4 The fight against corruption in the Italian legal system between repression and prevention

Debora Provolo

The relentless changes to the anti-corruption system in Italy

The current anti-corruption system in Italy is the result of a sequence of recent reforms. The most significant is certainly represented by Law No. 190 of 6 November 2012 (containing 'Provisions for the prevention and punishment of corruption and illegality in the Public Administration'), which redefined the offences provided under the Italian Criminal Code and outlined an integrated system to fight corruption, in which administrative prevention tools support the traditional model of criminal punishment (Mongillo, 2019: p. 232).

The 2012 reform (known as '*Legge Severino*') originates from the need to strengthen the instruments to fight corruption, along parallel prevention and punishment lines, also in compliance with the obligations arising from international and supranational law, specifically the UN Convention against Corruption of 2003 and the Strasbourg Convention on Corruption of 1999, instruments which have already been ratified by Italy (respectively with Law No. 116 of 3 August 2009 and Law No. 110 of 28 June 2012).

On the punishment side, the reform is an attempt, albeit not entirely successful, to align, insofar as possible, the relevant criminal provisions with the factual and criminological phenomenon of corruption, which has taken on an 'all-encompassing' nature, characterised by a very complex and detailed structure, both because it involves various institutional levels and because it is regulated by circuitous and sophisticated mechanisms that, in favouring the self-replication of offences, result in its systematic diffusion within the public administration (Cingari, 2012: pp. 79–81; Davigo and Mannozzi, 2007: p. 264; Forti, 2003: p. XV; Palazzo, 2015: pp. 62–66). A corruptive agreement involves, in addition to the corruptee and the corruptor, also other parties playing different roles: on the one hand, the political and administrative authorities of the State, tasked with regulating and ensuring complex corruption mechanisms, and acting as recipients of bribes paid by private persons; on the other hand, intermediaries in exchanges covered by the corruptive scheme (specifically, 'fixers'). Furthermore, corrupt public servants do not make a commodity out of a single act of office, but are often 'put on payroll', meaning that they are unduly and systematically paid to be available at length to make use of their functions or powers in carrying out future

actions under their office or exert 'influence' (Cingari, 2012: p. 90). The legislator attempted to take all this into account, introducing significantly innovative provisions from multiple standpoints, redrafting corruption offences, including a new offence of trading in influence in the Italian Criminal Code, maintaining (unlike most European countries) the offence of extortion by a public official ('*concussione*') and introducing a separate offence of undue inducement to give or promise a benefit, providing for corruption among private persons, and finally tightening the sentencing regime.

A large part of the 2012 reform is aimed at strengthening administrative preventive measures (Cantone, 2017; Severino, 2016: pp. 640–641; Fiandaca and Musco, 2013: pp. 4–6); in addition to revisiting certain existing tools – such as, for example, the *Code of conduct for employees in the public sectors*, containing rules of conduct aimed at ensuring the quality of services, prevention of corruption and compliance with the constitutionally mandated duties of diligence, loyalty and impartiality – the legislator introduced, *inter alia*, provisions aimed at enhancing transparency in the decision-making process and supervision over tendering procedures, preventing potential conflicts of interest through stricter rules on the incompatibility/ineligibility in appointments to public offices, as well as protecting whistle-blowers. However, the pivotal new feature of the reform is the establishment of the Italian Anti-Corruption Authority (ANAC), an independent administrative authority tasked with preventing corruption at a centralised state level (Cantone and Merloni, 2016; Nicotra, 2016), and providing for national anti-corruption plans. The prevention plans in question, containing baseline elements of the overall prevention design as a 'risk assessment' process, have a twofold structure, a national plan (PNA), drafted by the ANAC, and one adopted by each public administration; both are valid for three years, but they must be updated each year. In brief, the plans map out risks, that is, by identifying internal and external factors that can facilitate instances of corruption and specifying organisational measures suitable to neutralise them. Drafting anti-corruption plans, as well as selecting a person responsible for preventing corruption (director/manager responsible for implementing the plan within a body or entity) are connected to the compliance system provided within the scope of liability of the legal entities under Legislative Decree 231/2001 (Cantone, 2018; Severino, 2016).

ANAC's supervisory functions for corruption prevention purposes were further strengthened through Law Decree No. 90/2014, converted into Law No. 114/2014.

The subsequent Law No. 69/2015 (Mongillo, 2015; Cingari, 2015; Spena, 2015) tightened the punishment for actions that may be qualified as corruptive in a broad sense, on the heels of recent and notorious judicial cases (Mose, Expo, Mafia Capitale, etc.), also introducing a series of substantive and procedural provisions for forced recovery of amounts unlawfully received by public officials, as well as an extenuating circumstance aimed at encouraging *post factum* cooperation by the corruptee and corrupter who choose to collaborate with authorities. This latter measure rewards, by substantially decreasing the punishment, those who effectively contribute to limiting the effects of a criminal act, or provide decisive elements for establishing an offence or for identifying other persons

responsible, thus reducing the very high 'dark number' of illicit trade of public acts of office, above all due to the common interest of the parties in concealing the corruptive agreement and covering each other. The law has also increased the punishment provided for the offence of mafia-type association, given the proximity, as emerging from criminological surveys, between organised crime and white-collar criminality rooted in politics and public administration (Caneppele and Calderoni, 2014; Center for the Study of Democracy, 2010; Gounev and Ruggiero, 2012). On a preventive level, the 2015 reform was limited to increasing ANAC's investigation powers and improving information flows between ANAC and criminal judicial authorities.

Finally, Law No. 3 of 2019, evocatively called '*Spazzacorrotti*' (i.e. 'Wipe out the corrupt') (Mongillo, 2019; Gambardella, 2019; Padovani, 2018; Pulitanò, 2019a), ideally in a relation of continuity with the two previous anti-corruption reforms, introduced further changes to contrast offences against the public administration, also increasing disqualifying ancillary penalties (for example, the inability to contract with the public administration and the ban on holding public offices are made permanent in cases of imprisonment exceeding two years), and providing for new investigation and rewarding tools aimed at fleshing out hidden corruption (specifically, the possibility of using wiretaps among persons in the same place by resorting to 'trojans' is extended, and two new cases of exemption from criminal liability are introduced for the corruptee or the corrupter, if they confess immediately, and for the undercover agent, respectively). On the prevention side, the act contains provisions on transparency of political parties and movements and payments made in their favour.

The abovementioned reforms, which have been preceded and accompanied for twenty years by a series of changes in legislation intended to impact, more or less directly, the anti-corruption system (for example, the legislation on confiscation or the various mechanisms providing for an external commissioner or judicial administration of companies, or the progressive strengthening of investigation and procedural tools in the field of corruption offences) are part of an established 'urgency' logic characterising many branches of Italian criminal legislation (Moccia, 1997), which portray criminal law (increasingly punitive, as evidenced by the increasing severity of punishments) as a privileged tool for remedying social dysfunctions, often with distorting effects and in conflict with the fundamental principles of criminal law (Mongillo, 2019: pp. 235–251). We are thus witnessing an unchecked expansion of punitive law, used as symbolism or propaganda, to attract consensus and reassure the public as to the strong commitment against particularly serious forms of criminal activity, such as corruption.

Corruption offences: positive changes and persistent critical issues

The original punitive framework outlined in the 1930 Italian Criminal Code provided for two main types of corruption based, respectively, on a public official performing an official act (known as 'improper corruption', Article 318 of the

Italian Criminal Code) or an act contrary to the duties of their office (known as 'proper corruption', Article 319 of the Italian Criminal Code) against payment of undue compensation (or promise thereof) in cash or in the form of some other benefit. The offence of extortion by a public official ('*concussione*', Article 317 of the Italian Criminal Code) was placed alongside these offences. In its original wording, the criminal provision in question punished a public servant who, by abusing their office or powers, forced or induced someone to make an undue payment or promise money or some other benefit; in this case, the private person and victim of unlawful coercion was exempt from criminal liability. The system was subsequently supplemented by introducing an offence of corruption in judicial proceedings (Article 319 *ter* of the Italian Criminal Code) and by extending the criminal relevance of international corruption (Article 322 *bis* of the Italian Criminal Code).

With this framework created under the Italian Criminal Code, in the 1990s, Italy faced the most serious case of corruption that had ever been uncovered in the country's history. It became known as '*Tangentopoli*' or '*Mani pulite*'. The above was, however, a punitive system that needed to be updated. It was already inadequate with respect to the forms of corruption that emerged with *Tangentopoli*, and, moreover, not in touch with the times compared to those that gradually emerged later on (Cantone, 2018: p. 4).

First of all, the Italian anti-corruption system was not in line with the obligations undertaken by Italy internationally, as noted by the bodies responsible for monitoring the internal implementation of conventional instruments to fight corruption, adopted by the Council of Europe and the OECD, i.e., the GRECO (*Groupe d'Etats contre la corruption*) and the Working Group on Bribery in the International Business Transactions (WGB), respectively. Among the various crucial issues in the Italian system, these working groups found that there was a specific need to revise the offence of extortion to overcome the inconsistency represented by the impunity of private persons who were able to achieve undue advantages through an unlawful conduct; to establish an offence of corruption among private persons that was broader than the crime of breach of corporate trust as a result of giving or promising a benefit in force at the time; to provide for an offence of trading in influence (GRECO, 2012). As mentioned, intervening on the offences of corruption was also required in light of the inability of the system to effectively have an impact on the new forms of corruption emerging in practice, which case law was trying to remedy, sometimes even through actual 'interpretative twisting' in relation to the offences of corruption and extortion (Viganò, 2014: pp. 4–8; Severino, 2016: pp. 636–640).

There is no doubt that the abovementioned reforms, and especially the 2012 'framework-level' reform have had a positive effect on the punitive anti-corruption system.

For example, replacing the offence of 'improper corruption' with that of 'corruption for the performance of the function', consisting of an action by a public official who receives for themselves or for others a promise of or a payment of money or other benefit 'for the exercise of their functions or powers', subject

to a less severe punishment, remedied interpretations by way of analogy that conflicted with the principle of legality. The interpretations in question in effect cancelled by way of interpretation the requirement of the 'act' subject to the illegal trade, provided for in the previous wording of the offence, thus broadening the legislative framing of corruption. Case law sought to punish, specifically, the 'payroll' situations of public officials, which now appear to be perfectly covered by the new Article 318 of the Italian Criminal Code (Viganò, 2014: p. 9; Pulitanò, 2012: p. 7).

A symmetrically positive intervention was aimed at filling the gap in punishing illegal intermediation with public servants, preliminary to acts of corruption (Severino, 2013: p. 11): Article 346 *bis* of the Italian Criminal Code, introduced by Law 190/2012 and amended by the 2019 reform, punishes the actions by anyone, outside cases of complicity to commit corruption, participating in an agreement aimed at any form of 'illicit influence' on the activity of public officials or persons charged with a public office. Trading in influence is criminalised regardless of whether a connection with public bodies is boasted by an intermediary bearing no actual relationship with the former, or whether the person in question makes use of actual connections, by unduly causing others to give or promise money or another benefit as the price for unlawfully interceding before the public servant or as remuneration in relation to the exercise of the duties or powers.

The gradual broadening of the application scope of corruption among private persons is also noteworthy (La Rosa, 2018; Seminara, 2017; Venafro, 2018). Its uneven regulation, set out under Articles 2635–2635 *ter* of the Italian Civil Code, has long been affected by the Italian legislator's reluctance to adapt to international obligations. The changes introduced with Legislative Decree No. 38/2017 extended the offence's application scope (now applying to any private entity and not only to commercial companies), expanding the category of punishable persons (now also including persons performing work with management duties within the entities) and punishable conducts, punishing the giving, promise and offer of money or other benefit, as well as the incitement to commit corruption. Law No. 3/2019 duly intervened by providing that all offences of corruption among private persons (and not only instances of corruption resulting in a distortion of competition in acquiring goods or services, as previously provided) could be prosecuted by the authorities without an upstream criminal complaint being required. Therefore, the object of protection is undoubtedly a public interest, namely fair and free competition (Mongillo, 2019: p. 292).

However, in the current system for repression of corruption phenomena numerous critical issues remain, and they cannot be discussed in detail here.

The most problematic aspect remains the distinction between extortion by a public official, undue inducement and corruption. The 2012 reform, as mentioned above, chose to keep the offence of '*concussione*' in force – despite appeals to the contrary also by numerous international organisations, specifically the OECD (Di Martino, 2013: p. 373; Montanari, 2012: pp. 14–18) – but provided for two separate offences: extortion, reduced to mere 'coercion', and undue inducement to give or promise benefits, provided by the new Article 319 *quater*,

which also punishes the induced private party, thus transitioning from victim of the crime to active participant, albeit subject to a less severe punishment than the public servant. What is meant by inducement, and what the boundary with coercion is, are particularly controversial issues (Mongillo, 2013: pp. 174–206; Palazzo, 2016: pp. 67–69).

According to the psychologistic criterion, the thin red line between extortion and undue inducement allegedly lies in the different degree of psychological pressure exerted on the private person (less intense in case of undue inducement, essentially corresponding to milder forms of persuasion, suggestion, or moral pressure, which do not seriously affect the private person's freedom to choose), whereas the criterion of undue advantage pursued by the private person posits that the boundary between the two offences is determined by the outcome of the functional act under the agreement. In other words, extortion would come into play only in the case of a functional act detrimental to the private person, whereas whenever the latter may expect or obtain an undue advantage from the act, Article 319 *quater* of the Italian Criminal Code would apply. A third approach postulates that in cases of doubt, the quantitative criterion concerning the degree of intensity of moral coercion should be supplemented by a qualitative criterion based on the nature of the advantage pursued by the private person. The Italian Supreme Court of Cassation, Joint Sections, with decision No. 12228/2013, Maldera and others (Balbi, 2015; Bartoli, 2014; Donini, 2014; Gatta, 2014; Pisa, 2014; Seminara, 2014), while favouring the objective criterion of undue advantage (given that the advantage in question, like the threat characterising extortion, represents, according to the Supreme Court, the essence of inducement and justifies punishing the induced), nonetheless acknowledged the merely demonstrative value of the suggested discretional criterion, admitting the existence of ambiguous, borderline cases, which require using additional criteria that the court must draw on as guidance within 'grey areas'. In other words, the factual context (environmental factors and type of interpersonal relationships) will guide the court in choosing the type of offence that applies in the case at hand. Given the interpretative uncertainties that remain in case law (Collica, 2017), the need to draw a more precise line between constricting behaviour and inducive conduct (but also between the latter and the contiguous cases of corruption) is nowadays required even more so than in the past, given that they amount to different and differently punished offences.

Even the current wording of the offence of trading in influence generates doubts on its interpretation and has aspects that clash with constitutional principles (Mongillo 2019: pp. 297–302; Cingari, 2019: pp. 749–755; Gambardella, 2019: pp. 69–73). The essential elements of this offence are not comprehensively defined (for example no reference parameter exists to determine the unlawfulness of the mediation) and are inconsistent as to the disvalue of the unlawful conduct. It includes (and punishes in the same manner) both the 'actual' trading in influence, that is where the unlawful agreement relates to an actually existing relationship and to a power of influence actually capable of affecting the public servant (with real danger for the lawful and impartial functioning of the public

administration), and the 'potential' trading in influence, that is to say 'boasting' which does not relate to a power to influence that is actually capable of affecting the public servant, and is characterised by a lower disvalue (Cingari, 2019: pp. 751–752; Mongillo, 2019: pp. 301–302). The offence punishes the mediator, but also the person who promises or gives money or a benefit, irrespective of whether the relationship between the mediator and a public servant exists or not. Aside from the fact that punishing the 'client' actually compromises the possibility of the phenomenon to come to light, the choice to punish in the same manner both a person who pays after being deceived by a 'snake oil salesman', and a person who does so being certain, for example, of being able to rely on existing relationships (public and well-known) between the mediator and the public official, seems problematic; these are objectively different conducts in terms of disvalue (Cantone and Milone, 2018: p. 3; Gambardella, 2019: pp. 71–73).

Critical issues remain with regard to corruption among private persons, which is not yet fully aligned – specifically with reference to the category of perpetrators and the sentencing framework – with the provisions of the Convention of the Council of Europe on Corruption of 27 January 1999 and the Framework Decision 2003/568/JHA on combating corruption in the private sector (Seminara, 2019: pp. 597–599).

Finally, we note that no coordination exists between the new anti-corruption regulation and the provisions of military criminal law providing for offences against the military administration committed by military personnel with management or command functions; moreover, conflicting case-law remains as to the relationship between corruption and the offence of collusion of members of the Guardia di Finanza (Revenue Guard Corps) under Article 3 of Law No. 1383/1941 (Rivello, 2017: pp. 3–7).

The most recent tools introduced to 'wipe out corruption': new exemption provisions and new means of assessing the commission of offences

In an attempt to facilitate the uncovering of corruption, Law No. 3/2019 recently introduced, as already mentioned, an exemption from criminal liability (Article 323 *ter* of the Italian Criminal Code) for anyone (public servant or private person) who, after committing one of the offences against the public administration expressly listed in the provision in question, voluntarily turns themselves in, provided that the relevant report is formalised within a certain time limit and the offender actually cooperates with judicial authorities by providing useful and concrete information as proof of the offence and identifying the other perpetrators (Mongillo, 2019: pp. 262–271; Gambardella, 2019: pp. 54–56; Pulitanò, 2019b: pp. 601–602).

The offences to which the exemption from criminal liability applies include any form of corruption and the offence of undue inducement to give and promise a benefit, but – inexplicably – the provision does not extend to trading in influence (Mongillo, 2019: p. 264). According to the Report on the draft bill, exemption

from liability is in line with the rationale behind the 2017 whistle-blowing law (see below) and reveals a twofold purpose: on a special preventive level, breaking the wall of silence for bilateral offences or offences otherwise fuelled by collusion, also enabling the acquisition of probative elements which are generally very difficult to obtain in trial and are useful for establishing and punishing such criminal acts; on a general preventive level, discouraging unlawful conduct by introducing an 'uncertainty factor' with deterrence effects, in the sense that after providing for a criminal liability exemption for those who report an offence, the parties to the corruptive scheme may no longer rely for certain on a common interest in keeping quiet (Pulitanò, 2019b: p. 601). However, the strict time limit requirement introduced (the report must be made before the offender has been informed that investigations have been carried out against him/her in relation to the reported facts and, in any event, within four months from when the offence was committed) in fact runs the risk of making the exemption from liability ineffective. Indeed, the same posits that the person turn themselves in without actually knowing whether or not their name is entered in the register of suspects, whether they can actually benefit from the liability exemption (Gambardella, 2019: p. 55), and in any event within time limits that are so short that they make a change of heart by the offender, such as to encourage them to turn themselves in, unrealistic.

In terms of criminal investigation, the use of undercover agents – entirely new for these types of offences (Gambardella, 2019: pp. 56–58; Mongillo, 2019: pp. 252–262; Pulitanò, 2019b: pp. 602–603; Scevi, 2019: pp. 14–17) – responds to similar purposes of reducing the dark number of corruption. The legislator intervened by amending Article 9, Paragraph 1(a) of Law No. 146/2006, which already included in a single legislative text various cases of undercover operations previously provided for in several special laws concerning, *inter alia*, the offences of facilitating illegal immigration, money laundering, drug trafficking, child prostitution and child pornography, terrorism and organised crime. Following the 2019 reform, undercover operations may also be used in investigations for all corruption-related offences, to be understood in a broad sense (therefore including, in addition to various instances of corruption, also the offence of '*concussione*', undue inducement and trading in influence). Reference to corruption offences has made it necessary to supplement the types of conduct that an undercover agent is entitled to carry out 'for the sole purpose of acquiring evidence' in relation to the various offences provided, because those already set out under Article 9 could not allegedly fit the undercover operations relating to corruption (Padovani, 2018: p. 4). Therefore, it is provided that undercover agents' actions are justified if they pay money or other benefits in performing an unlawful agreement that has already been entered into by others, promise or give money or other benefits requested by a public official or a person charged a public office or requested as a price for unlawful mediation to a public servant or as remuneration. However, for actions not to be punishable, they must be necessary to obtain evidence relating to illegal activities that are already being carried out. Accordingly, undercover operations may not go so far as to solicit or provoke criminal conduct; an undercover agent may not act as an agent provocateur, but only be involved indirectly, or be purely

instrumental in the performance of others' unlawful activities, according to the exemption paradigm as conceptualised by the established case-law of the Italian Supreme Court and the European Court of Human Rights (Gambardella, 2019: pp. 57–48; Mongillo, 2019: pp. 253–254).

However, it is worth wondering to what extent an undercover operation may in practice be an effective tool in the anti-corruption sector. At least with reference to situations in which corruption occurs in a 'restricted' context (for example, a tendering procedure or a construction project), where selective mechanisms of personal reliability operate and everyone will likely get to know each other, the possibility that an undercover agent could infiltrate seems completely unrealistic; vice versa, where the criminal phenomenon originates from casual contingencies (for example, making use of a health care service), carrying out an undercover operation appears easier, but the risk that it crosses the line and provokes an offence is higher (Padovani, 2018: p. 5).

Whistle-blowing and the 'culture of legality'

In Italy whistle-blowing was provided with a comprehensive statutory dimension in 2012, with the '*Legge Severino*', only in relation to the public sector and with a certain delay compared to most European countries and over a century after the United States (Amato, 2014; Thüsing and Forst, 2016; Turksen, 2018). This delay was above all due to cultural reasons, connected both to the belief that corruption had to be fought with forms of criminal repression rather than through preventive administrative measures, and the fact that there has always been (and still is) a negative view of the person reporting an offence, seen as a traitor rather than a custodian of social integrity (Massari, 2018: pp. 981–982).

Recently, whistle-blowing was regulated more comprehensively with Law No. 179/2017 (Borsari, 2018; Massari, 2018; Rugani, 2018), aimed at encouraging reporting offences and irregularities that an employee has become aware of during their employment relationship, guaranteeing more extensive protection for the informant.

The 2017 reform supplements and strengthens the regulation already provided for the public sector under Article 54 *bis* of Legislative Decree 165/2001 (Italian Consolidated Law on Public Employment), which prohibits subjecting a civil servant to punishment, dismissal or a discriminatory measure if, in the interest of the public administration's integrity, they report illegal conduct (therefore, not only the whole range of offences against the public administration but also, more generally, any form of abuse of the powers entrusted to the perpetrator who exerts them to obtain a private advantage) which they have become aware of by virtue of their employment relationship. Whistle-blowers are not protected if they are found, also with a first instance decision, to be criminally liable for false allegations or defamation or for other offences committed by filing the report, or subject to civil liability for the same offences in cases of wilful misconduct or gross negligence. Law No. 179/2017 extended the concept of 'civil servant' (which

now includes, for example, workers and collaborators of companies supplying goods or services that carry out work on behalf of the public administration), expanded the category of recipients of the report (which are now the person responsible for corruption prevention and transparency, ANAC, the judicial authorities and audit authorities) and strengthened, albeit not fully, the measures to protect the whistle-blower, including protecting the confidentiality of the latter's identity, and providing for the appropriate procedures for presenting and managing reports, including electronically.

The most notable aspect of the reform is that of having extended the protection provided for whistle-blowers to the private sector by amending Article 6 of Legislative Decree No. 231 of 2001 on entities' liability for criminal offences, thus affecting organisational and management models to prevent the commission of predicate offences. Organisational models must now provide for, among other things, one or more channels whereby the indicated persons (top management and subordinates) may submit, to protect the entity's integrity, detailed reports of unlawful conduct relevant for the purposes of the Decree and based on specific and consistent facts, or infringements of the entity's organisational and management model, which the whistle-blower has become aware of on the basis of the functions performed. The models must also include suitable measures to protect the identity of the whistle-blower in managing the report, prohibit retaliation or discrimination against the whistle-blower, as well as appropriate punishment not only for those who infringe the measures set out to protect the whistle-blower, but also against those who make, with wilful misconduct or gross negligence, reports that prove to be unfounded.

The 2017 reform has also coordinated the whistle-blowing regulation with obligations relating to professional, scientific or industrial secrecy, the infringement of which is subject to criminal punishment, and with the civil law obligation of loyalty to the employer. In the event of a complaint or a report, both in the public and private sectors, the pursuit of the interest to the integrity of public and private administrations, as well as the prevention and punishment of wrongdoing, is a just cause for disclosing official, professional or company secrets, exempting the whistle-blower from criminal or civil liability. The importance of this provision is clear if we consider that only by prioritising disclosures on the commission of unlawful actions is it possible to effectively punish such conducts without them being shielded by confidentiality obligations, on the one hand; and, on the other hand, to encourage employees to report such actions, by ensuring that they will not be prosecuted for infringing the confidentiality obligation.

Nevertheless, there are several corrective measures that could still be provided to achieve a higher level of protection and greater preventive effectiveness of the instrument in question. The crucial issues concern, specifically, the private sector. The decision to extend the protection of whistle-blowers only to a 'restricted' class of persons, comprising only the entities to which Legislative Decree 231/2001 is addressed that have adopted the relevant organisational and management models, is perplexing; adopting the model is optional for private

entities, which also makes the measures aimed at protecting whistle-blowers purely optional. Furthermore, the gap existing in the area of unlawful conducts subject to report should also be expanded by including all those conducts that do not amount to a predicate offence under Legislative Decree 231 of 2001 or to an infringement of the organisational model.

And yet, the main problem remains that of promoting, within a broader project of increasing awareness on the 'culture of legality' (Severino, 2016: p. 641), the maximum social ingraining of whistle-blowing, regarding which a distorted perception still prevails.

Conclusion

There is no doubt that the historic 2012 reform triggered a fundamental change in perspective in the Italian anti-corruption system, placing alongside the traditional repressive approach – which had proven insufficient to deal with a now all-encompassing and widespread criminal phenomenon – administrative prevention and other measures to fight corruption. Creating an unfavourable environment for corruption is therefore a potentially winning strategy. However, faced with particularly serious forms of crime such as corruption, criminal punishment remains essential.

The result is a complex system with two 'cores', preventive and repressive, which do not always operate in perfect synergy and are not always fully effective, also because they are often the product of an urgency logic intended to affect contingent phenomena.

As regards criminal law, the fight against corruption has materialised, especially with the most recent developments, in terms of a gradual increase in punitive measures, in particular through a widespread increased severity of criminal punishment, including ancillary measures, as if the threat of greater punishment in itself meant strengthening protection. Faced with social concern, placed under the zoom-in lens of public opinion, principally through the media, the primary objective seems to be that of sending a 'zero tolerance' message, in an attempt to normalise the degree to which systemic corruption is perceived by society. The introduction of the two new causes of exemption from criminal liability for those who turn themselves in and for undercover agents has a symbolic meaning too, underpinning the legislator's idea of introducing new tools, even if not especially effective, to 'wipe out the corrupt' (Pulitanò, 2019b: pp. 606–607).

The debate on the reliability of corruption perception indicators, even if deduced from the evaluations of official operators, and therefore on the adherence of these indicators to the actual data, is in fact very heated in Italy (Cantone and Carloni, 2019; Mongillo, 2019: pp. 235–240; Padovani, 2018: pp. 1–3). The spread of corruption is certainly an actual problem, even if it is difficult to quantify, but it is also necessary to avoid emphasising data or indicators leading to them being elevated to guiding principles of criminal policy. Conversely, the data or indicators in question must not be ignored, lest running the risk of underestimating the phenomenon.

To effectively fight corruption, it is thus necessary not to lose sight of the bigger picture.

Clearly, the preventive system, albeit appropriately strengthened (e.g. through the introduction of the regulation to protect whistle-blowers – although it can still be improved), cannot adequately function if it is not supported by a comprehensive reform of public administration to avoid that the anti-corruption intervention plans and the preventive measures end up in the morass of bureaucratic formalities and muddled functioning mechanisms of public offices (Fiandaca and Musco, 2013: pp. 4–5).

Likewise, it is essential to rethink the entire micro-system for the repression of corruption, which, as we have seen, is characterised by the presence of similar or contiguous offences (that, when applied in practice, are not always easily distinguishable from one another), and criminal provisions focusing more on criminological perpetrator types than on criminal facts (the offence of trading in influence is emblematic in this regard), which respond to a rationale of anticipating protection and present a high deficit of certainty/specificity (Manes, 2018). Tackling ancillary penalties, investigation tools, or, let alone, the penalty limits for specific offences does not produce significant effects unless we first focus on a rational rearrangement of the entire subject matter (Gambardella, 2019: p. 62).

Finally, an effective anti-corruption policy undoubtedly cannot operate without a cultural and educational operation aimed at spreading the culture of legality in the public and private sectors (Pasculli, 2019: pp. 223–224). However, this clearly 'educational' function cannot be delegated primarily to punitive law through an unchecked and emergency expansion of criminally relevant conducts.

References

Amato, G. (2014). Profili penalistici del Whistleblowing: una lettura comparatistica dei possibili strumenti di prevenzione della corruzione. *Rivista Trimestrale di Diritto Penale dell'Economia*, 3/4, pp. 549–607.

Balbi, G. (2015). Sulle differenze tra i delitti di concussione e di induzione indebita a dare o promettere utilità. Alcune osservazioni in margine a Cass., Sezioni Unite, 24 ottobre 2013. *Diritto Penale Contemporaneo*, 1, pp. 143–159.

Bartoli, R. (2014). Le Sezioni unite tracciano i confini tra concussione, induzione e corruzione. *Giurisprudenza Italiana*, 5, pp. 1208–1218.

Borsari, R. (2018). La nuova disciplina del Whistleblowing. *Rivista della Guardia di Finanza*, 3, pp. 707–730.

Caneppele, S. & Calderoni F. (eds.) (2014). *Organized Crime, Corruption and Crime Prevention. Essays in Honor of Ernesto U. Savona*. Cham: Springer.

Cantone, R. (2017). Il sistema della prevenzione della corruzione in Italia. *Diritto Penale Contemporaneo*. Available from: https://www.penalecontemporaneo.it/upload/3335-cantone2017a.pdf [Accessed 2nd July 2019].

Cantone, R. (2018). Il contrasto alla corruzione. Il modello italiano. *Diritto Penale Contemporaneo*. Available from: https://www.penalecontemporaneo.it/upload/4217-cantone2018a.pdf [Accessed 2nd July 2019].

Cantone, R. & Merloni, F. (eds.) (2016). *La Nuova Autorità Nazionale Anticorruzione*. Torino: Giappichelli.

Cantone, R. & Milone, A. (2018). Verso la riforma del delitto di traffico di influenze illecite. *Diritto Penale Contemporaneo*. Available from: https://www.penalecontemporaneo.it/d/6358-verso-la-riforma-del-delitto-di-traffico-di-influenze-illecite [Accessed 2nd July 2019].

Cantone, R. & Carloni, E. (2019). 'Percezione' della corruzione e politiche anticorruzione. *Diritto Penale Contemporaneo*. Available from: https://www.penalecontemporaneo.it/d/6495-percezione-della-corruzione-e-politiche-anticorruzione [Accessed 2nd July 2019].

Center for the Study of Democracy. (2010). *Examining the Links Between Organised Crime and Corruption*. Available from: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/crime/docs/study_on_links_between_organised_crime_and_corruption_en.pdf [Accessed 22nd July 2019].

Cingari, F. (2012). La corruzione pubblica: trasformazioni fenomenologiche ed esigenze di riforma. *Diritto Penale Contemporaneo*, 1, pp. 79–98.

Cingari F. (2015). La nuova riforma in tema di delitti contro la P.A., associazioni di tipo mafioso e falso in bilancio. *Diritto Penale e Processo*, 7, pp. 806–813.

Cingari, F. (2019). La riforma del delitto di traffico di influenze illecite e l'incerto destino del millantato credito. *Diritto Penale e Processo*, 6, pp. 749–755.

Collica, M.T. (2017). La tenuta della sentenza Maldera, tra conferme e nuovi disorientamenti. *Diritto penale contemporaneo*, 2, pp. 195–235.

Di Martino, A. (2013). Le sollecitazioni extranazionali alla riforma dei delitti di corruzione. In: B.G. Mattarella & M. Pelissero, eds., *La legge anticorruzione. Prevenzione e repressione della corruzione*. Torino: Giappichelli, pp. 355–380.

Davigo, P. & Mannozzi, G. (2007). *La Corruzione in Italia. Percezione Sociale e Controllo Penale*. Roma and Bari: Laterza.

Donini, M. (2014). Il corr(eo)indotto tra passato e futuro. *Cassazione Penale*, 5, pp. 1482–1506.

Fiandaca, G. & Musco, E. (2013). *Diritto penale. Parte speciale. Vol. I, Addenda: La recente riforma dei reati contro la pubblica amministrazione*. Bologna: Zanichelli.

Forti, G. (2003). Introduzione. Il volto di Medusa: la tangente come prezzo della paura. In: G. Forti, ed. *Il Prezzo della Tangente. La Corruzione come Sistema a Dieci Anni da 'Mani Pulite'*. Milano: Vita e Pensiero.

Gambardella, M. (2019). Il grande assente nella nuova 'legge spazzacorrotti': il microsistema delle fattispecie di corruzione. *Cassazione Penale*, 1, pp. 44–73.

Gatta, G.L. (2014). La concussione riformata, tra diritto penale e processo. *Rivista Italiana di Diritto e Procedura Penale*, 3, pp. 1566–1586.

GRECO. (2012). *Third Evaluation Round, Evaluation Report on Italy Incriminations*. Council of Europe. Available from: https://www.coe.int/en/web/greco/evaluations/round-3 [Accessed 22nd July 2019].

Gounev, P. & Ruggiero, V. (eds.) (2012). *Corruption and Organized Crime in Europe: Illegal Partnership*. London: Routledge.

La Rosa, E. (2018). *Corruzione Privata e Diritto Penale. Uno Studio sulla Concorrenza Come Bene Giuridico*. Torino: Giappichelli.

Manes, V. (2018). Corruzione senza tipicità. *Rivista Italiana di Diritto e Procedura Penale*, 3, pp. 1126–1155.

Massari, G. (2018). Il whistleblowing all'italiana: l'evoluzione del modello sino alla legge n. 179 del 2017. *Studium Iuris*, 9, pp. 981–992.

Moccia, S. (1997). *La Perenne Emergenza. Tendenze Autoritarie nel Sistema Penale*. Napoli: Esi.

Mongillo, V. (2013). L'incerta frontiera: il discrimine tra concussione e induzione indebita nel nuovo statuto penale della pubblica amministrazione. *Diritto Penale Contemporaneo*, 3, pp. 166–212.

Mongillo, V. (2015). Le riforme in materia di contrasto alla corruzione introdotte dalla legge n. 69 del 2015. *Diritto Penale Contemporaneo*. Available from: www.penalecontemporaneo.it/d/4359-le-riforme-in-materia-di-contrasto-alla-corruzione-introdotte-dalla-legge-n-69-del-2015 [Accessed 5th July 2019].

Mongillo, V. (2019). La legge 'Spazzacorrotti': ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione. *Diritto Penale Contemporaneo*, 5, pp. 231–311.

Montanari, M. (2012). La normativa italiana in materia di corruzione al vaglio delle istituzioni internazionali. *Diritto Penale Contemporaneo*. Available from: http://www.penalecontemporaneo.it/upload/1341134726Montanari%20-%20DPC.pdf [Accessed 5th July 2019].

Nicotra, I.A. (ed.) (2016). *L'Autorità Nazionale Anticorruzione. Tra Prevenzione e Attività Regolatoria*. Torino: Giappichelli.

Padovani, T. (2018). La spazzacorrotti. Riforma delle illusioni e illusioni della riforma. *Archivio penale*, 3, pp. 1–10.

Palazzo, F.C. (2016). Le norme penali contro la corruzione tra presupposti criminologici e finalità etico-sociali. In: R. Borsari, ed., *La corruzione a due anni dalla "Riforma Severino"*. Padova: Padova University Press, pp. 61–76.

Pasculli, L. (2019). Brexit, integrity and corruption: local and global challenges. In: L. Pasculli & N. Ryder, eds., *Corruption in the Global Era: Causes, Sources and Forms of Manifestation*. Abingdon: Routledge, pp. 212–232.

Pisa, P. (2014). Una sentenza equilibrata per un problema complesso. *Diritto Penale e Processo*, 5, pp. 568–571.

Pulitanò, D. (2012). La novella in materia di corruzione. *Cassazione penale*. Suppl. 11, p. 7.

Pulitanò, D. (2019a). Tempeste sul penale. Spazzacorrotti e altro. *Diritto Penale Contemporaneo*, 3, pp. 235–250.

Pulitanò, D. (2019b). Le cause di non punibilità dell'autore di corruzione e dell'infiltrato e la riforma dell'art. *4 bis*. *Diritto Penale e Processo*, 5, pp. 600–607.

Rivello, P.P. (2017). Concorso di reati e conflitto apparente di norme. Conflitti di giurisdizione. *Rassegna della giustizia militare*, 5, pp. 1–18.

Rugani, A. (2018). *I profili penali del Whistleblowing alla luce della L. 30 novembre 2017n. 179*. Available from: http://www.lalegislazionepenale.eu/wp-content/uploads/2018/06/Rugani-approfondimenti.pdf [Accessed 5th July].

Scevi, P. (2019). Riflessioni sul ricorso all'agente sotto copertura quale strumento di accertamento dei reati di corruzione. *Archivio Penale*, 1, pp. 1–17.

Seminara, S. (2014). Concussione e induzione indebita al vaglio delle Sezioni Unite. *Diritto penale e processo*, 5, pp. 563–568.

Seminara, S. (2017). Il gioco infinito: la riforma del reato di corruzione tra privati. *Diritto penale e processo*, 6, pp. 713–729.

Seminara, S. (2019). Indebita percezione di erogazioni, appropriazione indebita e corruzione privata. *Diritto Penale e Processo*, 5, pp. 593–599.

Severino, P. (2013). La nuova legge anticorruzione. *Diritto Penale e Processo*, 1, pp. 7–13.

Severino, P. (2016). Legalità, prevenzione e repressione nella lotta alla corruzione. *Archivio Penale*, 3, pp. 635–641.

Spena, A. (2015). Dalla punizione alla riparazione? Aspirazioni e limiti dell'ennesima riforma anticorruzione (l. 69/2015). *Studium Iuris*, 10, pp. 1115–1124.

Thüsing, G. & Forst, G. (eds.) (2016). *Whistleblowing: A Comparative study*. Dordrecht: Springer.

Turksen, U. (2018). The criminalisation and protection of whistleblowers in the EU's counter-financial crime framework. In: K. Ligeti & S. Stanislaw Tosza, eds., *White Collar Crime - A Comparative Perspective*. Oxford: Hart Publishing, pp. 331–366.

Venafro, E. (2018). Il nuovo reato di istigazione alla corruzione privata come fattispecie attenuata dell'art. 2635 c.c. Available from: http://www.lalegislazione penale.eu/wp-content/uploads/2018/10/Venafro-approfondimenti-LP-1.pdf [Accessed 5th July 2019]

Viganò, F. (2014). I delitti di corruzione nell'ordinamento italiano: qualche considerazione sulle riforme già fatte, e su quel che resta da fare. *Diritto Penale Contemporaneo*, 3/4, pp. 4–24.