



# Revista Brasileira de **Direito** **Processual** **Penal**

Volume 8 - Nº 01 - jan./abr. 2022

ISSN 2525-510X

<https://doi.org/10.22197/rbdpp.v8i1>

*Dossiê*

*“O papel dos tribunais constitucionais  
na definição do devido processo penal”*



Publicação fomentada pelo CNPq  
(Chamada 15/2021 Programa Editorial)



IBRASPP


# The role of the constitutional courts and ECtHR in shaping negotiated justice mechanisms – a comparative perspective<sup>1</sup>

*O papel das cortes constitucionais e do TEDH em modelar os  
mecanismos de justiça negocial – uma perspectiva comparada*

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**ABSTRACT:** The article analyses the role of constitutional courts of Germany, France and Italy in shaping negotiated justice mechanisms in these countries with regard to their procedural and – to some extent – substantive fairness as well as the role of the ECtHR in establishing common standards of fairness of such settlements. In each of the analysed countries, as well as in the case law of the ECtHR, it was frequently questioned whether institutions similar to plea bargaining are conform to continental constitutional concepts as well as the standard of the fair trial derived from the ECHR. The role of constitutional courts and the ECtHR in shaping fairness of criminal justice settlements has been non-negligible, although differed in compared legal systems: in France and in case of ECtHR it has rather been a controlling one, whereas in Germany and Italy significant tensions between constitutional courts and the legislature as well as lower courts have arisen and had to be resolved.

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<sup>1</sup> This publication has been developed as part of the research project ‘The Optimum Model of Plea Bargaining. Between Efficiency and Justice’, Registration no. 2019/35/N/HS5/03125, financed by the National Science Centre, Poland.

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**KEYWORDS:** plea bargaining; negotiated justice; fair trial rights; comparative criminal procedure.

**RESUMO:** *Este artigo analisa o papel das cortes constitucionais da Alemanha, França e Itália ao modelar os mecanismos de justiça criminal negocial nesses países em relação à legitimidade processual e – em alguma medida – material, bem como o papel do Tribunal Europeu de Direitos Humanos em estabelecer os parâmetros comuns da legitimidade de tais acordos. Em cada país analisado, assim como na jurisprudência do TEDH, é frequentemente questionada a conformidade dos institutos semelhantes à plea bargaining em relação aos conceitos constitucionais continentais e ao standard de justo processo estabelecido pelo TEDH. O papel das cortes constitucionais e do TEDH em modelar da legitimidade dos acordos criminais não é negligenciável, mas difere nos sistemas jurídicos comparados: na França e no caso do TEDH, ele foi um pouco mais limitado, enquanto na Alemanha e na Itália, tensões significativas surgiram entre as cortes constitucionais e o legislador e tiveram que ser resolvidas.*

**PALAVRAS-CHAVE:** *acordo criminal; justiça negocial; devido processo; processo penal comparado.*

**SUMMARY:** 1. Introduction; 2. Comparative analysis; 2.1 Germany; 2.2 France 2.3 Italy 2.4 ECtHR; 3. Concluding Remarks; Bibliography.

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## 1. INTRODUCTION

Criminal justice systems throughout the world have become increasingly overloaded during the past half century. On the other hand, the system of procedural safeguards has been developed into an elaborate and sophisticated one, and thus criminal proceedings have become longer and more complicated. In Europe, as a result of the traumatising experience of totalitarianism and World War II, human rights were emphasised, including with respect to criminal proceedings, and the activity of the ECtHR also contributed to the imposition of new obligations on criminal courts in order to protect the accused from violations of his or her liberties and prerogatives. This tendency, although praiseworthy,

has led to an escalating problem of the excessive length of proceedings in many countries as courts were no longer able to deal with all cases within a reasonable time and provide the accused with necessary guarantees. The growing complexity of the social phenomenon of crime in the modern world also played its role. However, as getting the court's judgment within a reasonable time is also a component of the right to a fair trial as formulated in Article 6 of the European Convention on Human Rights and Fundamental Freedoms and in many constitutions, this problem could not remain unsolved. This caused a phenomenon which was called by George Fisher the plea bargaining's triumph to spread all over the world<sup>3</sup>. The method of settling criminal cases was originally a distinctive feature of the American criminal justice system. Over the last decades it became transposed or – according to a particularly apt formulation by Maximo Langer – translated into various legal systems around the world, where it was usually treated as a remedy for the excessive duration of proceedings<sup>4</sup>. However, the wish for strengthening consensual rather than adjudicatory means of resolving criminal cases were also of some importance.

The development of negotiated justice mechanisms inspired by plea bargaining was not always an easy process. In some countries their appearance was a result of a well-thought-out legislator's decision, whereas in others the practice of settling criminal disputes evolved by way of a *fait accompli* and was only afterwards noticed and regulated<sup>5</sup>.

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<sup>3</sup> FISHER, George. *Plea Bargaining's Triumph: A History of Plea Bargaining in America*. Redwood City: Stanford University Press, 2003.

<sup>4</sup> LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. *Harvard International Law Journal*, v. 45, n. 1, p. 1-4, 2004; BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion. *European Journal of Crime, Criminal Law and Criminal Justice*, v. 26, p. 237-238, 2018.

<sup>5</sup> FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach serve as a Model to Guarantee the Impartiality of German Judges? *Hanse Law Review*, v. 5, n. 1, p. 199-202, 2009. SCHULHOFER, Stephen J. Plea Bargaining as Disaster. *Yale Law Journal*, v. 101, n. 8, p. 2003-2008, 1992; EASTERBROOK, Frank H. Plea Bargaining as Compromise. *Yale Law Journal*, v. 101, n. 8, p. 1973-1974, 1992; SCOTT, Robert E., STUNTZ, William J. Plea Bargaining as Contract. *Yale Law Journal*, v. 101, n. 8, p. 1940-1966, 1992.

The constitutional and supreme courts also played their role: they usually intervened if new mechanisms posed a danger to the fairness of proceedings and their result but sometimes even forced the legislator to explicitly regulate negotiated justice by way of statute, as was the case in Germany<sup>6</sup>.

The aim of this paper is to conduct a comparative analysis of the role of constitutional courts in shaping negotiated justice mechanisms in three countries – Germany, France and Italy – as well as to explore the role of the ECtHR in establishing common standard of fairness of these institutions. Plea bargaining and other consensual institutions as well as the role of constitutional courts in legal systems have frequently been analysed by comparatists<sup>7</sup>. However, combining these two issues in order to assess the role of constitutional courts in the development of negotiated justice creates a new perspective, useful for evaluating the constitutional courts' position in shaping criminal politics and procedure.

The choice of countries for the comparative analysis is justified by the following reasons. The analysis pertains to the process of adjusting plea bargaining to continental constitutional standards. Thus, the focus was on European countries. Three of them were chosen due to active role of their constitutional courts in regulating the newly introduced practices of negotiated justice. Germany is an example of informal development of agreements between the prosecution and the defence

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<sup>6</sup> This issue will be further described hereinbelow.

<sup>7</sup> To name just a few examples: LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, op.cit.; TURNER, Jenia I. *Plea Bargaining Across Borders*. New York: Aspen Publishers, 2009; RAUXLOH, Regina. *Plea Bargaining in National and International Law*. Abingdon-sur-Thames: Routledge, 2012; LANGER, Maximo. Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions. *Annual Review of Criminology*, v. 4, n. 2, 2021; THAMAN, Stephen C. (ed.). *World Plea Bargaining. Consensual Procedures and the Avoidance of Full Criminal Trial*. Durham: Carolina Academic Press, 2010; THAMAN, Stephen C. Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases. In: BOELE-WOELKI, Katharina Boele-Woelki, VAN ERP, Sjeff (eds). *General Reports of the XVII<sup>th</sup> Congress of the International Academy of Comparative Law*. Bruxelles: Bruylant, Utrecht: Eleven, 2007. p. 951.

which were only afterwards statutorily regulated thanks to the activity of the Constitutional Tribunal and the Supreme Court<sup>8</sup>. On the other hand, the Italian legal system is an important field of comparative research with regard to criminal procedure law due to its 1989 reform, which reoriented the whole system from inquisitorial to adversarial and introduced a form of criminal plea agreements<sup>9</sup>. However, the Italian Constitutional Court's case law significantly undercut the reforms, which eventually led to a change in Italian Constitution. Even in France, regardless of the cautious attitude of the legislator towards negotiated justice mechanisms (which are precisely regulated and attached to a complex set of procedural safeguards) still some constitutional doubts have arisen, with the last Constitutional Council's judgment issued only in 2021. Lastly, the role of the ECtHR will also be analysed. Although the ECtHR is not a constitutional court, it may to some extent play a similar role in shaping the procedural fairness of national negotiated justice mechanisms. In some countries, such as Poland, constitutional courts have not had the occasion to express their views on this particular issue. The case law of the ECtHR is thus the important legal framework for negotiated justice in these countries.

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<sup>8</sup> ROXIN, Claus, SCHÜNEMANN, Bernd. *Strafverfahrensrecht*. Munchen: C.H. Beck, 2017. p. 79-80; ROBERSON, Cliff, DAS, Dilip K. *An Introduction to Comparative Legal Models of Criminal Justice*. Boca Raton: CRC Press, 2016. p. 145-146; LANGBEIN, John H. Land without Plea Bargaining: How the Germans Do It. *Michigan Law Review*, v. 78, n. 2, p. 201-212, 1979; LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, *op.cit.*, p. 39.

<sup>9</sup> LUPÁRIA, Luca. Model code or broken dream? The Italian criminal procedure in a comparative perspective. In: GIALUZ, Mitja, LUPÁRIA, Luca, SCARPA, Federica. *The Italian Code of Criminal Procedure. Critical Essays and English Translation*. Padova: Wolters Kluwer, 2014. p. 1-3; PIZZI, William T., MONTAGNA, Mariangela. The Battle to Establish an Adversarial Trial System in Italy. *Michigan Journal of International Law*, v. 25, n. 2, p. 437-438, 2004; VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system. *Emory International Law Review*, v. 11, p. 421, 1997.

## 2. COMPARATIVE ANALYSIS

### 2.12 GERMANY

The most typical example of negotiated justice in Germany, called *Absprachen* (literally meaning “agreements”) or *Verständigung*, is currently statutorily regulated in § 257c StPO<sup>10</sup>. There are also other instruments that involve the component of agreement between the prosecutor and the defendant. However, they either do not result in a criminal conviction but rather a conditional or unconditional discontinuance of proceedings (§ 153 and § 153a StPO) or are of a different nature and origin, as in case of a penal order (§ 407 StPO)<sup>11</sup>. Such instruments are not comparable to plea bargaining in a strict sense and thus were excluded from the analysis.

*Absprachen* are settlements that may be concluded during trial in any criminal case and may pertain to the outcome of proceedings (understood as the punishment and other penal measures only and excluding factual findings, guilt and legal classification of the act) and its course (i.e. shortening further presentation of evidence to the court)<sup>12</sup>. Such an agreement results in a criminal conviction with an agreed penalty. *Absprachen* are now explicitly regulated on statutory level but until 2009 the German Code of Criminal Proceedings did not contain any legal basis for settling criminal cases. Nevertheless, agreements were in fact concluded informally by using the existing procedural institutions<sup>13</sup>.

<sup>10</sup> Code of Criminal Procedure (Strafprozessordnung, hereinafter: StPO) as published on 7 April 1987 (Federal Law Gazette I 1074, 1319), as last amended by Article 3 of the Act of 11 July 2019 (Federal Law Gazette I 1066).

<sup>11</sup> LANGER, Maximo. Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions. op.cit., p. 2, p. 8.

<sup>12</sup> BOYNE, Shawn Marie. Procedural Economy in Pre-Trial Procedure: Developments in Germany and the United States. In: THAMAN, Stephen C., ROSS, Jacqueline E. (eds). *Comparative Criminal Procedure*. Cheltenham, Northampton: Edward Elgar Publishing, 2016. p. 249-250, BOHLANDER, Michael. *Principles of German Criminal Procedure*. Oxford: Hart Publishing, 2021. p. 121-123.

<sup>13</sup> FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? *Hanse Law Review*, v. 5, n. 2, p. 199-202, 2009.

Such a practice was present even when the German criminal justice system was widely considered to be extremely legalistic and free from all manifestations of negotiated justice<sup>14</sup>. Informal agreements on the outcome of proceedings are now believed to have been present in Germany since the 1970s<sup>15</sup>. The reasons for their development include (but are not limited to): growing workload among judges and prosecutors (partly caused by the complexity and time-consuming nature of criminal proceedings in economic, drug and environmental criminal cases), new obstacles to streamlined process stemming from growing requirements of admissibility of evidence, as well as approval for the increasing participation of the parties in shaping the outcome of proceedings and reorientation of the criminal law system in general from the abstract ideal of retributive justice to the more practical approach focused on the prevention of crime<sup>16</sup>. The conclusion of the agreement at trial would usually be preceded by informal

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<sup>14</sup> ROBERSON, Cliff, DAS, Dilip K. *An Introduction to Comparative Legal Models of Criminal Justice*, op. cit. p. 145; LANGBEIN, John H. Land without Plea Bargaining: How the Germans Do It, op. cit. p. 201-212.

<sup>15</sup> LANGER, Maximo. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, op. cit. p. 28. WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. *German Law Journal*, vol. 15, n. 1, p. 83, 2014. TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. In: AMBOS, Kai, DUFF, Antony, ROBERTS, Julian, WEIGEND, Thomas (eds). *Core Concepts in Criminal Law and Criminal Justice*, vol. I, 2020. p. 403. RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? *Fordham International Law Journal*, v. 34, n. 2, p. 296-331, 2011. WEIGEND, Thomas. The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure. In: JACKSON, John, LANGER, Máximo, TILLERS, Peter (eds). *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*. London: Hart Publishing, 2008. p. 50-53.

<sup>16</sup> WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 85-86. BOLL, Mathias. *Plea Bargaining and Agreement in the Criminal Process: A Comparison between Australia, England and Germany*. Hamburg: Diplomica Verlag, 2009. p. 39, p. 62; RAUXLOH, Regina. *Plea Bargaining in National and International Law*, op. cit. p. 64. KOBOR, Susanne. *Bargaining in the Criminal Justice Systems of the United States and Germany*. A Matter of Justice and Administrative Efficiency Within Legal, Cultural Context. Frankfurt: Peter Lang, 2007. p. 127-131.



talks between the judge, the prosecutor and the defence counsel<sup>17</sup>. Such confidential meetings were not attended by lay judges or the accused<sup>18</sup>. Agreements were thus usually concluded by professional participants in the proceedings, without a statutory basis and in hiding from the public opinion and scientific discourse<sup>19</sup>. This practice was disclosed in 1982 by a well-known German attorney-at-law in an article published under a false name<sup>20</sup>. The instigated debate lasted throughout 1980s and 1990s and divided legal scholars into opponents and proponents of negotiated criminal justice.

The German Federal Constitutional Court played a crucial role in determining the boundaries of the practice of informal agreements. The first key ruling was issued in 1987<sup>21</sup>. The Court acknowledged the practice of settling criminal disputes and stated that the principle of fair trial as interpreted in light of the rule of law did not generally prohibit agreements between the court and the parties concerning the assessment of the state of proceedings and the expected outcome. However, the court's duty to establish the substantive truth, observe the principle of

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<sup>17</sup> TURNER, Jenia I. Judicial Participation in Plea Negotiations: A Comparative View. *American Journal of Comparative Law*, vol. 54, p. 220, 2006. WEIGEND, Thomas. The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure. In: JACKSON, John, LANGER, Máximo, TILLERS, Peter (eds). *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*. London: Hart Publishing, 2008. p. 47. See also WEIGEND, Thomas. Exclusion without trial? Exclusion of evidence and abbreviated procedures. *Revista Brasileira de Direito Processual Penal*, v. 7, n. 1, p. 259-260, 2021. The author indicates that even nowadays negotiations usually take place before trial – although the wording of StPO suggests otherwise.

<sup>18</sup> TURNER, Jenia I. Judicial Participation in Plea Negotiations: A Comparative View. op. cit. p. 220.

<sup>19</sup> FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? *Hanse Law Review*, v. 5, n. 2, p. 199, 2009. Compare TURNER, Jenia I. Limits on the search for truth in criminal procedure: a comparative view. In: THAMAN, Stephen C., ROSS, Jacqueline E. (eds.). *Comparative Criminal Procedure*, op.cit. p. 51-52.

<sup>20</sup> DEAL, Detlef (pseudonym for WIEDER, Hans-Joachim). Der strafprozessuale Vergleich. *Strafverteidiger*, p. 545, 1982.

<sup>21</sup> Judgment of BverfG of 27 January 1987, 2 BvR 1133/86.

legality and impose a just sentence could not be negotiated or traded. The court was thus free to offer a lenient sentence only insofar as it remained within the boundaries of its guilt-appropriateness<sup>22</sup>. It was also explicitly stated that the accused cannot be persuaded to confess her guilt by deception or by a promise of benefits not provided for by the law. The defendant's freedom to act upon her will has to be protected from significant impairment. Nevertheless, the Court declared that if the evidence and the state of main hearing provided an objective basis for specific reference to the evidence or for the mitigating effect of the supposed confession, it was constitutionally admissible that the court communicated to the parties the maximum penalty, which would not have been exceeded by the court in case of a credible confession. However, it would be unacceptable to communicate a precise sentence that the court intended to impose.

The judgment of the Federal Constitutional Court constituted a milestone in the development of agreements in criminal proceedings. First, it officially acknowledged the existence of such a practice. Second, it confirmed its boundaries in terms of the principle of legality and the duty to establish substantive truth. Third, the Federal Court also referred to the procedural fairness of such mechanisms, clearly forbidding the use of deceit or false promises in negotiations as it would violate the defendant's rights.

However, the agreements remained outside the scope of statutory regulation. The case law of the Federal Court of Justice (*Bundesgerichtshof*) in the following years was divergent: the settlements' compliance with the principle of legality was either objected or accepted<sup>23</sup>.

The dispute was only ended by another key judgment of the Federal Court of Justice in 1997<sup>24</sup>. The agreements were once again

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<sup>22</sup> See also KOBOR, Susanne. *Bargaining in the Criminal Justice Systems of the United States and Germany*. A Matter of Justice and Administrative Efficiency Within Legal, Cultural Context. Frankfurt: Peter Lang, 2007. p. 124.

<sup>23</sup> RAUXLOH, Regina. *Plea Bargaining in National and International Law*, op.cit. p. 69-70; RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? *Fordham International Law Journal*, v. 34, n. 2, p. 317-319, 2011.

<sup>24</sup> Judgment of BGH of 4 August 1997, 4 StR 240/97.

found admissible, provided that the issued judgment is proportionate to the defendant's guilt (bearing in mind that the confession may be taken into account and mitigate the sentence). It was pointed out that any agreement could be concluded only in open court and with the involvement of all participants<sup>25</sup>. Out-of-trial talks of the parties were allowed, but their final conclusions must have been stated in public and included in the minutes of the main hearing. At the same time, it was found inadmissible for the court to exercise any influence over the defendant's freedom to decide on the agreement. It was also explicitly forbidden to obtain before sentencing the defendant's waiver of the right to appeal in exchange for a possible leniency. According to the analysed judgment, the criminal court cannot be bound to impose a specific sentence. The court may, however, indicate the maximum penalty in the case of confession, which is binding unless new significant circumstances are disclosed<sup>26</sup>.

In another judgment of March 2005<sup>27</sup>, the Federal Court of Justice confirmed this approach and responded to the criticism of the legal doctrine. Some scholars were still reluctant to accept such informal creation of new institutions and their conformity to principles of material truth and legalism. However, the Court of Justice strongly underlined that the limits of judicial activism in this respect had been reached and the matter demanded urgent statutory regulation<sup>28</sup>.

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<sup>25</sup> However, the empirical research of 2007 showed that only 2.4% of judges, defence attorneys and prosecutors admit that the defendants usually take part in negotiations. See ALTENHEIN, Karsten, DIETMEIER, Frank, MAY, Markus. *Die Praxis der Absprachen in Strafverfahren*. Baden-Baden: Nomos, 2013. p. 167, note 36.

<sup>26</sup> In practice the indicated penalty is usually understood as the one that in fact would be imposed and the empirical research proves that in fact it usually was. At this point it was controversial whether the court may at the same time have indicated what maximum sentence would have been considered as it may constitute an undue influence on the defendant's decision, especially if the difference between the two is significant. See ALTENHEIN, Karsten, DIETMEIER, Frank, MAY, Markus. *Die Praxis der Absprachen in Strafverfahren*. op.cit. p. 164-165, p. 169-172.

<sup>27</sup> Judgment of BGH of 3 March 2005, GSSt 1/04.

<sup>28</sup> RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? op. cit. p. 317-319.

That finally led to the enactment of the amending act on penal proceedings of 28 May 2009, which entered into force on 4 August 2009 and introduced a new § 257c of the StPO. The shape of statutory regulation was strongly influenced by the cited judgment of the Constitutional Tribunal (as well as by the further case law of the Federal Court of Justice).

The activity of the Constitutional Court regarding negotiated justice was continued after 2009 as well. The most important judgment was issued on 19 March 2013 in response to three constitutional complaints about § 257c StPO<sup>29</sup>. Two applicants claimed that their freedom from self-incrimination, right to a fair trial and the principle of individual guilt had been violated by the failure of the adjudicating courts to provide in advance relevant instructions as to the possibility of the court to withdraw from the agreement (although the courts had not actually withdrawn in their cases). The third applicant claimed that his right to a fair trial had been violated by the fact that the court had indicated – on its own initiative – not only the proposed sentence, but also the sentence which might be imposed if no confession would have been entered. According to the applicant, the proposed sentencing discount was so great that it in fact constituted undue pressure. The third applicant also alleged the violation of the court's duty to verify the facts of the case and truthfulness of the confession.

The Constitutional Court stated that improper application of the statutory provisions – although in fact occurred – did not make the law unconstitutional. The provision of § 257c StPO was conform to the Constitution as it contained sufficient guarantees of the substantive justice (which were: the duty to discuss the agreement openly at the public hearing and the court's obligation to establish all necessary facts truthfully so that the principle of guilt is observed) and the fairness of the procedure (these were especially: the duty of the court to give proper instructions to the accused and the inadmissibility of the defendant's

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<sup>29</sup> Judgment of BVerG of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10 and 2 BvR 2155/11. Available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319\\_2bvr262810.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319_2bvr262810.html) . Accessed on: 23.01.2022.

confession in case of the court's withdrawal from the agreement)<sup>30</sup>. Getting necessary instructions on the scope of the binding effect and the consequences of a failure to reach an agreement was deemed as a crucial factor for safeguarding the defendant's freedom of decision. If the court had failed to provide the defendant with all the necessary instructions specified in §257 c (4, 5) StPO, the agreement would have been concluded in violation of the law. Such a fault usually affects the judgment unless the defendant would have made the confession anyway had he been properly instructed<sup>31</sup>. The Court underlined that the principle of legalism and the rule of freedom from self-incrimination prohibited the court from offering the accused the prospect of a reduced sentence in case of confession, if such a sentence passed the limits of adequacy of the punishment to the guilt. In case of the third applicant, the penalties indicated by the court varied from suspended sentence in case of confession to a minimum sentence of three years imprisonment for one or two counts of aggravated robbery – if no confession would have been made. The Federal Constitution Court declared that these “sanction scissors” had been so huge that it amounted to an undue pressure over the defendant and a false promise of benefits not provided by the law<sup>32</sup>. Nevertheless, no practical guidelines to assess the proportionality of the sentencing discount were given by the Federal Court<sup>33</sup>.

The Court also emphasised the importance of the transparency and publicity of negotiations – or at least the public disclosure of their

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<sup>30</sup> With regard to the principle of guilt and its implications for the proportionality of penalty and the court's duty to establish the truth: see TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. op. cit. p. 401, p. 420.

<sup>31</sup> WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 95-96.

<sup>32</sup> German: *Sanktionsschere*, literally: sanction scissors. See BOHLANDER, Michael. *Principles of German Criminal Procedure*. Oxford: Hart Publishing, 2021. p. 122.; ALTENHAIN, Karsten, DIETMAIER, Frank, MAY, Markus. *Die Praxis der Absprachen in Strafverfahren*. Baden-Baden: Nomos, 2013. p. 169-170.

<sup>33</sup> WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 99.

occurrence in open court – for procedural fairness of the agreement<sup>34</sup>. The importance of transparency for procedural fairness of the agreement was later confirmed in another judgment of the Federal Constitutional Court of 15 January 2015<sup>35</sup>.

What is particularly interesting is that – for the purpose of issuing the discussed judgment – the Court appointed Prof. Karsten Altenhain to conduct an empirical study on the practice of *Absprachen*. The study showed that most settlements were entered by omitting judicial regulation, that is outside the main hearing and informally; usually they also involved the waiver of the right to appeal, which was inadmissible under the explicit wording of § 302 (2) StPO<sup>36</sup>. Thus, in practice procedural safeguards were circumvented by the participants to the proceedings, including the court. However, according to the discussed judgment, the statutory regulation would be contrary to the Constitution only if the unconstitutional practice could “be traced back to the provision itself, i.e. it was an expression of a normative regulatory deficit leading to this practice due to its structure”<sup>37</sup>. In the Court’s view, the statutory provisions met the constitutional

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<sup>34</sup> WEIGEND, Thomas, TURNER, Jenia I. The Constitutionality of Negotiated Criminal Judgments in Germany. op. cit. p. 95. Lack of transparency has long been considered a serious drawback of sentencing agreements in Germany. See TULKENS, Françoise. Negotiated Justice. In: DELMAS-MARTY, Mireille, SPENCER, John R. (eds). *European Criminal Procedures*. Cambridge: Cambridge University Press, 2002. p. 664. SCHEMMELE, Alexander, CORELLI, Christian, RICHTER, Natalie. Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013? *German Law Journal*, vol. 15, n. 1, p. 60-62, 2014.

<sup>35</sup> Judgment of BVerfG of 15 January, 2015, 35 STRAFVERTEIDIGER [StV] 269 (270), 2015 (Ger.). See more: JAHN, Matthias, SCHMITT-LEONARDY, Charlotte. The German “Verständigung” and Consensual Elements in German Criminal Trials. *German Law Journal*, vol. 21, n. 6, p. 1143. 2020.

<sup>36</sup> As stated in the discussed judgment, “58.9% of the judges surveyed stated that they had carried out more than half of their agreements ‘informally’, i.e. without applying Section 257c StPO, 26.7% stated that they had always proceeded in this way. 33% of the judges surveyed stated that they had made agreements outside of the main hearing, without this being disclosed at trial, while 41.8% of prosecutors and 74.7% of defence counsel said they had experienced it.”

<sup>37</sup> Judgment of BVerfG of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10 and 2 BvR 2155/11.

standard but they were circumvented by practitioners who found them impractical. The Court underlined that “the legislature must keep a careful eye on further developments” and intervene if the judicial practice continued to ignore procedural safeguards in the statutory regulation<sup>38</sup>.

At the same time, the Court reversed individual decisions in applicants’ cases, mostly because of the criminal courts’ failure to instruct the defendants of the scope of the binding force of the agreements and risks resulting from therein. Even if the court did not actually withdraw from the agreement, the issued judgment was still based on a confession obtained through a violation of the defendant’s fundamental rights and thus it had to be carefully assessed whether the accused would have confessed had he received the relevant instructions.

With regard to the third applicant, it was concluded that his freedom from self-incrimination had been violated by the fact that the court had indicated unjustifiably different upper and lower punishment limits in case of confession or its absence. What is even more important, the Court stated that the principle of guilt and the obligation to establish the material truth were violated as well, as the judgment had been based on a formal confession not backed by any statement as to the facts of the case or by additional evidence. That is a particularly important statement of the Constitutional Court. From this moment on, it is thus considered that some evidence has to be examined during the court hearing in order to check the credibility of a confession. However, it is deemed sufficient to inspect the investigative file or to question the leading investigator as a witness<sup>39</sup>.

The discussed judgment of the Federal Constitutional Court faced mixed attitude of legal scholars. On one hand, it was noted that the attempt to limit the practice of negotiated justice and the emphasis

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<sup>38</sup> Judgment of BVerG of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10 and 2 BvR 2155/11.

<sup>39</sup> GILLIÉRON, Gwladys. Comparing Plea Bargaining and Abbreviated Trial Procedures. In: BROWN, Darryl K., TURNER, Jenia I., WEISSER, Bettina. *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press 2019. p. 713. MOSBACHER, Andreas. The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements. *German Law Journal*, vol. 15, n. 1, p. 7 -9, 2014.

put on “the search for truth, the proportionality of punishment and transparency of negotiations” is praiseworthy<sup>40</sup>. However, it was also pointed out that the Court failed to truly address the problems that lie at the core of negotiated justice, namely the constitutionality of the trade of “proportionate sentencing and a full examination of the facts for a waiver of the defendant’s trial rights”<sup>41</sup>. It was also doubted whether the Court was able to actually influence the practice as it had long been developing outside statutory framework<sup>42</sup>.

The newest empirical research shows that 7,8% of judges admit that they often or very often inform the defendants about the so-called “sanction-scissors” in case of confession and its lack (whereas 9.1% of the prosecutors and 23,6% of the defence attorney report such a practice as often or very often)<sup>43</sup>. Almost all the professional participants witnessed the defendant’s confession after the court had indicated a possible punishment although the defendant had previously refused to confess<sup>44</sup>. When it comes to transparency, in 17,6% of the examined cases the negotiations of a settlement were not reflected in the minutes at all; even if in majority cases the duty to reflect the agreement in the minutes was fulfilled, it was usually only the results of negotiations that was noted, not their course<sup>45</sup>. As one can see, practitioners’ tendency to informal shortcuts is not easy to eradicate exactly as it has been feared when the

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<sup>40</sup> WEIGEND, Thomas, TURNER, Jenia I. *The Constitutionality of Negotiated Criminal Judgments in Germany*. op. cit. p. 82.

<sup>41</sup> WEIGEND, Thomas, TURNER, Jenia I. *The Constitutionality of Negotiated Criminal Judgments in Germany*. op. cit. p. 95.

<sup>42</sup> WEIGEND, Thomas, TURNER, Jenia I. *The Constitutionality of Negotiated Criminal Judgments in Germany*. op. cit. p. 98. Compare RAUXLOH, Regina. *Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?* op. cit. p. 321, p. 323-325, who expressed doubts as to whether the statutory regulation may prevent certain behaviours that have long been practised informally.

<sup>43</sup> ALTENHAIN, Karsten, JAHN, Matthias, KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. Baden-Baden: Nomos, 2020. p. 410.

<sup>44</sup> ALTENHAIN, Karsten, JAHN, Matthias, KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. op. cit. p. 412-414.

<sup>45</sup> ALTENHAIN, Karsten, JAHN, Matthias, KINZIG, Jörg. *Die Praxis der Verständigung im Strafprozess*. op. cit. p. 149-150, p. 186.



statutory regulation entered into force<sup>46</sup>. The practice of not disclosing the course of negotiations in the minutes of the court hearing has already been criticised in 2006 but is still present although the importance of transparency is emphasised by the legal doctrine<sup>47</sup>.

It was also pointed out in the legal doctrine that the strict legal framework of *Absprachen*, created by the discussed judgment of the Federal Constitutional Court of 2013, may have contributed to increasingly rare application of the institution itself and to the tendency of shifting the focus of practitioners to informal agreements in pre-trial phase of proceedings<sup>48</sup>.

To sum up, the German Constitutional Court's case law focuses on preserving the principle of material truth and legalism, paying attention to the protection of defendants as well. The protection of the true voluntariness of the defendant's decision to enter a settlement is strongly emphasised by the Court as well as the particular importance of the transparency of negotiations and their result. The Court's role in introducing agreements to the criminal procedure in the first place and shaping them in an equitable way was exceptional as the Court's initial guidelines were actually incorporated into the statutory law. Nevertheless, the practical tendency to circumvent the well-designed regulations still escapes the Court's jurisdiction to some extent.

## 2.2. FRANCE

The most typical French institution resembling American plea bargaining is called *la comparution sur reconnaissance préalable de culpabilité* (CRPC) or *le plaider-coupable*, literally meaning "to plead

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<sup>46</sup> RAUXLOH, Regina. Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle? op. cit. p. 321-323.

<sup>47</sup> TURNER, Jenia I. Judicial Participation in Plea Negotiations: A Comparative View. op. cit. p. 220-221; AMBOS, Kai, HEINZE, Alexander. Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure. In: BERGSMO, Morten (ed.). *Abbreviated Criminal Procedures for Core International Crimes*. Brussels: Torkel Opsahl, 2017. p. 72.

<sup>48</sup> JAHN, Matthias, SCHMITT-LEONARDY, Charlotte. The German "Verständigung" and Consensual Elements in German Criminal Trials. *German Law Journal*, vol. 21, n. 6, p. 1145-1146, 2020.

guilty”. There is also another institution bearing a consensual feature, *la composition pénale*. It was left out of the analysis because it is doubtful whether it can be qualified as a negotiated justice mechanism similar to plea bargaining because it does not lead to a criminal conviction<sup>49</sup>. However, it is worth mentioning that its introduction into the French legal system was induced by the Constitutional Council’s judgment of 2 February 1995 which had declared the institution of penal order unconstitutional due to the fact that its issuance had been the competence of the prosecutor and not of the court<sup>50</sup>. The penal order was thus substituted with *composition pénale*.

The CRPC was introduced into the French legal system by the Act of 9 March 2004 adapting the administration of justice to the changing face of crime, which dealt with several modern challenges to criminal justice systems such as organised crime and overly lengthy proceedings<sup>51</sup>. It was referred to the *Conseil Constitutionnel* (hereinafter: Constitutional Council or Council) for review by the members of parliament, who claimed that the new institution violated the right to a fair trial as well as the presumption of innocence, the principle of equality before the courts of law and the principle of trial in open court. It was argued that the institution put the defendant under real pressure due to the risk of harshening the sentence if the agreement was refused. The Constitutional Council in general did not share this view in its decision of 2 March 2004<sup>52</sup>. According to the Council, placing the approval of the agreement solely in the hands of the president of the relevant court sufficiently separated charging and adjudicating powers. Mandatory participation of the defence attorney, a ten-day period for reflection for the defendant

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<sup>49</sup> See PRADEL, Jean. *Procédure pénale*. Paris: Cujas, 2019. p. 669-670; GUINCHARD, Serge, BUISSON, Jacques. *Procédure pénale*. Paris: Lexis Nexis, 2020. p. 909; DESPORTES, Frédéric, LAZERGES-COUSQUER, Laurence. *Traité de procédure pénal*. Paris: Economica, 2015. p. 813-814.

<sup>50</sup> Cons. Const. no. 95-360 DC, 2 fevr. 1995; JO 7 fevr. 1995, 2097; STEFANI, Gaston, LEVASSEUR, George, BOULOC, Bernard. *Procédure pénale*. Paris: Dalloz, 20196. p. 666.

<sup>51</sup> Loi n°2004-204 du 9 mars 2004 portant sur l’adaptation de la justice aux évolutions de la criminalité, JORF n°59 du 10 mars 2004.

<sup>52</sup> Décision n° 2004-492 DC of 2.03.2004. Available at: <https://www.conseil-constitutionnel.fr/decision/2004/2004492DC.htm> . Accessed on: 16.01.2022.

upon request as well as the unlimited right to appeal guaranteed that the right to a fair trial was not infringed. The presumption of innocence was also not violated as the defendant was not forced to confess and the court remained obliged to verify the facts of the case. What is more, if the agreement was not approved, the statements made in the course of this procedure would be inadmissible at trial. The principle of equality before the law was not infringed either with regard to the victims, who enjoyed the right to make civil claims regardless of this special procedure. However, the Council agreed that it was unconstitutional that the court hearing regarding the agreement was supposed to take place *in camera*, as the Declaration of 1789 generally required that custodial sentences were imposed only in open court.

It was not long before the provisions regarding CRPC approval hearings were reviewed by the Constitutional Council again. This time it was questioned whether the new law providing for the non-mandatory presence of the prosecutor at the court hearing pertaining the settlement violated the Constitution. The Council disagreed with such a thesis in its decision of 22 July 2005<sup>53</sup>. However, the issue was controversial and even the Court of Cassation expressed in the course of proceedings before the Council the view that the prosecutor's presence at the hearing was of crucial importance for the constitutional values<sup>54</sup>.

Other judgments of the Constitutional Council regarding CRPC were:

- the decision of 10 December 2010<sup>55</sup>, resulting from a referral by the Court of Cassation (fr. *Cour de Cassation*) holding that it was conform to the Constitution that the prosecutor could simultaneously make a proposition of CRPC and summon the defendant to the court, as the summons became void

<sup>53</sup> Décision n° 2005-520 DC of 22.06.2005. Available at: <https://www.conseil-constitutionnel.fr/decision/2005/2005520DC.htm> . Accessed on: 16.01.2022.

<sup>54</sup> LAZERGES, Christine. Le rôle du Conseil constitutionnel en matière de politique criminelle. *Cahiers du Conseil Constitutionnel n° 26 (Dossier: La Constitution Et Le Droit Pénal)*, 2009. Available at: <https://conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/cahiers-du-conseil-constitutionnel-n-26-aout-2009> . Accessed on: 16.01.2022.

<sup>55</sup> Décision n° 2010-77 QPC of 10.12.2010. Available at: <https://www.conseil-constitutionnel.fr/decision/2010/201077QPC.htm> . Accessed on: 17.01.2022.

if the proposition was accepted and the law protected the accused by excluding all the documents regarding the CRPC procedure from the trial dossier,

- the decision of 8 December 2011<sup>56</sup>, approving the constitutionality of the amendment which expanded the scope of application of CRPC to almost all offences and created the possibility of remitting the case to the prosecutor for negotiations by the investigating judge,
- the decision of 21 March 2019<sup>57</sup>, affirming conformity to the Constitution of a reform which enlarged the scope of punishments that may be inflicted in the CRPC procedure,
- the decision of 18 June 2021<sup>58</sup>, given in response to the Court of Cassation referral, establishing that the lack of appellate review of the court's refusal to approve the agreement did not violate the Constitution, as such a decision neither ended criminal proceedings nor created any risk to the rights of the defence in its further course, as the minutes of negotiations and other related statements were excluded from the case file<sup>59</sup>.

As one can easily see, the case law of the Constitutional Council is usually approving the statutory regulation. Thus the role of the Council in shaping the procedural fairness of the CRPC was not predominant. However, the reason might simply be the quality of the French legislation regarding CRPC, which was always encased in an elaborate system of

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<sup>56</sup> Décision n° 2011-641 DC of 8.12.2011. Available at: <https://www.conseil-constitutionnel.fr/decision/2011/2011641DC.htm> . Accessed on: 17.01.2022.

<sup>57</sup> Décision n° 2019-778 DC of 21.03.2019. Available at: <https://www.conseil-constitutionnel.fr/decision/2019/2019778DC.htm> . Accessed on: 23.01.2022.

<sup>58</sup> Décision n° 2021-918 QPC of 18.06.2021. Available at: <https://www.conseil-constitutionnel.fr/decision/2021/2021918QPC.htm> . Accessed on: 23.01.2022.

<sup>59</sup> The exclusion of the documents created during CRPC from the case file is a particularly important safeguard for the defendant according to the French legal writing as well. AZIBERT, Gilbert. Perspectives et prospectives au sujet de la procédure de comparution sur reconnaissance préalable de culpabilité dans la loi dite "Perben 2". In: *Le droit pénal à l'aube du troisième millénaire. Mélanges offerts à Jean Pradel*. Collective work. Paris: Cujas, 2006. p. 176.

procedural safeguards protecting the accused and preserving fundamental values<sup>60</sup>. If the law already fulfils the standard of fairness, the role of a constitutional court obviously diminishes. It is underlined by French legal scholars that the CRPC is not an equivalent of American plea bargaining, does not involve real negotiations but rather consists in accepting or refusing the prosecutor's proposal and is coherent with fundamental principles of the presumption of innocence, fair trial as well as equitable punishment<sup>61</sup>.

The exception to that rule was when the private character of the court hearing was found unconstitutional – but it is worth noting that it was the first time that the Constitutional Council derived the general rule of publicity of court hearings from the Declaration of 1789, where it was not expressly stated<sup>62</sup>.

### 2.3. ITALY

The main Italian institution inspired by American plea bargaining is called *applicazione della pena su richiesta delle parti* (*patteggiamento*).

<sup>60</sup> Even legal scholars admit that the regulation was formulated in a particularly clear and detailed way whereas procedural safeguards diminish the risk of a miscarriage of justice or inflicting an unjust punishment. See PRADEL, Jean. *Le plaider coupable, confrontation des droits américain, italien et français. Revue internationale de droit comparé*, vol. 57, n. 2, p. 485, p. 488-491, 2005.

<sup>61</sup> PRADEL, Jean. *Procédure pénale*. op. cit. p. 927. PRADEL, Jean. *Le plaider coupable, confrontation des droits américain, italien et français. Revue internationale de droit comparé*, vol. 57, n. 2, p. 480, 2005. GUINCHARD, Serge, BUISSON, Jacques. *Procédure pénale*. Paris: Lexis Nexis, 2020. p. 940. FOURMENT, François, CAMOUS, Éric. *Procédure pénale*. Bruxelles: Bruylant, 2021. p. 239. PLANQUE, Jean-Claude, SAPSE, Danielle, TOURNEL, Gilles. *La comparution sur reconnaissance préalable de culpabilité (CRPC): lointaine cousine du plea bargaining américain? Revue pénitentiaire. Droit pénal*, v. 10, p. 97-98, 2016. Compare a different view expressed by NIANG, Babacar. *Le «plaider-coupable» en France et aux États-Unis au regard des principes directeurs du procès pénal*. Paris: l'Harmattan, 2014. p. 491-498.

<sup>62</sup> LAZERGES, Christine. *Le rôle du Conseil constitutionnel en matière de politique criminelle. Cahiers du Conseil Constitutionnel n° 26 (Dossier: La Constitution Et Le Droit Pénal)*, 2009. Available at: <https://conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/cahiers-du-conseil-constitutionnel-n-26-aout-2009>. Accessed on: 16.01.2022.

However, it is sometimes claimed that the abbreviated trial (*giudizio abbreviato*) is a negotiated justice mechanism as well. In the author's opinion, this view cannot be shared anymore, as currently the accused simply has the right to have an abbreviated trial, which does not require the prosecutor's consent. However, the case law regarding *giudizio abbreviato* (especially the one by ECtHR, which will be discussed later in the paper) in fact shaped the standard of procedural fairness of negotiated justice and will be included in the analysis.

Both *patteggiamento* and *giudizio abbreviato* were introduced (alongside other significant reforms transforming the Italian criminal justice system into an adversarial one) by the Code of Criminal Proceedings of 1987, which entered into force in October 1989<sup>63</sup>. The role of the Italian Constitutional Court in these reforms was an exceptional one, as the Court actually blocked many of them. It is even stated in the Italian legal doctrine with regard to *patteggiamento* that "it has, in fact, led to an endless series of decisions issued by the Joint Chambers of the Supreme Court and the Constitutional Court which were to find solutions to the crisis of *rejection* that was gradually produced by the transplant into the Italian legal culture of an institution that did not belong to that culture"<sup>64</sup>.

In the 1990s the Italian Constitutional Court struck down some crucial elements of the 1989 reform, such as the exclusion of hearsay evidence coming from police officers<sup>65</sup>, the exclusion of out-of-court statements of a defendant's accomplice who remained silent as a witness at trial<sup>66</sup>, the exclusion of out-of-court witness statements in

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<sup>63</sup> Decree of the President of Republic no. 447 of 22 September 1988 Approval of Criminal Procedure Code (*Codice di Procedure Penale*), Gazzetta Ufficiale della Repubblica no. 250 of 24 October 1988, hereinafter: Italian Code of Criminal Procedure or ICCP.

<sup>64</sup> LUPÁRIA, Luca, GIALUZ, Mitja. Italian Criminal Procedure: Thirty Years After the Great Reform. *Roma Tre Law Review*, v. 1, p. 66, 2019.

<sup>65</sup> Corte cost., 31 Jan. 1992, n. 24, Gazz. Uff. 1' serie speciale, 5 Feb. 1992, n. 6, Foro It. 1992, I, 1052.

<sup>66</sup> Corte cost., 3 June 1992, n. 254, Gazz. Uff. 1 serie speciale, 4 June 1992, n. 24, Giur. It. 1993, I, 533; the amended provision of Article 513 was once again held unconstitutional in judgment n. 361/1998 of 4 November 1998, Corte cost., 2 Nov. 1998, n. 361, Gazz. Uff. 1 serie speciale, 4 Nov. 1998, n. 44, Foro It. 1998, 3441.

their substantive use as evidence<sup>67</sup> or the limited power of the court to initiate the introduction of evidence<sup>68</sup>. The attitude of the Constitutional Court presented was in favour of not impeding the search for truth and the judges' active role in this process; it was nevertheless characterised in the legal doctrine as misinterpretation of the Constitution<sup>69</sup>. With regard to *patteggiamento* itself, it was already on 2 July 1990 when the Constitutional Court held that the court has to play an active role in assessing the adequacy of the sentence to the act committed in the light of the directive of social readaptation. Thus, the wording of Article 444 has to be construed in such a way to permit the judge to play such an active role and not to release the court from the duty to determine the defendant's guilt<sup>70</sup>. On the other hand, it was pointed out that the criminal court is not bound by the parties' request for a particular penalty as it may be rejected after assessing the merits of the case – and thus the institution does not violate Article 101 of the Italian Constitution, which subordinates the judge only to the law<sup>71</sup>. The court is always obliged to verify the voluntariness of the defendant's statements and the appropriateness of legal classification of the act and the punishment, as well as to check whether there are any reasons that should lead to an acquittal<sup>72</sup>. It was nevertheless stated in

<sup>67</sup> Corte cost., 3 June 1992, n. 255, Gazz. Uff. 1' serie speciale, 4 June 1992, n. 24, Foro It. 1992, I, 2012.

<sup>68</sup> Corte cost., 26 Mar. 1993, n. 11, Gazz. Uff. 1' serie speciale, 31 Mar. 1993, n. 14, Foro It. 1993, I, 1356.

<sup>69</sup> ILLUMINATI, Giulio. The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988). *Washington University Global Studies Law Review*, v. 4, n. 2, p. 576, 2005.

<sup>70</sup> VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system. op. cit. p. 446. The author provides a detailed analysis of the argumentation provided by the Italian Constitutional Court. See also FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? op. cit. p. 213.

<sup>71</sup> FROMMANN, Maike. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? op. cit. p. 216.

<sup>72</sup> IOVENE, Federica. Plea Bargaining and Abbreviated Trial in Italy. *Warwick School of Law Research Paper (Special Plea Bargaining Edition, editor Jackie Hodgson)*, n. 11, p. 5-6, 2013.

the legal doctrine that the Constitutional Court's strong support for the judge's position in negotiated justice was rather verbal and "masked the extent to which the agreed upon sentence stripped the judge of substantial power"<sup>73</sup>. On the other hand, it is pointed out that the Constitutional Court presented a new attitude towards the adequacy of punishment, confirming that it is conform to the Constitution that a penalty is lowered by one third (as in case of *patteggiamento*) and thus that the waiver of procedural right may constitute a mitigating circumstance (although other aggravating and mitigating factors still have to be considered in order to ensure appropriateness of the penalty to the guilt)<sup>74</sup>.

The judgment of 2 July 1990 led to the amendment of the Code no. 479/1999 of 16 December 1999 which introduced Article 444 (2) CPP. This provision explicitly imposed on the court the duty to inspect the guilt, the legal classification and the adequacy of sentence and prohibited bargaining over legal classification<sup>75</sup>.

The activity of the Constitutional Court seriously undercut the reforms<sup>76</sup>. The Parliament reacted by amending Article 111 of the Italian Constitution so that it contains a clear basis for the adversarial concept of criminal trial<sup>77</sup>. The amended provision also explicitly provides legal

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<sup>73</sup> VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system, op. cit. p. 449. See more criticism in: FROMMANN, Maïke. Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges? op. cit. p. 217.

<sup>74</sup> IOVENE, Federica. Plea Bargaining and Abbreviated Trial in Italy. op. cit. p. 9-10.

<sup>75</sup> FABRI, Marco in: FABRI, Marco (ed.). *Four Criminal Procedure Case Studies in Comparative Perspective: China – Italy – Russia – USA*. Baden-Baden: Nomos, Bern: Stämpfli Verlag, Wien: Jan Sramek Verlag, 2016. p. 140; GIALUZ, Mitja. The Italian Code of Criminal Procedure: a reading guide. In: GIALUZ, Mitja, LUPÀRIA, Luca. SCARP, Federica. *The Italian Code of Criminal Procedure. Critical Essays and English Translation*, op.cit. p. 45.

<sup>76</sup> PIZZI, William T., MONTAGNA, Mariangela. The Battle to Establish an Adversarial Trial System in Italy, op. cit. p. 430.

<sup>77</sup> Cost. Law n. 2 of Nov. 23, 1999, Gazz. Uff. serie generale, 23 Dec. 1999, n. 300, Lex. 1999, I, 4447. VITIELLO, Michael. Bargained-for-Justice: Lessons from the Italians? *University of the Pacific Law Review*, v. 48, p. 260, 2017.



grounds for waiving the right to a trial<sup>78</sup>. This is a unique example of a constitutional court having such a negative attitude towards the reforms intended by the legislature that it led to the change of the Constitution itself. However, other fields of the Constitutional Court's activity contributed to enhancing the fairness of negotiated justice. For example, as a result of judgment no. 443/1990 of 26 September 1990 the legislator provided legal basis for reimbursing the costs of proceedings borne by the victim regardless of the fact that proceedings ended in *patteggiamento*<sup>79</sup>.

Especially after the discussed amendment of the Italian Constitution, the Italian Constitutional Court changed its attitude towards introduced reforms. The clear sign of a new approach towards negotiated justice was the judgment of 9 July 2004, when the Court affirmed constitutionality of raising a possible punishment inflicted in *patteggiamento* procedure from two to five years imprisonment<sup>80</sup>. As a sidenote it has to be underlined that the very same constitutional doubt arose when the scope of application of CRPC was enlarged in France – but it was also resolved in favour of legislator's will to promote negotiated justice.

In the years to come, the Italian Constitutional Court even derived sort of a right of the defendant to request for *patteggiamento*. For example,

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<sup>78</sup> It was added to Article 111 of the Italian Constitution among others that the defendant has the right “that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to subpoena favourable witnesses at trial on an equal basis with the prosecution, as well as the right to produce other evidence in his favour”; that the “criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer.” It was also added that “The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by consent of the accused, due to verified objective impossibility or as a result of proven illicit conduct” (translation by PIZZI, William T., MONTAGNA, Mariangela. *The Battle to Establish an Adversarial Trial System in Italy*, op. cit. p. 460-461).

<sup>79</sup> PERRODET, Antoinette. The Italian System. In: DELMAS-MARTY, Mireille, SPENCER, John R. (eds). *European Criminal Procedures*. Cambridge: Cambridge University Press, 2002. p. 372-373.

<sup>80</sup> Corte cost., 9 July 2004, n. 219, Gazz. Uff. 1' serie speciale, 14 Jul. 2004, n. 27.

it was held in the judgment of 20 February 2019 that it is unconstitutional to deprive the defendant of the right to request for such a conviction due to the enlargement of the scope of the accusation with regard to the acts which were not initially covered by the act of indictment<sup>81</sup>. This tendency was initiated decades before, when in a series of three judgments the Constitutional Court determined that the provisions concerning *giudizio abbreviato* violated the constitutional principle of equality insofar as they did not demand the prosecutor to state reasons of refusal of consent to this procedure and did not allow the court to grant the benefits resulting from its application if the refusal was unfounded<sup>82</sup>. In light of the above, the standard of fairness of criminal proceedings in Italy involves the right of the defendant to request a sentencing agreement and such a request may only be refused on sufficient grounds subjected to judicial review. This exceptional feature of the Italian negotiated justice is partly resulting from the Constitutional Court's activity.

#### 2.4. THE ROLE OF THE ECtHR

The European Court of Human Rights has had the opportunity to express its views on plea agreements on many occasions, mostly referring to the conditions of renouncing fair trial rights. The ECtHR correctly assumes that such a waiver lies at the core of negotiated justice<sup>83</sup>.

One of the most widely cited judgments was the one of 18 October 2006 in *Hermi v. Italy*, case no. 18114/02. The applicant was sentenced in the *giudizio abbreviato* (which is a shortened and to some extent consensual procedure) but later filed an appeal. He was personally notified of the date of the appellate hearing and did not react to the notification. One of his defence counsels was present at this hearing and requested its adjournment

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<sup>81</sup> Corte cost., 20 Feb. 2019, n. 82, Gazz. Uff. 1ª serie speciale, 17 Apr. 2019, n. 16.

<sup>82</sup> Corte cost., 8 Feb 1990, n. 66, Gazz. Uff. 14 Feb. 1990, n. 7; Corte cost., 18 Apr. 1990, n. 183, Gazz. Uff. 18 Apr. 1990, n. 16; Corte cost., 15 Feb 1991, n. 81, Gazz. Uff. 20 Feb. 1991, n. 8; VAN CLEAVE, Rachel A. An offer you can't refuse? Punishment without trial in Italy and the United States: the search for truth and an efficient criminal justice system. op. cit. p. 453-456.

<sup>83</sup> BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion, op. cit. p. 238-239.

for reasons which included the motion to bring the defendant to the courtroom. This motion was denied as the accused had not demanded his participation in the hearing five days in advance, which was the legal requirement mentioned in the written notification. The appellate court upheld the judgment.

The applicant complained to the ECtHR about the violation of his right to a fair trial by not allowing him to take part in the appellate hearing. The Chamber's judgment initially stated that Article 6 of the Convention had been violated, as the applicant had never explicitly waived his right to participate in the hearing. However, the Grand Chamber later expressed a different view, underlining that Article 6 of the Convention did not forbid renouncing procedural rights. Such a waiver may be either explicit or implied as long as it is unequivocal, tied to a minimum of procedural safeguards and does not violate the public interest. Establishing that the defendant waived any rights in an implied way requires previous determination that he had been aware of these rights and could have reasonably foreseen the consequences of his or her behaviour. The Court concluded that this was the applicant's case, although the vote count was 12 to 5 and dissenting opinions were given.

Another fundamental judgment – and the one which explicitly refers to negotiated justice – was the judgment of 29 April 2014 in *Natsvlshvili and Togonidze v. Georgia*, application no. 9043/05. The first applicant, Mr Natsvlshvili, applied in writing for a plea agreement although he felt innocent, what he expressly stated in the very same letter. The applicant was detained at that time but was represented by two defence counsels and had access to the investigation file. He never plead guilty but participated in negotiations of the agreement which confirmed his guilt and contained a motion to inflict a lenient penalty. The settlement was approved by the court, whose judgment was not subject to appeal. During the court hearing, the applicant stated that he was aware of his rights and consented to the agreement entirely voluntarily, in the absence of any pressure from the prosecution during the negotiations. This statement was also confirmed by the defence counsel.

The applicant complained to the ECtHR about a breach of the right to a fair trial (Article 6 (1) ECtHR) and the right to appeal against a conviction (Article 2 of Protocol No. 7), pointing out that the waiver

of procedural rights was not accompanied by effective protection against procedural violations. In light of the low acquittal rate in Georgia (less than 1%), the applicant was under duress as an agreement was the only way to avoid long imprisonment. According to the complaint, judicial control of the agreement was insufficient as the court could only examine its contents, but not the procedure of negotiations. The applicant, being deprived of his liberty and therefore remaining in the hands of the public authorities, would not have had the courage to admit to the court that pressure had been put on him.

The Court did not consider any of these allegations justified, although the decision was not unanimous. The ECtHR once again confirmed that the right to a fair trial may be renounced provided that:

1. the waiver is unambiguous, genuinely voluntary, backed by full awareness of the facts and legal consequences,
2. the waiver is not contrary to the public interest
3. the waiver is accompanied by a minimum of procedural guarantees against abuse; in particular, both the content of the agreement and the fair method of its development should be subject to due review by the court<sup>84</sup>.

In the circumstances of the case there was no breach of these requirements. The applicant was assisted by lawyers from the very beginning and had access to the case file. He initiated the consensual procedure and stated before the court that he had entered into the agreement voluntarily and had been aware of all its consequences. As regards the right to appeal, the Court found that the applicant had voluntarily, effectively and knowingly waived it by concluding an agreement.

However, Judge Gyulumyan of Georgia submitted a dissenting opinion. It was therein stated that the domestic court was not able to check whether the negotiations were actually fair as they were not recorded in any way. The judicial review was all the more illusory as the agreement was approved the very next day after it had been presented to the court despite the size of the case file. In addition, due to the low percentage of

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<sup>84</sup> See also BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion, *op. cit.* p. 244.

acquittals in Georgia, the accused had no real alternative to the agreement, so he was under undue pressure.

The judgment in *Natsvlishvili and Togonidze v. Georgia* was criticised in the legal doctrine due to the lack of consideration of undue pressure resulting from particular circumstances of the pre-trial detention of the applicant and illusionary chances of acquittal in Georgia<sup>85</sup>. The judgment is considered as conservative and certainly not raising procedural standards of plea agreements over the one set by European constitutional courts<sup>86</sup>.

Another significant thread of the ECtHR's case law on consensual and abbreviated procedures is the loyalty of state authorities in negotiations, which was widely discussed in the landmark judgment *Scoppola v. Italy (II)*, application no. 10249/03.

The applicant, Franco Scoppola, was charged with the murder of his wife and requested the *giudizio abbreviato* (shortened procedure). The Italian Code of Criminal Procedure provided that if such a procedure had been applied, the penalty of life imprisonment (with or without daytime isolation) would have been replaced with thirty years' imprisonment. On the day of the applicant's sentencing, an amendment entered into force which allowed the imposition of the penalty of life imprisonment without daytime isolation instead of life imprisonment with daytime isolation in *giudizio abbreviato* procedure. After the prosecutor's appeal, the applicant was sentenced to life imprisonment without daytime isolation.

The applicant complained to the ECtHR about the breach of his right to a fair trial, arguing that when he had applied for *giudizio abbreviato*, he had understood that he would have been sentenced to 30 years' imprisonment instead of a life sentence. The subsequent change in the regulations resulted in the imposition of a life imprisonment, which unilaterally violated the agreement concluded at the moment of adopting the special procedure. The government claimed that the possibility of withdrawing the application for *giudizio abbreviato* within 30 days of the

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<sup>85</sup> BACHMAIER, Lorena. The European Court of Human Rights on Negotiated Justice and Coercion, op. cit. p. 245-249.

<sup>86</sup> TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. op. cit. p. 408.

entry into force of amended provisions had been a sufficient guarantee of the right to a fair trial.

The ECtHR found that, by requesting an abridged procedure, the applicant had expressly waived his right to a public hearing and to adversarial trial in exchange for certain benefits, especially for avoiding life imprisonment. These benefits could have been reasonably expected by the applicant. The ECtHR stressed that “a person charged with an offence must be able to expect the state to act in good faith and take due account of the procedural choices made by the defence, using the possibilities made available by law. It is contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial. (...) [I]t cannot be regarded as fair if (...) a crucial element of the agreement between the State and the defendant is altered to the latter’s detriment without his consent”<sup>87</sup>. At the same time, it was not enough to allow the applicant to withdraw the consent to *giudizio abbreviato*, as it deprived him of the said benefit anyway.

As it can easily be seen, the ECtHR’s case law is to the greatest extent focused on the issue of procedural fairness of the negotiated justice, true voluntariness and consciousness of the waiver of procedural rights as well as state authorities’ loyalty towards the defendant. As it has already been mentioned, the ECtHR’s case law is worth including in the analysis as it contributes to creating common standards of fairness of negotiated justice. This is particularly important in the countries where constitutional courts have not yet had the occasion to express their position in this matter. Nevertheless, the legal doctrine is somewhat critical towards the ECtHR’s case law. It is underlined that the ECtHR – especially in its *Natsvlishvili* judgment – did not create any standards that would surpass the level of protection of the defendant already guaranteed for example by the case law of the German Constitutional Court<sup>88</sup>. However, there is one issue which is emphasised by the ECtHR to a far greater extent

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<sup>87</sup> § 139.

<sup>88</sup> TURNER, Jenia I., WEIGEND, Thomas. Negotiated Case Dispositions in Germany, England, and the United States. op. cit. p. 408.

than in national legal orders: the loyalty of the state authorities expressed in awarding the benefits which were previously promised or at least reasonably expected by the defendant. The standard set in *Scoppola (II)* in this matter shall be of particular interest for the European constitutional courts and the legislators.

### 3. CONCLUDING REMARKS

The comparative analysis leads to the conclusion that the role of the constitutional courts and the ECtHR in shaping procedural fairness of negotiated justice systems is different in the compared legal systems.

The French Constitutional Council, although frequently asked to review the conformity to the Constitution of the negotiated justice, usually approves the legislative solutions. However, it has to be noted that French consensual institutions provide a particularly high level of procedural protection of the defendant and provide the court with a real possibility of inspecting the appropriateness of the legal classification of the act and the proposed punishment to the circumstances of the case.

In Germany, on the other hand, the Constitutional Court's competence to hear individual complaints entrenches a great number of judgments relating to the agreements in criminal proceedings. The reasoning of the Court usually focuses on the principles of legalism and material truth although procedural fairness is not omitted as well. The role of the Constitutional Court in the creation of *Absprachen* was exceptional as it was the Court which acknowledged the informal practice of concluding agreements and set its boundaries with regard to both substantive and procedural fairness. What is also worth underlining is the exceptional approach of the Federal Constitutional Court towards the transparency of negotiations (to the parties and the public) which is seen as an important guarantee of the procedural fairness. The Court's conclusion that the undue pressure over the defendant may result from proposing too broad sanction scissors is the crucial achievement in terms of fairness of negotiated justice. The case law of the German Federal Constitutional Court is also characterised by a practical focus – not only the law in books, but also the law in action is inspected by the Court.

In Italy the Constitutional Court played a peculiar role in the adversarial transformation of the legal system (which included introducing consensus mechanisms) as it used to undercut the legislator's efforts by eliminating important elements of the reforms from the legal system. This led to a particularly unique reaction of the Parliament: the amendment of the Constitution so that it now contains a specific basis for adversarial features of criminal trial as well as for waiving these rights, which is crucial for the existence of plea bargaining and similar institutions. The Constitutional Court's case law refers strongly to the active role of the court in verifying the adequacy of the proposed judgment.

On the other hand, the conditions of a voluntary waiver of procedural rights are at the heart of the ECtHR's case law, along with the loyalty of the state authorities in the course of negotiations. The ECtHR specifically focuses on providing the defendant with all the necessary information, protecting his or her freedom of making a decision without undue pressure and the exchange of mutual benefits as promised. Nevertheless, the standard or protection of voluntariness set by the ECtHR does not surpass the one provided by the case law of constitutional courts of the analysed countries. The ECtHR's approach thus gains importance in countries where constitutional courts have not reviewed negotiated justice instruments yet and with regard to the issue of loyalty of the state in providing the promised benefits. The latter was not covered by the case law of other analysed judicial bodies.

The common standard set by the case law in Germany, France and Italy is the constitutional requirement for the active role of the court in verifying not only the voluntariness of the defendant's consent for conviction but also the appropriateness of legal classification of the act and the proposed punishment to the circumstances of the case. Thus, the activity of the constitutional courts to the great extent focuses on distinguishing the negotiated justice in their legal systems from American plea bargaining. On the other hand, the ECtHR refers solely to the procedural fairness, acting within the frames of the wording of Article 6 of the ECHR.

In none of the compared countries the role of the constitutional court in shaping procedural fairness of negotiated justice can be described as marginal – although it sometimes consisted of amending the legislators'



efforts and sometimes opposing them to the extent that led to a change of the constitution itself. What is more, it is sometimes difficult to prevent the practitioners from circumventing the requirements set by the case law. For these reasons, the constitutional courts' power to shape the legal framework of negotiated justice is in fact limited.

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**Additional information and author's declarations  
(scientific integrity)**

*Acknowledgement:* This publication has been developed as part of the project 'The Optimum Model of Plea Bargaining. Between Efficiency and Justice', Registration no. 2019/35/N/HS5/03125, financed by the National Science Centre, Poland.

*Conflict of interest declaration:* the author confirms that there are no conflicts of interest in conducting this research and writing this article.

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### Editorial process dates

(<http://www.ibraspp.com.br/revista/index.php/RBDPP/about/editorialPolicies>)

- Submission: 23/01/2022
- Desk review and plagiarism check: 30/01/2022
- Review 1: 03/02/2022
- Review 2: 04/02/2022
- Review 3: 17/02/2022
- Review 4: 23/02/2022
- Preliminary editorial decision: 08/03/2022
- Correction round return: 29/03/2022
- Final editorial decision: 02/04/2022

### Editorial team

- Editor-in-chief: 1 (VGV)
- Associated-editor: 1 (MKJ)
- Reviewers: 4

### HOW TO CITE (ABNT BRAZIL):

CZERWIŃSKA, Dorota. The role of the constitutional courts and ECtHR in shaping negotiated justice mechanisms – a comparative perspective. *Revista Brasileira de Direito Processual Penal*, vol. 8, n. 1, p. 115-152, jan./abr. 2022. <https://doi.org/10.22197/rbdpp.v8i1.681>



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