The ‘Unitary’ Model of Sentencing Delineated in the Criminal Code

The evolution of sentencing in Italy has followed, in some instances, a rather different course to that of other European and non-European legal systems. In other, non-Italian systems, progress has been from a model of indeterminate sentencing based on rehabilitation, to a determinate paradigm based on the principle of proportion.

On the contrary, the Italian system, traditionally tied to a determinate/retributive model, has evolved towards a rehabilitative approach.

It may be helpful at this stage to provide an overview of the structure of Italian sentencing. This will help the reader to understand the significance of the relationship between the sentencing rules enacted by the criminal code and the sentencing rules enacted by the code of criminal procedure: in other words, between sentencing and sentence bargaining.

The Italian Criminal Code (CC)\(^1\) establishes, with Articles 132 and 133,\(^2\) a ‘unitary’, monophase sentencing model, where the judge giving the verdict also sets the punishment. The model also features ‘guided’ discretion because it is based on a law which acts similarly to the ‘narrative guidelines’ adopted by Sweden (von Hirsch and Ashworth 1998, pp. 229, 240). The sentence can be appealed, both on the basis of merit and the form and amount of punishment, before a Judge of Appeal and can successively be brought before the Court of Cassation, for reasons of unlawfulness.

In particular, Art. 132 CC establishes the discretionary power of the judge, which must be exercised within the legal sentence ranges, and imposes the obligation to justify the sentence with reference to the reconstruction of the...
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offence and the type and quantity of the punishment.

Art. 133 CC lays down the criteria that must guide the judge in the application of his/her discretionary powers.

The two fundamental guiding criteria are:

a) the seriousness of the crime, which is be derived from a series of objective and subjective indices (i.e. actus reus, mens rea, gravity of the damage caused, etc.);

b) the capacity to commit crimes of the offender, derived from a series of secondary factors implying the formulation of a predictive judgement regarding the future behaviour of the offender.

Despite its innovative character, which in its time was in the legal avant-garde, Art. 133 of our code has not provided a practical solution to the problem of grading punishment because it affords a very wide range of criteria – termed ‘factual criteria’ since they are related to the facts – that the judge should take into consideration in order to establish the punishment. Since Art. 133 allows so many factors to be taken into account, no real policy about how to assess the relative seriousness of a case emerges. Moreover, no indications were given by the legislator regarding the aims of criminal punishment. The absence of this parameter has meant that, in practice, the discretionary powers of the judge have remained wholly without guidance.

It should be pointed out that the transparent exercise of judicial discretion has been made arduous by the fact that the Italian Criminal Code sets very severe grades of mandatory punishment, which derive from the particular cultural context (Mussolini’s Fascist government) in which the Penal Code was made law, in far-off 1930. The establishment of extremely severe mandatory minimums has meant that in more recent times judges have generally applied the minimum sentence, thus foregoing, in practice, their discretionary power. This widespread lowering of sentencing rates to their minimum by judges (made feasible by the adroit use of mitigating circumstances), has ended up by making the provision for the justification for the sentence superfluous. This is because each time the sentence is close to the mandatory minimum, the judge avoids enunciating the reasons that led him to apply the punishment in question.

Jurisprudence at the highest level (that is, the Court of Cassation) has exhibited very little interest in the substantive aspects of sentencing, particularly regarding the problem of the rationale behind punishment. The doctrinal debate on this issue, both nationally and internationally, has only had a slight impact.
on this Court's rulings. This debate might have otherwise helped to provide an orientation for judges in the lower courts by encouraging self-regulation.

Rulings in favour of retribution are rare and dated; indeed, in some cases, punishment had even been spoken of as a "salve for the soul". On the subject of general prevention, jurisprudence is uncertain and contradictory. General prevention is at times included, at others explicitly excluded from the hierarchy of objectives of punishment. Much more numerous are the rulings in favour of rehabilitation, also due to the explicit mention of this ideal in the Italian Constitution.4

In practice, the lack of indications in the Code regarding the aims of punishment and the reluctance of judges adequately to justify the sentence when it is meted out (the most common formula is 'the punishment fits the crime' or 'the punishment is appropriate for the crime committed') have led to lack of control over the exercise of discretionary powers and more or less hidden forms of sentencing disparity.

Not even the explicit Constitutional provision for the "rehabilitation of the offender" (Art. 27, 3rd section) seems to have been able to definitively orient the criteria of sentencing as set by Art. 133 of the Criminal code. Moreover, the Constitutional Court has generally exhibited the tendency to emphasise the so-called "polyfunctional theory of punishment" (Vassalli 1961, p. 297), according to which any one of the following aims: retribution, rehabilitation and even deterrence, may be considered by the judge in establishing the type of punishment (imprisonment, fine, or 'semi-detention', etc.) and, above all, the length of imprisonment, according to the characteristics of each single case (see Corte Costituzionale, Judgement No. 107/1980).

The 'polyfunctional theory' – interpreted as the mere juxtaposition of retribution, rehabilitation and deterrence – however, cannot reconcile the opposing arguments associated with either of the traditional purposes of punishment. Moreover, it leads to the risk that a whole variety of features that should properly belong to each single traditional rationale will be lumped together in justification for an individual sentence, with the further effects of leaving the way open for disparate approaches to sentencing and, moreover, of strengthening the system of surveillance and repression.

The Crisis of the Unitary Model of Sentencing

The 'unitary' model of sentencing, based on Articles 132 and 133 of the Criminal Code and on a complex system of aggravating or mitigating
circumstances (see Articles 61–70 and, in particular, Art. 62 bis, of Criminal Code), has entered into a ‘crisis’ for two reasons.

a) The first factor that broke up the ‘unitary model’ of sentencing was the introduction of two different categories of measures to avoid incarceration of offenders: alternative measures (misure alternative) which represent a non custodial or a semi-custodial way of serving punishment and substitutive sanctions (sanzioni sostitutive) which are noncustodial or semi-custodial penalties alternative to short periods of imprisonment (up to one year). These both can be considered as ‘intermediate sanctions’, since they “fall between prison and probation in their severity and intrusiveness” (Tonry 1996, p. 100).

When an offender is sentenced to a term of imprisonment by the Sentencing Judge, the sanction inflicted can be modified qualitatively and quantitatively (even by a different judge).

Firstly, the same sentencing judge can directly suspend any term of imprisonment of up to two years, according to Art. 162 of the Criminal Code. Beginning in 1981, the sentencing judge can, within certain limits, also substitute those terms of imprisonment of up to one year with the above mentioned substitutive sanctions, which include: semidetenzione (semi-detention), libertà controllata and pena pecuniaria (fine).

Secondly, the sentence inflicted might be modified by a different judge — called ‘Magistrato di sorveglianza’ (Supervisory Judge) — who has the power to apply an alternative measure or to impose the house arrest, which is today beginning to be considered as a fully fledged alternative both to imprisonment and to other measures, and not simply as an alternative modality of serving imprisonment (Paliero 1998, p. 815).

The length of imprisonment, as laid down by the trial judge, can also be modified, during execution, by the ‘Giudice dell’esecuzione’ (Enforcement Judge). Any offender who has served a certain portion of his/her sentence may be granted a conditional release (Art. 176 CC).

b) The second factor leading to a crisis of the unitary model of sentencing is the introduction, following a reform of the criminal trial, of the so-called differentiated criminal proceedings: sentence bargaining (provided by Art. 444 of Code of Criminal Procedure [CCP]), and summary trial (provided by Art. 442 CCP).

The ‘summary trial’ is an institution of general character that can be applied to the majority of crimes. If the defendant asks for a summary trial
during the preliminary hearing, the punishment in the case of the accused being found guilty is reduced by exactly one third (i.e. a sentence to six years of imprisonment is reduced to four as a reward for having chosen a summary trial).

In contrast, ‘sentence bargaining’ (which the Italian Code of Criminal Procedure defines as ‘applicazione della pena su richiesta’ (application of the sentence on request)) is not an institution of general character. In the first place, the Italian legal system is based on the principle of mandatory prosecution, meaning that only sentence bargaining is possible and not charge bargaining. In the second place, the parties can agree on the sentence only if, after having taken into consideration all the circumstances and any reductions for having chosen this alternative procedure, it comes to less than two years of imprisonment. One should also be aware of the fact that any reduction in punishment for having chosen the sentence bargaining procedure does not amount to exactly one third but is up to one third, although the reduction is usually applied in its largest extension.

However, it should be pointed out that in the Italian legal system the role of the prosecutor is less important than in the United States. With our sentence bargaining system, the prosecutor has nothing to gain (or almost), given that the reduction in punishment is not given ‘in exchange’ for a plea of guilty. This is because the sentence which concludes the trial, while still meting out a punishment, paradoxically, does not constitute an equivalent to an admission of guilt by the offender. Nor can the reduction of punishment be accorded in exchange for collaboration by the accused in handing over other offenders to justice (Grevi 1988, p. 304). The only advantage for the prosecutor is in shortening the trial and simplifying the gathering of evidence.

The fact that sentence bargaining is used mainly to enhance efficiency and the organisational problems of the judicial system and not for prevention or retribution, brings in elements which contrast with the key principles of sentencing as laid down in the Criminal Code.

The Effects of the ‘Fragmentation’ of the Unitary Model of Sentencing

Judge Marvin Frankel, in his work Criminal Sentences: Law Without Order, wrote:

In the great majority of federal criminal cases ... a defendant who comes up for

sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between (Frankel 1973).

The problems afflicting Italian sentencing are perhaps less serious, but it is certain that piecemeal reforms limited to a number of sectors of the criminal justice system have had a series of negative effects on sentencing and on the sanctions system in general.

These ‘negative’ or ‘undesirable’ effects following reforms which have affected the sentencing system can be summarised as follows:

*The Labyrinth Effect*

The first problem to emerge, chronologically speaking, could be defined as the ‘labyrinth effect’.

The prison sentence, whose prerequisites of *swiftness* and *certainty* have been weakened by trials which are still too long, has also become precarious, because it can become lost in a *labyrinth* of ‘alternatives’, which may be imposed either by the Sentencing Judge, or the Enforcement Judge.

The sentence becomes only an abstract, theoretical punishment, in relation to which the punishment to be served is at the most only a fraction of the original, often limited and subject to a whole host of variants.

*The Widening of Penalty Ranges*

The labyrinth effect is further aggravated by the progressive widening of penalty ranges due to the introduction of sentence bargaining. This has brought our system closer to the paradigm of *indeterminate* sentencing: in particular, close to those legal systems in which the legislator establishes the maximum penalty only (see, for example, in Europe, the French legal system where judges have wide discretion).

*Two Practical Examples*

*The Crime of Robbery (Art. 628 CC)*

For the crime of robbery, the virtual sentence range, as set down in the Criminal Code, prescribes a sentence varying from *three* to *10* years.
Let us now move into the real punishment frame. That is, the one emerging from a coordinate reading of substantive norms regarding sentencing (i.e. the aggravating and the mitigating factors) as well as procedural rules regarding sentence bargaining and the summary trial.

**Minimum Punishment**

- In the presence of more than one mitigating circumstance, the term of imprisonment may only amount to *nine months*;
- in cases of sentence bargaining or summary trial there is a further reduction by (up to) one third: the term may drop to *six months*;
- at this point, one of the following six alternatives might be chosen instead of imprisonment. One of the following three alternatives may be selected by the Sentencing Judge directly:
  
  a) suspended sentence (Art. 162 CC), or;
  b) *semidetenzione* (semi-detention) (Art. 53 and 55 Act No. 689/1981) or;
  c) *liberta controllata* (Art. 53 and 56 Act No. 689/1981).

Where the sentencing judge intends to impose imprisonment, the Supervisory Judge might autonomously impose one of the following three alternatives:

a) house arrest (Art. 47 ter Act No. 354/1975), or;

b) *affidamento in prova* (Art. 47 Act No. 354/1975), or;


**Maximum Punishment**

- In the case of more than one aggravating circumstance, a term of imprisonment of up to 24 years may be imposed.

To sum up, the term of imprisonment set for the crime of corruption may vary from the suspended sentence (available for punishments involving less than two years of imprisonment), which in practice means *no punishment*, to 24 years of incarceration. The maximum punishment is so out of proportion with the objective seriousness of the crime, that it will never be imposed by judges. We should infer from this that punishments that are too severe (i.e. punishments not proportionate to the seriousness of the offence) are ‘symbolic’ punishments, with a low rate of effectiveness.\(^\text{11}\)
The Crime of Murder (Art. 575 CC)

The crime of murder is punished by a sentence of no less than 21 years.

Minimum Punishment

- In the presence of more than one mitigating circumstance, the term of imprisonment may be theoretically reduced to 5 years and 6 months;
- by applying a further reduction for the ‘alternative’ trial procedure (in this case only a summary trial and not sentence bargaining is permitted, with a reduction of exactly one third), we could come to 3 years 6 months imprisonment;
- there are three alternatives at this point:

  a) after 1 year and 6 months imprisonment the Supervisory Judge may impose the ‘house arrest’;
  b) after 6 months imprisonment the Supervisory Judge may impose the affidamento in prova; (Probation under surveillance of social services);
  c) finally, after 2 years and 2 months imprisonment, the Supervisory Judge, if unable to impose the affidamento in prova, may impose the semilibertà.

Maximum Punishment

- There is a variety of aggravating circumstances for murder in the Criminal Code. In this case (i.e. for premeditation, or for having murdered one’s parents or children) the offender may be sentenced to life imprisonment.

Thus, likewise for murder, starting from a ‘virtual’ punishment comprising anything from 21 years to life, there is a ‘real’ punishment that may range from 3 years and 6 months imprisonment to a life sentence.

Discrepancy with the Objectives of Punishment

The substantive impact of the laws regarding special procedures in the Code of Criminal Procedure (CCP) means that sentencing, in the context of sentence bargaining and the summary trial, shows markedly ‘autonomous’ characteristics. This in particular regards the concentration of the judge’s former discretionary powers in the hands of the ‘trial adversaries’ (prosecutor
and defendant). Hence a paradigm of sentencing has emerged which is ‘parallel’ to that laid down in the Criminal Code. This new paradigm has endosystematic aims (i.e. internal to the system) and creates serious problems of compatibility with the rationale of punishment which should normally guide the judge in the sentencing process.

Some have argued for sentence bargaining by referring to the aims of punishment in terms of the need for general prevention, since the diminished severity of the punishment would be balanced by its swiftness and certainty.

In this way, the institution of sentence bargaining would find its place at a substantive level in a theory of end-oriented sentencing. Holding the trial in the shortest possible time to decrease the case load in criminal justice and reducing punishments to reward collaboration by defendants, would inevitably lead to sentences which no longer correspond to the seriousness of the crime as originally evaluated by the legislator in the Criminal Code, nor meet the need for rehabilitation. Hence, such measures fail to satisfy both the requisite of proportion and the aim of rehabilitation.

In regard to proportion: the crime is no less serious because repression is swifter. In regard to rehabilitation: foregoing the defendant’s guarantees provided by an adversary trial gives no indication as to his/her suitability as a candidate for rehabilitation (Padovani 1992, p. 932). At this point, the paradox emerges of a punishment which has been reduced to meet the objective of general prevention, justified solely on the basis of the willingness of the defendant to forgo the guarantees of the adversary trial.

Reasonable doubts persist, moreover, as to whether swiftness and certainty of punishment – now assured only by sentence bargaining and the summary trial (but without being associated with the parameter of the adequate severity of the sentence), can effectively play a deterrent role. This is because swiftness of punishment is counterbalanced by a scarce visibility of the punishment meted out: the summary trial and sentence bargaining prevalently occur during the preliminary hearing, which is not open to the public. Thus the most certain and swift punishments are also the least visible.

Unwarranted Sentencing Disparity from a Trial Source

The Italian system has experienced forms of disparity due particularly to the lack of a hierarchy organising the aims of punishment. This has given legitimacy to different punishments for cases with the same characteristics (at least objective ones).
To this historical (and chronic) problem of sentencing, other problems have been added connected to a new source of disparity: that occurring during the trial.

Two cases involving the same crime, with the same objective and subjective characteristics, may be punished very differently. The sentencing range according to the type of trial starts from a suspended sentence, implying an immediate exit from the penal/prison system, to the application of imprisonment which, although softened by the imposition of intermediate sanctions, obviously involves significantly greater suffering.

The problem becomes of even greater urgency when one realises that sentence bargaining and the summary trial are becoming the most common trial type to be followed (see Appendix B, Table 4.1 for Magistrates’ Courts and Table 4.2 for Criminal Courts).

This phenomenon of disparity in sentencing, already unacceptable from the substantive point of view, risks weakening the ‘internalisation’ by society of the value judgements expressed by the legislator, thus frustrating the principle of general prevention which is the mainstay of the doctrine justifying the application of differentiated trial procedures.

**Prescriptions for Reform**

In brief, the prescriptions for reform aimed at solving the main problems of Italian sentencing can be summarised as follows.

*Contrasting the ‘Labyrinth’ Effect by Limiting the Alternatives to Imprisonment*

Here crime policy calls for restricting the variety of ‘alternative measures’ and ‘substitutive sanctions’ mentioned above which are available to judges.

Against the creative proliferation of models and types of penalties and intermediate sanctions, this approach proposes a different strategy: limiting punishment to simple alternatives of tried and monitored usefulness (Paliero 1992, p. 556). For example, intensive probation, community service, or fine (to be applied according to the German *Tagessatzsystem*, which is a day-fine system).12
Counteracting Widening of Sentence Range by a Clearer Legislative Specification of Penalties Options

Rather than opposing the anachronistic sentence range of the authoritarian 1930 Criminal Code by surreptitiously reducing the minimum terms of imprisonment through use of mitigating factors or procedural rules regarding the so-called ‘differentiate criminal proceedings’ (summary trial and sentence bargaining), the solution would lie in formally fixing new punishment options for each crime. This means that the reform of sentencing process should be supported by a general reform of punishment options (imprisonment, intermediate sanctions, fine) and of penalty range. In other words, a scale of penalties should be devised in the form of a pyramid: the tip would be the straightforward option of imprisonment, bordered below by the need for general prevention; the base of the pyramid should be constituted by fines, while intensive probation, house arrest and an appropriate model of community service would take up intermediate positions.

The choice of precepts to associate with these levels of punishment would take place later, following a cost/benefits analysis of the real capacity of the state to apply each category of punishment (this proposal was made by Paliero 1992, p. 560).

Counteracting Unwarranted Substantive Disparity by Fixing a Hierarchy of the Aims of Punishment

A theory of punishment, especially if the system of punishment is considered an independent variable of a more thorough reform of the criminal justice system, requires conceptual clarity and consistency. To this end, the Italian legislature should abandon its deep seated indifference towards establishing rationale for punishment. The vital issue in any reform of sentencing is the definition of the goals of punishment, which must logically take place before any choice is made by the legislator regarding types of penalties or the ‘regulation’ of penalty range.

In the North American reform of sentencing, for example, just desert was chosen as the founding principle for the coherent development of the articulations of the sentencing system (von Hirsch 1976; von Hirsch, Knapp and Tonry 1987; Tonry 1996; von Hirsch and Ashworth 1998). The final objectives of this criminal policy, however, were not limited to the simple reaffirmation of the principle of proportion.

What then could be the rationale to give to punishment?
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In seeking a response to this question, one must consider that the latest development of the modern theory of punishment was, at least in Europe, the syncretistic-dialectical model devised by Roxin in the mid-1960s (Volk 1993). In other words, for each phase of punishment—threat, infliction, enforcement—there are dominant criminal policy aims and recessive ones, having the function of limiting the other aims:

- the threat of punishment phase is generally guided by considerations of general prevention;
- the sentencing phase, in contrast, is guided by the principle of special prevention (and, particularly, by rehabilitation), but within the bounds of punishment proportionate to the liability of the offender;
- the enforcement phase, should strive towards the ‘rehabilitation’ of the offender, wherever possible and on a voluntary basis only.

Thus, the tendency should be towards a complex sentencing system, similar to the above mentioned Roxinian paradigm, but which also takes into account new variables, such as the capacity of the system for sanction implementation, the impact on the offender of the single models of punishment, and the results of the cost/benefit analysis applied to the sentencing system.

In this model, sentencing should essentially depend on the type of penalties.

a) **Imprisonment** This, above all, must be prescribed according to the principle of ‘necessity’, given that it is the most expensive option and that such costs are certainly not compensated by a high level of efficacy in terms (final objective) of a reduction in recidivism. Prison sentences should be imposed only in those cases where there is a high seriousness of crime, and where the perpetrators are generally unresponsive to any form of rehabilitation.

Under these conditions, sentencing cannot but follow a ‘secular’ retributive model: in practice, the principle of proportionality between crime and punishment. ‘Costly’ punishments, as prison sentences normally are, have a very low level of effective rehabilitation, and should be graded according to the guarantee of ‘just deserts’ (von Hirsch 1976).

b) **Intermediate sanctions** If the rehabilitative ideal appears to be inconsistent, at least in Italy, with the present features of imprisonment (with serious problems like overcrowding), this does not imply that rehabilitation should be abandoned altogether. In fact, rehabilitation should play an extremely
constructive role in the evolution of the system, especially with regard to the choice of intermediate sanctions.

Earmarked for rehabilitation should be those noncustodial penalties, which must also be evaluated according to their efficacy. In other words, the fulfilment of rehabilitative aims should be the task of punishment forms, such as fines and community service, which have shown in practice to be characterised by a satisfactory cost/benefit ratio.

It would also be positive if the application of such ‘substitutive’ models – to use a term which still reflects a prison centred view of the sanction system – were no longer a prerogative of the discretion of the sentencing judge, and be previously and directly defined by the legislator as pertaining to crimes of average and low gravity.

c) Suspended sentence Suspended sentence in Italy has been progressively impoverished of any content, because, since 1990, in association with the main sentence (detention for a period of up to two years) the so-called pene accessorie (additional sanctions) – such as prohibition from taking public office, prohibition from undertaking certain occupations or trades, prohibition from participating in tenders for public contracts, loss or suspension of parenting rights, etc. are suspended too.

Instead of the suspended sentence, it would be better to adopt the outright ‘waiving of punishment’, as in the l’Absehen von Strafe which has been given widespread application in the German legal system, but which operates in Italy only within the ambit of the juvenile justice system.

The conflict in this case is between the principle of expediency principio di opportunità which justifies the non-response of the state to events which are intrinsically deserving of punishment (Volk 1993, p. 35), and the need for general prevention, which would justify the application of a symbolic punishment, but which is not damaging from the point of view of ‘rehabilitation’. Nevertheless, this punishment may still be ‘useful’ in ensuring ‘social stability’.

Counteracting Unwarranted Sentencing Disparity with a Trial Source by ‘Bargaining Regulation’

Sentencing in the Italian legal system is no longer based on a single paradigm. The impact of summary proceedings and sentence bargaining on sentencing criteria has been significant: in all cases where a sentence is not given at the end of an adversary trial, the judge is mostly deprived of his/her discretionary
powers regarding the degree of punishment. Instead of issuing from an evaluation of the criteria contained in Art. 133 CC, the degree of punishment, as we have seen, is established by negotiation between the parties. It is thus vital that procedural rules regarding ‘non-adversary proceedings’ should be made consistent with ‘substantive’ rules on sentencing laid down by the Criminal Code.

In the Italian criminal justice system, subject to the principle of mandatory prosecution, the powers of the prosecutor are limited and circumscribed. ‘Sentence bargaining’, in practice, must always begin with the initiative of the defendant. On the basis of calculations regarding the crime he/she is accused of and which cannot be subjected to negotiation, and with the assistance of a lawyer the defendant thus proposes what ‘his/her’ punishment is to be. The prosecutor has only the power of veto, because his/her approval is mandatory in the application of this institution.

Thus the prosecutor is able to offer a ‘reduced’ punishment to the defendant, which can be defined according to general rules (a reduction up to one third of the primary sentence). However, the prosecutor can also be a source of disparity of treatment simply by denying or giving (discretional!) his/her approval of the choice of procedure.

So, the reduction of punishment ‘requested’ on the basis of Art. 444 CCP by the defendant, which the judge is obliged to apply to the sentence in practice (i.e. to the punishment which derives from his/her evaluation of the circumstances of the case) ultimately depends on the judgement of the prosecutor which cannot be challenged.

A further step forward in the process of regulating sentence bargaining could then be the introduction of guidelines ‘orienting’ the discretion of the prosecutor in agreeing to the request for the application of punishment according to sentence bargaining. This would ensure a more uniform application of trial institutions characterised by ‘rewards’ and above all preventing the power of the prosecutor to veto the summary trial or sentence bargaining being used as an “instrument of pressure on the defendants or to reward collaboration by some of them”.

As Alan Dershowitz has rightly stated: “there can be no understanding of any sentencing system without proper appreciation of the role played by bargaining” (Dershowitz 1976, p. 81). And if any ‘unity’ is at all possible in sentencing, at least in terms of its rationale, this must surely pass through a consolidation of procedural rules regarding sentencing but within the ambit of ‘substantive’ rules (Monaco and Paliero 1994, p. 454).
Notes

1 The Italian Criminal Code was enacted in 1930.
2 See Appendix A.
3 In the Italian criminal doctrine, the term ‘fact’ indicates all the elements that describe a specific crime.
4 Article 27 of the Italian Constitution states: “Le penne non possono essere contrarie al senso di umanità e devono tendere alla rieducazione del condannato”.
5 Bis means literally ‘twice’. In the legal field, when one or more new articles have to be added this Latin word is used to distinguish the new article from the others.
6 The ‘alternative sanctions’, introduced by Act No. 354/1975, include a measure similar to the ‘Probation order’ (termed ‘affidamento in prova al servizio sociale’), a semi-custodial measure that imposes on the offender to stay in prison during the night, but allows him to work or to study outside during the day (semilibertà), and a measure similar to the early release (liberazione anticipata).
7 By Act No. 689/1981 three ‘substitutive sanctions’ were introduced: semidetenzione, which is a semi-custodial penalty that allows the prisoners to work outside; libertà controllata, which is a measure similar to intensive supervision, obliging the offender not to leave the municipality of residence unless authorised, to report to a police station once a day; moreover, the offender cannot carry weapons and his/her passport is withdrawn; pena pecuniaria (fine), which involves the payment of a sum of money which is proportionate to the seriousness of the crime and the income and assets of the offender.
8 In Italy a judge always oversees the application of a sentence. This judge is the prosecutor working at the Judicial Office which has issued the sentence to be enforced. The Prosecutor independently enforces the sentence when there is no dispute over its application. In case such a dispute should arise, the Prosecutor or the offender appeal to the so-called ‘Enforcement’ Judge, who is the judge that had previously issued the sentence. If there is a conflict between more than one sentence to be implemented at the same time, the Prosecutor or the offender must appeal to the judge that has issued the last definite sentence.
9 A new Code of Criminal Procedure was enacted in 1989.
10 These prerequisites had already been enunciated in the mid-eighteenth century by Beccaria, Dei delitti e delle penne (1st edn 1764), Turin 1965, § XIX. See, in part, §§ 63 and 6: “Quanto la pena sarà più pronta e più vicina al delitto commesso ella sarà tanto più giusta e tanto più utile” (‘The Quicker the Sentence and the Closer to the Crime the More Just and Useful Will it be’).
11 On the concept of the ‘effectiveness’ of the sentence, that is on the possibility that a threatened punishment be applied in reality see Paliero 1990, p. 430. See also Giunta et al. 1998.
12 The day-fine sentencing system appears to have substantial advantages compared to the ‘overall sum’ system. This is principally because it allows greater equality of treatment given that the number of day-fines depend on the objective seriousness of the offence, while the sum to be paid each day depends on the actual income of the offender. In the second place, the day-fine system allows for easier ‘conversion’ of the fine into another type of punishment, if the offender is insolvent. On the German system see Horn, last edition.
13 On the potential of community service as an alternative par excellence to detention, see Fassone 1984, pp. 231 ff.
14 See Arts. 28–37 CC.
The German Criminal Code provides for two institutions which both involve forgoing the execution of the sentence. The first—set down in § 59 StGB—is the warning with reservation of punishment. When the fine to be imposed does not go over 180 daily rates, the judge, after having fixed the entity of punishment, can warn the offender and make the execution of the punishment conditional on the offender going through a trial period (which may vary from one to three years). The second, is the institution of waiving punishment (Absehen von Strafe), set down in § 60 according to which “the judge can waive punishment when the consequences of the event which affect the offender are so serious as to render the application of such punishment clearly mistaken” (§ 60 StGB). The foundation of such an institution is to not to evaluate punishment according to just desert, but rather in the lack of need for punishment (because the offender has already received a sort of poena naturalis). On the institution of waiving of punishment, the latest work is Fornasari, *I principi del diritto penale tedesco*, Padova 1993, pp. 523 ff and cited bibl.

Law No. 448 of the 22 September 1988, setting out provisions for the criminal procedure for minors, lays down, in Art. 28, an analogous institution to the German one of warning with reservation of punishment. This is called the institution of suspension of trial with probation, on the basis of which the judge can suspend the trial for up to three years, ‘when he/she believes the personality of the minor must be evaluated’. The minor who passes this test after being placed under the care of Juvenile Services for observation, treatment and support, will have the crime deleted.

The effects of ‘sentence bargaining’ on sentencing criteria is analysed by Dolcini 1990, pp. 797 ff. (in part, p. 805).

One may discern, in some judgement proceedings, a sort of invitation to the accused, to make use of ‘bargaining’ Art. 555 letter (e) CCP obliges, for example, the writ of summons to contain the notice that “if the prerequisites exist, the accused can ask for … a summary trial or the application of the punishment according to Art. 444”. The same notice is provided for in Art. 460, letter (e) CCP, which regulates the prerequisites for the writ of judgement and in Art. 456, second subsection CCP, which regulates the writ of immediate judgement. Finally, in the summary trial according to Art. 451 fifth subsection CCP, the Chief Judge advises the accused of the right to a summary trial or the application of the sentence according to Art. 444 CCP.

The defending lawyer does not have the same power to make a request to apply the sentence or to object to or change the agreement between his/her client and the prosecutor, because his/her role “is limited to supporting the private party and assisting it during negotiations at the end of which the request is drafted”. See Conso-Grevi 1994, p. 755.


Illuminati, op. cit., p. 264. The author proposes, in particular, that each Public Prosecutor’s Office bring out specific directives regulating the discretionary power of the Prosecutor at least regarding consent to ‘summary’ procedures which may be asked of the defendant.
References

Abbreviations of Italian reviews:

Arch. pen. = Archivio penale
Enc. dir. = Enciclopedia del diritto
Giust. pen. = La giustizia penale
Ind. pen. = L'indice penale
LP = Legislazione penale
Rass. it. crim. = Rassegna italiana di criminologia
Riv. it. dir. proc. pen. = Rivista italiana di diritto e procedura penale

Dolcini, E. (1975), ‘La disciplina della commisurazione della pena: spunti per una riforma’, Riv. it. dir. proc. pen., p. 34.
Dolcini, E. (1979), La commisurazione della pena, Padova: Cedam.
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Militello, V. (1982), Prevenzione generale e commisurazione della pena, Milano: Giuffrè.
Appendix A

Selection of Articles from the Italian Criminal Code and Code of Criminal Procedure Related to the Sentencing System

CRIMINAL CODE:

132. Discretionary power of the judge in applying the sentence – Within the limits set by law, the judge must apply the sentence discretionally; he/she must indicate the reasons that justify the use of such discretionary power.

In increasing or reducing the sentence, the limits set for each type of sentence must not be exceeded excepting where otherwise specified by law.

133. Gravity of the crime: evaluation for fixing the sentence – In the exercise of his/her discretionary power indicated in the preceding article, the judge must take into consideration the gravity of the crime, deduced from:

1) the nature, the type, the means, the object, the times, the place and each and every other modality of conduct;
2) the gravity of damage or danger caused the victim of the crime;
3) the intensity of the intention and the degree of negligence.

The judge must also take into consideration the future capacity to commit crimes of the offender, deriving from:

1) the reasons for committing the crime and the character of the offender;
2) previous criminal record and generally the behaviour and life of the offender, before the fact;
3) the conduct of the offender during or successive to the crime;
4) the lifestyle of the offender, his/her family and social environment.

CODE OF CRIMINAL PROCEDURE:

438. Premises for summary trial – 1. The defendant can request that the trial be defined in the preliminary hearing (...).

(...) Omissis

(...) Omissis

440. Measures taken by the judge – 1. On request, the judge can issue an order to instate a summary trial if he/she considers that the trial can be defined with the evidence already in his/her possession.

(...) Omissis
(…) Omissis

442. Decision – After having ended the discussion, the judge proceeds to judgement according to articles 529 and following (546, 651, 652).
(…) Omissis

If the defendant is convicted, the sentence which must be set by the judge having taken into consideration all the circumstances of the case, must be reduced by one third (…).

444. Application of the sentence on request – Both the offender and the prosecutor can ask the judge for an intermediate sentence, according to the type and degree indicated, or for a fine, both reduced by one third, or for a term of imprisonment having taken into consideration all the circumstances, which, after being reduced by one third, consists in not more than two years of imprisonment or detention, either singly or with a fine.

If there is agreement by the party which has not made the request, and an acquittal has not been given according to article 129, the judge, on the basis of the evidence, if he/she believes that the legal classification of the crime and the application or the comparison of the circumstances presented by the two parties to be correct, can apply the sentence indicated, after stating in its terms that it derives from a request from both parties. If there is a plaintiff, the judge cannot make a decision regarding the civil action; the terms indicated in article 75 subsection 3 are not applied.

The party in making the application, can render its application dependent on the concession of a suspended sentence. In this case the judge, if he/she believes that a suspended sentence cannot be conceded, can reject the application.
Appendix B

Statistical Data on the Distribution of Convictions and on Sentence Bargaining Rates

<table>
<thead>
<tr>
<th>Year</th>
<th>Preture (Magistrates' Courts)</th>
<th>Total Convictions (100%)</th>
<th>Convictions by Sentence Bargaining</th>
<th>Summary Trials (Fines)</th>
<th>Bargaining Adversary Trial</th>
<th>Justice + Summary Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>226,970</td>
<td>47,482 (20.9%)</td>
<td>50,754 (22.3%)</td>
<td>3,501 (1.5%)</td>
<td>125,233 (55.1%)</td>
<td>179,488 (79.0%)</td>
</tr>
<tr>
<td>1992</td>
<td>319,776</td>
<td>70,715 (22.1%)</td>
<td>66,675 (20.8%)</td>
<td>4,250 (1.3%)</td>
<td>178,136 (55.7%)</td>
<td>249,061 (77.8%)</td>
</tr>
<tr>
<td>1993</td>
<td>361,184</td>
<td>95,444 (26.4%)</td>
<td>89,649 (24.8%)</td>
<td>4,379 (1.2%)</td>
<td>171,712 (47.5%)</td>
<td>265,740 (73.5%)</td>
</tr>
<tr>
<td>1994</td>
<td>385,082</td>
<td>107,828 (28.0%)</td>
<td>96,984 (25.1%)</td>
<td>4,573 (1.1%)</td>
<td>175,697 (45.6%)</td>
<td>277,254 (71.9%)</td>
</tr>
<tr>
<td>1995</td>
<td>351,644</td>
<td>90,565 (25.7%)</td>
<td>89,298 (25.3%)</td>
<td>3,376 (0.9%)</td>
<td>168,405 (47.8%)</td>
<td>261,079 (74.2%)</td>
</tr>
<tr>
<td>1996</td>
<td>378,337</td>
<td>127,868 (33.7%)</td>
<td>110,008 (29.0%)</td>
<td>2,431 (0.6%)</td>
<td>138,030 (36.4%)</td>
<td>250,469 (66.2%)</td>
</tr>
<tr>
<td>1997</td>
<td>190,903</td>
<td>63,346 (33.1%)</td>
<td>54,863 (28.7%)</td>
<td>1,566 (0.8%)</td>
<td>71,128 (37.2%)</td>
<td>127,557 (66.8%)</td>
</tr>
</tbody>
</table>

Notes:
1. Judge: Magistrate (during the preliminary hearing) or Trial Judge (during the first hearing of trial).
2. Judge: Magistrate (during the preliminary hearing only).
3. Judge: Magistrate (on the prosecutor’s proposal and without the defendant’s opposition).

Source: Italian Ministry of Justice.
Table 4.2  Distribution of convictions (also expressed in percentages) by the type of proceeding, from 1991 to 1997 (first six months)

**Tribunale – (Criminal Court [Three-Judge Panel])**

<table>
<thead>
<tr>
<th>Years</th>
<th>Total Convictions (100%)</th>
<th>Convictions by Adversary Trial</th>
<th>Sentence Bargaining¹</th>
<th>Summary Trial²</th>
<th>Summary Trial (Fines)³</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>55,127</td>
<td>15,260 (27.7%)</td>
<td>27,973 (50.7%)</td>
<td>5,794 (10.5%)</td>
<td>6,100 (11.0%)</td>
</tr>
<tr>
<td>1992</td>
<td>55,832</td>
<td>18,265 (32.8%)</td>
<td>25,688 (46.0%)</td>
<td>7,388 (13.2%)</td>
<td>4,491 (8.0%)</td>
</tr>
<tr>
<td>1993</td>
<td>58,800</td>
<td>18,649 (31.8%)</td>
<td>26,145 (44.4%)</td>
<td>6,814 (11.5%)</td>
<td>5,151 (8.7%)</td>
</tr>
<tr>
<td>1994</td>
<td>69,842</td>
<td>22,189 (31.8%)</td>
<td>33,647 (48.1%)</td>
<td>7,121 (10.1%)</td>
<td>6,885 (9.8%)</td>
</tr>
<tr>
<td>1995</td>
<td>62,828</td>
<td>19,601 (31.2%)</td>
<td>31,033 (49.3%)</td>
<td>5,976 (9.5%)</td>
<td>6,218 (9.8%)</td>
</tr>
<tr>
<td>1996</td>
<td>75,615</td>
<td>26,074 (34.5%)</td>
<td>33,912 (44.8%)</td>
<td>6,533 (8.6%)</td>
<td>9,096 (12.0%)</td>
</tr>
<tr>
<td>1997</td>
<td>40,765</td>
<td>13,723 (33.7%)</td>
<td>18,216 (44.6%)</td>
<td>3,987 (9.7%)</td>
<td>4,839 (11.8%)</td>
</tr>
</tbody>
</table>

(half year)

**Notes**

1. Judge: Magistrate (during preliminary hearing) or Criminal Court (during first hearing of trial).
2. Judge: Magistrate (during preliminary hearing only).
3. Judge: Magistrate (on the prosecutor’s proposal and without the defendant’s opposition).

**Source:** Italian Ministry of Justice.