

## Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?

*Maike Frommann\**

### I. Introduction

In the late 1970's, the American scholar *Langbein* called Germany the land without plea bargaining.<sup>1</sup> This reality has undoubtedly changed in the meantime. Indeed, a practice often referred to as informal agreements has evolved in the past 30 years and it has increasingly gained prominence among legal practitioners. German scholars have entered into in depth debate as to whether such agreements comply with the principles governing German criminal procedure and it has been characterized by submissions of strong proponents as well as opponents.<sup>2</sup> However, plea agreements have become a reality in German criminal proceedings and they are widely used as a means to circumvent the ordinary trial conducted according to the principle of investigation and the search for substantive truth.<sup>3</sup>

Agreements occur in various shapes and forms<sup>4</sup>, but the focus of this article will be on so-called plea agreements, which the court concludes either with the public prosecutor *and* the defense counsel and its client or with either of the participants in the absence of the other. These agreements usually determine the outcome of the trial, in particular the sentence. However, in the absence of statutory regulation, plea negotiations and agreements in Germany have evolved in an informal way which often results in problematic practices. These include, for instance, the strong involvement of the judge, who commonly exercises considerable coercion on the defendant to confess to the charges of the indictment. Statutory regulation has therefore been long overdue. Finally, on 28 May 2009, after numerous judgments pronounced by German Courts and various proposals drafted by lawyers and judges associations, the German Parliament adopted a Law on Agreements in Criminal Proceedings (hereafter, 'Law on Agreements').<sup>5</sup>

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\* Maike Frommann, LL.B. (Hanse Law School/ University of Bremen and Oldenburg), LL.M. (University of Utrecht- Netherlands), currently legal research assistant at the Institute for Criminal Law and Criminology (BRIK-Bremer Institut für Kriminalforschung) at the University of Bremen.

<sup>1</sup> Langbein, John H.; 'Land without plea bargaining: how the Germans do it', [1979] 78 *Michigan Law Review*, 204.

<sup>2</sup> For instance Weigend, Thomas; 'Abgesprochene Gerechtigkeit: Effizienz durch Kooperation im Strafverfahren?' [1990] 45.2 *Juristenzeitung*, 774; Lüderssen, Klaus; 'Die Verständigung im Strafprozess' [1990] 10 *Strafverteidiger*, 415; Schönemann, Bernd; 'Die informellen Absprachen als Überlebensstrategie des deutschen Strafrechts', in: Festschrift für Jürgen Baumann, Bielefeld, 1992, pp. 361, 366; Pfeiffer, Gerd; 'Ich bin gegen den Deal' [1990] 23 *Zeitschrift für Rechtspolitik*, 355.

<sup>3</sup> Schlothauer, Reinhold/ Weider, Hans-Joachim; 'Erweiterte Handlungsspielräume- gesteigerte Verantwortung der Verteidigung im künftigen Ermittlungsverfahren' [2004] 24 *Strafverteidiger*, 504.

<sup>4</sup> Compare Hanack; Ernst-Walter; 'Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?', [1987] 7 *Strafverteidiger*, 501; for more information on the different forms of plea agreements.

<sup>5</sup> 'Gesetz zur Regelung der Verständigung im Strafverfahren' from 29 July 2009, Bundesgesetzblatt Jahrgang 2009 Teil I Nr. 49, ausgegeben zu Bonn am 3. August 2009, available at: [http://www.bmj.bund.de/files/-/3825/gesetz\\_verstaendigung\\_strafverfahren\\_bundesgesetzblatt.pdf](http://www.bmj.bund.de/files/-/3825/gesetz_verstaendigung_strafverfahren_bundesgesetzblatt.pdf).

In the course of this article two different ways of casting plea agreements into statutory law will be presented. The subject-matter of comparison will be Italian *patteggiamento* and German plea agreements (*Urteilsabsprachen*)<sup>6</sup> because in both procedures the participants and the judge agree to a sanction, to which the defendant must submit himself in order to abbreviate or even avoid a trial involving contradictory production of evidence. Italy used to be a legal system that was dominated by civil law traditions, before it underwent a drastic reform to introduce plea bargaining, whereas the German legislature implemented plea bargaining into the predominantly inquisitorial trial.

The purpose of the comparison is to examine whether *patteggiamento* could serve as a model for the German legislature in order to limit the involvement of judges. Italian *patteggiamento* appears appropriate for this comparison because, despite the introduction of adversarial criminal proceedings in Italy, Italian judges' still assume the role of supervisory bodies during plea agreements and scrutinize the parties' agreement without being involved in the actual plea negotiations. This aspect is an interesting feature for the German legislature to consider because the Italian approach appears to conform to the German constitutional requirement of a judge who is 'subject only to the law'<sup>7</sup> and is not bound by the participants' agreement.

It would go beyond the scope of this article to present a proposal for a comprehensive reform of German criminal proceedings. It is also not possible, due to spatial limitations, to conduct an all-embracing critical analysis of the Law on Agreements in its entirety. Rather, this article attempts to add to the current discussion on plea agreements in Germany by assessing the implications that the new law has on the independence of the judge, a topic which in the author's opinion has not yet provoked sufficient attention in the current legal debate. In addition, the article aims to present some possibilities of how the collision between the Law on Agreements and the independence of the judge could be solved.

The remainder of this article proceeds as follows: Section two briefly explains the emergence of informal plea agreements in criminal proceedings and the difficult path towards the adoption of the Law on Agreements. The third section begins with an overview of the most pertinent provisions followed by a critical assessment of the judge's role under the new German law. Section four assesses the notion of plea bargaining in Italy and identifies how *patteggiamento* has been implemented into the Italian Code of Criminal Procedure. The fifth section analyzes whether Italian *patteggiamento* could provide the German legislature with an alternative to the present Law on Agreements. The main focus of the fifth section will be on whether the Italian law bears potential to ensure the independence of the judge in the context of plea agreements. The conclusion summarizes the key findings and suggests that the German legislature could use the Italian solution as a model on how to guarantee the independence of judges.

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<sup>6</sup> Several terms exist in German literature to refer to an agreement which comprise: *Verständigung*, *Vereinbarung*, *Abrede*, and (*informelle Absprache*). A translation that was suggested for the term *Vereinbarung* was agreement. *Verständigung* could be best translated with understanding, whereas the last two notions fall in between the meaning of the first two terms. However, as the foregoing terms are often used interchangeably, the term agreement will be used in this article as it appears to be a more neutral term than informal arrangements, especially taking into account the fact that the initiative of the German legislature aims to confining informality by regulating the practice; For an in depth discussion on the various terms, see Swenson, Thomas; 'The German „Plea Bargaining' [1995] 7 *Pace International Law Review*, 379, supra note 12.

<sup>7</sup> Compare Article 97 paragraph 1 of the German Constitution, available at: <http://www.iuscomp.org/gla/statutes/GG.htm#97>.

## II. The German Law on Agreements in criminal proceedings

### 2.1. Plea bargaining in Germany: Introductory remarks

For the past 20 years, German criminal procedure has undergone significant changes<sup>8</sup> manifested through the phenomenon that increasingly the participants to the proceedings<sup>9</sup>, namely the public prosecutor and the defense counsel, but especially the courts, have taken recourse to often informal plea agreements. Most concerning is the judge's initiative to engage in agreements typically in cases, in which the production of evidence appears complex<sup>10</sup>, the establishment of the defendant's guilt proves to be complicated and numerous witnesses have yet to be heard.<sup>11</sup> As a result, the proceedings tend to last much longer than expected and to cause high costs for the judiciary.<sup>12</sup> These situations set an incentive for the court and the participants to engage in plea bargaining not only about the further course, but also concerning the outcome of the proceedings.<sup>13</sup> In such a scenario, the judge would, after having sought the prosecutor's consent, approach the defense counsel to offer its client a mitigated sentence in exchange for the defendant's confession to the charges brought against him.<sup>14</sup> The defendant, through his defense counsel, usually accepts the proposed sentence if it is significantly lower than the sentence anticipated after a complete trial. By accepting the proposed sentence term, the defendant waives his right to a contradictory trial which often also encompasses the right to appeal.<sup>15</sup> When an agreement has come into existence, the court and the participants no longer debate the subject-matter of the case until it is ripe for conviction (*Schuldspruchreife*). Instead, the accused confesses either partly or entirely to the charges brought against him and, as a result, receives in most cases (more or less) the negotiated sentence. This process shortens the taking of evidence and the proceedings significantly, as a contradictory trial will no longer be conducted.<sup>16</sup> The description of the plea bargaining process illustrates the 'ideal' situation in which the agreement does not fail. However, failure can stem from various reasons; for instance, if the judge breaks his promise or the defendant refuses to plead guilty or to act in accordance

<sup>8</sup> Weßlau, Edda; Strategische Planspiele oder konzeptionelle Neuausrichtung? Zur aktuellen Kontroverse um eine gesetzliche Regelung der Absprache im Strafverfahren, in: Festschrift für Egon Müller, Baden-Baden, 2008, p. 781.

<sup>9</sup> 'Participants to the proceedings' will be abbreviated in the following with 'participants'.

<sup>10</sup> Compare for instance, BGHSt 36, 210, Judgment of 7 June 1989, 2 StR 66/89.

<sup>11</sup> Schmidt-Hieber, Werner; 'Vereinbarungen, Absprachen im Strafprozess-Privileg des Wohlstandskriminellen?' [1990] 43.3 *Neue Juristische Wochenschrift*, 1885.

<sup>12</sup> Niemöller, Martin; 'Absprachen im Strafprozess' [1990] 10 *Strafverteidiger*, 36.

<sup>13</sup> Jung, Heike; 'Plea bargaining and its repercussions on the theory of criminal procedure' [1997] 5 *European Journal of Crime, Criminal Law and Criminal Justice*, 112; Roxin even states that the capacity overload of the prosecution services and the judiciary resulted in a crisis of the investigatory principle, compare Roxin, Claus; *Strafverfahrensrecht*, München, 1998; section 15, para. 6.

<sup>14</sup> The practice is estimated to have evolved in Germany in the mid 1970's according to Schünemann, Bernd; Gutachten zum 58. DJT, B16, or in the early 1980's pursuant to Weßlau, Edda; *Das Konsensprinzip im Strafverfahren- Leitidee für eine Gesamtreform?*, Baden-Baden, 2002, p. 5.

<sup>15</sup> Weigend, Thomas; 'Abgesprochene Gerechtigkeit: Effizienz durch Kooperation im Strafverfahren?' [1990] *Juristenzeitung*, 774; Hanack, Ernst-Walter; 'Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?' [1987] 7 *Strafverteidiger*, 501.

<sup>16</sup> There have been cases that have taken months and even years which was due to the fact that the defense counsel continuously submitted motions that protracted the proceedings significantly; see Wassermann, Rudolf; 'Von der Schwierigkeit, Strafverfahren in angemessener Zeit durch Urteil abzuschliessen' [1994] 47.2 *Neue Juristische Wochenschrift*, 1107.

with the agreement. Problems arising from failed agreements will be discussed in greater detail in sub-section 3.2.3.4. of this article.

According to estimates, around 50% of all criminal cases pending before German courts are concluded on the basis of plea agreements.<sup>17</sup> Plea agreements no longer only occur in the area of economic offences, where the complete taking of evidence has become the exception<sup>18</sup>, but also in the context of drug offences, especially in those of an international dimension that involve a complicated production of evidence.<sup>19</sup> Moreover, plea bargaining appears in cases dealing with white-collar crimes, tax evasion and crimes against the environment.<sup>20</sup> However, the German Code of Criminal Procedure (hereafter, StPO<sup>21</sup>) did not provide for the possibility for the participants and the judge to conclude such plea agreements before the adoption of the Law on Agreements.<sup>22</sup> This aspect explains why the participants and the judges have often tried to hide plea negotiations which tend to take place outside the court room, in the hallway, during telephone conversations or in the judge's office. Hence, this practice has often been referred to as *informal* agreements.<sup>23</sup>

Reasons why plea agreements have gained popularity are numerous and there is no consensus among scholars and practitioners as to what exactly has been pivotal for their emergence. What has become evident throughout the past years is that practitioners have rather, than unwaveringly searching for substantive truth<sup>24</sup>, developed a keen interest in shortening or even avoiding trial at once at the expense of fundamental principles governing criminal proceedings. Furthermore, legal practitioners changed the perception of their roles in court and increasingly desire to influence the outcome of the trial.<sup>25</sup> Moreover, participants as well as the judge more and more perceive consensus as the most adequate means to meet society's needs and to create lasting social peace.<sup>26</sup>

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<sup>17</sup> Weßlau, Edda; *supra note* 14, pp. 5; see also Roxin, Claus; *supra note* 13, section 42, para. 1; For a thorough survey conducted with judges, public prosecutors and defense counsels on the issue of agreements, see Hassemmer, Raimund/ Hippler, Gabriele; 'Informelle Absprachen in der Praxis des deutschen Strafverfahrens' [1986] 6 *Strafverteidiger*, 360.

<sup>18</sup> Weigend, Thomas; 'Abgesprochene Gerechtigkeit: Effizienz durch Kooperation im Strafverfahren?' [1990] 45.2 *Juristenzeitung*, 774.

<sup>19</sup> Hanack, Ernst-Walter; 'Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?' [1987] 7 *Strafverteidiger*, 501.

<sup>20</sup> Herrmann, Joachim; 'Bargaining Justice- A Bargain for German Criminal Justice?' [1991-1992] 53 *University Pittsburgh Law Review*, 756; Swenson, Thomas; 'The German „Plea Bargaining“' [1995] 7 *Pace International Law Review*, 381.

<sup>21</sup> StPO=Strafprozeßordnung.

<sup>22</sup> Swenson, Thomas; 'The German „Plea Bargaining“' [1995] 7 *Pace International Law Review*, 375.

<sup>23</sup> Even in the absence of a statutory regulation of agreements, the BGH developed a number of general principles whose compliance aimed at guiding the courts with regard to agreements; see Weßlau, Edda; *supra note* 14, p. 9.

<sup>24</sup> Eisenberg, Ulrich; *Beweisrecht der StPO. Spezialkommentar*, München 2002, para. 1; Roxin, Claus, *supra note* 13, section 15, para. 5.

<sup>25</sup> Hanack, Ernst-Walter; 'Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?' [1987] 7 *Strafverteidiger*, 501; Cramer, Peter; pp. 145, 148.

<sup>26</sup> Schünemann, Bernd; *Reflexionen über die Zukunft des deutschen Strafverfahrens*, in: *Festschrift für Gerd Pfeiffer*, Köln 1988, pp. 475, 481; Schünemann, Bernd/Hauer, Judith; 'Absprachen im Strafverfahren' [2006] 56.1 *Anwaltsblatt*, 440, *supra note* 20; Schünemann, Bernd; 'Die Verständigung im Strafprozeß- Wunderwaffe oder Bankrotterklärung der Verteidigung?' [1989] 42.3 *Neue Juristische Wochenschrift*, 1898; Behrendt, Hans-Joachim; 'Überlegungen zur Figur des Konzeugen im Umweltstrafrecht, Zugleich ein Beitrag zur Lehre vom Prozeßvergleich' [1991] 138 *Goldammer's Archiv für Strafrecht*, 345.

## 2.2. The long way to the adoption of the German Law on Agreements

While in the beginning plea agreements occurred mainly in the context of cases relating to petty crimes, they are now used to conclude cases of various kinds. Due to a legislative gap<sup>27</sup> and the fear that agreements might be criticized for infringing upon major principles underlying German criminal procedure, discussions on the topic took place outside of public debate<sup>28</sup> and those engaging in plea agreements tried hard to cover them up.<sup>29</sup> The topic caught the public's attention for the first time when a German defense counsel, *Dahs*, published a provocative article in 1982 highlighting the fact that agreements had become a reality in German criminal proceedings. Heated debate, among German scholars and practitioners on the issue, followed.<sup>30</sup> While *Dahs'* contribution led to the rise of many critical voices among German scholars<sup>31</sup>, practitioners in the field expressed broad approval.<sup>32</sup> The 58<sup>th</sup> bi-annual conference of German lawyers (*Deutscher Juristentag*) of 1990 focused on agreements and their implications on German criminal procedure. The majority of participants were of the opinion that agreements were in compliance with the principles governing German criminal procedure.<sup>33</sup> However, some scholars submitted that agreements needed to be subject to a general prohibition, while others appealed to the legislature to adopt a law limiting and regulating agreements.<sup>34</sup> The legislature invested little energy on the issue until the German Supreme Court (hereafter, BGH<sup>35</sup>), in a decision

<sup>27</sup> Weigend, Thomas; 'Abgesprochene Gerechtigkeit: Effizienz durch Kooperation im Strafverfahren?' [1990] 45.2 *Juristenzeitung*, 775.

<sup>28</sup> Widmaier, Günter; 'Der strafprozessuale Vergleich' [1986] 6 *Strafverteidiger*, 357.

<sup>29</sup> Schünemann, Bernd/Hauer, Judith; 'Absprachen im Strafverfahren' [2006] 56.1 *Anwaltsblatt*, 439.

<sup>30</sup> Dahs, Hans; 'Absprachen im Strafprozess- Chancen und Risiken' [1988] 8 *Neue Zeitschrift für Strafrecht*, 153ss.

<sup>31</sup> Opponents and critics of agreements in criminal proceedings include: Schünemann, Bernd; 'Wetterzeichen einer untergehenden Strafprozeßkultur? Wider die falsche Prophetie des Abspracheneliums' [1993] 13 *Strafverteidiger*, 657-658; *Ibid.*, Gutachten zum 58. DJT, p. B 82, 88, 96, 114 ss.; Kleinknecht, Theodor/ Meyer-Goßner, Lutz; *Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, erläutert von L. Meyer-Goßner, Munich, 1999, para. 119 c); Rönnau, Thomas; *Die Absprache im Strafprozeß*, Kiel 1990, p. 157; Gallandi, Volker; 'Vertrauen im Strafprozeß- Vom fehlgeschlagenen Vergleich und der Bedeutung nicht formalisierter Regeln der Verständigung im Strafprozeß' [1987] 41 *Monatsschrift für Deutsches Recht*, 801, 802; Weigend, Thomas; 'Abgesprochene Gerechtigkeit- Effizienz durch Kooperation im Strafverfahren?' [1990] 45.2 *Juristenzeitung* 774, 777; Schmidt-Hieber, Werner; *Verständigung im Strafverfahren, Möglichkeiten und Grenzen für die Beteiligten in den Verfahrensabschnitten*, München 1986, para. 193; Wolfplast, Gabriele; 'Absprachen im Strafprozeß' [1990] 10 *Neue Zeitschrift für Strafrecht*, 409, 415; Siolek, Wolfgang; 'Verständigung im Strafverfahren- eine verfassungswidrige Praxis!' [1989] 87 *Deutsche Richterzeitung*, 321 ss.

<sup>32</sup> Proponents of agreements encompass: Böttcher, Reinhard; 58. DTJ, p. L 18, 24; Widmaier, Günter; 58. DJT, p. L 36, 41; *Ibid.*; 'Der strafprozessuale Vergleich' [1986] 6 *Strafverteidiger*, 357, 359; Schäfer, 58. DTJ, p. L 51, 55, 57, 65; Böttcher, Reinhard;/ Dahs, Hans/ Widmaier, Günter; 'Verständigung im Strafverfahren- eine Zwischenbilanz' [1993] 13 *Neue Zeitschrift für Strafrecht*, 375, 376; Böttcher, Reinhard/ Widmaier, Günter; 'Absprachen im Strafprozeß? -Besprechung des Urteils des BGH vom 23.01.1991 -3 StR 365/90' [1991] Issue 9 *Juristische Rundschau*, 353, 355; Zschockelt, Alfons; 'Die Urteilsabsprache in der Rechtsprechung des BVerfG und des BGH' [1991] 11 *Neue Zeitschrift für Strafrecht*, 305, 309; Cramer, Peter; 'Absprachen im Strafprozeß, in: Festschrift für Kurt Rebmann, München 1989, pp. 145, 149; Kintzi, Heinrich; 'Verständigung im Strafverfahren' [1992] 70 *Deutsche Richterzeitung*, 245, 247; Hanack, Ernst-Walter; 'Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?' [1987] 7 *Strafverteidiger*, 500, 503; Schmidt- Hieber, Werner; *Verständigung im Strafverfahren, Möglichkeiten und Grenzen für die Beteiligten in den Verfahrensabschnitten*, München 1986, para. 178.

<sup>33</sup> Schünemann, Bernd; Gutachten zum 58. DJT, Bd.II, 1990, S. L 207 ff.

<sup>34</sup> Draft law of the Government of the Federal Republic of Germany, Law on the regulation of arrangements in criminal proceedings from 09 January 2009, Main part, p. 5; see also, Weßlau, Edda; *supra* note 14.

<sup>35</sup> BGH=Bundesgerichtshof.

from March 2005,<sup>36</sup> called on the legislature to assume its responsibility to draft a law regulating agreements in order to put an end to legal uncertainty. This decision resulted in a considerable number of initiatives from various German legal associations<sup>37</sup> and legislative organs<sup>38</sup> to draft proposals for a Law on Agreements. The initiative was eventually followed by the German Parliament's adoption of a Law on Agreements in criminal proceedings on 28 May 2009 which entered into force on 4 August 2009.<sup>39, 40</sup>

### III. The new Law on Agreements in criminal proceedings and its critical analysis

This section provides a critical analysis of the Law on Agreements in criminal proceedings. Special attention will be drawn to the multiple and contradictory roles that the Law on Agreements expects German judges to assume and what implications this might have on their independence and the credibility of the judiciary as a whole.

#### 3.1. Content of the new Law on Agreements

The Law on Agreements inserts section 257c StPO into the German Code of Criminal Procedure, as the main provision dealing with agreements. Section 257c I StPO stipulates that the court can, in suitable cases<sup>41</sup>, agree with the participants about the further course

<sup>36</sup> BGH (GS) [2005] 58.4 *Neue Juristische Wochenschrift*, 1440, see also Weßlau, Edda; *supra note* 8, p. 779.

<sup>37</sup> For information on proposal presented by the German Federal Lawyer's Association (Bundesrechtsanwaltskammer) in September 2005, "Vorschlag einer gesetzlichen Regelung der Urteilsabsprache im Strafverfahren", see: [2005] 38 *Zeitschrift für Rechtspolitik*, 235; also available at: [http://BRAK.de/seiten/pdf/Stellungnahmen/2005/Stn25\\_05.pdf](http://BRAK.de/seiten/pdf/Stellungnahmen/2005/Stn25_05.pdf); For proposal submitted by the Public Prosecutors (Generalstaatsanwälte) in November 2005, "Eckpunkte für eine gesetzliche Regelung von Verfahrensabsprachen vor Gericht", published in *Neue Juristische Wochenschrift*, 2006, Heft 1-2, S. XVI and NJW Sonderdruck zur Podiumsdiskussion in Berlin of 30 March 2006, "Der Deal im Strafverfahren", printed in Part VI) B) I), para. 466 ff.; For a critical analysis of the proposal submitted by the German Federal Lawyer's Association, see Schünemann, Bernd; 'Bundesrechtsanwaltskammer auf Abwegen' [2006] 39 *Zeitschrift für Rechtspolitik*, 63 ss.

<sup>38</sup> Draft presented by the German Federal Ministry of Justice (Bundesjustizministerium), available at: [www.bmj-bund.de/media/archive/1234.pdf](http://www.bmj-bund.de/media/archive/1234.pdf); Adoption by the German Bundesrat of a proposal on agreements presented by the Land Niedersachsen, see Bundesrats-Drucksache 235/06 (Beschluss); for a discussion on various proposals see, Peter Huttenlocher, Dealen wird Gesetz- die Urteilsabsprache im Strafprozess und ihre Kodifizierung, pp. 17-24.

<sup>39</sup> Gesetz zur Regelung der Verständigung im Strafverfahren, BGBl. I.S. 2353. For comments on that law, see for instance Schlothauer, Reinhold/Weider, Hans-Joachim; 'Das „Gesetz zur Regelung der Verständigung im Strafverfahren“ vom 3. August 2009', [2009] 10 *Strafverteidiger*, 600 ss.

<sup>40</sup> In the Law on Agreements, the German term that was chosen for agreements was "Verständigung". The drafters deliberately did neither chose the expression "Absprache" nor "Vereinbarung" as those two expressions would have given the wrong impression that the basis for the judgment is a quasi-contractual and binding agreement between the parties. However, as the participants to an agreement are not restricted in their right to appeal and the court is not bound by the agreement in every circumstance, when the expression 'agreement' is used in the context of this paper, it implies that neither of the parties to the agreement are legally bound as it would be the case for instance in a contractual situation.

<sup>41</sup> The term 'in suitable cases' has already been used in previous proposals on the law of agreements and scholars have criticized it for not being sufficiently precise in order to determine when the participants to the proceedings may engage in plea agreements. In the absence of any clarification presented by the courts, the term could be quite misleading; see Gieg, Georg; 'Letzter Anlauf für eine gesetzliche Regelung von Verständigungen im Strafverfahren?' [2007] 154.2 *Goltdammer's Archiv für Strafrecht*, 471, 472.

and outcome of the proceedings. The same paragraph states that the obligation of the court to elucidate the merits of the case pursuant to section 244 II StPO remains unrestricted.<sup>42</sup>

### 3.1.1. Scope of application

The subject-matter of an agreement may only comprise legal consequences, in particular those pertaining to the sentencing term (*Strafmaß*).<sup>43</sup> Section 257c II StPO states that the subject-matter of the agreement is the defendant's confession. The provision continues to stipulate that neither a conviction nor the defendant's announcement to waive remedies may be part of the agreement. The court must be convinced of the fact that the agreement reflects substantive truth<sup>44</sup> in order to adhere to its obligation to fully elucidate the merits of the case. If doubts arise as to whether the agreement reflects substantive truth, the court must enter into a procedure in which it scrutinizes the agreement's admissibility.

### 3.1.2. Conclusion of agreements

Pursuant to Section 257c III StPO, an agreement comes into existence when the court notifies the participants of the content of a possible agreement to which the prosecutor as well as the defendant have given their consent. The court must indicate a lower and an upper sentence limit. It must consider the general rules pertaining to sentencing and may not propose a disproportionately high or low sentence. The right to initiate agreements is not reserved to the court; the participants may also initiate negotiations geared towards the conclusion of plea agreements.<sup>45</sup>

### 3.1.3. Consequences of failed agreements

In exceptional cases, the court may withdraw from the agreement. Section 257c IV StPO spells out that the court is not bound by the participants' agreement if it has reason to consider the agreed sentence inappropriate, taking into account the gravity of the offence and/or the defendant's guilt. The same applies if the defendant's conduct throughout the further course of the proceedings has not complied with the court's prediction. In these circumstances, a defendant's confession is deemed inadmissible. The court has to notify the defendant of such a development pursuant to paragraph 5.<sup>46</sup>

<sup>42</sup> According to section 244 II StPO the court is obliged to conduct a comprehensive elucidation of the merits of the case, see Hanack, Ernst-Walter; 'Vereinbarungen im Strafprozess, ein besseres Mittel zur Bewältigung von Großverfahren?' [1987] 7 *Strafverteidiger*, 500; Haas, Günter; 'Vereinbarungen im Strafverfahren- Ein Beitrag zur Lehre von den Prozeßhandlungen, [1988] 41 *Neue Juristische Wochenschrift*, 1349.

<sup>43</sup> Other subject- matters of agreements may include procedural measures pertaining to the demeanor of the defendant as well as those relating to the course of the proceedings for instance the decision to drop the charges or the promise to generate compensation, see press release of 28 May 2009: [http://www.bmj.bund.de/enid/2605e482cfe9011e4d5725898f7d2000.c25684636f6e5f6964092d093539333093a095f7472636964092d0932343736/Pressestelle/Pressemitteilungen\\_58.html](http://www.bmj.bund.de/enid/2605e482cfe9011e4d5725898f7d2000.c25684636f6e5f6964092d093539333093a095f7472636964092d0932343736/Pressestelle/Pressemitteilungen_58.html).

<sup>44</sup> On a debate as to the meaning of the principle of substantive truth in the context of consensus based proceedings, compare Weßlau, Edda; *supra* note 14, p. 19-63.

<sup>45</sup> See press release of 28 May 2009.

<sup>46</sup> New Section 257 c) StPO, p. 4; available at: see *supra* note 123.

### 3.1.4. Remedies

Section 35a StPO provides for judicial review of any judgment that was based on an agreement. This section is the corollary to provision 257c IV StPO which states that the court, including the court of appeal, shall not be bound by an agreement in the cases enumerated in paragraph 4.<sup>47</sup> The same is true for the defense counsel and prosecutor engaged in the agreement.

There are various inconsistencies stemming from the Law on Agreements. However, as the Law on Agreements has already been subject to thorough scholarly criticism<sup>48</sup>, the following critical analysis focuses on the role that the judge assumes in agreements pursuant to the new law and its implications on overriding constitutional principles.

At first, a crucial aspect to point out in the context of the Law on Agreements is that the German approach is unique in comparison to all other commonly-known judicial systems.<sup>49</sup>

The new law allows for the court to play an active role in plea negotiations and even to become an equal partner in the plea agreement itself, while, if the agreement has failed the same court may decide upon the defendant's guilt and on the sentence in subsequent proceedings.<sup>50</sup> Interestingly and in contrast to the German law, in the USA the involvement of the judge in plea negotiations has given rise to harsh criticism and has subsequently been proscribed by statutory regulation because of the fear that the judge would abuse his position and expose the defendant to improper pressure.<sup>51</sup> Likewise, according to the Italian law on plea agreements, the judge is prohibited from engaging in plea bargaining and only conducts judicial review after the defense counsel, the defendant and the prosecutor have reached an agreement.<sup>52</sup>

Nevertheless, the German legislature opted for a different approach in regard to the judge's role in the context of plea bargaining. Among the various roles that the German judge assumes in ordinary proceedings, his first is to be in charge of guiding criminal proceedings. The trial judge must ensure the completeness and the hearing of evidence (section 244 II StPO<sup>53</sup>), and he controls and leads the interrogation of the defendant,

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<sup>47</sup> New Section 35 a) StPO, p. 3; available at: see supra note 123.

<sup>48</sup> Schünemann, Bernd; 'Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaats' [2009] 42 *Zeitschrift für Rechtspolitik*, 104 ss.; Meyer-Goßner, Lutz; 'Was nicht Gesetz werden sollte!- Einige Bemerkungen zum Gesetzentwurf der Bundesregierung zur Verständigung im Strafverfahren' [2009] 42 *Zeitschrift für Rechtspolitik*, 107 ss.

<sup>49</sup> For an analysis of plea bargaining in other European countries, see Ma, Yue; 'Prosecutorial discretion and plea bargaining in the United States, France, Germany, and Italy: A comparative perspective' [2002] 12 *International Criminal Justice Review*, 22 ss.; Jung, Heike; 'Plea bargaining and its repercussions on the theory of criminal procedure' [1997] 5 *European Journal of Crime, Criminal Law and Criminal Justice*, 112 ss.

<sup>50</sup> Schünemann, Bernd; 'Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaats' [2009] 42 *Zeitschrift für Rechtspolitik*, 107.

<sup>51</sup> Hanack, Ernst-Walter; 'Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?' [1987] 7 *Strafverteidiger*, 500; According to federal law and the law of some states, the judge is proscribed from engaging in plea bargaining pursuant to rule 11 e) of the Federal Rules of Criminal Procedure, see also Weigend, Thomas; *Absprachen in ausländischen Strafverfahren*, p. 46.

<sup>52</sup> Renzo, Orlandi; 'Absprachen im italienischen Strafverfahren', [2004] 116.1 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 123.

<sup>53</sup> Section 238 [Conduct of Hearing] states the following: '(1) The presiding judge shall conduct the hearing, examine the defendant and take the evidence', available at: <http://www.iuscomp.org/gla/statutes/StPO.htm#238>.

witnesses and expert witnesses (section 238 I StPO<sup>54</sup>); a discretion which the new law confers upon the judge in an unconfined manner.<sup>55</sup> Second, the judge observes the conduct of the trial while keeping the content of the prosecution file in mind that he may access unrestrictedly so as to develop his own opinion of the case.<sup>56</sup> Third, the judge pronounces the judgment determining guilt or innocence and also deciding on the appropriate sentence.<sup>57</sup> It is contended that these three tasks are required by and in perfect compliance with the judge's role as a neutral fact finder and do not infringe upon his independence. However, section 257c I StPO confers upon the judge a fourth task by allowing him to engage in plea bargaining with the participants to criminal proceedings in order to agree on the outcome of the trial.<sup>58</sup> It follows that by virtue of the fourth task the judge monopolizes additional power while disregarding constitutional as well as criminal procedural requirements, especially the obligation to adjudicate free of external influence.<sup>59</sup> It is submitted that the Law on Agreements risks compromising the judge's role as a neutral and impartial fact finder. This aspect will be closely analyzed in the following section.

### 3.2. The judge's role in the context of plea agreements

The problematic role that judges play in the context of plea bargaining will be illustrated by reference to a case which was pending before a German court.<sup>60</sup> It demonstrates the implications of the judge's involvement on the credibility of the judgment and his

<sup>54</sup> Section 244 [Taking of Evidence] stipulates that: '(2) In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision' available at <http://www.iuscomp.org/gla/statutes/StPO.htm#244>.

<sup>55</sup> Compare section 257 c (1) StPO of the new law on agreements, which states that section 244 (2) StPO is unaffected by the new law.

<sup>56</sup> German criminal procedure is governed by the principles of investigation (*Inquisitionsprinzip*) and the duty to search for 'substantive truth' (*Prinzip der materiellen Wahrheit*). According to the principles of investigation and the duty to search for substantive truth, the judge is fully in charge of seeking the truth and must shape his 'inner conviction' free of all doubts as to what the truth amounts to, irrespective of statements and evidence brought forward by prosecution and defense. The principle of investigation obliges the judge to establish the truth on the basis of taking of evidence which needs to encompass "all facts and means of proof which in a given case are relevant to the decision". It follows that the judge may pronounce the defendant's guilt based on an assessment of evidence as he freely chooses (*Grundsatz der freien Beweiswürdigung*; section 261, StPO). As a corollary, the principle of substantive truth implies that the participants to the proceedings (defense counsel and public prosecutor) may not, unlike it is the case in Anglo-American trials, through a presentation of consistent facts agree on the merits of the case and thus do not have an influence on the establishment of the substantive truth; Lüderssen, Klaus; 'Die Verständigung im Strafprozess' [1990] 10 *Strafverteidiger*, 416; Trüg, Gerson/ Kerner, Hans-Jürgen; Formalisierung der Wahrheitsfindung im (reformiert-) inquisitorischen Strafverfahren? Betrachtung unter rechtsvergleichender Perspektive, in: Festschrift für Reinhard Böttcher; Berlin, 2007 pp. 192-195; Weißlau, Edda; *supra note* 14, p. 28; Roxin, Claus; *supra note* 13, section 15, para. 3; Spencer, J.R., "Evidence", in: European Criminal Procedures, Mireille Delmas-Marty, J.R. Spencer (eds.), Cambridge 2005, p. 628; Juy-Birmann, Rodolphe, 'The German System', in: European Criminal Procedure, Cambridge 2002, p. 309.

<sup>57</sup> Unlike in common law proceedings, such as in England and Wales, where the jury decides on whether the defendant is guilty or innocent, whereas it is strictly preserved for the judge to fix the sentence term, in German criminal proceedings, the judge is in charge of both aspects; see J.R. Spencer, "The English System", in: European Criminal Procedures, pp. 157-8.

<sup>58</sup> According to the new law on agreements, the judge is expected to exercise the fourth task in the context of ordinary trial governed by traditional principles of German criminal procedure, because the new law does not embed plea negotiations and agreements into a separate and simplified type of proceedings.

<sup>59</sup> *Schünemann, Bernd*; Zur Kritik des amerikanischen Strafprozessmodells, in: Festschrift für Gerhard, Berlin, 2008, p. 570.

<sup>60</sup> SchwurG Darmstadt; Judgment of 23 April 1999; the judgment was quashed by the BGH in a judgment of 3 March 2000.

independence. Moreover, proposals can be drawn from this case as to what criteria a law regulating agreements should fulfill in order to guarantee judicial independence.

The facts of the case were as follows. The defendant was indicted for having inflicted bodily harm that caused the death of his victim. Upon the trial's opening, the judge initiated negotiations with the defense counsel and the prosecutor and subsequently suggested that if the defendant pled guilty he would impose a 2-year sentence. The defendant, however, objected to the offer because he aimed for an acquittal. He argued that his conduct had been justified as self-defense, and an agreement never came into existence. While the prosecutor suggested 1,5 years, the judge eventually imposed a 7-year sentence. This case illustrates the repeated experience<sup>61</sup> that courts impose disproportionately high sentences on defendants who do not confess and instead insist on a contradictory trial.<sup>62</sup> Imposing a disproportionately high sentence is contrary to previous holdings of the German Federal Constitutional Court (hereafter, BVerfG<sup>63</sup>)<sup>64</sup> namely that a sentence always has to be appropriate in relation to the defendant's guilt. The appropriateness of the sentence in this case was doubtful, because the judge varied his offer from a 2-year to a 7-year sentence, all in response to the defendant's willingness to confess. Moreover, section 136 a StPO incorporates the principle that any authority entrusted with prosecution must refrain from using coercive measures against the defendant during hearings and interrogations.<sup>65</sup> Hence, the judge by threatening the defendant to confess if he wanted to be subjected to a mitigated sentence acted in violation of the principle that the defendant's consent to an agreement must always be voluntary pursuant to section 136 a StPO.<sup>66</sup> Indeed, it has been persuasively argued that where the defendant confessed as a reaction to coercive practices, the confession would be of little probative value as it would not be based upon his free will.<sup>67</sup> In the case at hand, the judge was confronted with allegations of having imposed such a high sentence in order to take revenge on the defendant's refusal to accept his offer.<sup>68</sup> It has been convincingly argued that the exercise of such power has little to do with the determination of truth and legal analysis, but amounts to an improper exercise of power which goes beyond the legally conferred competence of a judge.<sup>69</sup>

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<sup>61</sup> In the case, BGHSt 36, 210, Judgment of 7 June 1989, 2 StR 66/89, unlike in the case which was decided by the SchwurG Darmstadt, the defendant faced a significantly higher sentence than what had been initially agreed upon between the defense counsel, the public prosecutor and the judge, even though the former had acted according to the agreement. In that case, the BGH declared the decision by the court of first instance void arguing that the judge had infringed upon the fair trial principle. The BGH continued to state that the judge either should have abode by his promise or he should have notified the defence counsel that the court no longer considered the mutually agreed sentence appropriate, so that the latter could have submitted motions to produce additional evidence, which had been excluded by the agreement.

<sup>62</sup> Weider, Hans-Joachim; 'Der verweigerte Deal- oder: Die Rache des Schwurgerichts?- Prozessbericht' [2002] 22 *Strafverteidiger*, 398.

<sup>63</sup> BVerfG= Bundesverfassungsgericht.

<sup>64</sup> BVerfG, Decision of 27 January 1987- 2 BvR 1133/86.

<sup>65</sup> Meyer-Goßner, Lutz; *Kurzkomentar, Strafprozessordnung, mit GVG und Nebengesetzen*, section 136 a, paras 1, 2, 4.

<sup>66</sup> *Supra note* 62, section 136 a, para. 5.

<sup>67</sup> Compare BGHSt 37, 301, in this decision the defendant expressed toward a journalist later on that he would not have confessed to the charges brought against him, had he not been promised a considerable sentence reduction by the judge in exchange.

<sup>68</sup> Frankfurter Rundschau of 18.7.2001; „Strafe reduziert sich in der Revision drastisch“.

<sup>69</sup> Salditt, Franz; 'Eckpunkte- Streitfragen des partizipatorischen Strafprozesses' [2003] 115.2 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 575.

3.2.1. The requirement of mutual consent according to section 257c I, III 3 StPO and its impact on the judge's independence.

After having presented a case in order to illustrate the dangers arising from the involvement of the judge in plea negotiations and agreements, attention will be drawn to the most pertinent provisions of the Law on Agreements in light of the judge's role.

The question arising in regard to the requirement contained in section 257 c StPO that agreements need the judge's as well as the participants' consent is whether this condition is in compliance with section 261 StPO as well as with articles 92 and 97 of the German Constitution (hereafter, GG<sup>70</sup>). Enshrined in section 261 StPO is the principle that the judge needs to base his judgment exclusively on his personal conviction. But how do agreements concluded in the context of the new law and under the involvement of the judge comply with this requirement if the principle inherent in this section can be construed to imply that the judge may never base his judgment upon the parties' agreement? By the same token, it is doubtful whether plea agreements concluded with the judge comply with the constitutional requisite of independent judicial decision-making comprised in articles 92 and 97 of the German Constitution.

Section 257c I StPO states that the court may agree with the participants on the outcome of the proceedings. The provision thereby legitimizes a practice, whereby, rather than basing the judgment on its inner and independent conviction alone, the final decision is a compromise accommodating the different interests of the participants and those of the judge. *Hassemer* convincingly argues that the content of such an agreement was rather indicative of the negotiating skills of the participants and the ability of finding a compromise between conflicting interests than a reflection of the judges' inner conviction concerning the truth of the case.<sup>71</sup> Moreover, it has been persuasively argued that if the judge was part of an agreement, the accused had certain expectations in regard to the promised sentence. These expectations put the judge into a contradictory situation, as he was likely to feel bound to lead the proceedings towards a certain outcome resulting in the court's bias.<sup>72</sup> The judge would hence no longer freely develop his conviction on the basis of the merits of the case and the produced evidence.<sup>73</sup>

The binding nature of an agreement follows from section 257c IV StPO which enumerates the exceptional circumstances under which the judge may withdraw from the agreement.<sup>74</sup> Contrasting the aspect that the judge is implicitly bound by the mutually consented agreement<sup>75</sup>, article 97 I GG and section 1 GVG<sup>76</sup> confer upon the court the power to

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<sup>70</sup> GG=Grundgesetz.

<sup>71</sup> *Hassemer, Winfried*; 'Pacta sunt servanda- auch im Strafprozeß?- BGH, NJW 1989, 2270' [1989] 29 *Juristische Schulung*, 892.

<sup>72</sup> *Gerlach, Götz*; *Absprachen im Strafverfahren, Ein Beitrag zu den Rechtsfolgen fehlgeschlagener Absprachen im Strafverfahren*, Gießen 1992, p. 114.

<sup>73</sup> *Jung, Heike*; 'Plea bargaining and its repercussions on the theory of criminal procedure', [1997] 5 *European Journal of Crime, Criminal Law and Criminal Justice*, 117.

<sup>74</sup> Section 257c IV StPO states that the court is not bound by the agreement if it considers that the announced sentence is no longer appropriate in relation to the defendant's offence or guilt.

<sup>75</sup> *Niemöller* submits that any agreement was implicitly binding on the court as it entailed that the defendant had certain expectations with regard to the outcome of the proceedings and trusted in the court keeping its word. Likewise, the court usually felt obliged to adhere to the agreement and was hence biased in his decision with regard to guilt and the appropriate sentence; see *Niemöller, Martin*; 'Absprachen im Strafprozeß' [1990] 10 *Strafverteidiger*, 37.

decide on the appropriate sentence and the defendant's culpability. During this process, the court is solely bound by the law and is obliged to independently and freely create its inner conviction. Moreover, in order to adjudicate freely, the decision making process must be free of any external influences.<sup>77</sup> In addition, it follows from section 261 StPO that the court is never bound by the affirmation of participants to the proceedings or by the defendant's confession.<sup>78</sup> *Meyer-Goßner* rightly points out that section 257c III 3 StPO disabled the court from imposing the sentence it considered appropriate, because an agreement only came into existence after all the participants had consented to the sentence. Therefore, section 257 c III 3 StPO restricts the court's discretion to freely and independently adjudicate and violates the discretionary power conferred upon the judge by section 261 StPO as well as the requirements set forth in article 97 I GG.<sup>79</sup> Article 92 GG confers the discretion to adjudicate exclusively to the courts, a principle that follows from the separation of powers.<sup>80</sup> Indeed, the Constitutional Court emphasized that the competence to impose penal sentences was strictly reserved to the judge and this rule could not be amended by the legislature.<sup>81</sup> Nevertheless, section 257 c I StPO allows the court to conclude agreements in cooperation with the participants as to the further course as well as to the outcome of the proceedings. It follows that the task of finding and imposing the sentence is no longer reserved to the judge, but is subject to negotiations and a consensus with the participants. The German legislature in the context of the Law on Agreements did not take a stance on how the requirement embedded in article 92 GG that the court alone is entitled to impose a penal sanction complies with a provision that allows the participants to at least partly substitute the judge in his task to adjudicate.

### 3.2.2. Implications for the defendant of failed agreements pursuant to section 257 c IV StPO

The last aspect discussed in the context of the critical analysis on the Law on Agreements relates to the implications that arise for the defendant if the judge withdraws from a plea agreement, as provided for by section 257c IV StPO.

The BGH<sup>82</sup> ruled on the consequences of broken promises in the context of the fair trial principle. In that case, the question arose whether a judge can be considered as complying with the fair trial principle if he withdraws from a plea agreement. The facts of the case were that the judge had promised the defence counsel not to exceed the sentence term suggested by the public prosecutor if the defendant refrained from bringing motions to adduce additional evidence. Even though the defendant and his counsel acted in accordance with the agreement the judge eventually withdrew from it. Subsequently, the court imposed a much higher sentence than what it had initially agreed upon with the defense counsel. The

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<sup>76</sup> Section 1 GVG states that the judicial power is only exercised by independent courts that are only bound by law. Paragraph 1 of the provision stipulates that the judge in its judicial exercise is personally and factually independent pursuant to article 97 I GG.

<sup>77</sup> Niemöller, Martin; 'Absprachen im Strafprozess' [1990] 10 *Strafverteidiger*, 38.

<sup>78</sup> Meyer-Goßner, Lutz; *Strafprozessordnung*, section 261, paras 1, 2a, 11.

<sup>79</sup> Niemöller, Martin; 'Absprachen im Strafprozess' [1990] 10 *Strafverteidiger*, 37; Cross, Rupert; p. 104.

<sup>80</sup> Pieroth, Bodo; *Grundgesetz für die Bundesrepublik Deutschland- Kommentar*, Jarass, Hans/ Pieroth, Bodo (eds.), Article 92 para. 1; Detterbeck, Steffen; *Grundgesetz Kommentar*, Sachs, Michael (ed.), Article 92, para. 1.

<sup>81</sup> BVerfGE 22, 49, 81; Judgment of 6 June 1967, 2 BvR 18/65.

<sup>82</sup> BGHSt 36, 210, 214, Judgment of 7 June 1989, 2 StR 66/89.

BGH overruled the judgment arguing that the judge had violated the fair trial principle.<sup>83</sup> It held that the judge should have either kept his promise or should have notified his intention to withdraw from the agreement so as to enable the defense counsel to submit motions to take further evidence.<sup>84</sup> The rationale behind this reasoning was that if the court changes its mind and consequently withdraws from the promise the defendant and his counsel need to be granted the possibility to adjust their defence strategy accordingly. The BGH concluded that in such cases the defence counsel could rely on the fidelity clause (*Vertrauensschutz*).<sup>85</sup> In a ruling from 2003, the BGH restricted the possibility of the defendant to rely on the fidelity clause. In that case, the defendant confessed and in exchange the court promised a reduced sentence. Eventually, the agreement became void, because the court had refrained from including the prosecutor into the plea negotiations. The BGH held that in the given case, the defendant did not have reason to trust the court's promise and hence could not rely on the fidelity clause or insist on the confession not to be invoked in subsequent proceedings.<sup>86</sup> It can be inferred from the court's reasoning that, at least in cases, where the prosecutor had not been part of the plea negotiations, the defendant alone bears the risk for a failed agreement and his confession is not rendered void if the court withdraws from its promise, even if the defendant was not responsible for the failure of the agreement.<sup>87</sup>

The main problem that arises from the court's withdrawal from an agreement is that the defendant finds himself in a disadvantageous position, as he has given away his most precious asset, his confession. Section 257 c IV StPO sentence three states that a previously obtained confession is no longer admissible if the court withdraws from the agreement for the reasons listed in the paragraph. This provision reflects how the legislature intended to guarantee the proceedings' fairness.<sup>88</sup> However, the law does not provide a solution to the phenomena that even though the court is proscribed to formally rely on the confession during subsequent proceedings, a previously obtained confession might still play a vital role in the judge's mind while contemplating about the appropriate sentence. Even if there was a provision stating that a judge who had been involved in a failed agreement would have to be substituted by another judge during subsequent proceedings in order to prevent bias, *Niemöller* convincingly argues that once a confession has been made, it can always be revoked but never be made undone.<sup>89</sup> While at first glance, this statement sounds a bit drastic, it seems to be true in the event that members of the court are aware that the defendant initially confessed to the charges. In those circumstances, the presumption of guilt is likely to prevail over the presumption of the defendant's innocence. Hence, it would be difficult for the participants and the public to trust in the judge's independence<sup>90</sup>, who initially engaged in plea negotiations, but subsequently changed roles into a neutral fact-

<sup>83</sup> And thus, the BGH avoided to rule on the question of the legality of bargaining.

<sup>84</sup> Weigend, Thomas; 'Abgesprochene Gerechtigkeit: Effizienz durch Kooperation im Strafverfahren?' [1990] 45.2 *Juristenzeitung*, 776.

<sup>85</sup> BGHSt 36, 216, Judgment of 07 June 1989, 2 StR 66/89; see also Bogner, Udo; *Absprachen im deutschen und italienischen Strafprozessrecht*, Marburg 2000, p. 73.

<sup>86</sup> Judgment of 7 May 2003- 5 StR 556/02, for remarks on that judgment, see Schlothauer, Rainhold; [2003] 23 *Strafverteidiger*, 481 ss.

<sup>87</sup> Weßlau, Edda; 'Absprachen im Strafverfahren' [2004] 116 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 167-168.

<sup>88</sup> Compare p. 18, paragraph 3 of the Law on Agreements.

<sup>89</sup> Niemöller, Martin; 'Absprachen im Strafprozess' [1990] 10 *Strafverteidiger*, 38.

<sup>90</sup> Schönemann, Bernd; 'Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaats' [2009] 42 *Zeitschrift für Rechtspolitik*, 107.

finder in contradictory proceedings.<sup>91</sup> The long term effects of such practice would be the loss of trust in the ethics of the judge, which would be devastating for the credibility of the German judiciary as a whole.<sup>92</sup>

### 3.3. Preliminary findings

The agreement model as proposed by the Law on Agreements—by which the judge is encouraged to step outside of his role, become an equal partner in plea negotiations and eventually party to the agreement—is not workable under the current state of law as it conflicts with constitutional law and major principles of German criminal procedure. The judge's independence and the credibility of the judiciary are hampered through the judge's involvement in plea negotiations as the role of an equal partner in those negotiations conflicts with those tasks conferred upon the judge by the German Constitution. Indeed, the Law on Agreements provides little hope for the prevention of coercive practices exercised by the judge to the defendant in the context of agreements, as sections 257 c I and III StPO explicitly invite the court to initiate negotiations and to engage in plea agreements. It is even more concerning that the legislature nevertheless feigns, in section 257c I StPO, that this provision constituted no collision with section 244 II StPO. The way in which the legislature attempted to regulate agreements provides little more guidance than what has already been developed by the jurisprudence on the topic. The current approach creates a risk of compromising the independence of the judge and the credibility of the judiciary as an institution that adjudicates free of external influence. Hence, section 257 c I StPO does not offer an adequate solution to ensure the judge's independence in the context of plea agreements.

## IV. The implementation of plea bargaining into Italian law

### 4.1. Plea bargaining under the 'new' Italian Criminal Procedure Code

At the time of its adoption, Italian scholars and legal practitioners perceived the 'new' Italian Code of Criminal Procedure (hereafter, new Code) as a 'revolution'. It introduced new elements into Italian criminal procedure, and replaced the investigative judge and extensive trials with cross-examination and plea bargaining.<sup>93</sup> Another reason for considering the adoption of the new Code revolutionary includes that Italy was the first traditionally inquisitorial judicial system to introduce various adversarial principles into its criminal procedure.<sup>94</sup>

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<sup>91</sup> Meyer-Goßner, Lutz; 'Rechtsprechung durch Staatsanwaltschaft und Angeklagten?' [2007] 27 *Neue Zeitschrift für Strafrecht*, 428.

<sup>92</sup> Duttge, Gunnar; Von Flutwellen, Sümpfen und Wetterzeichen- zu den aktuellen Bestrebungen, Urteilsabsprachen per Gesetz zu „zähmen“ - in: *Festschrift für Reinhard Böttcher*, Berlin, 2007, p. 64.

<sup>93</sup> Amodio, Ennio/ Selvaggi, Eugenio; 'An accusatorial system in a civil law country, the 1988 Italian Code of Criminal Procedure' [1989] 62 *Temple Law Review*, 1211.

<sup>94</sup> Miller, Jeffrey J.; 'Plea bargaining and its analogues under the new Italian Criminal Procedure Code and in the US: towards a new understanding of comparative criminal procedure' [1989-1990] 22 *New York University Journal of International Law & Politics*, 215.

## 4.1.1. The procedure of Applicazione della pena su richiesta delle parti

One of the most wide-ranging procedures<sup>95</sup> provided for by the new Code that exemplifies the tendency towards an adversarial system is called *patteggiamento sulla pena*<sup>96</sup> (hereafter, *patteggiamento*). This procedure enables the parties to dispose of the case before the commencement of the trial. It also allows the prosecutor, the defense counsel and his client, under the scrutiny of the judge, to determine the sentence term.<sup>97</sup> *Patteggiamento* intends to simplify proceedings by pronouncing a judgment before the conduct of a trial in order to save judiciary resources and to counteract the overwhelming case load which in the past led to a slow and dysfunctional criminal justice system.<sup>98</sup>

Pursuant to the new Code, the parties engaged in *patteggiamento* agree on the merits of the case and the actual sentence<sup>99</sup> and “at any time prior to trial, may request the judge to accept their negotiated agreement [...]”<sup>100</sup> However, according to article 444 Codice di Procedura Penale (hereafter, Cpp.)<sup>101</sup> the defendant and the public prosecutor must agree on a sentence before presenting the result of their negotiations to the judge.<sup>102</sup> The judge then may approve of or dismiss the parties’ amicably initiated request and is not bound by the parties’ agreement.<sup>103</sup> The judge decides on the admissibility of the parties’ request on the basis of the case file in several steps. First, he scrutinizes whether the requirements for acquittal set forth in article 129 Cpp. have been met.<sup>104</sup> If this is not the case, the judge proceeds to verify whether the parties acted within the ambit of their legally conferred competence when determining the sentence. He rejects the approval of the parties’ request if the latter erred in the legal qualification of the merits of the case and if that error actually had an impact on the sentence. The judge equally disapproves of the parties’ request if they invoked inapplicable reasons to mitigate the sentence or if the balancing of incriminating

<sup>95</sup> Besides ‘*patteggiamento*’, the Italian Code of Criminal Procedure provides for two other procedures that prevent the initiation of a trial: the ‘*giudizio abbreviato*’ (abbreviated proceedings) and the ‘*decreto penale*’ (penal order). For more information on these types of procedures, see Bogner, Udo; *Absprachen im deutschen und italienischen Strafprozessrecht, Verfahrensbeschleunigung durch die applicazione della pena su richiesta delle parti und das giudizio abbreviato, ein Modell für den künftigen deutschen Strafprozeß?* Marburg, 2000, p. 143-144.

<sup>96</sup> *Patteggiamento sulla pena* translates into ‘bargaining as to the punishment’; compare Pizzi, William T. / Marafioti, Luca; ‘The new Italian Code of Criminal Procedure: The difficulties of building an adversarial trial system on a civil law foundation’ [1992] 17 *The Yale Journal of International Law*, 22.

<sup>97</sup> Bogner, Udo; *supra note* 82, p. 157.

<sup>98</sup> Miller, Jeffrey J.; ‘Plea bargaining and its analogues under the new Italian Criminal Procedure Code and in the US: towards a new understanding of comparative criminal procedure’ [1989-1990] 22 *New York University Journal of International Law & Politics*, 226.

<sup>99</sup> Pizzi, William T. / Marafioti, Luca; ‘The new Italian Code of Criminal Procedure: The difficulties of building an adversarial trial system on a civil law foundation’ [1992] 17 *The Yale Journal of International Law*, 22.

<sup>100</sup> *Patteggiamento sulla pena* translates into bargaining as to the punishment and has its roots in American plea bargaining, but is really only similar in concept ‘imposition of a sentence agreed upon by the parties, without trial.

<sup>101</sup> Italian Code of Criminal Procedure.

<sup>102</sup> Ma, Yue; ‘Prosecutorial discretion and plea bargaining in the United States, France, Germany, and Italy: A comparative perspective’ [2002] 12 *International Criminal Justice Review*, 39.

<sup>103</sup> Orlandi, Renzo; ‘Absprachen im italienischen Strafverfahren’ [2004] 116.1 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 123.

<sup>104</sup> Article 129 Cpp. states that the court has to acquit the accused at any time in the proceedings where it notices that the offence has not been committed or where the offence has not been committed by the accused concerned; where the act of the accused does not amount to an offence, where the act has not been classified as an offence by the law or where the unlawful act has lapsed or other requirements to initiate proceedings are missing.

and exculpatory indicia (*giudizio di bilanciamento*) is conducted incorrectly.<sup>105</sup> If the judge eventually approves of the requested sentence he pronounces a judgment, imposes the requested sentence and provides a written statement of reason explaining why he accepted the parties' sentence.<sup>106</sup> The judge may not deviate from the parties' request by amending the requested sentence.<sup>107</sup> It follows that if the judge approves of the parties' request, he is held to impose the mutually agreed sentence.<sup>108</sup>

The new Code neither *explicitly* states that the judge must determine the defendant's guilt in the context of *patteggiamento* nor does it confer upon the judge the right to determine whether the requested sentence is appropriate in the light of the gravity of the offence and of the defendant's guilt. The wording of article 444 Cpp. seems to suggest that these tasks fall within the ambit of the parties' discretion. This rule has been interpreted as an expression of the legislatures' intention to limit the judges' discretionary power to review the parties' agreement. However, the legislature's opinion that, in the course of this procedure, the judge may neither determine the defendant's guilt nor assess the appropriateness of the sentence<sup>109</sup> has been disputed by scholars and the Italian Constitutional Court. These two aspects will be addressed in the subsequent sections.

#### 4.1.2. Scholarly opinion on the need for the judge to establish the defendant's guilt

In contrast to the legislature's point of view, scholars argued that even a judgment based on *patteggiamento* proceedings pursuant to article 444 II Cpp. requires the establishment of the defendant's guilt. This opinion relies on a systematic interpretation of article 444 II Cpp., which obliges the judge to pronounce a judgment at the end of the *patteggiamento* procedure. Therefore, all provisions pertaining to the pronouncement of a judgment were applicable. According to article 546 e) Cpp. a judgment had to comprise a statement of reasoning entailing a short explanation of all factual and legal grounds of the court's decision and a thorough description of all evidence that was relevant for the decision as well as evidence that was not considered credible and an explanation why this was the case. If the investigative stage led to evidence of considerable probative value, article 546 e) Cpp. would be applicable and thus required the court to formally establish the defendant's guilt.<sup>110</sup>

Moreover, the judge's obligation to determine the defendant's guilt also stemmed from article 129 Cpp., which referred to article 444 II Cpp. Article 129 Cpp. required the judge to acquit the defendant if the offence had not been committed at all or if it had not been committed by the alleged defendant. Both of these findings required a prior examination of the case file. It followed from article 529 ss. Cpp. that the examination obliged the judge to establish the defendant's guilt. Moreover, article 530 II Cpp. stated that the court had to acquit the defendant if it had not been positively established and if evidence was

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<sup>105</sup> Article 69 Cp. governs the *giudizio di bilanciamento*, the procedure whereby incriminating and exculpatory indicia is weighed. Where the incriminating and exculpatory indicia are of equal value, the sentence may neither be mitigated nor increased (Article 69 III Cp.). Where the incriminating indicia prevail, Article 69 I Cp. provides for an increased sentence, and where the opposite is the case, pursuant to Article 69 II Cp. a mitigated sentence is to be imposed.

<sup>106</sup> Constitutional Court (Corte cost.) Judgment of 2 July 1990, Nr. 313; see also Bogner, Udo; p. 174.

<sup>107</sup> Cass. 12.05.1992, Cass. pen. 1993, Nr. 234.

<sup>108</sup> Cass. Pen. 1989 III, S. 2105, 2108.

<sup>109</sup> Bogner, Udo; *supra note* 82, p. 173.

<sup>110</sup> Bogner, Udo; *supra note* 82, p. 183.

contradictory or insufficient to prove that the defendant had actually committed the alleged crime. Hence, a judgment pronounced on the basis of article 444 II Cpp. required a positive determination of guilt.<sup>111</sup>

Also, scholars convincingly pointed out that in the absence of a trial, the defendant still faces a conviction, which clearly appears on his criminal record and which logically equates to a confirmation of guilt, even if not formally confirmed in trial. Therefore, the establishment of guilt was a vital element in the admissibility of the parties' agreement. What accentuated the difficulty of accomplishing compliance between the notion of plea bargaining and civil law traditions was that a defendant could face a considerable sentence<sup>112</sup> without having confessed to the charges or having been formally found guilty by a court.<sup>113</sup>

In summary, according to the scholarly opinion *patteggiamento* does not allow for a conviction without the judge having previously established the defendant's guilt. If guilt cannot be established to the degree required in the context of *patteggiamento*, the judge must acquit the defendant.<sup>114</sup>

#### 4.1.3. Jurisprudence of the Italian Constitutional Court

The Italian Constitutional Court held that it was specific to *patteggiamento* to require the prosecutor and the defendant to agree upon the charges contained in the indictment as well as on the defendant's guilt and the related sentence.<sup>115</sup> However, this party-based agreement could not be construed in such a way as to release the judge from the obligation to positively determine the defendant's guilt. The fact that the judge, according to article 129 Cpp., reviewed the case file in order to verify if there were sufficient *indicia*, on whose basis the defendant's guilt could be excluded, and thus the defendant needed to be acquitted, was to be interpreted in the sense that the judge assumed significant participatory rights in determining guilt. It was important to note that article 546 e) Cpp. required the judge to reveal the evidence on which he based his decision and also to reason why he did not consider the counter-evidence plausible. This meant that article 444 II Cpp. had to be read in such a light that as long as the defendant was not acquitted, his guilt had to be fully established.<sup>116</sup> Similar to what Italian scholars pointed out, the Constitutional Court concluded that the determination of guilt in the context of abbreviated proceedings, like *patteggiamento*, did not have to meet the same threshold as in ordinary proceedings as the former were characterized by the absence of an elaborate and contradictory hearing of evidence. Moreover, the sentence imposed in the framework of *patteggiamento* was based on the mutual consent of the parties which, by the same token, expressed the defendant's consent to waive the right to dispute the indictment in trial. In fact, the procedure was characterized by its negotiability according to which the judge only had to establish guilt to the extent required by article 444 II Cpp.<sup>117</sup> The Constitutional Court thereby confirmed

<sup>111</sup> Bogner, Udo; *supra note* 82, pp. 183-4.

<sup>112</sup> Orlandi, Renzo; 'Absprachen im italienischen Strafverfahren' [2004] 116.1 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 123.

<sup>113</sup> Pizzi, William T. / Marafioti, Luca; 'The new Italian Code of Criminal Procedure: The difficulties of building an adversarial trial system on a civil law foundation' [1992] 17 *Yale Journal of International Law*, 23.

<sup>114</sup> Bogner, Udo; *supra note* 82, pp. 185-6.

<sup>115</sup> Corte cost., Judgment of 08 February 1990, Nr. 66.

<sup>116</sup> Corte cost., Judgment of 02 July 1990, Nr. 313.

<sup>117</sup> Corte cost., Judgment of 06 June 1991, Nr. 251.

that the judge in the context of the *patteggiamento*, still had the obligation to establish guilt, but that this requirement was limited by nature of this simplified procedure.<sup>118</sup>

#### 4.1.4. The conclusion of an agreement according to *patteggiamento*

If one party does not consider the agreement acceptable, it can object to it. The defendant may rely on his constitutionally guaranteed right to defense<sup>119</sup> and object to the prosecutors' request without having to indicate reasons.<sup>120</sup> In contrast, if the prosecutor refuses to negotiate or to agree to the suggested sentence, he as 'an autonomous body for the administration of justice (*selbständiges Organ der Rechtspflege*) is expected to provide the judge with reasons as to why he refused to agree.<sup>121</sup> Hence, the prosecutor may not reject approval to an agreement on unreasonable grounds.<sup>122</sup> Moreover, the refusal by either party averts the possibility to have recourse to *patteggiamento*. However, articles 444 and 446 Cpp. provide as a safeguard for the defendant to still have his requested sentence implemented. These articles state that if the judge is of the opinion upon conclusion of the trial, that the prosecutor submitted a refusal on unjustified grounds and that the defendant's request was legitimate, the court is obliged to impose the sentence that was initially suggested by the defendant.<sup>123</sup> The prosecutor has the right to request a review of such a decision. In all other cases, the decision pronounced by the judge on the basis of an agreement between the parties is not subject to appellate review.<sup>124</sup> This rule aims to introduce the possibility for the defendant to ask the judge directly for a reduced sentence and to have the proposal judicially reviewed, even if the prosecutor objects to the defendant's request and *patteggiamento* is never applied. Scholars pointed out that the introduction of this safeguard reflected the distrust of the Italian legislature towards the prosecutor's broad discretionary power; the legislature feared that the prosecutors could abuse their position and impose sentences on arbitrary grounds.<sup>125</sup> This position is convincing as the defendant's possibility to directly ask the judge to review the adequacy of a sentence reduction following the prosecutor's refusal, effectively prevents the latter from only agreeing with a certain class or group of offenders<sup>126</sup> and to rely on arbitrary grounds

<sup>118</sup> Bogner, Udo; *supra note 82*, p. 188; Even though different Italian courts of Cassation pronounced decisions regarding the compliance of *applicazione della pena* with the presumption of innocence, and some chambers expressed that *applicazione della pena* infringed upon the presumption of innocence, eventually the overriding tendency was to argue along the lines of the Italian Constitutional Court. This is why the opinions expressed by the Cassation court will not be discussed in the scope of this thesis; for more information on the various opinions by the Cassation court, see Bogner, Udo; *supra note 82*, pp. 188-9.

<sup>119</sup> The right to defense is manifested in Article 24 II of the Italian Constitution.

<sup>120</sup> Bogner, Udo; *supra note 82*, p. 163.

<sup>121</sup> Bogner, Udo; *supra note 82*, p. 166.

<sup>122</sup> Ma, Yue; 'Prosecutorial discretion and plea bargaining in the United States, France, Germany, and Italy: A comparative perspective' [2002] 12 *International Criminal Justice Review*, 40.

<sup>123</sup> VanCleave, Rachel; 'Italy', in: *Criminal Procedure: A Worldwide Study*, North Carolina, 1999, p. 272.

<sup>124</sup> Orlandi, Renzo; 'Absprachen im italienischen Strafverfahren' [2004] 116.1 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 123.

<sup>125</sup> Pizzi, William T. / Marafioti, Luca; 'The new Italian Code of Criminal Procedure: The difficulties of building an adversarial trial system on a civil law foundation' [1992] 17 *Yale Journal of International Law*, 23.

<sup>126</sup> This argument is based on findings of a study that concluded that if the defendant holds an equally high social status as the public prosecutor especially in the area of economic offences the status often facilitates the public prosecutor willingness to come to a positive estimate with regard defendant's criminal conduct and thus increased the likelihood of a mitigated sentence. In contrast, in cases where the defendant originates from a lower

in his decision to conclude agreements. It follows that the procedure is flexible to the parties' will and the actual sentence negotiation is free from judicial interference.<sup>127</sup> However, judicial review allows the judge, the defendant and his counsel to adequately prevent an arbitrary conclusion of agreements, and ensures that legally prescribed requirements form the basis for the negotiated sentence.

## 4.2. Compliance of *patteggiamento* with the principle that the judge is only subordinate to the law (articles 101 II, 27 III Cost.)

### 4.2.1. Introductory remarks

According to the literal understanding of article 444 II Cpp., the judge is held to impose the sentence as proposed by the parties, unless article 129 Cpp. is applicable.<sup>128</sup> In the context of *patteggiamento*, the imposition of a sentence is conditioned upon the judge's conviction gained on the basis of the case file, the soundness of the parties' evaluation of the offence and the parties' exhaustive appreciation of all relevant circumstances pertaining to the offence. These conditions and the literal interpretation of article 444 II Cpp., suggest that the judge is bound by the parties' request and may not engage into scrutiny as to the appropriateness of the actual sentence.<sup>129</sup> If read in this light, the law confers upon the parties the exclusive authority to conduct the procedure pertaining to sentencing. It follows from this interpretation that article 133 Codice Penale (hereafter, Cp.)<sup>130</sup>, which states that the judge must, in order to determine a sentence, take into account the gravity of the offence (surrounding circumstances of the crime, damage incurred, degree of intent) and also the offender's propensity to commit the offence (the offender's motives, character, earlier convictions, style of life, demeanor in the aftermath of the crime, social circumstances) is not applicable to cases where the parties take recourse to the *patteggiamento* procedure. Continuing this line of thought, article 444 II Cpp. confers only a limited possibility on the judge to scrutinize the parties' agreement in comparison to the wider discretionary power provided for in article 133 Cp. Conversely, this means that the judge may not apply article 133 Cp. when assessing the sentence request submitted by the parties. Hence, the judgment no longer comes into existence based on the judge's inner conviction, with the exception of the assessment criteria enumerated in article 444 II Cpp., but is rather based on the conviction agreed to by the parties alone.<sup>131</sup>

The fact that after approval, the requested sentence becomes binding to the judge gives rise to the question whether this concept is in compliance with article 101 II Cost.<sup>132</sup>, which stipulates that the judge is only subordinate to the law (and not to the agreement concluded by the parties). The purpose of this provision is to ensure the freedom and independence of the jurisprudence and the judiciary. Furthermore, the judge shall apply the law freely and

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social class, the willingness of the public prosecutor to negotiate a lowered sentence was found to be limited; see Kaiser, Günther/ Meinberg; Volker, '„Tuschelverfahren“ und „Millionärsschutzparagraph“?' [1984] 4 *Neue Zeitschrift für Strafrecht*, 348.

<sup>127</sup> Bogner, Udo; *supra* note 82, pp. 164-165.

<sup>128</sup> Article 129 Cpp. stipulates that the judge has to engage in a legal assessment of the case file and establish whether there are grounds to believe that the defendant is innocent and needs to be acquitted.

<sup>129</sup> Cass. pen. 1989 III, S. 2105, 2108.

<sup>130</sup> Italian Criminal Code.

<sup>131</sup> Bogner, Udo; *supra* note 82, pp. 173, 174.

<sup>132</sup> Italian Constitution.

only in the absence of any external influence can he potentially form his independent conviction without impediment.<sup>133</sup>

#### 4.2.2. Italian Constitutional Court

The Italian Constitutional Court held, with regard to the constitutionality of *patteggiamento*, that the discretion legally conferred on the parties did not *per se* infringe upon the principle that the judge is subordinate exclusively to the law (article 101 II Cost.). The Constitutional Court pointed out that the judge came to his conviction on the basis of his *own* perception of the case file and not by adhering to the parties' presentation of facts. Thus, different aspects derived from the case file, in addition to those raised by the parties, could form the basis of the judge's decision. This finding demonstrated that the court was not confined by the parties' interpretation of facts. The Court concluded that in the context of *patteggiamento* the judge had the possibility to exercise discretion by giving his independent assessment of the merits of the case. This conclusion underlines that the judge is bound only by law. Further discretion of the judge could be derived from article 69 Cp., which conferred upon the judge the discretion to verify whether the requested sentence indeed complied with the obligation of balancing all incriminating and exculpatory indicia. This discretionary power demonstrated that the judge's competence to scrutinize the request as submitted by the parties was not restricted to exercising an independent assessment of the merits of the case. In addition, the judge's review aimed at determining the validity of the sentence so as to subject the parties to the law.

In addition to the judge's controlling function pursuant to article 444 II Cpp., the Constitutional Court was of the opinion that the judge could establish other exculpatory or incriminating grounds, which would impact the parties' appreciation of the circumstances of the case. The Court concluded that article 444 Cpp. could not be construed in such a way as to impede the judge's discretion to freely assess the mutually agreed sentence and thus *patteggiamento* did not violate the principles set forth in article 101 II Cost.<sup>134</sup>

The Constitutional Court stated that notwithstanding article 444 II Cpp., cases could occur where the parties' request, as a result of an excessive application of the sentencing rules, proposed a sentence that by virtue of the offence's gravity, would not appear appropriate in the eyes of the judge. In this regard, the Court critically remarked that the legislature had not explicitly provided for the possibility, within the scope of article 444 II Cpp., for the judge to engage in an assessment as to the appropriateness of the sentence.

The Court concluded that the absence of a possibility to review the appropriateness of the sentence constituted a violation of article 27 III Cost, which states that sentences may never contradict the judge's sense of humanity and always have to aim at the rehabilitation of the convicted person. The rehabilitation requirement of a sentence became relevant not only during the execution phase of the sentence, but already assumed importance during discussions pertaining to sentencing in the pretrial phase and during trial. The Court elaborated that the imperative of rehabilitation needed to be read in conjunction with the principle of proportionality which not only encompassed the sentence term, but also its possible contravention against overriding norms of criminal law. In other words, the Court clarified that article 444 II Cpp. was not in compliance with the Italian Constitution in so far as it 'does not expressly permit the judge to consider whether the agreed sentence

<sup>133</sup> Bogner, Udo; *supra* note 82, p. 174.

<sup>134</sup> Constitutional Court (Corte cost.) Judgment of 2 July 1990, Nr. 313.

promotes the constitutional goal of rehabilitation'.<sup>135</sup> Moreover, the Court held that article 444 II Cpp. violated the constitutional principle of proportionality in so far as the provision envisioned that the judge was obliged, to impose the requested sentence, without having been able to engage in prior scrutiny as to its appropriateness. The Court added that the judge was under an obligation to assess whether the sentence requested by the parties was appropriate. Beyond the limited review possibility expressly provided for by article 444 II Cpp., the judge had to disapprove of the request if the suggested sentence appeared to be disproportionate.<sup>136</sup>

#### 4.2.3. Scholarly opinions

Even though most scholars concurred with the overall outcome reached by the Constitutional Court, most scholars did not fully agree with its legal reasoning. Indeed, scholars submitted that the court was bound by the parties' request once it had accepted the suggested sentence as the request could not be dismissed partially. Nevertheless, this did not prevent the judge from dismissing the case pursuant to article 129 Cpp., if the judge, for instance, concluded that the offence had not been committed, or if evidence suggested that the wrong defendant had been charged.<sup>137</sup> Moreover, it had been contended that *patteggiamento* required the judge to be bound by the requested sentence. This requirement amounted to a violation of article 133 Cp.<sup>138</sup> Article 133 Cp. provided for a number of additional aspects that the judge needed to consider in order to assess the appropriateness of the sentence. If it was true that the judge could not assess the appropriateness of the sentence in light of the proportionality principle provided for in article 27 III Cost., it would follow that the judge could also not consider article 133 Cp. in his sentence review. In the absence of the judges' possibility to review the sentence according to the principles set forth in article 133 Cp, the decisive question was whether the mutually agreed sentence was in compliance with article 101 II Cost. Scholars contend that the judge's inability to rely on article 133 Cp. in his review amounted to a violation of article 101 II Cost., because this provision stated that the judge was only subordinate to the law and could never be bound by the sentence term as suggested by the parties. With that, scholars submit that the Constitutional Court should have based its reasoning on the compliance of *patteggiamento* with article 133 Cp. rather than by only referring to article 27 III Cost. The obligation to assess the appropriateness of the sentence on the basis of article 133 Cp. resulted from the principles established by the case law on article 27 III Cost. Therefore, article 133 Cp. was applicable in the context of *patteggiamento*.<sup>139</sup>

<sup>135</sup> Corte cost., July 2, 1990, n. 313; see also Bogner, Udo; *supra note* 82, p. 172.

<sup>136</sup> Corte cost. (Constitutional Court) Judgment of 2 July 1990, Nr. 313; see also Bogner, Udo; *supra note* 82, pp. 174-177.

<sup>137</sup> Van Cleave, Rachel; *supra note* 120, p. 245.

<sup>138</sup> Article 133 Cp. states that the judge must, in order to determine a sentence, take into account the gravity of the offence (surrounding circumstances of the crime, damage incurred, degree of intent) but also the propensity of the offender to commit the offence (the offender's motives, character, earlier convictions, style of life, demeanor after the crime has been committed, social circumstances).

<sup>139</sup> Cited according to Bogner, Udo; *supra note* 82, see *supra notes* 817-823.

## V. Can the Italian model serve as an example to regulate German plea bargaining practice?

The subsequent section will deal with the question whether the Italian approach could serve as an example for the German legislature to improve the current statutory regulation of plea agreements. In order to answer the question, it will be assessed whether the Italian judge plays a role in relation to *patteggiamento* that is suitable to ensure independent decision-making in the German context.

The critical assessment identified that the Law on Agreements expects the judge to assume contradictory roles in criminal proceedings pertaining to plea bargaining. On one hand, in ordinary *ex officio* trials, the judge is expected to be a neutral fact finder who is not considered a participant to the proceedings. On the other hand, the judge is expected, after having engaged in negotiations with the defendant and his counsel, and even if the agreement has failed, to encounter the defendant with absolute independence in subsequent proceedings. The judge then has to act as if plea negotiations had never taken place and to forget about the defendant's confession. If the judge lures the defendant to conclude an agreement, the latter is left with little else but to assume that the court already presumed guilt or at least, that the court had a biased opinion. *Schünemann* accurately pointed out that in these circumstances a reasonable defendant would immediately respond to the court's offer in order to prevent the worst-case scenario of having to face a disproportionately high sentence as a result of a contradictory trial.<sup>140</sup> Scholars have convincingly pointed out that the contradiction between the conflicting roles that the judge is expected to assume was likely to compromise the judge's independence.<sup>141</sup> Therefore, it is crucial that a Law on Agreements does not confer upon the judge the right to engage in plea negotiations and agreements with the defense counsel and the prosecutor.

The Italian law envisions that the judge only becomes active once the parties have come to an agreement and submit the request for the sentence approval. Subsequently, and only after assessing the appropriateness of the agreement with regard to the defendant's guilt, the judge approves or dismisses the parties' request. He is, therefore, not bound by the parties' request, as it has also been clarified by the Italian Constitutional Court. Indeed, irrespective of the parties' agreement, the Italian judge always has to assess the case file in order to seek exculpatory evidence that may justify the defendant's acquittal (article 129 Cpp.). That mechanism decreases the risk of convicting innocent defendants. Precluding the judge from being engaged in plea negotiations could prevent the abusive tactics that were evidenced by the case discussed under 3.2.1.1. in which the judge applied coercive means to encourage the defendant to confess. Also, by being excluded from plea negotiations and fulfilling the task of scrutinizing the parties' agreement, the judge serves as an important safeguard against abuses that stem from the prosecutor's exercise of power towards the defendant during the negotiations. Nevertheless, one could argue that the prosecutor remains in a position to exercise improper coercion against the defendant. For instance, if one imagined that the prosecutor completely overcharged and tried to make the defendant believe that he had unequivocal and incriminating evidence against the former, the defendant might simply

<sup>140</sup> Schünemann, Bernd/ Hauner, Judith; 'Absprachen im Strafverfahren' [2006] 56.1 *Anwaltsblatt*, 443, 444.

<sup>141</sup> See Damaska, Mirjan; 'Der Austausch von Vorteilen im Strafverfahren: Plea-Bargaining und Absprachen' [1988] 8 *Strafverteidiger*, 398 ss.

confess fearing that he might be subject to an even higher sentence as a result of an ordinary trial. However, the Italian Constitutional Court clarified that in the context of *patteggiamento*, the judge has to engage in an independent assessment of the case file, irrespective of the way in which the parties portrayed the merits of the case. In addition, article 444 II Cpp. must be construed to oblige the judge to engage in an assessment as to whether the agreed sentence is appropriate in light of the defendant's guilt and the gravity of the offence.<sup>142</sup> By conducting that scrutiny, the judge prevents the prosecutor from overcharging. Moreover, according to Italian law, the prosecutor cannot blatantly reject to conclude an agreement, unless for reasonable grounds. Again, this mechanism prevents the prosecutor from abusing his position and engaging in agreements on arbitrary grounds. According to Italian law, if the prosecutor withdraws consent and the agreement does not come into existence, he has to provide reasons for dismissal. Also, in case of the prosecutor's dismissal, the defendant can always directly submit his sentence request to the judge. If, in the course of the proceedings, the judge concludes that the prosecutor did not agree on unjustified grounds and that the defendant's request was legitimate, the court must impose the sentence that was initially suggested by the defendant. Therefore, the Italian approach leaves little scope for abusive practices of the prosecutor in the context of plea bargaining. The scholars who oppose plea agreements due to their arbitrary nature and because prosecutors supposedly favored engaging in plea bargaining with higher class defendants over 'ordinary defendants'<sup>143</sup>, might welcome the Italian solution. Italian *patteggiamento* seems capable of solving the problem of the judge exceeding his competence as a neutral and independent fact-finder, by forbidding him to engage in plea bargaining. In addition, the Italian model enables the judge to adhere to the constitutional principles enshrined in articles 92 and 97 GG, which implicitly proscribe the judge from being bound by agreements pertaining to the sentence.<sup>144</sup> Indeed, the Italian approach serves as a useful example for the German legislature, as it allows for the judge to engage into an independent assessment of the facts to the case, and he can thereby establish his own version as to what the truth is. One potential weakness of this approach is that the judge does not carry out an elaborate production of evidence in compliance with the principle of immediacy. However, the Italian Constitutional Court correctly recognized, in the context of *patteggiamento*, that the very nature of abbreviated and simplified proceedings limited the possibility to exhaustively produce evidence even though comprehensive production of evidence was also not required, since the parties had mutually agreed to forego trial. While *patteggiamento* did not release the judge from his duty to establish the defendant's guilt, independent of what has been stated in the parties' agreement, the extent to which the judge must establish the merits of the case and reveal the truth is less than in ordinary proceedings; this conclusion was compliant with the expectation to conclude the case as expeditiously as possible.<sup>145</sup>

<sup>142</sup> Constitutional Court (Corte cost.) Judgment of 2 July 1990, No. 313.

<sup>143</sup> Schmidt-Hieber, Werner; 'Vereinbarungen, Absprachen im Strafprozess-Privileg des Wohlstandskriminellen?' [1990] 43.3 *Neue Juristische Wochenschrift*, 1886; Schmidt-Hieber argues that the judges and prosecutors showed more willingness to negotiate and more respect vis-à-vis an intelligent defendant of a high social status.

<sup>144</sup> Article 92 GG which states that the judge is entrusted with the judiciary. Furthermore, Article 97 I GG adds that the judge is independent and only subordinate to the law. From these two provisions it can be inferred that the judge may never be bound by the agreement of the parties; see Meyer-Göfner, Lutz; 'Rechtsprechung durch Staatsanwaltschaft und Angeklagten?' [2007] 27 *Neue Zeitschrift für Strafrecht*, 428.

<sup>145</sup> See Bogner, Udo; *supra* note 82, pp. 182-186.

## VI. Conclusion

This article demonstrated that plea bargaining has become a prominent and daily practice used by the participants in criminal proceedings in order to circumvent contradictory trials in Germany and in Italy. In addition, the prominence of plea bargaining in Germany is not only due to the overwhelming case load, but more importantly stems from a change in attitude of the judge and the participants to the proceedings. In fact, instead of extensively seeking for substantive truth, it is often more critical for the participants and the court to impose the sentence that appears after only a limited production of evidence, but that reflects a compromise found by all sides and is socially acceptable. In this process, the judge assumes the role less and less as a neutral and independent fact-finder, but rather engages in the consensus-building process as an equal partner. Because plea bargaining has evolved into an alternative, simplified and abbreviated procedure to a contradictory trial, which surely erodes the fundamental principles, which, at least in theory, have governed German criminal procedure, this practice needs to be subjected to statutory regulation.

It has been illustrated that the German Law on Agreements suffers from significant shortcomings. These are manifested in the failure to reestablish and enhance the judiciary's independence. In this regard, we have seen that the Italian model, in an attempt to construe the relevant provisions in conformity with the Italian Constitution, *patteggiamento* is part of a comprehensive reform and offers a solution to a number of problems that German judges currently encounter in the context of plea bargaining.

The Italian approach has potential to return the German judge to the ethics which the initial, legally conferred tasks used to require. The Italian law ensures that the judge does not compromise his independence in the context of the procedure, by proscribing him from engaging in plea negotiations. The judge might, again, serve as a neutral-fact finder free from external influence, making decisions on the basis of his inner conviction while being subject solely to the law. Also, *patteggiamento* meets the parties' interest to influence the outcome of the proceedings while guaranteeing judicial scrutiny. In fact, the prosecutor, the defense counsel and his client may engage in negotiations and enter into agreements, which are subject to judicial supervision in regard to the appropriateness of the sentence and the establishment of guilt.

However, the foregoing analysis demonstrated that plea bargaining undeniably restricts the court's possibility to fully elucidate the merits of the case and to reveal the truth. Nevertheless, in abbreviated proceedings, this limitation appears legitimate if the defendant confesses voluntarily without having been exposed to coercive measures and if the confession occurs not only for tactical reasons, but actually corresponds to the outcome of the investigative phase of the proceedings. The realization of these conditions would require the German legislature to introduce consensus-based proceedings, in which the defendant is entitled to waive his right to a contradictory trial. Finally, a Law on Agreements should include judicial review in order to verify whether the defendant's right to trial was waived truly voluntarily.

In conclusion, *patteggiamento* provides for a workable and defensible solution that pays due regard to the defendant's rights and the proper administration of justice which is conditioned upon a judge that is held to decide independently of external influence. The Italian approach might serve a valuable example for the German legislature to consider in future attempts to introduce simplified and abbreviated proceedings into German criminal procedure.