Editorial of the Dossier "A Comparative Analysis of Negotiated Justice Systems": an introductory overview.

Editorial do Dossiê "Uma Análise Comparada dos Sistemas de Justiça Negociada": uma visão introdutória.

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Abstract: The editorial analyses the different models of negotiated justice from a methodological perspective. It investigates the notion

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of negotiated justice, in relation to the mechanisms provided for under such label in different legal systems and critically examines the impact of similar models on procedural safeguards.

Keywords: negotiated justice; plea bargain; procedural safeguards; miscarriages of justice.

Resumo: *O editorial analisa os diferentes modelos de justiça negociada sob uma perspectiva metodológica. Examina-se o conceito de justiça negociada em relação aos mecanismos previstos sob essa denominação em distintos ordenamentos jurídicos e realiza-se uma análise crítica do impacto desses modelos sobre as garantias processuais.*

Palavras-chave: *justiça negociada; acordos criminais; garantias processuais; erros judiciários.*

1. Introduction

Since the last decades of the twentieth century, a growing number of states have adopted a highly heterogeneous set of procedural schemes based on the consent of the accused, through which the latter has assumed a key role in criminal proceedings, to the extent, according to some scholars, of preventing the possibility or even halting the proceedings.[3]

The extent of this phenomenon is now evidenced by numerous studies conducted in recent years.[4] Among these, a global study by Fair Trials, which analyzed ninety legal systems across six continents, is particularly noteworthy. The survey shows that, over the last thirty years, the number of countries that have introduced "trial waiver systems", which allow for the early resolution of criminal proceedings, has increased exponentially. While in 1990 only 19 of the countries examined officially

[3] "Dans le déroulement de la justice pénale, jusqu'à empêcher la possibilité ou même l'arrêt de la procedure", CHIAVARIO, Mario, La justice négociée: une problématique à construire. *Archives de politique criminelle*, 1993, 15, 27.

[4] See, for instance, LANGER, Máximo, The diffusion of plea bargaining and the global administratisation of criminal convictions. In LANGER, Máximo, MCCONVILLE, Mike and MARSH, Luke (eds.) *Plea Bargaining and Criminal Justice*, Elgar, 2024.

provided for forms of "justice by consent", by 2016 this number had reached 66: an impressive increase of around 300%.[5]

However, this global picture does not fully capture the complexity of the phenomenon. If we focus on the European continent, we can see that, at least for some countries, this trend is not exclusively a contemporary phenomenon but rather represents a return to the past[6]. Although until a few decades ago "it was a general opinion that, because of its construction in compliance with the rules governing the mixed form, a criminal process in continental Europe was not able to accommodate consensual decisions ending a process",[7] numerous studies have now clarified that forms of negotiated justice have a long tradition in the old continent as well[8].

If this is true, it should also be noted that the spread of "criminal consensualism"[9] in Europe has been less linear than in the Anglo-American experience. Periods of strong expansion—during which Roman-Germanic legal systems focused significantly on consensual justice to manage the caseload—were followed by periods of regression, among which the Age of Codification stands out in particular. That time was characterized by the never entirely successful attempt by central authorities to eliminate the possibility for defendants to enter into genuine 'negotiated criminal contracts'. In recent decades, however, the situation has reversed again, giving rise to a sort of circular path.

This observation is particularly interesting in that it reveals a fundamental fact of great importance: neither diachronically nor synchronically can it be argued, as some legal scholars have done in the

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5 See FAIR TRIALS, *The Disappearing Trial. Towards a rights-based approach to trial waiver systems*, April 2017, accessible at: https://www.fairtrials.org/app/uploads/2022/01/The-Disappearing-Trial-report.pdf.

6 See DELLA TORRE, Jacopo. *La giustizia penale negoziata in Europa. Miti, realtà e prospettive*. Wolters Kluwer/CEDAM, 2019, pp. 47-145

7 WALTOŚ, Stanisław, Settlements in Criminal Procedures in Europe: an Attempt of Synthesis. *Archivum Iuridicum Cracoviense*, 2000, p. 6

8 See DELLA TORRE, Jacopo. *La giustizia penale negoziata in Europa,* cit., p. 48.

9 EKEU, Jean P., *Consensuolisme et poursuite en droit pénal comparé*, Parigi, 1993 e PRADEL, Jean, Le consensualisme en droti pénal comparé. *Boletim da Faculdade de Direito. Nùmero especial. Estudos em homenagem ao Prof Doutor Eduardo Correza*, vol. lll, Coimbra, 1984, pp. 331 ff.

past,[10] that justice by consent was a characteristic specific and typical exclusively of Anglo-American accusatory trial models. This has now been openly acknowledged by the Strasbourg Court, which affirmed how "it can be considered a common feature of European criminal-justice systems for an accused to obtain the lessening of charges or receive a reduction of his or her sentence in exchange for a guilty plea or nolo contendere plea".[11]

Given these premises, one should inquire about the underlying reasons that lead criminal justice systems to feel, in a widespread and transversal manner, the need to resort to such institutions[12].

It is clear that one factor has a decisive impact on this phenomenon: the need, felt by states, to identify tools capable of reducing the number of controversial cases, thereby lightening a judicial burden that has often become unsustainable[13]. From this perspective, it is not surprising that contexts of greatest expansion of negotiation, such as the present one, have occurred precisely when the ordinary process is no longer able to absorb the demand for justice, according to the forms prescribed by the various Charters of Fundamental Rights and by criminal justice systems as a whole. In such a context, the possibility of bringing a criminal case to an early conclusion following an agreement has often been perceived as a mechanism for the survival of the system, rather than as a criminal policy choice. It is precisely the need to address this problem that has led to the spread, in a formal or purely judicial manner, in more and more legal systems, of more streamlined procedural schemes than the 'ordinary' model of criminal procedure. Such schemes being characterized by the defendant's waiver of a more or less extensive set of guarantees, often incentivized by the promise of favorable treatment in terms of penalties (and, in some cases, even the possibility of avoiding a criminal conviction altogether).

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[10] LANGBEIN, John H., Land without Plea Bargaining: How the Germans do it. *Michigan Law Review*, 1979, p. 204; LANGBEIN, John H. and WEINREB, Lloyd L. Continental Criminal Procedure: "Myth" and "Reality". *Yale Law Journal*, 1978, p.1549.

[11] See ECtHR, 23.2.2016, *Navalnyy ond Ofitserov v. Russia*, § 100.

[12] See DELLA TORRE, Jacopo. *La giustizia penale negoziata in Europa,* cit., pp. 145-151.

[13] FAIR TRIALS, *The Disappearing Trial*, cit., pp. 36 ff.

But that is not all. It should not be overlooked that the phenomenon described here can also be explained in light of the higher standard of fundamental rights recognized since the second half of the 20th century[14]. More rights mean longer trials; but, given the heavy workload and the scarcity of structural resources, this has placed many systems in a difficult position in terms of overall sustainability. This results in an obvious paradox: on the one hand, legal systems recognize more guarantees than in the past; on the other, they perceive the need to make some of them waivable, because they are not always sustainable in the full forms of ordinary judgment.

And it is precisely because of this structure, based on the renunciation of fundamental rights, that, among the mechanisms aiming at accelerating the procedure, those based on the defendant's consent are among the most delicate. This is especially true when, as is the case in several countries, even essential safeguards for reducing the risk of miscarriages of justice can be waived in such accelerated procedures, such as the standard of proof considered optimal for making a decision, the adversarial principle, the right to confront the accuser, the right to remain silent, the right to a second hearing on the merits, and so on. It is clear, moreover, that relativizing these guarantees means weakening fundamental safeguards to prevent the pronouncement of an unfair decision[15].

Hence, it is clear that the nature of the agreement, i.e., the content of the waiver, together with its effects and the controls that govern it, is a key factor in measuring the extent of the deviation that a similar mechanism entails with respect to the optimal cognitive model of criminal judgment. It is important to bear in mind that, as rightly pointed out in legal theory and now also in some international instruments, such mechanisms,

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[14] See THAMAN, Stephen C., A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial. In THAMAN, Stephen C. (ed.) *World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial*, Durham, 2010, pp. 326-330; WEIGEND, Thomas, Why have a Trial when you can have a Bargain?. In: DUFF, Antony, FARMER, Lindsay, MARSHALL, Sandra, TADROS, Victor (eds.), *The trial on trial*, vol. II, Oxford e Portland, 2006, p. 213.

[15] See DELLA TORRE, Jacopo, Riti consensuali ed errore giudiziario: un binomio ricco di criticità. In: LUPARIA, Luca (ed.), *L'errore giudiziario*, Milano, 2021, p. 403.

if not accompanied by adequate procedural guarantees, can profoundly transform the role of the parties to the proceedings and give the latter a more administrative connotation. What is more delicate, however, is that they may even compromise consistency with the deeper purposes of criminal justice, "such as identifying those who commit criminal offenses so that criminal law can be appropriately applied to them, while preventing wrongful convictions, treating defendants fairly and equally, using criminal law only as a last resort, and enabling the penal system to be transparent and render accounts to society".[16]

Given the spread of the phenomenon and its critical aspects, in this Dossier we have decided to focus our attention on one of the most problematic aspects of the broader phenomenon of consensualism in the criminal matter: that of negotiated justice in the strict sense.

This goal already poses an initial difficulty, which also emerged in the contributions selected in *this Dossier*. Indeed, the lack of a single normative definition of the concept in question generates significant complexity in determining what falls within its scope and what is excluded. For this reason, it is useful to start from the attempt to identify what – at least in our opinion – constitutes the core and the truly characteristic feature of criminal negotiation.

2. In search of a shared definition of "negotiated justice"

The expression "negotiated criminal justice" can be included, without fear of contradiction, among the most widely used doctrinal categories at international level for classifying the procedural frameworks present in contemporary procedural systems.[17]

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[16] LANGER, Máximo, Plea Bargaining as Second-Best Criminal Adjudication and the Future of Criminal Procedure Thought in Global Perspective. In: LANGER, Máximo, MCCONVILLE, Mike and MARSH, Luke (eds.) *Plea Bargaining and Criminal Justice*, cit., p. 552.

[17] See, in support of this, the study, characterized by a European perspective, by TULKENS, Françoise. Negotiated justice. In: DELMAS MARTY, Mireille and SPENCER, John (eds). *European Criminal Procedures,* Cambridge, 2005, pp. 641 ff.

However, anyone encountering this term cannot help but feel confused, at least at first glance, as it is affected by a considerable degree of linguistic uncertainty.

As proof of this, suffice it to say that authoritative Belgian doctrine, in order to account for some of the possible meanings with which this concept can be understood, found itself forced to divide *justice négociée* into a narrow sense,[18] a broad sense,[19] and a very broad sense.[20] It is interesting to note that a similar opinion had already been expressed more than a decade earlier in other countries. Even then, for instance, in Italy there were those who had stated that the concept of negotiated criminal justice in the *strict sense* adhered precisely only to the negotiation schemes grounded on the agreement of the parties, while in a *broad sense* it be used to encompass all the schemes of participation of the defendant alternative to the typical operating models of criminal justice.[21] More recently, in the same context, it has been acknowledged that the label "negotiated justice" lends itself to more or less extensive uses, resulting

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[18] See JACOBS, Ann. Le droit belge dans le concert européen de la justice négociée. *Revue internationale de droit pénal* 2012/1 Vol. 83, p. 44, according to whom "au sens strict, la justice négociée s'entend d'une justice ouvrant un champ pour une véritable négociation entre les intervenants à la procédure pénale [...] partenaires à part entière de la rencontre des volontés, chacun faisant valoir son point de vue et ses intérêts sous forme de propositions et de contrepropositions jusqu'à aboutir à un accord".

[19] Id., which states that "la justice négociée peut aussi être comprise, dans un sens plus large, comme incluant tout mécanisme comportant un assentiment des personnes visées par le processus judiciaire à la solution du conflit".

[20] Id., who finally argues that "plus largement encore, l'on peut parler de justice négociée chaque fois que le particulier se trouve en situation de jouer un rôle décisif dans le déroulement de la justice pénale".

[21] This opinion is held by CATALANO, Elena Maria. *L'accordo sui motivi di appello*. Giuffrè, 2001, p. 38, and is also taken up, among others, by GARUTI, Giulio. Dal dissenso immotivato alla giustizia riparatoria: lo stato dei poteri dispositivi delle parti. *Studium Iuris,* 2002, p. 1331.

in the identification of a "generic meaning",[22] a "slightly less generic meaning"[23], and, finally, a "more specific" meaning.[24]

In any case, from the most commonly used (re)definitions of the concept, it seems that the majority opinion[25] favors the "etymological"

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[22] See PULITANÒ, Domenico. Relazione introduttiva. Problemi del negoziabile nella giustizia penale. In: *Criminalità d'impresa e giustizia negoziata: esperienze a confronto,* Milano, 2017, p. 28, according to whom this concept, in the most general sense, can refer to negotiations (direct or indirect, explicit or implicit) that are part of the normal system, those concerning compensation for damage caused by a crime.

[23] Id. p. 28, who specifies that in a slightly less generic sense negotiated justice may refer to the use of *lato sensu* reward regulations, which link favorable consequences to *post delictum* behavior.

[24] Id., according to whom the expression in question in the "most specific sense" would indicate formal negotiations within the framework of alternative procedures (plea bargaining).

[25] Among others, BEERNAERT, Marie-Aude, Transactions, accords de plaider coupables et autres procedures judiciaires simplifiées – Quelques considérations sur la jurisprudence de la Cour européenne des droits de l'homme en matière de justice pénale consensuelle ou négociée, en marge de l'arrêt Natsvlishvili et Togonidze c. Géorgie du 29 avril 2014*, Revue trimestrielle de droit de l'homme*, 2015, p. 208 nt 2; BRANDÃO, Nuno. Acordos sobre a setença penal: problemas e vias de solução. *Julgar,* 2015, p. 16, nt. 15; DELMAS-MARTY, Mireille Prospettive sulla procedura penale in Europa*, Indice penale*, 1994, p. 236-237; D'ORAZIO, Samuel. La consécration de la justice pénale négociée. *Annales de droit de Louvain,* 2003, p. 384; FIŠER, Zvonko, GIALUZ, Mitja. La giustizia negoziata in Europa: uno sguardo comparato tra Slovenia e Italia. *Dir. pen. proc.*, 2012, p. 1149; JACOBS, Le droit belge*,* cit., p. 44; JUNG, Heike, Plea Bargaining and its Repercussions on the Theory of Criminal Procedures. *European Journal of Crime, Criminal Law and Criminal Justice*, 5, 2, 1997, pp. 112 ff.; MOREAU, Thierry, La reconnaissance préalable de culpabolité : just a deal ? Une occasion à ne pas manquer, mais un virage à bien négocier. In AA.VV., *La loi «pot-pourri II» : un recul de civilisation ?*, directed by M. Cadelli-T. Moreau, 2016, Limal, p. 129; TULKENS, Françoise. Una giustizia negoziata. In: CHIAVARIO, Mario (ed), *Procedure penali d'Europa,* Padova, 1998, p. 621; TULKENS, Françoise, VAN DE KERCHOVE, Michel. La justice pénale: justice imposée, justice participative, justice consensuelle ou justice négociée ?. In: GÉRARD, Philippe, OST, François et VAN DE KERCHOVE, Michel. *Droit négocié, droit imposé ?,* Presses universitaires Saint-Louis Bruxelles, 2019, p. 533; TURNER, Jenia I., WEIGEND, Thomas. Negotiated Justice. In: G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÀ (eds), *International Criminal Procedure: Principles and Rules,* edited by Oxford, 2013, pp. 1376 ff.; GLESS, Sabine, ZURKINDEN, Nadine. Negotiated Justice. Balancing Efficiency and Procedural Safeguards. In: LIGETI,

meaning of the adjective "negotiated",[26] linked to the Latin word *negotiatio*, to be understood as a series of discussions and negotiations between individuals, social partners and representatives of States, conducted with a view to reaching agreement on the issues raised.[27] Used in this way, the concept would refer, in particular, to those criminal law mechanisms that can give rise to a genuine exchange of proposals and counterproposals[28] between several parties, aimed at reaching an agreement,[29] capable of altering, to a greater or lesser extent, the normal procedural sequence

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Katalin, FRANSSEN, Vanessa (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart Publishing, 2017), p. 119. A peculiar exegesis of the phrase in question is, however, supported by FERRUA, Paolo. *La prova nel processo penale. Volume I. Struttura e procedimento*, 2nd ed. Turin, 2017, p. 9, according to which "negozio" refers to the exchange, the *do ut des* that characterizes these procedures: reduction of the sentence in exchange for acceptance of the conviction in the plea bargain or waiver of the right to cross-examination in the abbreviated trial. In doing so, therefore, this authoritative doctrine identifies as an essential feature of negotiated justice not the existence of concrete bargaining, but the presence, precisely, of an 'exchange', even an abstract one, determined by the adherence of a party to the proceedings to a procedural institution. A definition focused on the concept of "exchange" is also proposed by GIALUZ, Mitja. Voce *Applicazione della pena su richiesta delle parti*. In: *Enc. dir.,* Annali II, t. I, Milan, 2008, p. 14, who adds other conditions to this element: the mechanism that provides for *do ut des* must primarily respond to a procedural request and lead to a conviction through a "barter" between the defendant's admission of responsibility and the granting of advantages for the latter.

[26] See, on this point, GLESS, ZURKINDEN. Negotiated Justice, cit., p. 119.

[27] A "ensemble de discussions, de pourparlers entre des personnes, des partenaires sociaux, des raprésentants d'États, mené en vue de parvenir à un accord sur des problèmes poses", see CABON, Sarah-Marie. *La négociation en matière pénale*. Droit. Université de Bordeaux, 2014, p. 1. According to CHIAVARIO, Mario. La justice négociée, cit., p. 28, note 3, the expression "justice négociée" could evoke the idea of necessary bargaining; hence a preliminary negative assessment in terms of value judgment.

[28] In this regard, see TULKENS, VAN DE KERCHOVE. La justice pénale, cit., p. 533; as well as JACOBS, Le droit belge, cit., p. 44.

[29] It is worth noting that some authors, including MARCOLINI, Stefano. *Il patteggiamento nel sistema della giustizia penale negoziata,* Milano, 2005, p. 5, and MARAFIOTI, Luca. *La giustizia penale negoziata,* Milano, Giuffrè, 1992, p. 1, seem to focus their definitions of "negotiated justice" more on the element of agreement than on the necessary presence of negotiations, of which this is the result.

provided for by the legislator.[30] In other words, the key element of this category would be the fact that a negotiated justice model can provide for negotiation between the parties involved in the criminal justice system (judicial and police authorities, the accused, the victim), who act, at least formally, as *partners* in a contract in what could be defined as a "meeting of minds".[31] Conversely, all those mechanisms in which the dynamic element of negotiation is missing[32] - i.e. where there is no power of discussion, capable, through mutual concessions, to affect at least partially the content of these proposals and thus lead to a genuine negotiated agreement-[33] would not belong to this legal paradigm.

Opting for this interpretation, for example, mechanisms such as the Italian summary judgment and the *oblazione*, where there is the manifestation of consent by only one party to the proceedings (the defendant), who is faced only with the choice attributed in abstract terms by the law to decide whether or not to opt for such procedures,[34] would not fall within the scope of "negotiated justice", given the absence of an exchange of mutual concessions.[35]

At the same time, this judicial paradigm would not traditionally include those forms of criminal settlements in force, among others, in France and Belgium, precisely because they are based on a flat offer made by the authority to the accused, which, at least in theory, can only be accepted or rejected in its entirety, but not negotiated in terms of quantity.[36]

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30 See MARCOLINI. *Il patteggiamento,* cit., p. 5.

31 In this regard, see TULKENS. Una giustizia negoziata, cit., p. 621.

32 Idem.

33 TULKENS, VAN DE KERCHOVE. La justice pénale, cit., p. 533.

34 See, for example, CATALANO. *L'accordo,* cit., p. 31, who states that unilateral expressions of will are foreign to the concept of negotiated criminal justice in the *strict* sense but instead constitute the elective scope of application of the category of negotiation in the field of criminal proceedings.

35 See GLESS, ZURKINDEN. Negotiated Justice, cit., p. 119.

36 This view is expressed by TULKENS. Una giustizia negoziata, cit., pp. 621-622, as well as JACOBS, Le droit belge, cit., p. 72, who, however, pointed out that if in Belgium, prior to the laws of April 14 and July 11, 2011, a criminal settlement could not be considered negotiated justice, but only a contract of adhesion, on the contrary, this new law would "sans doute

On the contrary, not only the Anglo-Saxon *plea bargaining*,[37] the German *Verständigung*, or the Italian plea bargaining, but also all forms of bargaining in juvenile justice proceedings or during the enforcement phase would be exemplary manifestations of the category of "negotiated justice", precisely because they can be based on *negotiation*, even though that does not necessarily happen in concrete terms.[38] Indeed, given its generality, the term "negotiated justice" does not allow, at least if understood from a strictly literal point of view, for further distinctions to be made *a priori* between the heterogeneous existing forms of bargaining. In other words, even opting for the etymological meaning of the term "negotiated", the range of mechanisms potentially based on "bargaining" remains clearly heterogeneous.

In light of all this, it is not surprising that several authors have felt the need to adopt additional secondary classification criteria, with respect to the primary criterion of negotiation and/or agreement, suitable for carving out even more restricted areas (and therefore meanings) within the vast archipelago of negotiability.

To this end, parameters based on the moment when the agreement is reached have been proposed, considering it appropriate to separate the negotiated schemes operating before the judgment becomes final

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ouvrir un espace pour une véritable négociation, même si tel n'est pas le modèle adopté par le législateur".

[37] It should also be noted that in US doctrine, some authors argue that, despite appearances, in practice *plea agreements* are not really negotiated in most cases but, due to the greater bargaining power of *prosecutors* compared to the defendant and his or her defense counsel, are more like a "contract of adhesion in which one party can effectively force its will on the other party", see, verbatim, RAKOFF, Jed. S. Why Innocent People Plead Guilty, in *www.nybooks.com*. In the same vein, see STRUTIN, Ken. Truth, Justice, and the American Style Plea Bargain. *Albany Law Review,* 2013-2014, p. 829.

[38] It should be noted that, in order for a mechanism to fall within the category in question, it does not seem necessary for an exchange of proposals and counterproposals between two or more parties to take place in each individual case, but only that such a possibility exists in the abstract. In fact, it is entirely natural that, in practice, an agreement between the parties can be reached immediately, without prior negotiation.

from those occurring in the enforcement phase.[39] And this certainly not because the study of these regulatory areas from the point of view of consensus cannot prove fruitful, but because they constitute autonomous subsystems that obey logics and fundamental principles different from those in force in the trial phase.[40]

At the same time, subjective criteria have also been proposed, suggesting that the procedural mechanisms concerning adult defendants should be separated from those designed for minors,[41] or that they should be divided according to whether or not the victim participates in the proceedings,[42] or, again, whether or not the agreement is presented in proceedings concerning natural or legal persons.

The following sections will follow this approach by proposing two (additional) classification sub-criteria, based in particular on *the rationale* behind the negotiated mechanisms and their purpose. This will serve as indispensable corrective measures to the vagueness that also afflicts the definition of negotiated criminal justice *in the strict sense*.

3. "Negotiated justice" and "restorative justice"

Without fear of contradiction, it can be said that one of the most debated classification issues concerning the macro-category of procedural mechanisms is whether those belonging to the paradigm of *restorative justice*[43] – and in particular mediation between the offender and the

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[39] In this regard, see, for example, TULKENS. Una giustizia negoziata, cit., p. 622, as well as MARCOLINI. *Il patteggiamento,* cit., p. 4.

[40] See MARCOLINI. *Il patteggiamento,* cit., pp. 4-5.

[41] Id., p. 2.

[42] Thus, authoritatively, DELMAS-MARTY. *Prospettive,* cit., p. 236.

[43] The literature on this model of justice is boundless. For the necessary doctrinal references on this point, see, in Italian literature alone, the volumes EUSEBI, Luciano (ed), *Una giustizia diversa. Il modello riparativo e la questione penale*, Milano, 2015; MANNOZZI, Grazia, LODIGLIANI, Giovanni Angelo (eds). *Giustizia riparativa. Ricostruire legami, ricostruire persone*, Bologna, 2015; MANNOZZI, Grazia. *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale,* Milano, 2003; MATTEVI, Elena. *Una giustizia più riparativa. Mediazione e riparazione in materia penale*, Napoli, 2017. For a comparative analysis of the evolution of 'restorative justice' at European level, see

victim (*victim offender mediation*-VOM) – can also be included within the realm of *negotiated justice*. This question inevitably arises, given that VOM contains elements that characterize the definition of negotiated justice in the strict sense: within VOM, a dialogue takes place between the parties to the proceedings (in this case, the offender and the victim) in front of a mediator, with the aim of reaching an agreement that can lead to an early settlement of the case.[44] In short, we are undoubtedly dealing with procedural paradigms based on discussion, which, if successful, can result in a (very marked) *diversion* from the ordinary procedure.[45]

Precisely by leveraging the objective—and indisputable—fact that negotiations can lead to an agreement that can transform the ritual, a part of the European doctrine, albeit with some different nuances of thought, has classified VOM—perhaps the main institution of *restorative justice*[46] —within the domain of negotiated justice[47]. However, this opinion

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the extensive collective volume by DÜNKEL, Frieder, GRZYWA-HOLTEN, Joanna, HORSFIELD, Philip (eds.), *Restorative Justice and Mediation in Penal Matters*. A *stock-taking of legal issues, implementation strategies and outcomes in 36 European countries,* vols. I-II, Mönchengladbach, 2015.

[44] For a complete description of how mediation between victims and offenders works, see MANNOZZI, LODIGLIANI. *Giustizia riparativa,* cit., pp. 249 ff.

[45] See, CIAVOLA, Agata. *Il contributo della giustizia consensuale e riparativa all'efficienza dei modelli di giurisdizione*, Giappichelli, Torino, 2010, p. 50.

[46] See MANNOZZI, LODIGLIANI. *Giustizia riparativa,* cit., p. 101, as well as p. 255, where the authors clarify that among the instruments of restorative justice, mediation can be considered, if not the most important, at least the most formalized.

[47] In this regard, among many others, see CAIRO, Robert. *La médiation pénale: Entre répression et réparation,* Paris, 1997, p. 17; M. CAPUTO, Matteo. *Il diritto penale e il problema del patteggiamento,* Jovene, 2009, p. 416; CATALANO. *L'accordo,* cit., p. 38; AMIEL, Claude, GARAPON Antoine. Justice négociée et justice imposée dans le droit français de l'enfance. *Annales de Vaucresson*, 1987, n°27, pp. 17 ff.; GARUTI, *Dal dissenso*, cit., p. 1331; JACOBS, Le droit belge, cit., p. 45; MAZEROL, Marie-Thérèse. Justice négociée: une expression ambiguë; pour le magistrat, un «compromis» *entre deux types* d'aspirations,. *Annales de Vaucresson,* 1988, no. 29, p. 77 ff.; MILBURN, Philip. De la négociation dans la justice imposée. *Négociations,* no 1(1), 2004, pp. 27 ff.; Id., *Évolution de la place de la médiation dans la justice française*. *Négociations,* 2009, no. 12, p. 147; MONDON, Denis Justice imposée, justice négociée *: les limites d›une opposition, l›exemple du parquet*. *Droit et société*, n°30-31, 1995. pp. 349 ff.; TULKENS. Una giustizia negoziata, cit., pp. 629 ff.; TULKENS, VAN

has been completely rejected by other authors, who have placed VOM outside the phenomenon under consideration, relying on the completely heterogeneous *rationale* that characterizes classic mechanisms of negotiated justice, as opposed to restorative ideals.[48]

It is, moreover, undisputed that the *restorative* model—beyond the complex definitional problems that afflict it[49] —has, as its primary purpose, that of favoring an alternative to traditional punitive sanctions, in response to criminal offenses.[50] This model does not focus on the

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DE KERCHOVE. La justice *pénale,* cit., p. 533; VAN DE KERCHOVE, Michel. Contractualisation de la justice pénale ou justice pénale contractuelle?. In : S. CHASSAGNARD-PINET, D. HIEZ, *La contractualisation de la production normative,* Dalloz, 2008, pp. 195 ff. It seems useful to point out that VENTUROLI, Marco. *La vittima nel sistema penale dall'oblio al protagonismo?*, Napoli, 2015, p. 79, even stated that "the protection of the victim represents one of the main objectives – if not the primary one – of the paradigm of negotiated justice (known as *restorative justice*", thus demonstrating that he uses the two concepts as synonyms. CAPRIOLI, Francesco. Processo penale e commisurazione della pena. In: PAVARINI, Massimo (ed). *Silète poenologi in munere alieno! Teoria della pena e scienza penalistica, oggi,* Bologna, 2006, p. 152, notes strong similarities between *restorative justice* and Italian plea bargaining.

48 In this sense, see EUSEBI, Luciano Giustizia conciliativa e discrezionalità nel sistema penale. In: PICOTTI, Lorenzo, SPANGHER, Giorgio (eds), *Contenuti e limiti della discrezionalità del giudice di pace in materia penale.* Milano, 2005, p. 71; GIALUZ. Voce *Applicazione,* cit., p. 14; MAGGIO, Paola. Mediazione e processo penale: i disorientamenti del legislatore italiano. In: PERA, Alessandra, *Dialogo e modelli di mediazione*, Padova, 2016, p. 39; PATANE', Vania also seems to believe that mediation operates from a different perspective compared to negotiated justice, see La tutela della vittima nel procedimento di mediazione. *Giur. it*., 2012, p. 488. In similar terms, but with reference to Spanish *conformity*, see DEL MORAL GARCÍA, Antonio. Otra vez sobre conformidad y conformidades en el proceso penal. In: *Fernando Herrero-Tejedor Algar. Liber Amicorum,* Madrid, 2015, p. 507 ff., who believes that mediation implies anthropological concepts that are very distant from the criminal utilitarianism that inspires conformity.

49 See MANNOZZI, LODIGLIANI. *Giustizia riparativa,* cit., pp. 89 ff. See also, in particular, Annex 3, entitled *Restorative justice. Definitional profiles; types and characteristics of restorative justice programs,* in the proceedings of Table 13, of *the General Assembly on Criminal Enforcement,* entirely dedicated to "*Restorative justice, mediation, and victim protection*," available at *www.giustizia.it*.

50 See PERONI, Francesco. Nozioni fondamentali. In: PERONI, Francesco, GIALUZ, Mitja. *La giustizia penale consensuale. Concordati, mediazione e conciliazione*, Torino, Utet, 2004, p. 5. On this subject, see also VAN DE

mere atonement for the illicit committed but rather on a process of reconciliation and reparation of the conflict that has arisen as a result of the criminal offense. In short, if the fundamental element of the mechanisms belonging to the paradigm of negotiated justice is, once again, identified in the consent of the accused,[51] in the restorative models the former is not merely instrumental to the early closure of the proceedings[52] or to obtaining a reward, but, on the contrary, serves - for the most part - as a sign of adherence to a "process of pacification" between the victim and the offender.[53] Restorative justice is, in essence, certainly a dialogical paradigm, but not because it presupposes a dialogue between the state and the perpetrator of the crime. Instead, it presupposes, at least in the basic form of VOM, a dialogue between the perpetrator and the victim,[54]

KERCHOVE, Michel. La justice restauratrice au cœur du conflit des paradigmes de la peine. *Histoire de la justice,* 2015, no. 1, pp. 123 ff.

[51] See, for example, Articles 2 and 12 of Directive 2012/29/EU of October 25, 2012, establishing minimum standards on the rights, support, and protection of victims of crime and replacing Framework Decision 2001/220/JHA, in *OJEU,* November 14, 2012, L. 315/57, which establish the free consent of the defendant and the victim as a prerequisite for the functioning of restorative justice.

[52] See GIALUZ, Mitja. *Mediazione e conciliazione.* In: PERONI, Francesco, GIALUZ, Mitja. *La giustizia penale consensuale* cit., p. 103.

[53] Id., p. 103. UBERTIS, Giulio. *Riconciliazione, processo e mediazione in ambito penale*, in Id., *Argomenti di procedura penale,* vol. II, Milan, 2006, p. 102 speaks of a restored relationship between victim and offender, in which mutual recognition of their humanity is achieved, painful but also without resentment and, if anything, confident in the future.

[54] See DONINI, Massimo. Compliance, *negozialità e riparazione dell'offesa nei reati economici. Il delitto riparato oltre la* restorative justice. In: *Criminalità d'impresa e giustizia negoziata: esperienze a confronto*, a cura del CNPDS, Giuffrè, Milano, 2017, p. 45, to which reference should also be made for an effective distinction between the categories of '*restorative* justice' and 'repaired crime', which – unlike the former – 'may depend on very cynical, instrumental assessments of the legal system itself, on very utilitarian interpretations of rewards'. By the same author, on the category of 'repaired crime', see Id., Il delitto riparato. Una disequazione che può trasformare il sistema sanzionatorio. *Dir. pen. cont. – Riv. trim*., 2015, no. 2, pp. 236 ff. According to PALAZZO, Francesco. Giustizia riparativa e giustizia punitiva. In: MANNOZZI, LODIGLIANI. *Giustizia riparativa,* cit., p. 73, institutions based on subsequent behavior to neutralize the offense can be conceived in a purely

whose relationship is placed at the center of the system.[55] The aim is to reach an agreement that allows for the reconstruction of that personal and social "fracture" that the crime has produced, by leveraging on a third party, preferably outside the criminal justice apparatus.[56] Once reconciliation has been achieved, the idea is that the public interest in bringing a case before the criminal court diminishes: reparation and reconciliation between the victim and the offender would, in fact, justify the judicial apparatus' decision not to pursue the proceedings.[57]

Conversely, "canonical" institutions of negotiated justice – such as *plea bargaining*, *Verständigung*, or other forms of settlement – are driven by a purely efficiency-based approach.[58] They pursue – to a undoubtedly predominant extent – the purely intra-procedural goal of ensuring the survival of the classic state-centric criminal model, allowing for the reduction of the excessive judicial workload[59] (in some cases, also the prison workload), to which modern criminal justice systems are certainly exposed. The "negotiation idea" is therefore permeated by an "economic" logic, that valorizes the failure to hold trials as a fact worthy of punitive reward.[60] This synallagmatic premise, already at first glance, is completely different from the *restorative* idea.

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utilitarian logic or in the broader framework of a path of reconciliation between offender and victim.

55 In this regard, see PALIERO, Carlo Emilio. La mediazione penale tra finalità riconciliative ed esigenze di giustizia, in *Accertamento del fatto, alternative al processo, alternative nel processo*, Milano, 2007, p. 112, as well as CIAVOLA. *Il contributo,* cit., p. 48.

56 See also DONINI. Compliance, cit., p. 45.

57 In this regard, see CIAVOLA. *Il contributo,* cit., p. 50.

58 See, on this point, the effective considerations of DAMASKA, Mirjan. *Negotiated Justice in International Criminal Courts,* in *World plea bargaining,* cit., p. 94, according to whom "practical usefulness or necessity turns out to be the only persuasive justification for negotiated justice".

59 Id, p. 94, where the author states that "the other, more important manifestation is the overload of the criminal justice system. If most cases went to trial, the personal and financial resources available for criminal law enforcement would be strained to the point where the quality of justice would be lowered throughout the system".

60 See DONINI. Compliance, cit., cit., p. 32.

It is precisely from this perspective, for example, that those who have attempted to separate conciliatory justice from *negotiated justice* have stated that the former aims to re-establish a dialogue between the perpetrator and the victim – regarding the needs for protection and reparation concerning the damaged property; while negotiated justice aims to promote the efficiency of the procedural system.[61]

Even in the absence of any regulatory guidance, the opinion of those who place VOM (and other restorative mechanisms involving a dialogue phase of discussion) outside the scope of negotiated criminal justice seems preferable to us, for several reasons.

Firstly, the clear distinction between these two phenomena, based on the *rationale* criterion has considerable advantages for classification purposes, given that it allows for a better delineation of the boundaries of both the category of negotiated justice and that of restorative justice.

Thus, for example, the division between *restorative* and *negotiated justice* allows us to clearly distinguish mediation between victim and offender from other types of mediation, which are characterized by a purpose unrelated to reparation. As is well known, in recent years, especially in the United States, alongside VOM, so-called *Case-Management Criminal Mediation*[62] (also known as *Voluntary Settlement Conferencing*) has also developed. They are nothing more than a process in which a "mediator" – often a judge – is not concerned at all with achieving reconciliation between the victim and the offender, but, on the contrary, aims at facilitating – at the request of the parties or the court – the conclusion of an agreement between *the prosecutor and* the defendant.[63]

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[61] EUSEBI, Luciano. Profili della finalità conciliativa nel diritto penale. In: DOLCINI, PALIERO, *Studi in onore di Giorgio Marinucci,* Milano, 2006, 1110 ss.

[62] On this subject, see, among many others, LAFLIN, Maureen E. Remarks on Case-Management Criminal Mediation. *Idaho Law Review,* 2004, pp. 572 ff.; LEONARD, Taylor C. The Pressure to Plead: How Case-Management Mediation Will Alter Criminal Plea-Bargaining. *Journal of Dispute Resolution,* 2014, pp. 161 ff.; LESTER, Brandon. System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining. *Ohio State Journal on Dispute Resolution,* 2005, pp. 563 ff., to which reference should also be made for further doctrinal and jurisprudential indications.

[63] For a clear distinction between VOM and *Case-Management Criminal Mediation,* based on the different *rationales* that characterize these institutions,

The purpose of *Case Management Mediation* is, in fact, "to conserve limited government funds, by cutting court dockets and increasing the likelihood of pre-trial plea bargains".[64] In short, it is a procedural mechanism aimed – first and foremost – at making it easier to reach an agreement on a *guilty plea* by the defendant, especially when "initial attempts at negotiation or plea bargaining have failed".[65] Well, it is precisely the *rationale* criterion that allows us to classify this type of mediation as plea bargaining,[66] being it "focused on the retributive paradigm".[67] In other words, it is not the word "mediation" in itself that is the key to the unlock the restorative model. Rather, that depends on the concrete ways in which the mechanism is organized to (re)build the (social) bond between the victim and the offender.

A clear separation between *restorative* and *negotiated* schemes is also useful in order to avoid "label frauds". In this regard, one need only to think of the mechanism recently introduced by the Italian legislator in Article 162-*ter* of the Criminal Code, namely the extinction of the offense through restorative conduct.[68] Despite the reference to "reparation", this

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see LAFLIN, Remarks, cit., pp. 579 ff., where it is also specified that "while victims and family members may be present for at least some portions of the conference, and some victim offender dialogue is theoretically possible, in practice the session itself is closer to facilitated plea negotiation than to VOM. If the victim and the offender can reconcile, this is an added bonus. Healing relationships is a by-product which may occur under the case management model, but it is not a primary focus". For a case law application, see *State v. Milligan,* No. 108.094, 2013 WL 2919942 (Kan. Ct. App. June 27, 2013), on which, see LEONARD, The Pressure, cit., pp. 162 et seq. A detailed doctrinal proposal aimed at enhancing the use of mediators in *plea* bargaining is contained in the recent volume by KELLY, William R., PITMAN, Robert. *Confronting Underground Justice. Reinventing Plea Bargaining for Effective Criminal Justice Reform,* Lanham – Boulder – New York – London, 2018, pp. 138 ff.

64 See, in this regard, LEONARD, The Pressure, cit., p. 168.

65 Thus, LAFLIN, Remarks, cit., cit., p. 587.

66 The expression is taken from LESTER. System Failure, cit., pp. 563 ff.

67 See LAFLIN, Remarks, cit., p. 587.

68 Among the first analyses of this provision, inserted by Law No. 103 of June 23, 2017, see CASCINI, Domenica Naike. Il nuovo art. 162-ter c.p.; esempio di "restorative justice" o istituto orientato ad una semplice funzione deflattiva?, *Arch. pen. online*, n. 2, 2017; DE FALCO, Giuseppe La nuova causa di estinzione del reato per effetto di condotte riparatorie di cui all'art. 162-ter

model is, in fact, a scheme that has nothing to do with *restorative justice*.[69] Conversely, it seems fully applicable – as a source of possible negotiations between parties to the proceedings – within the framework of *negotiated justice*. This is precisely because, within Article 162-*ter*, the scope for intervention by the victim is entirely marginal compared to the pressing need for deflation, which is always in the background.[70] In short, it is a form of "monetized" criminal justice scheme,[71] characterised by a purely economic logic,[72] which does not satisfy the ideals of restorative justice.

In any case, a second reason why the thesis that assimilates such different procedural schemes as *plea bargaining* and VOM into a single macro-category – namely, negotiated criminal justice – does not seem acceptable is that doing so greatly increases the danger of devaluing the completely different meaning of the discussion and confrontation between the parties to the proceedings that takes place in these institutions.

As has been effectively stated, in fact, the essence of mediation is the "journey", the shared path, the dialogue, the *storytelling* with

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c.p.: efficacia deflattiva reale o presunta?. *Cass. pen.,* 2017, pp. 4626 ss.; FERRANTI, Donatella. Giustizia riparativa e stalking: qualche riflessione a margine delle recenti polemiche, *Dir. pen. cont*., 4 July 2017; GRANDI, C. L'estinzione del reato per condotte riparatorie. Profili di diritto sostanziale. *www.lalegislazionepenale.eu*, 13 November 2017; MARUOTTI, RG. La nuova causa di estinzione del reato per condotte riparatorie di cui all'art. 162-ter cp tra (presunta) restorative justice ed effettive finalità deflative: prime riflessioni de iure condito. *www.questionegiustizia.it*; MURRO, Ottavia. La riparazione del danno come causa di estinzione. In SPANGHER, Giorgio (ed). *La riforma Orlando. Modifiche al Codice penale, Codice di procedura penale e Ordinamento penitenziario*, Pisa, 2017, pp. 48 ss.; QUATTROCOLO, Serena. Condotte *post factum* ed estinzione del reato: il nuovo art. 162-ter c.p. conferma il terzo principio della dinamica?. In: GIULIANI, Livia, ORLANDI, Renzo (eds). *Indagini preliminari*, cit., pp. 265 ss.

[69] See, on this point, in particular, as well as QUATTROCOLO. Condotte *post factum,* cit., p. 292. On the contrary, FERRANTI, Giustizia riparativa, cit., p. 3, seems to express a different opinion.

[70] See QUATTROCOLO. Condotte *post factum,* cit., p. 293, note 65.

[71] This echoes the expression used by CENTORAME, Federico. «*Certa, liquida ed esigibile»: sulla giustizia penale «monetizzata»*. *Riv. dir. proc.*, 2018, pp. 127 ff.

[72] The quotation is again from CENTORAME. «*Certa, liquida ed esigibile*» cit., p. 140.

therapeutic value and recognition of the other, the "ritual" that seeks to transform the destructive effects of conflict into an opportunity to "live with disorder" and find the infinite patience to start again.[73] On the contrary, in Italian plea bargaining, in German *Verständigung* or in US *plea bargaining*, the negotiation between the parties has purely economic or strategic aims: for the defendant to minimize the penalty that would abstractly be applicable to him/her and for the prosecution to save time and energy. In short, in the restorative and negotiated models, there are totally different "dialogic moments", which, precisely because of their heterogeneity, should not be assimilated at all.

Last, placing the *restorative* and *negotiated* paradigms on the same level is inadvisable even from a strictly pedagogical point of view. Doing so, would exacerbate the danger—already concrete in itself – that restorative institutions will not be seen in practice as useful means of rebuilding the bonds of human and social coexistence damaged by crime, but as schemes devoted solely to efficiency, allowing for easy reductions in sentences or quicker and more substantial compensation for damages.

As proof of the reality of the risk just mentioned, one needs only consider what happened in Italy with regard to the suspension of proceedings with probation for adult defendants.[74] Although authoritative doctrine had suggested that this procedural mechanism should be framed within *restorative justice*,[75] in its concrete application the Constitutional

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[73] See MANNOZZI, LODIGLIANI. *Giustizia riparativa,* cit., p. 257.

[74] For a presentation of this, see the monographic studies by BOVE, Valeria. *La messa alla prova,* Pisa, 2018; MAFFEO, Vania. I *profili processuali della sospensione con messa alla prova,* Naples, 2017; MIRAGLIA, Michela. *Un processo penale diverso. Analisi e prospettive della messa alla prova*, Torino, 2018, as well as the encyclopedic entries by CESARI, Claudia. Voce *Sospensione del processo con messa alla prova,* in *Enc. dir*., Annali IX, 2016, pp. 1005 ff.; CONTI, Carlotta. Voce *Sospensione del processo con messa alla prova dell'imputato maggiorenne,* in *Dig. disc. pen.,* Agg. VIII, Turin, 2016, pp. 691 ff.

[75] This thesis is supported, for example, by UBERTIS, Giulio. Sospensione del procedimento con messa alla prova e Costituzione. *Arch. pen*., 2015, pp. 726 ss.; SANNA, Alessandra. L'istituto della messa alla prova: alternativa al processo o processo senza garanzie? *Cass. pen*., 2015, pp. 1266 ss.; CESARI, Claudia, sub *art. 464-bis*. In: CONSO, Giovanni, ILLUMINATI, Giulio. *Commentario breve al codice di procedura penale*, 2ª ed., Padova, 2014, p. 2124. Altra parte della dottrina, invece, ha negato che la disciplina della messa alla

Court,[76] driven by deflationary needs, gave it a purely utilitarian interpretation,[77] expressly assimilating it, on several occasions, to summary judgment and plea bargaining.[78] This example clearly demonstrates that

prova rientri realmente all'interno dei paradigmi della *restorative justice*, cfr., per tutti, BERTOLINI, Benedetta. *La messa alla prova per adulti sotto le lenti della giustizia riparativa*, in *Verso un processo penale accelerato. Riflessioni intorno alla l. 67/2014 al d lgs. 28/2015 e al d.l. 2798/2014*, Napoli, 2015, pp. 30 ss.; MUZZICA, Raffaele. La sospensione del processo con messa alla prova per gli adulti: un primo passo verso un modello di giustizia riparativa? *Proc. pen. giust*., 2015, n. 3, p. 170 s.; ORLANDI, Renzo. *Procedimenti speciali*. In: BARGIS, Marta et al (eds). *Compendio di procedura penale*, 9ª ed., Padova, 2018, p. 693, stating that this probation mechanism is based essentially on reasons of procedural economy.

[76] For an overview of case law trends concerning probation, see BARTOLI, Roberto. Le recenti questioni applicative in tema di messa alla prova dell'adulto. In: *Giur. it., Gli speciali, Sistema sanzionatorio e processo penale: lavori in corso*, a cura di PALAZZO, Francesco e SPANGHER, Giorgio, 2015, pp. 6 ff.; CONTI, Carlotta, La messa alla prova tra le due Corti: aporie o nuovi paradigmi?. *Dir. pen. proc.,* 2018, pp. 677 ff.; ID., Messa alla prova: gli interventi delle Sezioni Unite, *inwww.treccani.it*; DI CHIARA, Giuseppe. Sub *art.* 464-bis c.*p.p.* In: GIARDA, Angelo, SPANGHER, Giorgio (eds). *Codice di procedura penale commentato,* 5(a)ed., vol. II, Milan, 2017, pp. 2171 ff.

[77] See, in this regard, PALAZZO, Francesco. Sanzione e riparazione all'interno dell'ordinamento giuridico italiano: *de lege data* e *de lege ferenda*. *Pol. Dir.*, 2017, p. 358, who states that the request for suspension seems to be motivated most of the time by assessments of convenience, which appear to presuppose a view of the institution according to a substantive logic of negotiation of the procedure: in short, it is the calculations of the chances of defense and the availability of other benefits that guide the choice of the person concerned.

[78] Reference is made, in particular, to the judgments of the Constitutional Court, December 7, 2018, no. 231, in *Dir. pen. proc.,* 2019, p. 955, with a note by PERONI, Francesco. La messa alla prova per adulti nuovamente al vaglio della Corte costituzionale; Corte cost., 21 febbraio 2018, n. 91. *Dir. pen. cont.,* June 26, 2018, with note by MUZZICA, R. La Consulta "salva" la messa alla prova: l'onere di una interpretazione "convenzionalmente" orientata per il giudice nazionale and Constitutional Court, November 26, 2015, no. 240, in *Giur. cost.,* 2015, pp. 2189 ff. with note by MAZZA, Oliviero. *Il regime intertemporale della messa alla prova.* See also BONINI, Valentina. *La progressiva sagomatura della messa alla prova processuale*, in *www.lalegislazionepenale.eu*, 28 November 2018, pp. 6 ss.; BOVE, Valeria. La Corte costituzionale salva la messa alla prova con un'ingegnosa quadratura del cerchio. *Dir. pen. proc*., 2018, pp. 1574 ss.; LEO, Guglielmo. La Corte costituzionale ricostruisce ed "accredita", in punto di compatibilità costituzionale, l'istituto della messa alla

practice, led by the perennial need to identify new and suitable means of reducing the excessive judicial workload, could even effectively translate even schemes potentially similar to restorative ideals into *negotiated justice*.

4. "Strong" and "weak" models of negotiated justice

Also the notion of "procedural agreement", resulting from prior negotiations between the parties, can vary greatly depending on the case.[79] An example from the case law of the European Court of Human Rights may clarify the problem.

In the case of *Litwin v. Germany*, the Strasbourg Court recognized conventional legitimacy (based in particular on the parameter of Article 6, paragraph 1, ECHR) of a German informal *Absprache*, characterized by complex content.[80] Namely, a judge offered the defendant a reduced sentence in exchange for his (preventive) waiver of his right to appeal, to assert certain rights (his and his wife's) over confiscated assets, and, finally, to present further evidence.[81] In this case, we are therefore dealing with a negotiated agreement, with both intra-procedural effects. On the one hand, an impact on the available evidence; on the other, the elimination of the appeal phase and a reduction in the amount of the penalty – and extra-procedural effects, as it concerns the waiver of rights to certain assets.

Even at first glance, if broken down into separate agreements, the contents of such a negotiated agreement alter the ordinary procedural sequence in a more or less significant way.

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prova. *Dir. pen. cont*., 7 May 2018; PARLATO, Lucia. La messa alla prova dopo il dictum della Consulta: indenne ma rivisitata e in attesa di nuove censure. *Dir. pen. cont*., 2019, n. 1, pp. 89 ff.

79 See, for example, CAMON, Alberto. Accordi processuali e giustizia penale: la prova patteggiata. *Riv. dir. proc*., 2008, 1, p. 57; CATALANO. *L'accordo,* cit., p. 31; DEL COCO, Rosita. *Disponibilità della prova penale e accordi tra le parti,* Milano, 2004, pp. 8 ff.; MARCOLINI. *Il patteggiamento,* cit., p. 3.

80 See European Court of Human Rights, Section V, November 3, 2011, *Litwin v. Germany,* §§ 37 ff.

81 Id., § 8.

In the case of an agreement to waive the right to appeal, the consequences for the proceedings are much greater, as the entire phase of reviewing the judicial decision is potentially eliminated and the case immediately becomes final. On the other hand, where there is a mere waiver of the right to present evidence, it is clear that the impact of the *pactum* on the proceedings is less significant, given that the proceedings continue to take place in their ordinary form. Finally, the level of alteration to the proceedings is minimal where waiving the right to claim confiscated property - given that the only consequence of the agreement would be a possible reduction in the defendant's sentence.

Therefore, since the agreements negotiated may vary to a different extent in the ordinary course of criminal proceedings, it is easy to understand why many proposed to divide such mechanisms into "more" or "less" strong models of negotiated justice, depending on how close the content of the agreement is to the merits of the case.[82]

We are therefore faced with a sub-criterion for classifying the phenomenon of negotiated justice, based, this time, on the subject of the agreement and the negotiation. This can be represented graphically by arranging negotiated mechanisms along a scale of intensity,[83] with the "strongest" (i.e. modifying the ordinary procedural sequence to a maximum extent) and the "weakest" (i.e. modifying the ordinary procedural sequence to a maximum extent) negotiated mechanisms positioned at opposite ends.

In this regard, consider, for example, the heterogeneous possibilities for evidentiary agreements foreseen in the Italian code of criminal procedure. On the one hand, they encompass agreements about the *an*, i.e. aiming at allowing the use at trial of information that could

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[82] This distinction was created by CATALANO. *L'accordo,* cit., p. 39, and immediately taken up, among others, in particular by GARUTI, *Dal dissenso*, cit., p. 1331. See also FONTI, Rossella, Vizi della volontà e giustizia penale negoziata. In: SANTORIELLO, Ciro (coord). *La giustizia penale differenziata. I procedimenti speciali*, vol. I, Torino, 2010, pp. 228-289.

[83] See, on this point, MARCOLINI. *Il patteggiamento,* cit., p. 6, as well as CAMON, Accordi, cit., p. 57.

otherwise not serve as evidence in light of the adversarial principle.[84] On the other hand, they include agreements on the *quomodo,* which do not settle the question of the evidentiary value of information but only affect the method by which such knowledge is gathered.[85] Both these models could be placed at the bottom of the aforementioned scale, i.e., among the weakest models of negotiated justice.[86] This is because the will of the party does not fall – except in a very indirect sense – on the subject matter of the trial, but rather on the manner in which one or more elements of the investigation are gathered, or, even more trivially, on the order in which evidence is produced at trial.

Mechanisms with a more significant impact of the structure of the procedure, for instance where the agreement among parties makes it possible for the court to use *all* the investigative information to ground its decision, could be placed at an intermediate level of the spectrum.[87]

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[84] This is the case of plea bargaining on evidence but also of Articles 500, paragraphs 3 and 7, 513, paragraphs 1 and 2, c.p.p. and of Article 78, paragraph 2, of the implementing provisions of the Code of Criminal Procedure.

[85] Article 496, paragraph 2 and Article 559, paragraph 3, c.p.p., see quotation and the one immediately preceding it are from CAMON, Accordi*,* cit., p. 57. On the subject of evidentiary agreements under Italian law, reference must be made, among many others, to BELLUTA, Hervè. Contraddittorio e consenso: metodi alternativi per la formazione della prova. *Riv. dir. proc.,* 2003, pp. 126 ff.; Id., Nuovi poteri istruttori extradibattimentali delle parti: l'accordo ex art. 431 comma 2 c.p.p. come criterio epistemico della prova. In: NOSENGO, Serafino (ed). *Nuovi scenari del processo penale alla luce del giudice unico*, Milano, 2002, pp. 69 ff.; DI BITONTO, Maria Lucia. *Profili dispositivi dell'accertamento penale.* Torino, 2004, pp. 93 ff.; BUZZELLI, Silvia. Fascicolo dibattimentale «negoziato» e cognizione probatoria. *Ind. Pen.* 2001, pp. 389 ff.; CHINNICI, Daniela. L'incursione della «prova negoziata» nel giudizio penale (alcuni rilievi critici). *Riv. dir. proc.,* 2003, pp. 864 ff.; DEL COCO. *Disponibilità,* cit.; BACCARI, GM., CONTI, Carlotta. Una nuova espressione del metodo dialettico: l'acquisizione concordata di atti di indagine. *Dir. pen. proc.,* 2003, pp. 873 ff.; MARAFIOTI, Luca. Prova «negoziata» e contraddittorio. *Cass. pen.,* 2002, pp. 2933 ff.; PROCACCINO, A. *Il negozio probatorio dibattimentale*, Giuffrè, 2010.

[86] See CATALANO. *L'accordo,* cit., p. 39, who seems to include agreements under Article 18, paragraph 2, c.p.p., as well as those under Articles 139, 5 and 559, paragraph 2, c.p.p., among the weak models.

[87] This is for example the case of the old Italian abbreviated judgment in its configuration prior to Law No. 479 of December 16, 1999. For a diachronic analysis of the evolution of summary judgment in the first twenty years of

Finally, near the top of the spectrum are schemes in which parties directly agree on the penalty[88] or, in any case, on the outcome of the proceedings. This is the case, among others, with the Italian plea bargaining,[89] the German *Verständigung* and the conditional dismissal *under* § 153a StPO, as well as the US *plea bargaining* and the Spanish *conformidad*, examined in detail in this *Dossier* by Borràs Andrés.[90]

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the Italian Code of Criminal Procedure, see, for all, TONINI, Paolo. I riti di impronta angloamericana: patteggiamento e giudizio abbreviato. In: *Il rito accusatorio a vent'anni dalla grande riforma. Continuità, fratture, nuovi orizzonti,* Milano, 2012, p. 275 ff.), which removed its nature as a negotiated procedure. See APRILE, Ercole. Gli esiti alternativi sul giudizio: la negoziazione sul rito, sulla prova e sulla pena. *Cass. pen.,* 2000, p. 3515; SPANGHER, Giorgio. *La pratica del processo penale,* vol. I, Padua, 2012, pp. 16-17; TONINI. *I riti,* cit., p. 280. *Contra,* however, FERRUA. *La prova,* cit., p. 6, who, adopting a peculiar definition of negotiated justice, still includes summary judgment within this category today.

It is no coincidence, moreover, that in the preliminary draft report, summary judgment was defined as a plea bargain on procedure. See, on this point, CONSO, Giovanni, GREVI, Vittorio, NEPPI MODONA, Guido. *Il nuovo codice di procedura penale. Dalle leggi delega ai decreti delegati*, vol. IV, il *Progetto preliminare del 1988*, Padova, 1990, p. 1009. In literature, see, for all, FERRUA, Paolo. Scelte accusatorie e riviviscenze inquisitorie nel nuovo processo penale. *Dif. Pen.,* no. 22, p. 49, as well as TONINI. *I riti*, cit., p. 278, who points out that from reading the preparatory work for the 1988 code, it can be inferred that the contractual nature of both Anglo-American models has been the guiding principle for the two simplified procedures in Italy since their inception, so much so that the symmetrical terms 'plea bargaining on the procedure' and 'plea bargaining on the sentence' have been used. With regard to the use of these expressions, see GREVI, Vittorio. 'Patteggiamento' sul rito e 'patteggiamento' sulla sanzione tra progetto Martinazzoli e prospettive del nuovo processo penale. *Riv. it. dir. proc. pen.,* 1985, pp. 1127 ff.

[88] See CAMON, Accordi*,* cit., p. 57, and, in similar terms, CATALANO. *L'accordo,* cit., p. 39.

[89] As LUPO, Ernesto stated immediately after the entry into force of the new Italian Code of Criminal Procedure, in *Il giudizio abbreviato e l'applicazione della pena negoziata.* In: GAITO, Alfredo. I *giudizi semplificati,* Padova, 1989, p. 80, in plea bargaining, the agreement has a much more intense content than in summary judgment, because it concerns the penalty to be applied, and it also has an effect on the procedure in that it determines a particular conclusion to the trial.

[90] BORRÀS ANDRÉS, Núria. La deriva epistémica de la conformidad penal en España: del juicio oral a un proceso estructuralmente sesgado, in *this Volume*.

On a closer inspection, however, even mechanisms where the negotiation directly concerns the sentence do not all seem to be placed at the same point on the above scale. Depending on the individual regulatory framework, the agreement between the parties can have a different impact on the outcome of the proceedings, altering the normal sequence in different ways.

The strongest models of negotiated justice (at the top of our scale) are found in countries such as the United States, which allow not only *sentence bargaining*,[91] but also horizontal and vertical *charge bargaining*,[92] and *fact bargaining*.[93]

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[91] This expression "refers to the agreement between the defendant and the judge and/or the public prosecutor in which, in exchange for the defendant's guilty plea, the application of a specifically indicated penalty or a penalty that can be determined from a pre-established range of options is promised", see, in this regard, BROWN, J. Meriti e limiti del patteggiamento. In: AMODIO, Ennio, BASSIOUNI, M. Cherif. *Il processo penale negli Stati Uniti d'America*, Milano, 1988, p. 132.

[92] For this distinction, taken from the expression "*vertical* and *horizontal overcharg*ing" used by ALSCHULER, Albert.W. The Prosecutor's Role in Plea Bargaining. *Chicago Law Review,* 1968, pp. 85 ff., see FIŠER, GIALUZ. La giustizia negoziata, cit., p. 1154, as well as KOBOR, Susanne. *Bargaining in the Criminal Justice Systems of the United States and Germany,* Frankfurt am Main, 2008, p. 64. In "horizontal *charge* bargaining", the parties are allowed to enter into a plea bargain, i.e. to agree on the penalty for certain offences and, at the same time, on the public prosecutor's waiver of prosecution for offences committed by the defendant and not included in the admission of guilt. In "vertical *charge* bargaining", there is an exchange between the defendant's self-incriminating statement and the downgrading of the charge to a less serious offence. For a clear and effective summary of the different types of institutions in which US negotiated justice unfolds, see, for all, BROWN, Meriti, cit., pp. 132-133; HERMAN, G.N., BOLITHO, Z.C. *Plea Bargaining,* 4(ª) ed., New York, 2017, *p*. 2; MANNOZZI, Grazia. Commisurazione e negoziato sulla pena nell'esperienza statunitense: punti di riflessione con riferimento alla legge n. 134 del 2003. In: PERONI, Francesco (ed). *Patteggiamento "allargato"* e *giustizia penale,* Torino, 2004, pp. 163 ff.

[93] An effective definition of this practice can be found in the judgment *Berthoff v. United States,* 140 F. Supp. 2d 50 (D. Mass. 2001), in which it is described as "the knowing abandonment by the government of a material fact developed by law enforcement authorities or from a witness expected to testify in order to induce a guilty plea". On this subject, see, among many others, BERMAN, Douglas A. Editor's Observations: Is Fact Bargaining Undermining the Sentencing Guidelines? *Federal Sentencing Reporter,* 1996, pp. 300 ff.;

Moreover, there is no doubt that where, through their mutual agreement, the parties can, for example, bring about a reclassification of a criminal offense, there is not only a marked deviation from the impact of ordinary criminal proceedings, but also a sort of "contractualization on the truth".[94] Indeed, where there is *charge* or *fact bargaining,* the factual statement contained in the judicial decision is no longer that which can be derived, in a generally neutral manner, from the evidence. Rather, it becomes the result of an artificial construction by the parties,[95] which has nothing to do with truth understood as correspondence with the factual recollection of the relevant events.[96]

EDMUNDUS, Robert H. Analyzing the Tension between Prosecutors and Probation Officers over "Fact Bargaining". In: Federal Sentencing Reporter Vol. 8, No. 6*, Assessing the Probation Officers' Survey: Does Fact Bargaining Undermine the Sentencing Guidelines?* (May - Jun., 1996), Duke University Press, pp. 318 ff.; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It,* in *www.nacdl.org,* July 10, 2018, p. 26; PIZZI, William T. Fact-Bargaining: An American Phenomenon. In: *Federal Sentencing Reporter,* cit., pp. 336 ff.; SARNER, Felicia. "Fact Bargaining" under the Sentencing Guidelines: The Role of the Probation Department*, ibid.,* pp. 328 ff. In Italian literature, see MANNOZZI, Commisurazione e negoziato*,* cit., p. 164, where the author states that *fact bargaining* should be understood as the promise to qualify the fact in a less serious manner (for example, by refraining from considering certain aggravating circumstances) in exchange for the defendant's admission of guilt.

94 The expression is borrowed from A. Camon, *Accordi processuali e giustizia penale,* cit., p. 59, who, however, uses it with reference to Italian evidentiary agreements.

95 See, in this regard, PAPA, Michele. La crescita miracolosa del bonsai: l'albero del patteggiamento allarga vistosamente la chioma ma stenta a sviluppare le radici. *Leg. pen*., 2004, p. 870, who points out that, in the most extreme cases, negotiation bulimia even leads the parties to fabricate, for the individual dispute, fictional legal entities: abstract *ad hoc* cases that have no counterpart in the catalogue of crimes officially provided for by the legal system.

96 For the relevant bibliographical references on this concept, see, for all, CAPRIOLI, Francesco. Verità e giustificazione nel processo penale. *Riv. it. dir. proc. pen.,* 2013, pp. 608 ff.; DAMASKA, Mirjan. Truth in Adjudication. *Hastings Law Journal,* 1998, pp. 289 ff.; FERRAJOLI, Luigi. *Diritto e ragione. Teoria del garantismo penale,* Rome-Bari, 1989, pp. 20 ff.; FERRER BELTRÁN, Jordi. *La valutazione razionale della prova,* Milan, 2007, p. 79; Id., *Prova e verità nel diritto,* Bologna, 2004, pp. 85-86; FERRUA. *La prova,* cit. pp. 42 ff.; KOSTORIS, Roberto E., voce *Giudizio (dir. proc. pen.)*, in *Enc. giur. Treccani*, Agg. VI,

What is more, the effectiveness of the negotiation on the *res judicanda* varies significantly depending on other factors.

One is the provision, as part of the agreement, of a formal admission of guilt by the defendant, which facilitates and corroborates the court's decision to convict. This is the case, for instance, of a the French *Comparution sur reconnaissance préalable de culpabilité*, where the agreement is based on a necessary prior admission of guilt. Still, other models, like the Italian plea bargaining, or the US *nolo contendere*[97] and *Alford plea*,[98] do not require any self-incriminating disclosure by the defendant at the same time showing an even more direct impact of the will of the parties on the subject matter of the trial.

Other classifying factors include the type of control that the judge must carry out on the negotiated agreement before sentencing, or how much the common will of the parties actually binds the decision-maker.

Roma, 1997, p. 8 ff; MAZZA, Oliviero. voce *Verità reale e verità processuale*, in *Dig. disc. pen.*, Agg. VIII, Torino, 2014, p. 715; TARUFFO, Michele. *La prova dei fatti giuridici,* Milano, 1992, pp. 145 ff.; Id., *La semplice verità. Il giudice e la costruzione dei fatti*, Roma-Bari, 2009, p. 81; UBERTIS, Giulio. *Profili di epistemologia giudiziaria,* Milano, 2015, pp. 16 ff.; WEIGEND, Thomas. Should We Search for the Truth, and Who Should Do it. *North Carolina Journal of International Law,* 2011, p. 395.

97 In the "nolo contendere", based on United States Federal Rules of Criminal Procedure, Rule 11, the accused accepts the application of the penalty as if he were guilty, which is to say without any admission of guilt. On this subject, for all, see BIBAS, Stephanos. Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas. *Cornell Law Review,* 2003, pp. 1379 ff.; LEVIN, Nathan, MEYERS, Ernest S. Nolo Contendere: Its Nature and Implications. *The Yale Law Journal,* 1942, pp. 1255 ff.

98 The so-called *Alford Plea,* whose name derives from the famous U.S. Supreme Court case *North Carolina v. Alford,* 400 U.S. 25 (1970) again on United States Federal Rules of Criminal Procedure, Rule 11, consists – in a nutshell – of an admission of guilt openly contradicted by declarations of innocence. For an analysis of this institution, see ALSCHULER, Albert. W. Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas. *Cornell Law Review,* 2003, pp. 1412 ff., who defined it as 'terrible'; Id., A *Nearly Perfect System For Convicting The Innocent,* in *Albany Law Review,* 2017, p. 923; BIBAS, Stephanos. Bringing Moral Values Into a Flawed Plea-Bargaining System. *Cornell Law Review,* 2003, pp. 1425 ff.; Id., *Harmonizing,* cit., pp. 1372 ff.; REDLICH, Allison D., ÖZDOĞRU, Asil. Alford Pleas in the Age of Innocence. *Behavioral Sciences and the Law,* 2009, pp. 470 ff.

As examined in *this Dossier* by Zieliński and Sakowicz, also on this aspect models of negotiated justice diverge significantly.[99] In some systems, courts' powers are confined to minimal arrangements, limited to formal and a rudimentary factual basis scrutiny. This is the case, for instance, of the United States, where, at the federal level,[100] courts essentially just ensure that the plea is voluntary, by addressing the defendant personally,[101] and to determine that a sufficient factual basis supports the plea.

In others, judges extend their control more significantly over the factual elements. For instance, this is the case of in England and Wales, particularly through the so-called *Newton* hearing.[102] Similar is also the role played by French courts in the mechanism of the *composition pénale*, where the scope of the assessment encompasses also the substantive and formal justice of the negotiate measure, by assessing the appropriateness of the agreement in light of the circumstances of the offense and the personality of the offender.[103] The substantial control of the judge is even more pronounced in the *comparution sur reconnaissance préalable de culpabilité* procedures, where the court's assessment enters into the accuracy of the facts at the basis of the agreement, as well as of their legal classification.[104] Also in the Spanish *conformidad*, examined in *this Dossier* by Borràs Andrés, judicial review of conformity is essential to verify both the legality and appropriateness of the sentence imposed.[105]

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[99] ZIELIŃSKI, Sebastian and SAKOWICZ, Andrzej. Judicial Control of Plea Agreements and the Right to Appeal: A Comparative Analysis of Common Law and Civil Law Models, in *this Volume*.

[100] The legal framework may vary at the state level, where more judicial involvement can be envisaged, see ZIELIŃSKI, SAKOWICZ. Judicial Control, cit.

[101] Though the numerous cases of miscarriages of justice involving plea bargain suggest that this control is far from being substantially effective, see in general, RAKOFF, Why Innocent People Plead Guilty, cit., and most recently, the infamous Post-Office scandal in the UK.

[102] From case of *R v* Newton [1983] Crim LR 1982.

[103] According to Article 41-2 of the French Code of Criminal Procedure.

[104] According to Article 495-9 of the French Code of Criminal Procedure.

[105] See Article 655 of the Criminal Procedure Act, BORRÀS ANDRÉS, Núria. La deriva epistémica de la conformidad penal en España: del juicio oral a un proceso estructuralmente sesgado, in *this Volume*.

At the other end of the spectrum, we then find models where the active initiative of the judges is explicitly foreseen. This is the case of the Polish system, where courts can correct the prosecutor's motion and requires the absence of any "doubt" as to guilt and circumstances,[106] or even more so of the German *Verständigung*, where the court actively shapes the framework of the agreement and ties it to the principle of truth seeking, or, finally, as illustrated by Bozbayındır again in *this Dossier*, of the Turkish expedited procedure, after the 2021 decision of the Constitutional Court, that enabled judges to modify the prosecutor's proposal when they consider the sentence requested by the prosecutor too high.[107]

In any case, it is precisely because the object on which the will of the party falls changes, and gradually approaches the moment of factual assessment and final decision that progressively the antibodies (including constitutional ones) of the various legal systems are triggered.[108] This progression determines an clear deviation from the ordinary course of the procedure, which increasingly causes greater friction with some fundamental principles of modern procedural systems: first and foremost, the unavailability of personal freedom, the principle of culpability, and the presumption of innocence.

It is precisely the presence of such potential, perennial conflict between negotiated justice and fundamental rights[109] that has led the Strasbourg Court to require that defendants willing to adhere to "strong" models of negotiated justice, renouncing – in exchange for obtaining one or more benefits – some of their primary guarantees, be accompanied by special safeguards.

This refers, in particular, to the *Natsvlishvili and Togonidze v. Georgia* judgment, which is undoubtedly the most important decision

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[106] In reference to the negotiated justice mechanisms provided by Articles 335 and 387 of the Polish Code of Criminal Procedure.

[107] BOZBAYINDIR, Ali Emrah. The Expedited Adjudication Procedure (Seri Muhakeme Usulü) in Turkish Criminal Procedure, in *this Volume*.

[108] See CAMON, Accordi, cit., p. 59.

[109] See, on this point, DELMAS-MARTY. *Prospettive,* cit., p. 237, who, as early as the 1990s, warned of the difficulties in preserving fundamental rights in these institutions, because the consent of the parties is not always a sufficient guarantee against the risk of pressure from the public prosecutor.

taken by the ECtHR in this area to date. In the judgment, the Court made a significant change from its previous case law, establishing more detailed minimum safeguards regarding the compatibility of procedural mechanisms (and, in particular, agreements on punishment) with the Convention. Without going too much into detail, it should be noted that the core of the judgment in question lies in the part where the Court clarifies the safeguards that must be put in place to protect the defendants' choice to implicitly waive, by entering into a plea bargain, the right to have the merits of the charges against them examined. In a nutshell, according to the European judges, for a negotiated settlement to be fair, i.e. in line with Article 6 ECHR, the conclusion of the agreement with the authorities must be accompanied by a twofold set of safeguards: a) the agreement must be accepted with full knowledge of the facts of the case and the legal consequences of concluding the agreement, and must be genuinely voluntary; and b) the content of the agreement and the fairness of the way in which it is reached must be subject to "sufficient" judicial review.[110]

These are minimum principles that have subsequently undergone significant political development, particularly in the recent Resolution No. 2245 (2018) of the Parliamentary Assembly of the Council of Europe, entitled "Agreements negotiated in the context of criminal proceedings: the need to establish minimum standards of protection for trial waiver systems".[111] Although this is a soft law instrument, it is of great interest because it openly urges states to adopt a "rights-based approach" to plea bargaining schemes: that is, to exploit their potential to reduce caseloads without, however, sacrificing the fundamental principles on which modern criminal procedural systems are based.

In this perspective, the Resolution does not merely recommend the adoption of appropriate safeguards to ensure that defendants give their consent to a plea agreement in a fully free and informed manner. It also clarifies that the accused, even if opting for such schemes, should continue to benefit from the presumption of innocence. It follows that,

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[110] See ECtHR, 29.4.2014, Natsvlishvtli and Togonithe v. Georgia, § 92. See, on this judgement, BACHMAIER WINTER, Lorena, The European Court of Human Rights on Negotiated Justice and Coercion, *European Journal of Crime Criminal Law and Criminal Justice*, 2018, 236.

[111] Resolution No. 2245 (2018).

according to the Parliamentary Assembly, this fundamental principle should not be included among those that defendants can waive when choosing a negotiated justice procedure.

Furthermore, it should be noted that the Resolution also contains a rule on remedies to be provided in the event of a negotiated sentence. This refers, in particular, to § 8.5, in which it states that "in order to maintain the possibility of redressing possible procedural and other violations in the process of 'deal-making', the possibility of an appeal against the verdict must remain open". In this way, the Assembly has explicitly expressed its preference for models of negotiated justice, such as those in France and Germany,[112] which do not limit the right of defendants to appeal the decision after an agreement has been reached.

Once more, this is clearly an attempt to lay the foundations for a series of minimum—and, above all, non-negotiable—standards of fairness that are also applicable in the context of negotiated justice. The goal is to strike a better balance between the deflationary objectives pursued through these institutions and the need to safeguard human rights.

However, it is a fact that even the most basic principles of fair trial are often at risk in the context of national negotiated justice. A paradigmatic example of the excesses to which the desire to strengthen the deflationary effects of a negotiated procedure at any cost can lead — and of how such choices can even prove counterproductive to the very objectives pursued — can be drawn from the Italian experience in the field of plea bargaining, which is worth briefly discussing.

5. A problematic exemplary system: the Italian model

Italy is one of the first countries of Roman-Germanic tradition to have reopened its doors to forms of negotiated justice. In an attempt to ensure the practical implementation of the accusatory shift introduced with the approval of the Vassalli Code, the legislator introduced, as early as the 1980s, a wide range of mechanisms that encourage the defendant

[112] See, on this point, DELLA TORRE, Jacopo. *La giustizia penale negoziata in Europa,* cit., 425-427.

to waive the trial phase and the exercise of those rights of defense and evidence that could be exercised in it.

The choices made in Italy then served as a reference point for other countries, promoting the spread of negotiated justice both within and outside Europe. This is particularly true of the Italian plea bargain mechanism (*applicazione della pena su richiesta delle parti*), regulated by Articles 444 et seq. of the Code of Criminal Procedure (hereinafter "c.p.p."), which was soon recognized in international literature as "one of the most significant expressions of negotiated justice and has become 'one of the main models [...] which have been introduced in Europe'".[113]

This judgment can be explained by the fact that, in the area of plea bargaining, the Italian legislature was among the first to attempt to reconcile a scheme based on agreements and negotiations between the parties, directly affecting the penalty, with the fundamental principles on which modern continental systems are based. It is precisely because of this "compromise" perspective that the codifiers chose to: a) limit the scope of the instrument to penalties of a less serious nature; b) prohibit the parties from entering into valid agreements on the circumstances or legal classification of the offence; c) codify in the law the benefits resulting from the procedure; d) allow only the defendant and the prosecutor to participate in the agreement, indirectly excluding the judge and the victim of the crime; and, furthermore, e) not include a formal admission of responsibility by the defendant among the requirements for access to the procedure.[114]

If this is true, it should nevertheless be noted that there are other points in the legislation on which the legislator was willing to make radical

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[113] See LUPÁRIA, Luca, GIALUZ, Mitja. Italian criminal procedure: thirty years after the great reform. *Roma Tre Law Review,* 2019, p. 66, who take up this assessment from THAMAN, Stephan C. Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases. In: K. BOELE WOELKI and S. VAN ERP (eds), *General Reports of the XVIIth Congress of the International Academy of Comparative Law,* Brussels - Utrecht, 2007, p. 973.

[114] PIZZI, William, MARAFIOTI, Luca. The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation. *The Yale Journal of International Law,* 1992, p. 23, rightly point out that the drafters of the code excluded a formal *guilty plea* from the requirements for access to the procedure, also for reasons of guaranteeing the rights of the accused.

choices. Apart from the impossibility to challenge the sentence negotiated between the parties, which was soon overturned by the Constitutional Court,[115] the main aspect that stands out is that concerning the defendant's responsibility. In this regard, the report on the preliminary draft of the criminal procedure code was already clear in establishing that the judge, when asked to approve a plea bargain, should only be responsible for assessing—on the basis of existing documents and without taking any evidence—whether the conditions for immediate acquittal under Article 129 c.p.p. existed, without the need for a positive finding of criminal responsibility.[116] In short, while the legislator had been careful to construct the procedure on the basis of a balance between judicial and negotiating components, when it came to the assessment on culpability, they had proposed to entrust the decision-maker with minimal powers.[117]

The approach described above marked a sharp departure from the typical tendency of continental legal systems to safeguard the epistemic requirements of criminal proceedings to the maximum extent possible, regardless of the parties' claims.[118] In this regard, it is well known that, even in Italy, until the last decades of the twentieth century, various principles, including the presumption of innocence and the principle of truth seeking, had been so highly valued, that they were considered a suitable barrier to prevent the introduction of instruments of negotiated justice in the strict sense.[119]

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[115] The reference is to Constitutional Court, July 2, 1990, no. 313.

[116] This is the wording used by the Italian Association of Criminal Lawyers in its report on the preliminary draft of the code of criminal procedure, in CONSO, GREVI, NEPPI MODONA. *Il nuovo codice*, cit., p. 1030.

[117] See, in this regard, VIGONI, Daniela. *L'applicazione della pena su richiesta delle parti,* Milano, 2000, p. 303.

[118] This trend is effectively recalled by WALTOŚ, Stanisław. Settlements in Criminal Procedures in Europe: an Attempt of Synthesis. *Archivum Iuridicum Cracoviense,* 2000, p. 6, who recalls that, until a few decades ago, "it was a general opinion that, because of its construction in compliance with the rules governing the mixed form, a criminal process in continental Europe was not able to accommodate consensual decisions ending a process".

[119] In Italian literature, this traditional idea is clearly expressed in the work of LEONE, Giovanni. *Trattato di diritto processuale penale,* vol. I, *Dottrine generali,* Napoli, 1961, p. 179, where it is stated that the defendant cannot

Despite its revolutionary nature, the anti-cognitive interpretation of plea bargaining proposed by the legislator in 1988, although immediately opposed by the majority of legal scholars on the basis of convincing constitutional reasons,[120]has been taken to extremes by the prevailing case law.

What is most important to note is that the path that led to this result was facilitated by both the Constitutional Court and the Court of Cassation.

With regard to the former, the decisive factor was that case law that identified the core of plea bargaining as a model of participation by the judge and the parties, not only on the issue of the quantification of the penalty, but also on that of liability.[121] In the famous ruling no. 251 of 1991, it was clarified that the mechanism finds its primary basis in the agreement between the public prosecutor and the defendant on the merits of the charge (liability of the defendant and consequent penalty), since those who request the agreed penalty would waive their right to contest the charge.[122]

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conventionally or extrajudicially accept the penalty and cannot correspondingly waive the jurisdictional guarantee or even the trial phase alone.

[120] The main inspiration for a 'cognitive' interpretation of plea bargaining is LOZZI, Gilberto. La legittimità costituzionale del c.d. patteggiamento. *Riv. it. dir. proc. pen*., 1990, p. 1600; Id. Il patteggiamento e l'accertamento di responsabilità: un equivoco che persiste. *Riv. it. dir. proc. pen*., 1998, p. 1396. In the same vein, see, among many others, CAPRIOLI, Francesco. Voce *Condanna* (*dir. pen. proc.*), in *Enc. dir*., *Annali*, II, t. I, Milano, 2008, p. 118; CORDERO, Franco. *Procedura penale,* 9([a])ed., Milan, 2012, p. 1037; MARCOLINI. *Il patteggiamento,* cit., p. 156; MARZADURI, Enrico. Commento all'art. 3 della l. 12.6.2003 N. 134 ("Patteggiamento allargato"). *Leg. pen*., 2004, p. 258; MENNA, Mariano. *Studi sul giudizio penale,* Torino, 2009, p. 72; NACAR, Barbara. *Natura cognitiva della sentenza di patteggiamento e rimedi impugnatori*, Milano, 2022, p. 23 ss; PERONI, Francesco. *La sentenza di patteggiamento*, Padova, 1999, p. 1-23; SANNA, Alessandra. *Il "patteggiamento" tra prassi e novelle legislative*, Milano, 2018, p. 26-31. In legal theory, the staunchest supporter of the thesis that denies, on the contrary, the recognition of any cognitive capacity within plea bargaining is FERRUA, Paolo. Il ruolo del giudice nel controllo delle indagini e nell'udienza preliminare. In: Id., *Studi sul processo penale*, 1990, p. 69 ff. See also, more recently, Id., *La prova*, cit., p. 229-232

[121] See GIALUZ. Voce *Applicazione,* cit., p. 23.

[122] This and the immediately preceding quotation are taken from Constitutional Court, April 22, 1991, no. 251, on which see FERRUA, Paolo. La giustizia

The Court thus placed the pact between the public prosecutor and the defendant at the center of the proceedings, legitimizing a proportional reduction in the scope of judicial review with regard to the factual aspects. This strong emphasis on the parties' power of disposition was then confirmed not only in other rulings by the Constitutional Court, belonging to the line of reasoning inaugurated by judgment no. 251/1991,[123] but also in decisions belonging to what could be called a "third stage" of the constitutional jurisprudence on the subject.[124] More specifically, this refers to that line of interpretation that has relied on the formula of inadmissibility to avoid demolishing interventions on the procedure.[125] The Court had been repeatedly asked to rule on the constitutionality of Article 444 c.p.p. on the grounds that it conflicts with Article 27, paragraph 2, of the Constitution, insofar as it does not require the court to ascertain the guilt of the defendant before accepting the agreement. However, the Constitutional Court declared the issue manifestly inadmissible, considering that the discretionary choice made in this case by the legislator cannot be considered an expression of mere arbitrariness.[126]

In short, a comprehensive reading of Italian constitutional case law on the matter confirms that, contrary to what has happened in other

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negoziata nella crisi della funzione cognitiva del processo penale. In: MOCCIA (ed), *La giustizia contrattata. Dalla bottega al mercato globale*, Napoli, p. 59 ff.

[123] See, for example, Constitutional Court, July 25, 2002, no. 394; Constitutional Court, May 13, 1996, no. 155, according to which the judgment applying the penalty at the request of the parties would lack "a full assessment of responsibility based on an evaluation of evidence of similar significance to that carried out in the trial or in the abbreviated procedure"; Constitutional Court, March 19, 1992, no. 116.

[124] The reference is to Constitutional Court, December 11, 1997, no. 399. See also, among many others, Constitutional Court, December 21, 2000, no. 574; Constitutional Court, May 13, 1998, no. 172; Constitutional Court, July 30, 1997, no. 297.

[125] In this regard, see VIGONI, Daniela. La prova di resistenza del «patteggiamento» nei percorsi costituzionali. In: CONSO, Giovanni (ed), *Il diritto processuale penale nella giurisprudenza costituzionale*, Napoli, 2006, p. 808 ff.

[126] Constitutional Court, July 30, 1997, no. 297.

continental countries,[127] the Constitutional Court has shown itself willing to save the legitimacy of the most sensitive rules of plea bargaining, even at the cost of effectively refuting the thesis of absolute unavailability, both of the subject matter of the criminal trial and of the principle *of nulla poena sine iudicio*. These principles have, in fact, been significantly rethought due to requirements related to reasonable length of criminal proceedings, no longer being interpreted literally as an absolute prohibition on the parties to self-regulate criminal proceedings but, much more mildly, as an obligation that the agreement be subject to control by the judge.[128] The latter being limited, at the factual level, to a verification of the non-necessity of reaching an acquittal pursuant to Article 129 c.p.p.

Moreover, while the Constitutional Court, even in its most "negotiating" rulings, has at least always highlighted the judicial and not merely supervisory nature of the function exercised by the judge in the procedure,[129] the positions taken on the matter by the Court of Cassation have been much more extreme.

The Supreme Court has, in fact, sought to maximize, at all costs, the reduction in time and energy ensured by plea bargaining, even at the cost of radically sacrificing the powers entrusted to the judge in the proceedings, which have been conceived in a rather reductive manner. The most authoritative line of case law, following in the footsteps of the aforementioned preliminary draft report, usually reiterates in this regard that the negotiating mechanism would consist in the application of a penalty "without judgment",[130] because the judge should not declare

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[127] The reference is, in particular, to France and Germany, where the constitutional courts have strongly emphasized the principle of seeking the truth even in the context of negotiated institutions: see, in this regard, DELLA TORRE. *La giustizia penale*, cit., p. 398 ff.

[128] See GIALUZ. Voce *Applicazione,* cit., p. 23.

[129] In this sense, Constitutional Court, April 22, 1991, no. 251, cit.

[130] See, for example, Cass., sez. un., May 8, 1996, De Leo, in *Dir. pen. proc*., 1996, p. 1227. Among other significant rulings on the subject, see Cass., sez. un., November 25, 1998, Messina, in *Cass. pen*., 1999, p. 1746, Cass., sez. un., May 27, 1998, Bosio, *ibid.,* p. 833; Cass., sez. un., 25 March 1998, Giangrasso, *ibid.,* 1998, p. 2897; Cass., sez. un., 25 March 1998, Palazzo, in *Riv. it. dir. proc. pen.,* 1998, p. 1378; Cass., un. sect., May 28, 1997, Lisuzzo, *ibid.,* p. 1377; Cass., un. sect., February 26, 1997, Bahrouni, in *Cass. pen*., 1997, p. 2666.

the defendant guilty, but refer to the agreement between the public prosecutor and the defendant on the merits of the charge.[131] Consistent with this starting point, the Supreme Court then outlined a (nearly) total emptying of the epistemic potential of the preliminary assessment of the existence of grounds for non-punishment under Article 129 c.p.p. In fact, prevailing case law holds that, in the agreed procedure, the judge is not required to address the "full merits" of criminal liability according to the standards imposed at trial by Article 530 c.p.p.[132] In this context, the power to pronounce a judgment of acquittal or dismissal due to lack, insufficiency, or inconsistency of evidence (i.e., due to the existence of reasonable doubt) would no longer apply, as this possibility is not among those explicitly indicated in Article 129, paragraph 1, c.p.p.[133] Instead, the positive evidence of the existence of one of the grounds for acquittal indicated in the provision in question must emerge from the documents.[134]

Once it has been established that, according to this case law,[135] in such procedures the doubt should apply *contra reum*,[136] it should be noted

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[131] Cass., sez. un., May 8, 1996, De Leo, cit., p. 1227.

[132] In this sense, see Cass., sez. un., April 26, 2014, no. 36847, in *Onelegale*. In similar terms, see Cass., sez. VI, November 16, 2021, no. 41750, *ibid.;* Cass., Section I, April 5, 2019, no. 17417, *ibid.;* Cass., Section I, June 30, 2015, no. 36326, *ibid.;* Cass., Section V, May 4, 2015, no. 34443, *ibid*.

[133] See, *among others,* Cass., sect. I, March 22, 2023, no. 12036, in *Onelegale;* Cass., sect. II, April 4, 2022, no. 12474, *ibid.;* Court of Cassation, Section II, December 12, 2014, no. 1390, in *Ced. Cass.*, no. 261857; Court of Cassation, Section IV, June 7, 2012, no. 27952, *ibid.,* no. 253588.

[134] Thus, verbatim, Cass., Section III, April 23, 2015, No. 33411, in *Onelegale*. The only exception to this rule is when the trial judge, after the conclusion of the proceedings, considers the public prosecutor's dissent or the rejection of the request to be unjustified, and applies the penalty at the request of the defendant alone *pursuant to* Article 448 of the Code of Criminal Procedure (see, in this regard, Cass., Section III, November 3, 2016, No. 7951, in *CED Cass.*, No. 269319, which recognizes that in such cases the decision-maker must apply the ordinary *standard* of beyond reasonable doubt).

[135] Which remained dominant even after the reform of the "extended" plea bargain Reference is made to Law No. 134 of June 14, 2003, which, as is well known, extended the scope of the penalty that can be negotiated in practice to five years. The literature on this subject is vast. For a summary, see DELLA TORRE. *La giustizia penale*, cit., p. 204 ff.

[136] See, in this regard, in doctrine, DI CHIARA, Giuseppe. L'architettura dei presupposti. In: *Il patteggiamento,* Milan, 1999, p. 49; ORLANDI. Procedimenti,

that many rulings of the Court of Cassation have felt the need to fill the "factual void" that has thus been created, attributing a broad confession-like meaning to the defendant's choice to adhere to the special procedure.[137] This refers to the fact that the willingness to negotiate, as expressed in the request pursuant to Article 444 c.p.p., is identified by a copious number of sources as an admission of responsibility by the requesting defendant, who implicitly and voluntarily waives the presumption of innocence.[138] It should be noted that this is an interpretation that has no basis in the law and that ultimately reverses the intention of the legislator not to include an admission of liability among the requirements for access to the procedure, not least for reasons of legal certainty.

Nevertheless, in certain rulings, the Court of Cassation has gone even further, stating that, in the Italian legal system, it would be possible to find a logical and legal basis for plea bargaining only if one assumes that the legislator links a presumption of guilt to the formulation of the plea bargain request, understood as an implicit admission of the fact.[139] It is worth noting that this argument is, from a constitutional point of view, completely untenable: in fact, it has the fatal effect of making the provision of Article 27, paragraph 2, of the Constitution and, indirectly, that of Article 13 of the Constitution, subject to the will of the parties.

At this point, it will be clear that, by taking such a "contract like" stance, the case law, while succeeding in its objective of keeping the rejection rates of agreements to a minimum, has caused the definitive

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cit., p. 662; TONINI. I riti, cit., p. 292 ff.

[137] It should be noted that part of the doctrine has also attributed to the defendant's request *a broad sense* of admission of responsibility. See, for example, the recent work by See GIALUZ. Voce *Applicazione,* cit., pp. 24-26.

[138] In this regard, see Cass., sect. VI, July 12, 1995, no. 9406, in *Cass. pen*., 1996, p. 3065; Cass., sect. VI, January 28, 1993, in *Riv. pen*., 1993, p. 1252. More recently, see, in similar terms, Cass., sect. III, February 12, 2019, no. 22064, in *Onelegale;* Cass., sect. V, November 9, 2018, no. 5679, *ibid*. Cass., sect. II, July 4, 2018, no. 31825, *ibid*. In doctrine, among others, FERRUA. *La prova,* cit., p. 303, TONINI, I riti., cit., p. 294 ff.

[139] Thus, Cass., sect. V, March 15, 2005, no. 14063, in *Onelegale*. See, in similar terms, Cass., sect. VI, September 27, 2023, no. 39183, *ibid.;* Cass., sect. II, June 23, 2020, no. 19383, *ibid.;* Cass., sect. V, February 25, 2020, no. 12967, *ibid*., Cass., sect. II, February 27, 2019, no. 16100, *ibid.;* Cass., sect. V, November 9, 2018, no. 5679, *ibid*.

breakdown of the already precarious balance between the negotiating and judicial components of plea bargaining. This made it a highly critical mechanism from the perspective of protecting the fundamental rights of defendants. Indeed, the decision to allow the application of a penalty using a much lower standard of proof than the ordinary standard of beyond reasonable doubt, or worse, to overturn it altogether, means loosening one of the main safeguards put in place by the legal system to reduce the risk of imposing a penalty on an innocent person.[140]

Nor, it should be noted, is it sufficient to rely on the consensual nature of the instrument in question to resolve every problem.[141] This is due to the fact that the issue of the guarantees provided by the Italian legislator to ensure that the defendant's decision to participate in the procedure is truly informed and free from coercion has always been a sensitive one.[142] Although the legislator chose to allow defendants to express their willingness to settle indirectly, through a special mandate to their attorney (Article 446, paragraph 3, c.p.p.), to safeguard the consensual nature of the mechanism, they have historically foreseen also the provision of Article 446, paragraph 5, c.p.p. From the latter, it can be inferred that Italian judges, unlike those in other countries,[143] have the mere power and not the obligation to assess the consent of the accused before ratifying the *pactum*.[144]

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[140] With regard to the delicate relationship between standards of proof and the distribution of the risk of miscarriages of justice, see DELLA TORRE, Jacopo. Standard probatori, efficienza e giustizia penale. *Pol. dir*., 2023, p. 337 ff.

[141] See, on this point, the agreeable statements by Fair Trials, *Efficiency over justice,* cit., p. 9 on the 'myth of consensus', which can also be extended to the Italian mechanism.

[142] See, on this point, MARCOLINI, Stefano. A quali condizioni i negoziati sulla pena sono conformi alla Cedu? *Cass. pen*., 2014. *pen*., 2014, p. 3495.

[143] Consider, for example, the Spanish legal system, which in Article 787 of the Criminal Procedure Code not only establishes that the defendant must be present during the judicial review of conformity, but also obliges the decision-maker to always assess personally that the defendant's statement is made freely and with knowledge of its consequences.

[144] In this regard, see Cass., Sec. III, March 18, 1997, Osenneke, in *Giur. it,* 1998, c. 1917.

However, relying on the negotiated nature of the procedure is not sufficient, not least because the maxim that those who are not responsible for a crime are not inclined to favor their own conviction is, in itself, far from infallible. While it is reasonable to assume that it is the guilty and not the innocent who plead guilty, it is by no means certain that this is always the case.[145] As demonstrated by the vast literature that now exists on the innocence problem of negotiated justice,[146] several factors, independent of guilt, can influence the defendant to accept a reduced sentence: lawyers' fees, the suffering caused by the trial, the lack of trust in the justice system, and even the more or less free choice to 'cover up' the responsibility of others.[147] The extreme delicacy of the "anti-epistemic" judicial interpretation lies precisely in this: based on the idea that in the mechanism at stake, doubt should not be in favor of the defendant, it inevitably increases the risk that individuals who are actually innocent will enter into an agreement with the authorities.

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[145] See FERRUA. *La prova,* cit., p. 10.

[146] On this point, see, among many others, ALSCHULER, Albert.W. A Nearly Perfect System. *Albany Law Review,* 2017, p. 919 ff.; BLUME, John H., HELM, Rebecca K. The Unexonerated: Factually Innocent Defendants Who Plead Guilty. *Cornell Law Review,* 2014, p. 172 ff.; BOWERS, Josh. Punishing the Innocent. *University of Pennsylvania Law Review,* 2008, p. 1117 ff.; COVEY, Russell D. Signaling and Plea Bargaining's Innocence Problem. *Washington and Lee Law Review,* 2009, p. 74 ff.; DERVAN, Lucian E. Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve. *Utah Law Review,* 2012, p. 51 ff.; DRIPPS, Donald A. Guilt, Innocence, and Due Process of Plea Bargaining. *William & Mary Law Review,* 2016, p. 1360 ff.; GAZAL, Oren. Screening, Plea Bargains and the Innocent Problem. *University of Michigan Law School, Law & Economics Working Paper Archive,* 2004, p. 1 ff.; TOR, Avishalom, GAZAL-AYAL, Oren, GARCIA, Stephen M. Fairness and the Willingness to Accept Plea Bargain Offers. *Journal of Empirical Legal Studies,* 2010, p. 97 ff.; KELLY, PITMAN. *Confronting Underground Justice*, cit., p. 79 ff.; HESSICK Andrew F. III, SAUJANI, Reshma. Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge. *Brigham Young University Journal of Public Law,* 2002, p. 189 ff.; SCHULHOFER, Stephen J. Plea Bargaining as Disaster. *Yale Law Journal,* 1992, p. 1981 ff.; SCOTT, Robert E., STUNTZ, William J., Plea Bargaining as Contract. *Yale Law Journal*, 1992, p. 1909 ff. In Italian literature, see DELLA TORRE. Riti consensuali,cit., p. 401 ff.

[147] FERRUA. *La prova,* cit., p. 10.

Having clarified this, it is now worth pointing out that the majority opinion that pushes for a restrictive interpretation of safeguards did not stop there, but then influenced, in a cascade effect, the way in which the Court of Cassation approached other key issues. For instance, as illustrated by Cabiale in *this Dossier*, according to established case law, the agreement at the basis of the mechanism requires the waiver of any plea of nullity, even absolute (for instance, concerning evidence) other than those relating to the plea bargain request and the consent given to it. The Court thus created a problematic and controversial form of preclusion, which affects the right to object to invalidity at its root.[148]

What is worse is that the already critical picture reconstructed so far is made even more problematic by the extremely limited scope of appeals that can be lodged by the defendant against decisions pursuant to Articles 444 et seq. c.p.p. Indeed, the 1988 legislature limited itself on this point to intervening only in matters of appeal, crystallizing in Article 448, paragraph 2, c.p.p. the rule that the plea bargain judgment is completely unappealable by the accused.[149] This choice can be explained, once again, by the intention to maximize the deflationary potential of the plea bargaining procedure, even at the cost of sacrificing another important safeguard, such as the second instance judgment.

Conversely, no provision originally dealt with regulating the cases and ways in which it was possible to lodge an appeal with the Court of Cassation or a request for review against the judgments in question, which gave rise to complex questions of interpretation. It should be noted that the Court of Cassation filled this gap by adopting a very restrictive approach,[150] aimed at limiting as much as possible the availability of ordinary remedies, which was ultimately also adopted by the legislator.

The consequences of the joint operation of these strands are clear: by giving precedence, even in terms of encumbrances, to the dispositive component of the mechanism over the jurisdictional one, further essential

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[148] CABIALE, Andrea. Giustizia negoziata e invalidità nel procedimento penale italiano: un rapporto problematico, in *this Volume*.

[149] See GERACI, Rosa Maria. *L'appello contro la sentenza che applica la pena su richiesta,* Padova, 2011.

[150] See DELLA TORRE. *La giustizia penale,* cit., p. 197 ff.

safeguards for correcting an unfair agreed outcome have been curtailed. This has, of course, made the innocence problem of the procedure in question even more pressing.

What is paradoxical, however, is that it is precisely the fact that the negotiating component has prevailed over the guarantees on so many fronts that has ultimately had a negative impact on the appeal of the procedure itself.

Over time, the consequences of this choice have proved fatal to its statistical success. In this regard, it should be noted that the legislator's idea—according to which it should have been the main alternative to ordinary proceedings—has proved to be a failure. Various reasons, including the lack of guarantees, competition from other special procedures, and the expectations of defendants to obtain acquittal through the statute of limitations, have progressively reduced the propensity to resort to it, to the point that plea bargaining has undergone a serious crisis in terms of numbers, especially in the second decade of the 2000s, being surpassed even by other mechanisms such as summary judgment.[151] Further accentuating the paradox is the fact that these competing procedures are often less convenient for the legal system: they take longer, involve higher costs, and, since they are not based on an agreement on the penalty, leave the way open for appeals.

The lesson to be learned from this is ultimately significant: the Italian experience shows that a drastic reduction in guarantees in a negotiated mechanism can, under certain conditions, even prove counterproductive to the very deflationary objectives pursued.

6. Conclusion

Drawing some conclusions from this brief analysis, two guidelines seem to emerge to guide the direction of future studies.

The first concerns the methodological difficulty of establishing clear categories for classifying negotiated justice procedures. As we have

[151] See, on this point, for detailed data GIALUZ, Mitja and DELLA TORRE, Jacopo, *Giustizia per nessuno. L'inefficienza del sistema penale italiano tra crisi cronica e riforma Cartabia*, Turin, 2022, pp. 107 ff.

attempted to highlight, not only is the category extremely varied and the term "negotiated justice" somewhat vague, but the classification categories used are often divergent and do not always find a consistent approach, even at the doctrinal level.

This uncertainty is reflected, first and foremost, in an obstacle to the accurate study of these mechanisms, particularly from a comparative perspective. For this reason alone, it would therefore be appropriate to approximate the categories of study further, to develop a solid, and (as much as possible) comprehensively adequate methodological comparative approach.

Secondly, this methodological divergence also has increasing practical repercussions. One example is the functioning of the young European Public Prosecutor's Office (EPPO). The EPPO, indeed, is faced with a single office that must act on a supranational basis, yet with internal consistency, both for organisational purposes and to guarantee the rights of those involved in proceedings on a transnational level. Still, the interpretative differences between procedural institutions, observable at the domestic level, reveal the fragility of the system. Among these, the mechanisms of negotiated justice play a key role, as discussed by Neroni Rezende in *this Dossier*.[152]

The second line of thought, which already emerged in the previous analysis, concerns the close relationship, observed on a large scale and often regardless of the legal system in question, between negotiated justice systems and the risk of miscarriage of justice. While the variety of characteristics of these systems frequently reflects domestic legal traditions, certain features have long been empirically identified as significant risk factors for wrongful convictions. These include, among others, mechanisms characterised by limited judicial control, or which allow not only the negotiation of the evidence that can be used or the penalties imposed, but also the very existence of the charges.

The well-known Post Office scandal, in which numerous defendants pleaded guilty despite being innocent, serves as a poignant

[152] NERONI REZENDE, Isadora. Sui limiti della giustizia negoziale nel sistema EPPO: Criticità e margini di ampliamento delle procedure semplificate di azione penale, in *this Volume.*

reminder of the ever-present risk of such a connection and the dramatic effects that ensue.[153]

In this sense, therefore, the development of a common and, possibly, shared approach to negotiated justice systems should increasingly take into account not only the demands for efficiency (in the deflationary sense), and the need to comply with procedural safeguards in light of the fair trial rights, but also the recommendations explicitly developed to minimise the risk of miscarriages of justice.

We hope that the reflections of the authors of *this Dossier*, with their different perspectives and rich expertise, will be a step forward in continuing the debate in a fruitful direction.

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[153] See, for all, ORMEROD, David, QUIRK, Hannah. The Post Office Miscarriage of Justice. Editorial. *Criminal Law Review*, 2021*(7),* 509-512, and DAY, Sally, MOORHEAD, Richard, NOKES, Karen, HELM, Rebecca. *Working Paper 11 Accessing Injustice? Experiences of representation and the criminal justice system during the Post Office Scandal*, November 2025, available at: https://news.exeter.ac.uk/wp-content/uploads/2025/11/WP11-FINAL-clean-copy-Accessing-Injustice.pdf.

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Conflict of interest declaration: the authors confirm that there are no conflicts of interest in conducting this research and writing this article.

Declaration of authorship: all and only researchers who comply the authorship requirements of this article are listed as authors; all coauthors are fully responsible for this work in its entirety. Although the article is the result of a common reflection, Jacopo Della Torre is the primary author for §§ 1,3,5 and Giulia Lasagni for §§ 2,4,6.

- *Giulia Lasagni*: conceptualization, methodology, data curation, investigation, writing – original draft, validation, writing – review and editing, final version approval.
- *Jacopo Della Torre*: conceptualization, methodology, data curation, investigation, writing – original draft, validation, writing – review and editing, final version approval.

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Data Availability Statement: In compliance with open science policies, all data generated or analyzed during this study are included in this published article.

Editorial process dates (https://revista.ibraspp.com.br/RBDPP/about)

- Submission: 24/11/2025
- Desk review and plagiarism check: 25/11/2025

Editorial team

- Editor-in-chief: 1 (VGV)

How to cite (ABNT Brazil):

LASAGNI, Giulia; DELLA TORRE, Jacopo. Editorial of the Dossier "A Comparative Analysis of Negotiated Justice Systems": an introductory overview. *Revista Brasileira de Direito Processual Penal*, vol. 11, n. 3, e1362, set./dez. 2025. https://doi.org/10.22197/rbdpp.v11i3.1362