prosecutor, who has control over the police. The prosecutor must apply to a pre-trial judge whenever the investigations entail intrusions into the fundamental rights of the suspect, as in the case of warrants of arrest, seizure or wiretapping. The pre-trial judge is also responsible for collecting evidence when compelling reasons call for an early hearing in the presence of the parties (*incidente probatorio*) and for committal proceedings. At the time of committal proceeding, all the findings of the investigation are disclosed to the defence. In 1988, a right to private defence investigation was also acknowledged in the supplementary provisions of the Code, although very little was said about the procedures to be followed for the collection of information by counsel.

The adversarial soul of the CPP was especially apparent in its evidence provisions. The assumption was – and still is, notwithstanding the swinging reforms of the 1990s – that a court should base its decision solely upon the evidence presented orally by

5 See in this issue M.R. Damaška, ‘Negotiated Justice in International Criminal Courts’, 2 *Journal of International Criminal Justice* (2004) 1018–1039, at 1025–1026.

6 Cf. Law No. 81/1987.

7 L.J. Fassler, ‘The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe’, 29 *Columbia Journal of Transnational Law* (1991) 245–278, at 247; F. Del Duca, ‘An Historic Convergence of Civil Law and Common Law Systems – Italy’s New “Adversarial” Criminal Procedure System’, 10 *Dickenson Journal of International Law* (1991) 73–85.

witnesses. Witnesses are summoned on behalf of the parties and questioned in a three-stage examination (examination-in-chief, cross-examination, re-examination). Information gathered at the investigation stage does not count as evidence and prior inconsistent statements of witnesses may only serve the purpose of impeachment.

The CPP also established procedures of negotiated justice: the experience of American litigation taught Italians that adversarial trials are costly proceedings and ought to be employed only for a small fragment of litigation. To be accurate, a tentative experiment in negotiations had been introduced by statute as early as in 1981:<sup>8</sup> upon request of the defendant and consent of the prosecution, the court could apply an alternative sanction; that is, a punishment other than imprisonment (e.g. limited liberty, curfew, fine).<sup>9</sup> Alternative sanctions, however, were only available for very minor offences. In 1988, simplification was absolutely central to the drafters: the lack of flexibility of the prior code – even for petty offences and simple cases – had made the justice system slow and wasteful to the point of becoming dysfunctional. Several special proceedings were then established in Book VI of the CPP, including the two 'negotiating' procedures that reward the cooperative defendant with a penalty reduction: the summary proceeding (*giudizio abbreviato*) and the 'application of penalty upon request of the parties' (commonly referred to as *patteggiamento*).<sup>10</sup>

It is anticipated that if the objective of the drafters was to reduce trials by 70–80%, then reform has fallen short: no such figure matches the current state of Italian litigation. Relief of backlog pressure was more recently sought through the transfer of a limited, yet not minimal, criminal jurisdiction to the justice of the peace. If the objective of the drafters, instead, was to pave the road to negotiating procedures in the criminal arena, then the conclusion must be different. Several experiments have been tested, amended and adjusted to the peculiarities of the legal culture over the last decade; in 1999, negotiated justice even achieved – perhaps unexpectedly – a constitutional foundation.

### ***B. Constitutional Challenges to Negotiated Justice***

The 1990s were the decade of the constitutional challenges against negotiated justice. While some academics wondered what damage the concept of consensual justice could do to the fundamental principles of procedure,<sup>11</sup> the Constitutional Court took repeated action to align experiments of negotiations to allegedly superior principles.

8 Article 77 Law No. 689/1981. The procedure in question was abolished in 1989, when the CPP came into force.

9 For discussion, see R.A. Van Cleave, 'An Offer you Can't Refuse? Punishment Without Trial in Italy and the United States: the Search for Truth and an Efficient Criminal Justice', 11 *Emory International Law Review* (1997) 419, at 430–440; R. Gambini Musso, 'Il "Plea Bargaining" tra Common Law e Civil Law' (Milano: Giuffrè, 1985), 113.

10 For valuable comparisons between the US and Italian variants of plea-bargaining, see J.J. Miller, 'Plea Bargaining and its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure', 22 *Journal of International Law & Politics* (1990) 215–251.

11 See P. Ferrua, 'La Giustizia Negoziata nella Crisi della Funzione Cognitiva del Processo Penale', in P. Ferrua (ed.), *Studi sul Processo Penale*, Volume II (Torino: Giappichelli, 1997), 157.

Although the Court stopped short of declaring the essence of negotiated justice unconstitutional, many adjustments had to be made to the proceedings in question before 1999, when negotiated justice received constitutional assent. Those early challenges, however, still permeate the debate surrounding this area of the law.

For a start, negotiated justice is in tension with the principle of mandatory prosecution, embedded in Article 112 of the Italian Constitution. How can an obligation to prosecute all reported crime be reconciled with the discretion to bargain with the accused? In essence, the principle of mandatory prosecution prevents the representatives of the prosecution from dropping charges out of their own discretion. In Italy, the decision to dismiss a case is subject to judicial review: applications for dismissal are to be filed by the prosecution with the pre-trial judge. Originally, the principle intended to ensure the independence of the prosecution from any political influence, since no politically motivated decision to drop charges can officially be taken. Although the principle is still worshipped as a cornerstone of Italian law, the idea that prosecution discretion can be taken away by constitutional provision is only a 'myth'.<sup>12</sup> Prosecutors always enjoy a *de facto* sphere of autonomy in deciding where to concentrate their efforts and where to spend their scarce resources. Over the years, the principle has resulted in a lack of accountability of the priority criteria followed by the offices of prosecution in bringing reported offences to justice. The indispensable degree of discretion granted to the prosecution in the negotiation procedure, nevertheless, has been the cause of major dissatisfaction with the Constitutional Court. The logic of negotiations relies on the idea that when an agreement is not reached between free and informed parties, no benefit should be granted to any of them. In the United States, when the defendant and the prosecution disagree on the term of the plea, the case proceeds to trial by jury. Instead, the Italian Constitutional Court repeatedly endorsed the claim that an early refusal of the prosecution to reach such agreement must be subject to judicial review. When the prosecution refusal is 'unjustified',<sup>13</sup> the reasoning goes, fairness calls for some remedy in favour of the defendant, who otherwise would suffer an unequal treatment under the law because of the arbitrary conduct of the prosecutor. Both provisions for summary proceeding and application of penalty upon request had to be interpreted so as to allow the court to disregard and even 'overrule' the prosecution decision to put an end to negotiations. Paradoxically, the defendant would then benefit (at the end of the trial, or even on appeal) from the rewards established by the law for the negotiators, despite the fact that the criminal justice system would have saved no costs.

Secondly, negotiated justice is arguably in tension with the 'principle of legality', according to which no accused person may be punished for a certain conduct unless such conduct qualifies as a criminal offence (Article 25(2) of the Italian Constitution). One of the corollaries of this principle is that punishment may only be served when one is found 'guilty' by a court of justice – not when one simply admits one's guilt. This

12 E. Grande, 'Italian Criminal Justice: Borrowing and Resistance', 48 *Am. J. Comp. L.* (2000) 227–256, at 240.

13 See Corte Cost., Judgment No. 66/1990, in *Giurisprudenza Costituzionale* (*Giur. Cost.*) (1990) 274.

must be read in conjunction with Article 111(6) of the Constitution, which states that all criminal judgments must be reasoned, and Article 101(2), pursuant to which judges are subject only 'to the law', and not to the will of the parties. Later in this paper, it will be shown how Italian jurisprudence has ingeniously managed to reconcile bargains on the sentence between prosecution and defence with the formal preservation of the traditional twofold legal role of the court (namely, assessment of guilt or innocence and determination of penalty).

Thirdly, plea-bargaining itself may be seen as an infringement of the presumption of innocence. If every person must be considered innocent until his guilt is 'proved' by trial, what happens to such a presumption from the moment when the accused himself, in the initial stages of the proceedings, signs his own renunciation of it?<sup>14</sup> Italian commentators have solved the problem by suggesting that even when the defendant files a request for a bargained penalty, it is only the court that can declare him 'guilty' after an assessment – although rather limited in scope – of the circumstances of the case. Applications for a bargained sentence may be rejected and the court can acquit the defendant if the proposed penalty appears to have no factual basis.

### ***C. 1999: A Constitutional Foundation for Negotiated Justice?***

In 1999, the Italian Constitution was amended to include the concept of a 'fair trial'.<sup>15</sup> In a duplication of Article 6 ECHR, Article 111 now announces the 'impartiality of the judge', the 'equality of arms', the reasonable time requirement as well as the fundamental right of the accused to confront adverse witnesses.<sup>16</sup> The origin of the amendment deserves some discussion. Rather than the outcome of a wide-ranging debate on the reform of criminal justice, the amendment was an abrupt reaction to the anti-adversarial role played by the Constitutional Court since 1992. At that time, the Italian criminal justice system came under mounting pressure from organized crime; in particular, the assassination of two famous crusading Mafia prosecutors left the country shaken. While public opinion called for a tougher reaction to organized crime, sectors of the judiciary developed a stark opposition to the recently enacted exclusionary rules of evidence. They were, it was said, obstacles against the efficiency of justice and the discovery of the truth. On three occasions in 1992, the Constitutional Court endorsed such a view and affirmed that the most significant exclusionary rules of evidence embedded in the CPP offended constitutional values. More specifically, the Court deemed the exclusion of hearsay evidence of police officers,<sup>17</sup> previous inconsistent statements of witnesses<sup>18</sup> and prior statements of

14 Tulkens, *supra* note 1, at 676.

15 Cf Law Cost. No. 2/1999.

16 For discussion of the Right to Confrontation in Italian criminal procedure, with specific reference to the evidence of 'absent', 'anonymous' and 'vulnerable' witnesses, see S. Maffei, *Il Diritto al Confronto con l'Accusatore* (Piacenza: CELT, 2003), 78–92, 277 s.

17 Corte Cost., Judgment No. 24/1992, in *Giur. Cost.* (1992) 114.

18 Corte Cost., Judgment No. 255/1992, in *Giur. Cost.* (1992) 1961.

silent or absent co-defendants<sup>19</sup> as causes of an ‘unreasonable loss’ of reliable evidence.<sup>20</sup> When statutory amendments were passed in order to comply with the aforementioned judgments, the structure of the CPP was altered and the shadow of inquisitorial practice was cast again on the criminal process.

In 1995 and 1997, statutory amendments were passed in order to restore adversarial principles and promote certain rights of the defendant; nevertheless, in 1998, a further judgment of non-constitutionality stated that a conviction could be based on the pre-trial depositions of a co-defendant who had refused to give oral evidence.<sup>21</sup> Faced with such antagonism, the Parliament then took the matter into its own hands and inserted the concept of ‘adversarial adjudication’ (*principio del contraddittorio*) into the Constitution. An exclusionary rule of evidence was also established, according to which a conviction ‘cannot be based on the evidence given by those who have always voluntarily avoided confrontation with the defendant or his counsel’. The reform was specifically intended to prevent any further interference of the Constitutional Court. The related provisions of the CPP were amended accordingly in 2001 and, after 12 years, adversarial assumptions were recovered.<sup>22</sup> Further, in the last month of 2000,<sup>23</sup> a comprehensive reform of the private investigation of the defence was passed to promote equality of arms. Counsel and private investigators may now approach informants and collect their depositions. They may also file requests for documents to public offices and, with some limitations, access private premises to assess their conditions.

The 1999 constitutional amendment also touched upon matters of negotiated justice. While Article 111(4) declares that evidence in criminal proceedings ought to be collected in an adversarial manner, Article 111(5) provides that ‘departures’ from the adversarial paradigm are permissible if, and only if: (a) there is a case of ‘proved misconduct’ (e.g. threats against a witness so as to keep him or her from testifying); (b) an ‘objective impossibility’ prevents the taking of oral evidence; (c) the defendant consents to such a departure. The clause sub(c) establishes a justification for the use in evidence of information collected unilaterally by one party (namely, the prosecution) when the accused consents. More importantly, for the first time in the history of Italian law, a constitutional provision reflects the idea that the process of adjudication may be subject to the will of the defendant, rather than being a legally predetermined, publicly run and non-negotiable process.

In an attempt to reduce the revolutionary impact of the 1999 amendment, many scholars muddied the waters through some convoluted legal reasoning. A claim was put forward that the concept of a ‘fair trial’ had been inserted in the Constitution not as a fundamental ‘personal’ right of the accused person, but rather as a ‘public

19 Corte Cost., Judgment No. 254/1992, in *Giur. Cost.* (1992) 1932.

20 For a critical view, cf. O. Dominioni, ‘Un Nuovo Idolum Theatri: il Principio di Non Dispersione Probatoria’, *Rivista Italiana di Diritto e Procedura Penale* (Riv. It. Dir. Proc. Pen.) (1997) 736–773.

21 Corte Cost., Judgment No. 361/1998, in *Giur. Cost.* (1998) 2083.

22 cf. Law No. 63/2001.

23 Law No. 397/1999; see M. Nobili, ‘Giusto Processo e Indagini Difensive: Verso una Nuova Procedura Penale?’, *Diritto Penale e Processo* (2001) 5–14.

good'.<sup>24</sup> The argument was based on the phrasing of Article 111, which in effect does not state that the accused person has a *right* to a fair trial but, instead, that 'judicial adjudication must take place through a fair trial'. Constitutional guarantees, the reasoning goes, are not only to be interpreted in the interest of the defendant, but also in the 'public interest' in an efficient prosecution of offenders. Similarly, the concept of a 'speedy trial' has been transfigured from a fundamental right into a public good: Italian commentators commonly suggest that certain guarantees of the defendant ought to be balanced against the public interest in a 'speedy adjudication'.<sup>25</sup>

This vision also affects the reading of the clause concerning the 'consent of the defendant' in Article 111(5). If the adversarial paradigm constitutes the expression of a 'public good', then the defendant should not be entitled to influence the process of evidence collection with his own will. Some commentators have therefore suggested that the clause should be narrowly interpreted, so as to cover only cases in which the defendant agrees that a confrontational method of adducing evidence would have led to the 'very same evidentiary outcome'<sup>26</sup> or would have been at all 'superfluous'.<sup>27</sup> This view does not deserve endorsement here. The concepts of 'fair trial' and 'adversarial adjudication' are established in constitutional texts precisely to shield the accused from the intrusions of public authority. Such concepts are indeed the expression of 'natural' rights of the accused.<sup>28</sup> Article 111(5) ought just to be interpreted for what it says, i.e. that the *principio del contraddittorio* may be waived by the accused, whenever he believes that it may be convenient to do so in exchange for some concessions from the prosecution or other advantages. The Italian Constitution now openly says what scholars remain reluctant to admit: criminal adjudication may be based on values other than the official public pursuance of the truth, including the accommodation of the opposing interests of the parties. Conflict solving, as opposed to policy implementing,<sup>29</sup> is making its way into the discourse surrounding criminal procedure.

### 3. Negotiations 'on Evidence'

In the adversarial systems of procedure, it is left to the parties to decide what evidence to collect, present or dispute. This is an area of Italian law in which 'informal'

24 See V. Grevi 'Garanzie Soggettive e Garanzie Oggettive nel Processo Penale Secondo il Progetto di Revisione Costituzionale', *Riv. It. Dir. Proc. Pen.* (1998) 726–760, at 728.

25 This is because Art. 111 does not state that the defendant has a 'right to a speedy trial' but, instead, that 'the law ensures speedy trials'. Such view conflicts with the approach taken by ECHR law and US law, where the concept of a speedy trial is construed as a fundamental individual right.

26 G. Ubertis, 'Giusto Processo e Contraddittorio in Ambito Penale', *Cassazione Penale (Cass. Pen.)* (2003) 2096–2107, at 2104.

27 G. Giostra, 'Analisi e Prospettive di un Modello Probatorio Incompiuto', *Questioni Giustizia* (2001) 1128–1144, at 1135.

28 Promoters of this view are E. Amodio, *Processo Penale Diritto Europeo e Common Law. Dal Rito Inquisitorio al Giusto Processo* (Milano: Giuffrè, 2003), 131–136 and Maffei, *supra* note 16, at 287.

29 This dualism is staged by M.R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 97–180.

negotiations between the parties are permissible: the prosecution could agree to set aside the summon of witness A if the defence does the same with witness B. Negotiations may also result in a relaxation of certain exclusionary rules of evidence, when the law so permits. In the following sections, the phrase ‘negotiations on evidence’ refers to any procedure that allows the parties to convert otherwise ‘non-usable’<sup>30</sup> information into ‘evidence’.

### ***A. Trial Bargains: Out-of-Court Depositions Converted into ‘Evidence’***

The statutory reform of 2001 reintroduced some exclusionary rules of evidence, in an attempt to reinforce the principle of adversarial adjudication, following the ‘fair trial’ amendment to the Constitution. These exclusionary rules are based on the compilation of two separate dossiers at the end of committal proceedings. All the findings of the preliminary investigations must be placed either in the ‘court dossier’ or the ‘prosecution dossier’. The law sets rigorous limits on what may be included in the ‘court dossier’, since such items count as evidence at trial.<sup>31</sup> All residual findings, including the depositions of informants to the police, prosecution and counsel, are placed in the ‘prosecution dossier’. This is only available for consultation by the parties and ought not to be disclosed to the court.

At trial, out-of-court depositions of informants can no longer be reported as hearsay by police officers and have a very limited evidentiary value. If the witness gives evidence in the courtroom, prior inconsistent statements may only serve the purpose of impeaching his or her credibility, unless it is proved that the declarant has been corrupted or subject to intimidation.<sup>32</sup> If the witness does not give evidence, prior depositions may not be used at all to the detriment of a defendant, unless the absence is the outcome of unforeseeable circumstances that make it ‘impossible’ to ensure a court testimony.<sup>33</sup>

Since these exclusionary rules are established in the interest of the party that may suffer adverse consequences, this party is also free to put them aside. Before trial (or at its opening), counsel and prosecutors may thus negotiate the transfer of any act of the investigation from the ‘prosecution dossier’ into the ‘court dossier’. In practice, such negotiations concentrate on pre-trial depositions: the defence may agree to transfer the statement that Mr A gave to the police in exchange for the transfer of what Mr B submitted to a private investigator. Such an agreement operates independently of the summons of Mr A and Mr B. As a result, not only may the negotiations expand the range of ‘usable’ evidence, but they may also have the effect of replacing oral

30 At this point, the Italian concept of ‘non-usable’ evidence may be said to correspond, in broad terms, to that of ‘inadmissible evidence’ in US and English law.

31 The rule is that a court may base its judgment on oral evidence and readings of the ‘court dossier’. The court dossier includes the defendant’s criminal record, items of real evidence, reports of searches and seizures, evidence collected abroad on commission, transcripts of intercepted communications and conversations and evidence collected at the *incidente probatorio*.

32 Article 500(4) CPP.

33 Article 512 CPP. Such circumstances are limited to the unforeseeable death or poor health of the concerned declarant: Maffei, *supra* note 16, at 330.

testimonies with out-of-court depositions. Similarly, during the examination of a witness, parties may also agree that the prior inconsistent statements that are put to the declarant count as evidence.

Consensual procedures of this sort result in a departure from the principle of adversarial adjudication. Nonetheless, such departure finds a constitutional justification, since Article 111(5) makes an exception for the case in which there is an expressed 'consent of the defendant'. Moreover, no intrusion into the fundamental Right to Confrontation can be invoked, for the obvious reason that the defence agrees to the employment of unchallenged evidence.

### ***B. Summary Proceeding: From Parties' Negotiations to an Automatic Reward for the Cooperative Defendant***

In the original version of the CPP, negotiations between defence and prosecution could lead to a summary proceeding (*giudizio abbreviato*) instead of an ordinary trial, in respect of any criminal offence.<sup>34</sup> Such procedure resembled, on the one hand, the English summary trial, in so far as the hearing was held before a pre-trial judge acting alone. On the other hand, it was akin to what in the United States is called a 'slow plea' or 'submitting a case on the transcript', in which the judge may rule the case upon the findings of the investigations.

As anticipated, the defence could accept to be tried upon the findings of the investigations before the pre-trial judge, in a hearing to be held *in camera*, in exchange for a mandatory one-third reduction of the penalty to be served, should the defendant be found guilty. The prosecutor's main incentives for consenting to this 'quasi-trial procedure' were that the process would quickly come to a close (no additional evidence could be presented for consideration to the pre-trial judge) and that out-of-court depositions of informants would count as evidence. The prosecutor would disagree if he considered that the case required publicity or a higher sentence. The joint request of the parties was still subject to judicial review, so that the pre-trial judge could reject it if the amount of evidence available at that stage would not permit a reasoned decision.

The impact of this version of summary proceeding on the backlog of the courts was minimal: only a disappointing 5% of cases were tried summarily in the period 1989–1993.<sup>35</sup> The reason for this failure can be easily explained, since the procedure posed a number of problems to the defence. First, no evidence could be presented to claim the existence of a mitigating factor that the prosecution had ignored when the

34 Some controversy arose with regard to offences punishable with life in prison. These could be tried summarily by virtue of Art. 442(2) CPP, but the Constitutional Court deemed such provision unconstitutional (Judgment No. 176/1991, in *Cass. Pen.* (1991) 483) because it exceeded delegated authority. Summary proceedings for these offences was re-introduced in 1999: as an incentive, life sentences are automatically shortened to a prison term of 30 years.

35 *Atti Parlamentari, Camera dei Deputati. XIV Legislatura*, Document No. C–718, 12 June 2001, 1.

charge was filed.<sup>36</sup> Secondly, despite the mandatory reduction of sentence, the defendant had no guarantee as to the *exact* penalty that might be served upon him. The pre-trial judge, in fact, would still enjoy ample discretion in determining the basic penalty, from which such reduction had to be calculated. Further, since 1990, the one-third mandatory reduction could be applied at the end of trial, whenever the court found that the earlier refusal of the prosecution to agree to summary adjudication had been ‘unjustified’. In such a case, paradoxically, the reward for the defendant corresponded to no savings of costs for the criminal justice system and no beneficial impact on the courts’ workload.

In addition, from 1992 onwards, the Constitutional Court repeatedly voiced its disquiet at the evidentiary basis of summary adjudication. As mentioned above, no new evidence – with the sole exception of the examination of the defendant – could be presented by the parties. The judgment had to be based on the investigation transcripts, unless the pre-trial judge considered the findings insufficient to reach a reasoned decision. In a series of judgments that stopped short of ruling the entire system of summary adjudication unconstitutional, the Court argued that too heavy a reliance had been placed upon the arbitrary decisions of the prosecution. For instance, if the prosecution deliberately left gaps in the investigation, applications for summary adjudication would be invariably rejected. Defendants in such proceedings would therefore lose their chance to negotiate a penalty reduction and suffer an undue intrusion into their right to equal protection.<sup>37</sup> More broadly, the Court did not appreciate the idea that a criminal judgment could be delivered upon ‘incomplete’, albeit not necessarily ‘insufficient’, evidence.

Under the threat of a judgment of unconstitutionality, the Parliament amended the rules for summary adjudication in 1999. A new procedure was designed, in which, on the one hand, no room for negotiation between the parties had been left, but, on the other hand, the incentive of a penalty reduction for the defendant had been preserved. At present, the prosecutor has no say in the request for summary proceedings: the decision to apply rests with the defendant alone. When such an application is made, a hearing takes place before the pre-trial judge and, if he considers the findings insufficient to serve a judgment, additional evidence is acquired *ex officio*. The hearing is held *in camera*, unless the defendant requires it to be public.

In essence, the law makes a permanent and unconditional offer to all defendants in Italian criminal proceedings: if they waive their right to trial and accept to be judged on the basis of the findings of the investigation, the penalty in the case of a conviction is reduced by one-third. Such procedure has no precedent in the Western World and it is revolutionary in so far as it establishes a ‘right to a penalty reduction’ upon request.

The justification of this peculiar right still lies in concerns of procedural economy: while no trial is celebrated, proceedings come to a prompt close before the pre-trial

36 W.T. Pizzi and L. Marafioti, ‘The New Italian Code of Criminal Procedure: The Difficulties of Binding an Adversarial Trial System on a Civil Law Foundation’, 17 *Yale Journal of International Law* (1992) 1–40, at 28.

37 Corte Cost., Judgment No. 92/1992, in *Cass. Pen.* (1992) 1461.

judge. Whether this would happen in practice, however, is a different matter. In fact, the costs saved by the criminal justice system in exchange for a waiver of the 'right to trial' may be rather limited. As anticipated, additional evidence can be acquired *ex officio* by the court. Furthermore, the defendant's request for summary adjudication may be subject to the condition that certain evidence is adduced at the hearing. In such cases, the prosecution also enjoys a procedural right to make counter-arguments and produce counter-evidence. Most often, a number of witnesses and experts will be called to take the stand and there is also a chance that the counts on the indictment may be amended. For these reasons, summary hearings could become as lengthy and complex as trial hearings are.

Last but not least, doubts have been cast over the desirability of such procedure. The one-third penalty reduction is automatic and 'universal': it applies even to the most vicious offences and the most dangerous defendants.<sup>38</sup> For the purpose of this work, however, what matters is that the new procedure has completely thrust aside negotiations between the parties. While the new model of summary adjudication has been received favourably by the Constitutional Court,<sup>39</sup> however, it remains to be seen whether the replacement of negotiations with an 'inquisitorial' early hearing will be at all beneficial to concerns of procedural economy.

## 4. Negotiations 'on Sentence'

Italian law also experiments with negotiations on the penalty to be served on the defendant. In the following sections, discussion concentrates on the 'application of a penalty upon request' and the procedure for a bargained sentence in appeal.

### *A. Penalty upon Request: The Italian Analogue of Plea-Bargaining*

Professor Damaška argues that while Anglo-American negotiations can affect charges, leading to their alteration or even partial elimination, Continental negotiations mainly lead to the reduction of punishment. This remark suits the present state of Italian law. In the American model, the guilty plea – i.e. the decision of a defendant to plead guilty to, or not contest, a number of counts on the indictment – is often preceded by plea-bargaining. This is a pure negotiation between the defendant in person or his counsel and the representative of the prosecution, over the terms of the plea. Such terms may refer to the offence to which the defendant is prepared to plead guilty and/or the sentence that he may be prepared to suffer as a result of the plea. In practice, negotiations may be long and complex, and defenders have developed various types of techniques to persuade the prosecutor to make a more acceptable offer for a guilty plea. In comparison, the Italian analogue procedure only leaves room for 'bargaining on the sentence': the defence is entitled to negotiate up to a one-third reduction of the penalty laid out by the law, and only when the concerned offence is of a limited gravity. Informally, however – especially when the agreement between the

38 F. Cordero, *Procedura Penale* (Milano: Giuffrè, 2000), 967.

39 Corte Cost., Judgment No. 115/2001, in *Cass. Pen.* (2001) 2603.

parties is reached at early stages – a ‘charge’ bargaining may still take place, if the prosecutor accepts to under-qualify the charges.

### 1. *Mode and Temporal Boundaries of Negotiations*

Italian law is silent as to the mode of the negotiations. There are no formalities governing the matter and no court supervision is provided for at this stage. Typically, counsel would approach the public prosecutor at her office, where the details of the agreement can be drafted. Negotiations, however, may also be conducted on the phone or via e-mail. When an agreement on a specific penalty is reached, the parties may either file a written request with the pre-trial judge or else apply orally for such a penalty at the committal hearing. In essence, the parties draft a ‘project of sentence’ and submit it for approval to the court. Obviously, no use in evidence can be made of any admission made by the defence during such negotiations. To ensure procedural economy, a valid agreement must be reached before closing speeches start at the committal hearing. When no committal hearing is held,<sup>40</sup> the agreement must be reached before the formal opening of the trial.

### 2. *Negotiable Offences*

A symptom of the resistance of Continental systems against negotiated justice is their tendency to reduce its ambit of application to petty offences.<sup>41</sup> The drafters of the Italian CPP followed this assumption in 1988 but the wind has recently changed. At the time of the coming into force of the CPP, bargaining was permissible as long as the resulting period of detention did not exceed two years in duration. Since the maximum reduction allowed by the law was – and still is – one-third of the punishment laid down by the law, such procedure applied to offences that were punishable by a prison term of less than three years. As anticipated, a way around this restriction was possible at the investigation stage, where counsel could try to persuade the prosecutor to under-qualify the related offence. For example, shoplifting could be characterized as simple theft, in order to keep the penalty within the required limits.

This state of affairs has been reviewed in 2003,<sup>42</sup> when an extended form of plea-bargaining (commonly known as *patteggiamento allargato*) was introduced by statute. While the principle remains that the procedure of ‘penalty upon request’ should not be available for each and every offence, the legal threshold has moved upwards, so as to cover any offence punishable by less than seven-and-a-half years in prison. The said increase, however, does not operate if (a) the offence relates to the area of organized crime, or (b) the declarant is of bad character. In such cases, the old three-years rule applies. The reform was intended as a response to the rather disappointing figures of the first decade of plea-bargaining in Italian litigation. In the period 1988–1993, the charged offences that were disposed of through such

40 In proceeding for offences punishable by a prison term of less than four-years, a notice of direct transfer to trial is served by the prosecution to the defendant when the decision to prosecute is taken.

41 Damaška, *supra* note 5.

42 Law No. 134/2003.

bargaining were 10 times fewer in number than those which proceeded to trial.<sup>43</sup> These figures are no match for the US system of justice, where nearly 95% of all criminal cases are settled with a bargained plea of guilt or no contest. Also, from its early days, the procedure of 'penalty upon request' caused mixed emotions among the Italian practitioners in different areas of the Country. For instance, while in the north this simplified procedure was mostly favourably received for its contract-like nature, 'in the south [it] gave rise to some distrust, for [it] diminish[es] the resources of lawyers, of which there are many'.<sup>44</sup>

Commentators acknowledge that the 2003 reform has broadened enormously the area of negotiations: offences such as sexual assault, assisting suicide and corruption of judges may now be disposed of through bargains between defence and prosecution. Further, since the threshold of seven-and-a-half years refers to the penalty *after* the reduction for any mitigating factor that may be relevant, crimes such as manslaughter or even homicide may sometimes fall within the ambit of the *patteggiamento allargato*.

### 3. Nature of the Judgment

The eccentricity of this form of procedure can be inferred from the nature of the judgment. In fact, applications for a negotiated penalty lead to a *sui generis* judgment, analogous in some respect but by no means identical with that of a conviction.

The problem is that the defendant does not admit guilt; nor is his criminal responsibility 'fully' established by the court. If one accepts that an ordinary criminal conviction consists of both a judgment of positive ascertainment of facts and responsibility and a declaration of the legal consequences emanating from such an ascertainment, some doubts may arise as to whether the former part is in effect present in the decision under scrutiny.

In 1990, the Supreme Court argued that the prosecution is exempted from the burden of proving guilt beyond reasonable doubt while the accused accepts, based on his own assessment of convenience, to be sanctioned with a specified sentence. For such reason, the Supreme Court's reasoning went on, the judgment ought to be considered 'hypothetical' in nature, as it only establishes an hypothesis of responsibility, and not its positive ascertainment.<sup>45</sup> Instead, commentators have long argued that a judgment that serves a penalty on the defendant can be nothing other than a ordinary conviction.<sup>46</sup> This view is to be preferred. On the one hand, the judgment served upon a joint request of the parties is not the mere ratification of the parties' agreement: it must be anticipated that the judge is entitled to acquit the defendant when the sentence lacks an adequate factual basis. On the other hand, if the judgment serving the penalty made no assessment of guilt, then there would be a violation of the

43 N. Boari and G. Fiorentini, 'An Economic Analysis of Plea Bargaining: the Incentives of the Parties in a Mixed Penal System', 21 *International Review of Law & Economics* (2001) 213–229, at 214.

44 Tulkens, *supra* note 1, at 681.

45 Corte Cass., 19 February 1990, in *Cass. Pen.* (1990) 44.

46 Cordero, *supra* note 38, at 972.

‘principle of legality’, as described earlier. The Constitutional Court has indirectly subscribed to this view. In 1992, it stated that a judge who rejects a request for bargained penalty at pre-trial stage cannot serve as a trial judge, precisely because the early assessment goes to the merits of the case.<sup>47</sup>

It must be said, nevertheless, that the legal effects of a bargained judgment are more limited than those of any conviction served at the end of a trial. Such limited effects are an incentive for the defendant to pursue negotiations, as explained in the following section.

#### 4. *Incentives for the Negotiators*

The incentives for the negotiators may be easily summarized. The prosecution saves the time and expense of a trial (and appeal).<sup>48</sup> The defendant enjoys a silent and inexpensive end to the proceedings brought against him, along with the certainty of a specified – and rather lenient – sentence and a shield against the legal consequences of a conviction. Not all these incentives, however, have been extended to the 2003 version of plea-bargaining. In other words, serious offenders who agree to a negotiated penalty are not eligible for the ‘full’ panoply of advantages established by the law.

These are five types of incentives that operate concurrently.

First, when an application for a bargained penalty is accepted by the court, the judgment is drafted immediately. No public appearance of the defendant in the courtroom is necessary. This is a significant difference from the procedure adopted in England or the United States, where the defendant is required to come to court, listen to the public arraignment and admit that he or she is ‘guilty’. Instead, in Italy the submission of an application for a negotiated penalty is by no means equivalent to an admission of guilt.<sup>49</sup> On the one hand, the absence of the ‘plea of guilt’ is the consequence of fear of the drafters of the Code that such a plea could undermine the presumption of innocence as set out in Article 27 of the Constitution. On the other hand, one should note the reluctance of Italian law in allowing the defendant himself to determine the outcome of the trial by pleading guilty: it is still the judge who determines such an outcome and he may, in certain cases, reject the application filed by the parties.

Secondly, the application for a negotiated penalty gives to the defendant some control over the discretion of the judge in serving a suspended sentence. An application for penalty may be filed on condition that a suspended sentence is served,<sup>50</sup> provided that the penalty is one that can be suspended under the provisions of the

47 Corte Cost., Judgment No. 186/1992, in *Ind. Pen.* (1994) 126. The rule is that a judge who dealt with the merit of a case at any stage before trial is ‘incompatible’ to serve as a member of the court.

48 A limited right to appeal is granted only to the prosecution, when its refusal to come to an agreement is overruled as ‘unjustified’ by the court.

49 This view is shared by the Constitutional Court: Judgment No. 251/1991, in *Giur. Cost.* (1991) 2056.

50 Cf. Art. 444(3) CPP.

Criminal Code.<sup>51</sup> If the judge refuses to suspend the sentence, then the application for a penalty is automatically discarded and the case proceeds to trial.

Thirdly, the judgment served as a result of an application for a negotiated penalty has no effect in related civil or disciplinary proceedings. In other words, in such proceedings, the defendant may still claim innocence or contest the findings of the criminal judgment. This is the outcome of the 'diminished' nature of the judgment under scrutiny and has adverse effects for a civil party claiming compensations for damages occurring as a consequence of the offence.

Fourthly, defendants will have the conviction expunged from their record after a few years if, in the meantime, they do not suffer a conviction for an offence of a similar nature.

Lastly, incentives also cover cost, disqualification orders and other security measures. Defendants who apply for a negotiated penalty are not liable for the costs of the proceedings, which goes against the general rule that calls for reimbursement of costs to the State in the case of a conviction. Following a Constitutional Court decision of 1990, however, defendants may be required to pay the costs suffered by the civil party.<sup>52</sup> Further, the sentence may not entail the ordinary disqualifications (from voting, parental authority, management of companies and so forth) and security measures for convicted persons.

### 5. *The Intrusions of the Court*

In Italian criminal procedure, 'the court is under no obligation to endorse ... any agreement the parties may have reached'.<sup>53</sup> In fact, courts enjoy considerable powers to intrude into the process of negotiation and even to disregard it. Such powers, which are often used in practice, can be seen as the emblems of an inquisitorial nostalgia. 'Intrusions' may be profitably grouped into two categories, in accordance with the interests that they are supposedly meant to promote: the fundamental rights of the defendant, on the one hand, and the 'public interest' in the punishment of offenders, on the other.

#### (a) The court as a guarantor of the fundamental rights

Negotiations cannot find judicial endorsement when their outcome is openly false or the defendant has been exploited. US commentators often argue that the frequency of plea-bargaining has perverted and trivialized the process of charging and sentencing, allowing prosecutors to overcharge and permitting defendants to be sentenced for offences that bear no resemblance to the facts of the case. Matters are remarkably different in Italy. By virtue of Article 444(2) CPP, the court may dismiss an application

51 A criminal sentence may be suspended when the penalty does not exceed two-year imprisonment and it is reasonable to expect that the defendant 'will not commit further offences'.

52 Corte Cost., Judgment No. 443/1990, in *Cass. Pen.* (1992) 525.

53 E. Amodio and E. Selvaggi, 'An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure', 62 *Temple Law Review* (1989) 1211-1224, at 1219.

for a consensual penalty whenever the accusation lacks a factual basis. This is meant to preserve the legality of the criminal process, so that no punishment may be served simply because it was requested by the defendant. The same applies if the offence is being prosecuted after the time limitation period or if an official complaint has not been filed, when the law considers such a complaint as an indispensable condition for the prosecution.

In Italy, as in the United States,<sup>54</sup> the court must also dismiss the application for a negotiated penalty if it is not satisfied that the application was made by the defendant voluntarily, with an understanding of the nature of the charge and the consequences of the conviction. The reason is obvious: only the free and informed decision of a defendant may give legitimacy to a punishment without a trial. When applications are made in person at committal hearings, the court may interrogate the defendant on the spot, in order to assess whether his decision is voluntary under the terms of the Code. When an application is filed in writing, the judge may summon the defendant to his office, although in practice this rarely happens. This is not to deny that the decision to apply for a penalty may sometimes be influenced by the strong pressure of the prosecution, or the fear of a higher sentence at the end of the trial. So far, however, Italian commentators have not yet suggested that negotiating pre-trial procedure should be deemed equivalent to ‘torturing the defendant’ with the prospect of a prison term – a view often expressed in the United States.<sup>55</sup> This is also because defendants in Italy may not waive their right to counsel and must be assisted by a lawyer at any stage of the proceeding.

Further, as anticipated, the ‘unjustified’ refusal of the prosecution to reach an earlier agreement with the defence may be overruled by the court, either at the opening of the trial or at its closure. The refusal is ‘unjustified’ when the prosecutor states no reason for it or when the qualification of the offence and the penalty proposed by the defendant appears to the court to be consistent with the facts in issue.

#### (b) The court as a promoter of the public interest

In 1990, a defendant in the town of Pistoia was charged with drug trafficking. Defence and prosecution agreed on a suspended sentence of one-and-a-half years. The court agreed that the qualification of the offence was correct and the mitigating factor considered in the agreement consistent with the facts in issue. Nevertheless, it considered the penalty too lenient with regard to the gravity of the offence. It then raised the question of the unconstitutionality of Article 444 CPP in so far as it prevented the court from challenging the terms of the parties’ agreement. The Constitutional Court found a constitutional violation: the provision in question failed to consider that a court should always be in the position to reject the applications of

54 Federal Rules of Criminal Procedure No. 11.

55 See D.G. Gifford, ‘Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion’, *University of Illinois Law Review* (1983) 37–98, at 58.

the parties, if the agreed sentence does not promote the value of the 'rehabilitation of the offender' embedded in the Italian Constitution.<sup>56</sup>

This landmark decision led Italian courts to frequently challenge the terms of the proposed penalty in order to assess whether it is 'congruous' with the facts in issue, the character of the defendant and the function of the criminal sanction. In practice, lenient penalties are often rejected by pre-trial judges: negotiations may then re-open and another 'project of sentence' may be drafted.

### *6. Adverse Impact for the Victim*

Attention shall now briefly focus on the prejudicial effects of plea-bargaining for the victims of the offences. Victims are excluded from the process of negotiations, despite the fact that they may suffer adverse consequences if such negotiations succeed.

In Italy, those who claim to have suffered damages as a consequence of the perpetration of a criminal offence are entitled to play a role in the trial against the alleged perpetrator, in the peculiar capacity of a 'civil party'. When they elect to do so, the judgment on the civil claim is served jointly with the criminal sentence. Most importantly, the assessment of 'guilt' or 'innocence' is relevant also to the civil claim. In the case of conviction, there is an obvious benefit for the civil party, since the decision on the compensations for damages is based upon the finding of guilt.

Matters are different when a negotiated penalty is served on the defendant. As explained, no trial takes place in such cases and the civil party is forced to bring the claim for damages before a civil court. This rule has two major drawbacks for the victim. First, civil proceedings are much more lengthy than criminal proceedings. Secondly, the defendants are entitled to claim their innocence before a civil court, despite the fact that a penalty was served upon them as a result of negotiations with the prosecution.

Furthermore, in the version of plea-bargaining established by the 1988 Code, victims could not even claim reimbursement of the costs suffered during the phase of the investigations, when the case was later settled with a negotiated penalty. This was because the incentives for the cooperative defendant included the waiver of all expenses. This unreasonable state of affairs was remedied by the Constitutional Court in 1990 and statutory provisions were later amended accordingly.

### *B. Negotiations in Appeal*

The model of consensual justice accords to the features of appellate proceedings in Italian law. In both civil and criminal proceedings, in fact, the areas to be covered in the judgment of appeal are determined by the parties, through the filing of specified 'grounds of appeal'. The assumption is that courts of appeal should limit their rulings to the points raised by the parties, while any undisputed matter is definitively settled.<sup>57</sup> Since the offices of the prosecution at the Tribunal of first instance and the Court of

56 Corte Cost., Judgment No. 313/1990, reported in J. Hatchard, B. Huber and R.A. Vogler, *Comparative Criminal Procedure* (London: British Institute of International & Comparative Law, 1996), 153.

57 For discussion, see E.M. Catalano, *L'Accordo sui Motivi d'Appello* (Milano: Giuffrè, 2001), 22.

Appeals are independent, the failure of early negotiations does not necessarily make later agreements between the parties impossible. Different prosecution offices may have different priorities and may be more willing than others to strike a deal with the defendant in the name of procedural economy.

Pursuant to Article 596 CPP, parties are expected to file their grounds of appeal in writing with the Court of Appeal within 60 days. Typically, appeals against conviction would argue that no offence had in fact been committed by the defendant, or a defence or a mitigating factor had not been considered by the court of first instance. The prosecution may appeal against acquittals and also convictions, when a higher sentence is sought. The interesting thing is that the law explicitly allows the parties to make concessions to each other, with reference to the grounds of appeal that they have already filed with the Court of Appeal. A simplified procedure applies when the parties agree to endorse certain grounds of appeal while simultaneously dropping all others. In such cases, as in the *patteggiamento*, the parties draft a ‘project sentence’, with an indication of the exact terms of the penalty that they are prepared to accept. In practice, negotiations on the grounds of appeal may be described as the functional equivalent to negotiations ‘on the sentence’.

Suppose that Mr A is convicted for murder. Suppose that counsel files an appeal on two separate grounds: (a) insanity and (b) provocation (this is a mitigating factor in Italian law). Suppose also that the prosecution files an appeal on the ground that the court failed to consider that the murder was especially cruel. Negotiations may in such a case be profitable, since the defence could have an interest in dropping ground (a) in exchange for the guarantee of a more lenient sentence.

Additional incentives for the parties are that the hearing is promptly held *in camera* and no further challenges based upon the dropped grounds of appeal can be brought before the Supreme Court.

## 5. The Italian Contribution to an International Discourse on Negotiated Justice

Italian law is experimenting with multiple ways of simplifying criminal trials through negotiations between defence and prosecution. While it is true that some experiments have failed (as in the case of ‘summary adjudication’), others have instead achieved remarkable successes. Appellate proceedings are often resolved with a bargain on the sentence and the application of penalty upon request was extended in 2003 to serious offences, in an attempt further to encourage pre-trial negotiations. Despite the constitutional acknowledgement of negotiated justice in 1999, however, the subject remains controversial. Certain constitutional principles (i.e. ‘the presumption of innocence’, ‘the principle of legality’ and the rule of ‘compulsory prosecution’) struggle to conform to the concept of negotiated justice and only convoluted legal reasoning may accommodate them all. It is commonly argued that the assumptions and principles of negotiating procedures are eccentric – and detached from – those of the traditional process. This is despite the fact that such procedures already account

for a thick portion of litigation. One could then conclude that a dual Italian criminal procedure is emerging, where values and principles are inherently different if the road taken by the parties is that of an 'imposed' or rather a 'negotiated' justice.

From an international perspective, some lessons can be learned from the Italian experience. First, any attempt to treat a criminal court of justice as the notary of an agreement reached elsewhere appears doomed to fail. Italian culture is not prepared to leave the resolutions of the criminal conflict in the hands of the parties. On the one hand, little faith is placed in the capability of contract-like relations to provide justice when an offence is perpetrated. On the other hand, there is a fear that in the process of negotiations, the affluent defendants would gain unjust benefits, often to the detriment of the victims of crime. As shown above, Italian courts act sometimes as the guarantor of 'public interest' and, at other times, as the promoter of the fundamental rights of the accused who may be unjustly induced – under the threat of imprisonment – into accepting a 'offer that he cannot refuse'. Secondly, if negotiations have to be encouraged for reasons of procedural economy, then appropriate and diverse incentives must be offered to the parties. The certainty of a specified penalty, for instance, may be more appealing to a defendant than a simple 'penalty reduction'. Cost, publicity and consequences in the criminal record are also relevant. Thirdly, it is inappropriate to confine the area of negotiations to the investigation stage. Profitable negotiations 'on evidence' may be pursued during trial, while appellate proceedings also provide an ideal opportunity to bring the criminal context to a close with a settlement 'on the sentence'.

The costs and resources saved by negotiated settlements in terms of court's workload and the speed of proceedings may still be paid by other actors in the criminal arena; society as whole may pay a price if negotiating procedures diminish public confidence in the fairness of criminal justice. Victims of crime may also suffer if they are systematically excluded from such bargains. Since the cost of holding trials for each and every criminal offence would be exorbitant and unbearable, however, these experiments of negotiated justice are leading Italian criminal procedure down a road of no return.