Public Corruption in the Italian Legal System: Between Early Deflagration Offenses, a Low Determinacy Coefficient and Remaining Application Tensions

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Abstract

This paper takes as its starting point the analysis of a recent judgment of the Sixth Section of the Supreme Court on the subject of bribery and provides a reconstruction of the microsystem of the cases provided by the Italian legal system on the subject. It proposes a solution to overcome the application difficulties that have emerged in practice in delineating the boundary between functional bribery and corruption proper, configuring the outlines of a new framework more in line with the guarantees and principles of criminal law.

I. Introduction

A little more than thirty years after Tangentopoli, the issue of public corruption still remains in Italy as well as in Europe, of great topicality both from a political point of view (see, for example, the recent Belgian investigation into corruption in European institutions called in the media as *Qatargate,* which involved some Italian politicians) and from a purely legal point of view, which is the subject here.

Moreover, even though the sporadic interest in the subject has prompted the Italian legislature to intervene, within a few years, at least three times (2012, 2015, 2019) in a direct way on corruption offenses, even distorting the original structure of the Rocco Code, today there remain certain regulatory gaps to be filled. Many scholars have substantial doubts about the application of jurisprudence in the various cases that our current Penal Code provides in the field of public corruption.

Currently, the two articles of the Criminal Code dealing with bribery (Arts 318 and 319), following the Severino reform of 2012, are characterized in a relationship of 'speciality by specification', in the sense that Art 318 of the Criminal Code provides for a crime of danger that punishes the generic conduct of selling the public function, while conversely Art 319 of the Criminal Code provides for a crime of damage and requires a specific act contrary to the duties of office.

The rewriting of the provision is in line with the qualitative and criminological changes that has affected the corrupt phenomenon, thus aiming at the repression of the new and more serious forms of so-called systemic and 'subservient corruption'. In systemic corruption, in fact, there is a corruptive agreement which, far from

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relating to the trading of a single specific or identifiable office act, aims rather at creating a permanent commitment on the part of the public official, who makes available to the corruptor the generality of the acts proper to his function. The corruptive relationship is projected into a long-term perspective and is transformed into the commodification of public function or power.

The legislator thus represses the placing on the public official's payroll or the subservience of the public function, which until now was assumed in the case provided for in Art 319 of the Criminal Code, in the amended Art 318 of the Criminal Code, provided that the payments made are not related to the performance of one or more acts contrary to official duties. Thus, after the 2012 reform, there was a break in the synallagmatic relationship between the act of office and the acceptance of a promise and receipt of benefits by the public agent, which always characterised the two traditional forms of corruption in the Criminal Code: bribery for an act in conformity with the act and bribery for an act contrary to official duties.

This setting has not been peacefully accepted in recent years by the jurisprudence, which has operated, at least in an initial phase, a sort of counter-reform in its application, contrary to the *littera legis*.

The proposed analysis below first attempts to verify the state of the art in the field of public corruption and, then to propose a new arrangement of corruption offences within our legal system that may help to overcome the interpretative difficulties still emerging.

II. Supreme Court Returns to the Issue of Corruption for the Exercise of Function

The Sixth Section of the Supreme Court, for the reason mentioned above, recently returned to the issue of delimiting the scope of application between the two main corruption offenses provided for by the Italian legal system in Arts 318 and 319 of the Criminal Code: bribery for the exercise of function and so-called proper bribery for an act contrary to the duties of office.

It has ruled both on the correct interpretation of the notion of the 'official act' that the public official must undertake to perform, as consideration for the agreement with the private corrupting party, for the purposes of the configurability of bribery proper, and on the correct application of bribery cases in cases of stable subservience of the public official to private interests.

The subject has been several times the object of the attention of both doctrine and jurisprudence, which from the 1990s have tried to give an answer on the interpretative level to the relevant phenomenological changes[1] that have influenced

[1] The classical phenomenology of corruption has always been rooted in the individual pact (*pactum sceleris*) that was established between two subjects, an *extraneus* and an *intraneus* of the Public Administration, with an exchange - a real 'contract' - between act and utility as its object. On the 'phenomenological revolution' of corruption, which emerged particularly from the 1980s and

public corruption, to the repercussions of these on the normative datum and to the answers that the legislature has provided on the political-criminal level.

It is worthwhile, briefly, to recall the facts covered by this judgment.

The case brought to the Court's attention a corrupt affair involving a contractor and a mayor in the province of Potenza, which is part of the more famous media-judicial case known as '*Tempa* Rossa'.[2] This affair, as is well takes its name from the oil site at the center of the investigation by the Potenza Public Prosecutor's Office, which, starting in 2006, dealt with a system of corrupt facts concerning mainly the contracts necessary for the construction and upgrading of oil extraction facilities in the area.

The case under review, against the ruling of the Potenza Court of Appeals, was brought by the entrepreneur found guilty of the crime of bribery proper *under* Art 319 of the Criminal Code. and sentenced to a term of three years' imprisonment, in addition to accessory penalties and statutes in favor of the civil plaintiff, for having bribed the local politician with the aim of obtaining - through certain forms of undue pressure exerted by the first citizen on the managers of major oil companies operating in the municipal territory - subcontracts from multinational companies awarded the contract for the exploitation of the Tempa Rossa oil field.

From the judicial investigation, which concerns one of the 'strands' into which the investigation was divided, it emerged that this activity would have been the result of an agreement between the two individuals - one public and the other private citizen - concerning certain economic benefits, consisting in the employment in the corrupting entrepreneur's company of a number of people liked by the mayor, specifically identified, and in the giving of a monthly sum of money through the signing of a fictitious lease of a property owned by the public official's children (which in reality always remained at the owner's disposal).

According to the judgments of merit (on the basis of findings also coming

1990s of the last century, with the spread of so-called systemic corruption and with new forms of manifestation of the crime, leading to the most recent reforms on the subject, *ex plurimis*, see the work of G. Forti, 'Il volto di Medusa: la tangente come prezzo della paura', in Id ed, *Il prezzo della tangente. La corruzione come sistema a dieci anni da "mani pulite"* (Milano: Vita e Pensiero, 2003); G. Fiandaca, 'Esigenze e prospettive di riforma dei reati di corruzione e concussione' *Rivista italiana diritto e procedura penale*, 885 (2000); P. Davigo and G. Mannozzi, *La corruzione in Italia. Percezione sociale e controllo penale* (Bari: Laterza, 2008), 7; F. Cingari, 'La corruzione pubblica: trasformazioni fenomenologiche ed esigenze di riforma' *Diritto penale contemporaneo Rivista Trimestrale*, 79 (2012); M. Gambardella, 'Dall'atto alla funzione pubblica: la metamorfosi legislativa della corruzione "impropria" ' *Archivio penale*, 15 (2012). For a sociopolitical perspective, see the contributions of D. Della Porta, *Lo scambio occulto. Casi di corruzione in Italia* (Bologna: il Mulino, 1992); Id and A. Vannucci, *Corruzione politica e amministrazione pubblica. Risorse, meccanismi, attori* (Bologna: Il Mulino, 1994); A. Vannucci, *La corruzione nel sistema politico italiano a dieci anni da mani pulite*, in G. Forti, ed, *Il prezzo della tangente* above, 23.

[2] On the events related to the prosecutions of the 'Tempa Rossa' case refer to M. Gambardella, 'Corruzione, millantato credito e traffico di influenze nel caso "Tempa Rossa": una debole tutela legislative' *Cassazione penale*, 3597 (2016); M.C. Ubiali, 'I rapporti tra corruzione ex art. 319 c.p., traffico d'influenze illecite e millantato credito nella prima pronuncia della Cassazione sulla vicenda "Tempa Rossa" ' *Diritto penale contemporaneo*, 20 June 2016.

from telephone intercepts) the public official, as a quid pro quo for the corrupt agreement - especially through implicit threats – would have carried out conduct materialized, subsequently, in activities of illicit conditioning and influence towards the entrepreneurs of the 'Tempa Rossa' Oil Center, already the subject of separate trial for the crime of extortion.

On closer inspection, the main issues before the Supreme Court in this case related to the need to correctly qualify the crime in addition to the need identify both the consummation moment of the crime and the public act being commodified.

In relation to the consummation of the crime, the Court reiterated regarding of antecedent bribery, that

> 'the performance of the act by the public official is not part of the structure of the crime and does not even play a role in determining the moment of consummation'.

In fact, it is irrelevant - for the purpose of the integration of the case - that the act is actually performed, since bribery

> 'is a two-pronged crime in the sense that it is perfected alternately with the acceptance of the promise or with the giving of the utility in exchange for the mercy or a specific act to the contrary'.

The Supreme Court, therefore, had to intervene to ascertain whether the conduct engaged in by the subjects integrated, as established in the first two levels of the trial court, the more serious crime of bribery proper under Art 319 of the Criminal Code or whether, instead, it was necessary to requalify the act and bring it back into the sphere of functional bribery, which is punished less severely by Art 318 of the Criminal Code.

The judges of legitimacy rejecting part of the grievances put forward by the defense that aimed to exclude *in toto* the nexus of correspondence between the private party's promises and donations and the public official's activity. Instead, on the basis of a temporal *hiatus* defined as extremely relevant between the two conducts, the judges departed from the approach of other previous jurisprudence, and established the need to bring the fact, as requested by the appellant, back into the more suitable framework of the case of corruption for the exercise of function.

The judges justify this derubrication by agreeing with the reinterpretation of bribery 'for subservience' according to which they now consider outdated

> 'the approach that, starting from the assumption that the contrary act of office, the object of commodification, can include any behavior detrimental to the duties of loyalty impartiality and honesty that must be observed by anyone exercising a public function, has arrived at the affirmation that configures the crime of bribery for an act contrary to the duties of office - and not the milder crime of bribery for the exercise of the function referred to in Art 318 of the

> Criminal Code - the stable subservience of the public official to the personal interests of third parties, which results in acts, which, although formally legitimate, insofar as they are discretionary and not strictly predetermined in an, when or *quomodo*, conform to the objective of realizing the interest of the private party in the context of a logic globally oriented to the realization of interests other than institutional ones'.

In the case at hand, on closer inspection, the judges found the agreement between the corrupt and the corruptor did not have as its object the performance of a specific administrative act falling within the competence of the mayor, but only a generic placing at the disposal or on the payroll of the public agent, which- as reconstructed by the court proceedings on the merits-had not translated into the performance of concrete acts of the office.

The Court, following up on an already established jurisprudential orientation, reiterated how stable subservience to the function, in cases where it does not result in acts contrary to the duties of the office, should be brought under the provision of Art 318 of the Criminal Code as amended by legge no 190 of 2012.

The ruling, therefore, makes it possible to review the differences between the offenses in question and, considering the interpretative difficulties still prevalent in enforcement practice today, to propose a reformulation of the entire system of corruption offenses that could overcome the jurisprudential contrasts and define, with greater clarity, the boundaries between the different types of public corruption.

III. A Step Back: The Microsystem of Public Corruption Offenses After the Reform Season (Brief Overview)

The microsystem of public corruption offenses,[3] provided for by the system within Title II of the Second Book of the Penal Code, has been reformed on several occasions in recent years, both (1) to address needs of a phenomenological nature, relating to the new ways of manifesting corrupt conduct that have emerged mainly since the Tangentopoli investigation and 'refined' in subsequent years, as well as to meet Italy's covenant commitments at the international level,[4] and (2) to

[3] For a historical-normative reconstruction of the system of corruption offenses in Italy, may we refer to A. Milone, *Corruzione pubblica e diritto penale. La crisi dei principi tra Italia e Stati Uniti* (Napoli: Edizioni Scientifiche Italiane, 2023). See also, recently, G. Furciniti, *Il sistema penale anticorruzione* (Napoli: Edizioni Scientifiche Italiane, 2022); G. Stampanoni Bassi ed, *La corruzione, le corruzioni* (Milano: Wolters Kluwer, 2022).

[4] On the international legislation on corruption, *ex plurimis*, see L. Salazar, 'Recenti sviluppi internazionali nella lotta alla corruzione (… e conseguenti obblighi di recepimento da parte italiana)' *Cassazione penale*, 1529 (1998); Id, 'Strumenti più efficaci per reprimere la corruzione e le frodi comunitarie' *Diritto e giustizia*, 10 (2000); S. Manacorda, *La corruzione internazionale del pubblico agente* (Napoli: Jovene, 1999); C.R. Calderone, 'La lotta alla corruzione in campo comunitario ed internazionale' *Rivista trimestrale diritto penale dell'economia*, 607 (2001); F. Palazzo, 'Kriminologische und Juristiche Aspekte der offentlichen Korruption', in *Festschrift fur Klaus Volk*

provide the institutions in charge of combating the phenomenon with an anti-corruption armamentarium that could guarantee greater effectiveness both in terms of prevention and repression.

It is useful to check the regulatory 'state of the art' in the field of public corruption following the three main reforming interventions in recent years, legge no 190 of 2012, legge no 69 of 2015 and legge no 3 of 2019 (the so-called 'Spazzacorrotti' law), dwelling here only on the aspects related to the cases under observation.

The legislature, as anticipated, intervened in 2012, with the so-called Severino reform,[5] partially abandoning the model of typification of bribery offenses, defined as 'mercantile', adopted by the Rocco Code, which - based on the illicit buying and selling of a public act - provided for the differentiation between improper bribery (an act of office in accordance with official duties: Art 318 of the Criminal Code) and proper bribery (an act contrary to official duties: Art 319 of the Criminal Code). The most obvious result of the novelty was, within the scope of bribery offenses, the inclusion of bribery for the exercise of a function in Art 318 of the Criminal Code in the *corpus of* corrupt offenses.[6]

Until the reformatory intervention under consideration, bribery, in all its forms, required not only the necessary concurrence of two parties, but also the identification of a specific act, conforming to or contrary to the duties of office, as the object of the corruptor's giving or promising. The figures of corruption described by the Rocco Code were centered on the so-called 'mercantile model' within which the act of bribery represented the core of the cases.

With the transformation of corruption from an episodic to a systemic phenomenon,[7] the rigid notion of 'act of office',[8] however, over time, has

(Munchen: C.H. Beck, 2009), 535; V. Mongillo, *La corruzione tra sfera interna e dimensione internazionale* (Napoli: Edizioni Scientifiche Italiane, 2012).

[5] On the anti-corruption reform desired in 2012, during the technical government headed by Mario Monti, by former Justice Minister Paola Severino, see eg the contributions by E. Dolcini and F. Viganò, 'Sulla riforma in cantiere dei delitti di corruzione' *Diritto penale contemporaneo Rivista trimestrale*, 232 (2012); F. Palazzo, 'Gli effetti "preterintenzionali" delle nuove norme penali contro la corruzione', in B.G. Mattarella and M. Pelissero eds, *La legge anticorruzione. Prevenzione e repressione della corruzione* (Torino: Giappichelli, 2013), 1; D. Brunelli, 'La riforma dei reati di corruzione nell'epoca della precarietà' *Archivio penale*, 59 (2013).

[6] The following is the text of Art 318 of the Criminal Code currently in force: 'A public official, who, in the exercise of his functions or powers, unduly receives, for himself or a third party, money or other benefits, or accepts the promise thereof, shall be punished by imprisonment from three to eight years'.

[7] On the transformation of corruption from the 'bureaucratic' type, in which the administrative act is the object of commodification, to 'business corruption', in which stable relationships that act on the entire administrative function predominate, see F. Palazzo, 'Le norme penali contro la corruzione tra presupposti criminologici e finalità etico-sociali' *Cassazione penale*, 3389 (2015); A. Spena, *Il «turpe mercato». Teoria e riforma dei delitti di corruzione pubblica* (Milano: Giuffré, 2003).

[8] On the criminalistic notion of 'act of office' see the contributions of M. Romano, 'Fatto di corruzione e atto discrezionale del pubblico ufficiale' *Rivista italiana diritto e procedura penale*, 1314 (1967); G. Vassalli, 'Corruzione propria e corruzione impropria' *Giustizia penale*, 305 (1979); C.F. Grosso, 'Corruzione' *Digesto delle Discipline Penalistiche* (Torino: UTET, 1989); M. Pelissero, 'La nozione di atto d'ufficio nel delitto di corruzione tra prassi e teoria' *Diritto penale e processo*, 1011

undergone a long process of erosion or dilation of its content by the jurisprudence[9] which, with the aim of responding to the need to effectively repress the phenomenon, has gradually reduced its centrality.[10]

It should be preliminarily noted that the criminal concept of an official act is broader than that used in administrative law, in that the criminal legislature refers not only to the act understood in the strict sense but to the overall administrative activity carried out by a Public Administration entrusted with powers to manage public interests. Over time, therefore, two alternative approaches to the interpretation of the reference (to the act) contained in legal provisions have been consolidated and stratified in case law.

The first orientation[11] held that the act of office that was the object of remuneration should be identified in its content or kind, even in cases where there was a plurality of acts. However, such a view ended up considerably restricting the possibilities of incriminating certain conduct, bringing it back into the sphere of corrupt acts. As a result, there was a strong push to overcome this approach - the result of the so-called mercantile model - in order to allow for evidentiary simplification at trial.

Thus, as early as the 1990s, a second - more flexible - direction[12] developed,

(2000); V. Manes, 'L'atto di ufficio nelle fattispecie di corruzione' *Rivista italiana diritto procedura penale*, 924 (2000); E. Amati, 'Sulla necessità di individuare un atto specifico e determinato nei delitti di corruzione' *Foro ambrosiano*, 1 (2001).

[9] The so-called criminal jurisprudential law is not a novelty circumscribed only to the subject of corruption and in particular of corruption by subservience, the result of an elaboration built in the courts, but rather it is a constant, with respect to the evolution of Italian criminal law, which has touched numerous fields of criminal protection (for example, from external complicity in mafia association to the so-called environmental concussion), especially the so-called emergency one, where - in the absence of effective legislation or repressive norms - the supplance of the judicial power has intervened. See *ex plurimis*, M. Donini, 'Il diritto giurisprudenziale penale. Collisioni vere e apparenti con la legalità e sanzioni dell'illecito interpretativo' *Diritto penale contemporaneo Rivista trimestrale*, 22 (2016); F. Palazzo, 'Legalità fra law in the books e law in action' *Diritto penale contemporaneo Rivista trimestrale*, 4 (2016).

[10] The tendency of the practice to valorize proper corruption is recalled by G. Fidelbo, 'La corruzione "funzionale" e il contrastato rapporto con la corruzione propria' *Giustizia insieme*, 14 May 2020, according to whom 'the path of jurisprudence in this matter is well known and can be summarized in what has been effectively defined as a progressive 'dematerialization of the element of the act of office', a path that determined the 2012 legislature to intervene on art. 318 c.p.' See also P. Severino, 'La nuova legge anticorruzione' *Diritto penale e processo*, 7 (2013).

[11] See, eg, Corte di Cassazione 16 October 1997, *Giurisprudenza italiana*, 212 (1998), with a note by Ronco; Corte di Cassazione 2 September 1996, *Rivista penale*, 336 (1997); Corte di Cassazione 17 February 1996 no 204440; expressly in the sense of denying the configurability of the crime where it is not possible to ascertain the nature and content of the act that the public official should have performed.

[12] See, eg, Corte di Cassazione 7 March 1997, *Rivista penale*, 576 (1997); Corte di Cassazione 5 March 1996 no 205076. In doctrine, see the critical considerations of V. Manes, n 8 above, 924; Id, 'La "frontiera scomparsa": logica della prova e distinzione tra corruzione propria e impropria', in G. Fornasari and N.D. Luisi eds, *La corruzione: profili storici, attuali, europei e sovranazionale* (Padova: CEDAM, 2003), who already wrote: 'in the typical domain of case elements, on the other hand, in our opinion, the typicality heritage proper to corruption cases, marked, in the discipline of the Italian

which, taking its cue from the so-called clientelistic model of typification, ended up affirming that the failure to concretely identify an act does not affect the incrimination for bribery, in cases where the service was agreed upon by reason of the functions held by the public agent.

In essence, well before Severino's reforming intervention, the notion of an act of office had undergone - in enforcement practice - a "progressive rarefaction"[13] because, according to the Court, for the existence of the crime of bribery proper, the act did not necessarily have to be identified in concrete terms.

This was a new vision that, denouncing the inadequacy of the Rocco Code model with respect to the strong changes that had emerged in the criminological reality, starting precisely with Mani Pulite, had tried to affect corrupt offenses with the introduction of the concept of subservience to the function,[14] redrawing the acceptable application of the rules in force through a forcing of the literal datum, thus creating a clear break between the norm and jurisprudential application.

After a long process of interpretation and applicative extension of the norms, jurisprudential doctrine, however, had brought this new hypothesis of enslavement under the umbrella of bribery proper *under* Art 319 of the Criminal Code. For the Supreme Court, therefore, the identification of the act was no longer necessary, as it was only necessary to ascertain the finalistic link and the connection between the utility granted or promised and the public function completely enslaved to the illicit purposes of the private individual.[15] This broadening of the notion of an

code, by two fundamental junctures, must be preserved with every care: - the necessary linking of the case in question to an official act, falling within the competence of the agent; - the distinction between proper and improper corruption, with the necessarily autonomous consideration of corruption in discretionary acts, referable, as the case may be, to one or the other hypothesis'.

[13] Thus, M. Pelissero, 'I delitti di corruzione', in C.F. Grosso and M. Pelissero eds, *I reati contro la pubblica amministrazione* (Milano: Giuffrè, 2015), 287.

[14] The current formulation of bribery for the exercise of the function of Art 318 of the Criminal Code finds, therefore, its own 'predecessor' in the jurisprudential creation of the so-called bribery by subservience or payroll entry, which was determined in the hypotheses in which the public agent was systematically paid by the private party for the future realization of acts or for the influence that - *one-off* - served within the administration for the management of the illicit activities of the private 'employer'. Specifically, in the so-called payroll entry, the public entity periodically receives undue consideration regardless of the realization of an official act, granting the private party its willingness to act - in the most heterogeneous ways - where the need arises. This is behavior - on closer inspection - that is particularly serious, but which can hardly be traced under the typical scheme of corrupt *quid pro quo* and which has been included in it only by a decidedly extensive interpretation operation of jurisprudence. See on the subject H.J. Woodcock, 'La corruzione per asservimento', in P. Davigo et al eds, *Corruzione e illegalità nella pubblica amministrazione*, (Roma: Aracne, 2012); S. Massi, 'Atto vincolato, atto discrezionale e "asservimento" del pubblico agente nella struttura della corruzione propria' *Diritto penale dell'economia*, 271 (2003).

[15] 'On the subject of bribery proper, it is not necessary to identify the specific act contrary to the duties of office when, as in the present case, the public official, in exchange for money or other benefits, subjugates the function to the interests of the private individual, since in this way the dutiful function of control that the public official is entrusted with is thwarted, thereby integrating the violation of the duties of loyalty, impartiality and exclusive pursuit of public interests that are incumbent on the same (...) That it is corruption proper is derived from symptomatic indices of the

act had meant that the crime of bribery proper was also applied to conduct directed at giving money or utilities to public officials with a view to influencing future and eventual acts (and suitable for realizing, in the first instance, a fiduciary link between the two parties involved in the pact). In this way, it was jurisprudential law, through these new forms of corruption in 'future memory',' that brought about the painful shift from the centrality of the act to the function.

Despite the internal fibrillations within the jurisprudential formant, the regulatory framework on the subject, still strongly anchored to the mercantile model of corruption, remained substantially unchanged until 2012, when the Severino law, posing the issue of adapting domestic legislation to international requirements, carried out a more comprehensive reform of crimes against P.A, consecrating the effective crisis of the 'act-centric' corrupt model both through the reformulation of Art 318 of the Criminal Code and through the introduction of the case of corruption for the exercise of function.

Art 1, para 75, letter *f* of legge 190 of 1012, in reformulating Art 318 of the Criminal Code, merged the so-called improper bribery in compliance with official duties into the new, broader case of 'bribery for the exercise of the function',' punished in a more serious way than bribery for a contrary act, which remained structurally unchanged in Art 319 of the Criminal Code with limited changes that affected only in terms of tightening of sanctions.

With this choice, the 2012 legislature, by reaffirming the prevalence of the principle of legality, tried to heal that rift that had matured in jurisprudential practice, which had created the figure of bribery in future memory or 'on the payroll' of the private individual, and attempted to overcome the inadequacy of the Italian repressive system, which until then had been incapable of effectively curbing the corruptive phenomenon that, on the phenomenological level, as mentioned above, had changed its *modus operandi*.

The purpose of the novelty was to give relevance to a phenomenon - that of public officials being paid in view of their generic availability - which is widespread, serious for the democratic system and still not referable to any incriminating case, except through the work of 'creative' interpretation of jurisprudence in the courtroom. The rule, in effect, no longer reports the link to a specific act, overcomes the distinction between antecedent and subsequent bribery and, eliminating the reference to the private party's performance as remuneration, refers to the more generic phrase 'money or other utility'.

On the criminal policy level, this new criminal type seems to have met the needs of recomposing the discord between 'living law' and normative data, meeting the need to respond to social changes. Although the new norm has given legislative coverage to serious conduct that takes the form of subjugating the

existence of the corrupt pact given by the payment of private benefits of various kinds', thus the Supreme Court of Cassation explains the theory of subservience of the function in Corte di Cassazione 26 February 2007 no 21192, *Cassazione penale*, 1408 (2008).

public function to private interests, it should be noted that, on the level of compliance with the principle of legality, its wording raises some concerns, which we will account for in the following section.

The crime, transformed, according to some, into a 'crime of danger', by virtue of a marked anticipation of the criminal protection of the legal asset, is difficult to contain in its expansive force, having been constructed with the aim of having to 'hit' agglomerations of corrupt interests that resort to sophisticated and innovative techniques.

The choice, made by the Severino reform, to partially abandon the traditional link of the case to the presence of the official act and to replace it with the functions or powers of the public official, has marked, undoubtedly, not only a fundamental step in the evolution of this crime but also - on the level of the criminal matter - an important innovation on the side of the protected legal good, which has seen the rarefying of the strict connection of the crime to the classical model of protection relating to the good performance and impartiality of the PA[16]

Only three years later, legge 27 May 2015 no 69, made a further intervention in the area of crimes against the Public Administration. Although this intervention did not produce significant changes on the substantive level, it both toughened, for the second time in a few years, the prison sentences for corruption offenses, and for the introduction in Art 322-quater of the Criminal Code of a hypothesis of pecuniary reparation owed to the PA by the corrupt public official, and it included Art 323-*bis* of the Criminal Code, para 2, which provides for a decrease in punishment from one-third to two-thirds for the offender who decides, under certain conditions and after the commission of the crime, to cooperate with the judicial authority.

The latest relevant intervention on public corruption is the Bonafede Reform Law[17] (legge 9 January 2019 no 3 named after the proposing Minister of Justice

[16] F. Cingari, 'La corruzione per l'esercizio della funzione', in B.G. Mattarella and M. Pelissero eds, n 5 above, 406, according to which 'the choice to decouple the corrupt pact from the act of office radically breaks with tradition by affecting the characters of the current model of criminal protection, contributing (...) to shift the center of gravity of the protection increasingly from the 'act' to the 'pact' and from the more solid good of the good performance of public administration to the less graspable good of trust in the loyalty and dignity of the public apparatus'.

[17] On the reform, *ex plurimis*, R. Cantone, 'Ddl Bonafede: rischi ed opportunità per la lotta alla corruzione' *Giurisprudenza penale web*, 1 (2018); A. De Vita, 'La nuova legge anticorruzione e la suggestione salvifica del Grande Inquisitore. Profili sostanziali della l. 9 gennaio 2019, n. 3' *Processo penale e giustizia,* 947 (2019); in a critical sense see also the considerations of A. Gaito and A. Manna, 'L'estate sta finendo ...' *Archivio penale*, 3, (2018); G. Flora, 'La nuova riforma dei delitti di corruzione: verso la corruzione del sistema penale?', in Id and A. Marandola eds, *La nuova disciplina dei delitti di corruzione. Profili penali e processuali*, (Firenze: Pacini Giuridica, 2019), 3; M. Gambardella, 'Il grande assente nella nuova "legge spazzacorrotti": il microsistema delle fattispecie di corruzione' *Cassazione penale*, 44 (2019); M. Mantovani, 'Il rafforzamento del contrasto alla corruzione' *Diritto penale e processo*, 608 (2019); N. Pisani, 'Il disegno di legge "spazzacorrotti": solo ombre' *Cassazione penale*, 3589-3592 (2018); T. Padovani, 'La spazzacorrotti. Riforma delle illusioni e illusioni della riforma' *Archivio penale web*, 577 (2018); A. Camon, 'Disegno di legge spazzacorrotti e processo penale. Osservazioni a prima lettura' *Archivio penale web*, 799 (2018); D. Pulitanò, 'Tempeste sul penale. Spazzacorrotti ed altro' *Diritto penale contemporaneo Rivista trimestrale*, 235 (2019).

in office during the Conte I government), which - in the wake of a social perception particularly sensitive to the issue of corruption and by virtue of a changed political-criminal approach to the phenomenon - radically reversed the course of the 2012 legislature, which was also concerned with preventing risk of corruption, thus increasingly pushing anti-corruption law towards the shores of emergency criminal law.[18] This fully realized the tendency to unite anti-corruption legislation with legislation on mafia-type organized crime and counterterrorism.[19]

The Bonafede measure,[20] in short, inspired by a vision of criminal law as a fighting tool,[21] responded to social demand by creating even tougher regulatory schemes than those already used for the repression of ordinary crime. It, on closer inspection, does not affect the structure of corruption offenses and mostly focuses its attention toward the institutes of the cause of non-punishability, undercover operations, the statute of limitations and finally on the subject of accessory penalties, without forgetting the investigative novelties introduced on the subject of the use of computer capturers, the so-called *trojan* viruses, and on the penitentiary level, the inclusion of certain offenses in the so-called anti-mafia double track.

Regarding bribery offenses, the only major substantive change was the upward adjustment of the prison sentence for the crime of bribery for the exercise of function, which had already been amended only four years earlier by the aforementioned legge no 69 of 2015, motivated by the need to be able to allow the use of pre-trial detention for this crime as well.[22] To this day, the crime of so-called functional

[18] On the relationship between criminal policies, emergency legislation and fundamental rights, with particular reference to antiterrorism and antimafia disciplines see, G. Riccio, *Politica penale dell'emergenza e Costituzione* (Napoli: Edizioni Scientifiche Italiane, 1982); S. Moccia, *La perenne emergenza. Tendenze autoritaria nel sistema penale*, (Napoli: Edizioni Scientifiche Italiane, 2000); G. Fiandaca, 'Criminalità organizzata e controllo penale' *Indice penale*, 19 (1991); A. Cavaliere, 'I reati associativi tra teoria, prassi e prospettive di riforma', in G. Fiandaca and C. Visconti eds, *Scenari di mafia,* (Torino: Giappichelli, 2010).

[19] See, for example, G. Spangher, 'L'anticorruzione "imita" il modello crimine organizzato' *Guida al diritto*, 7, 6 (2010). Similarly, on the tendency to assimilate mafia-type organized crime and administrative crime see, more recently, also G. Di Vetta, 'L'assimilazione tra corruzione e criminalità organizzata nel declino della categoria del white-collar crime' *Studi sulla questione criminale*, 31 (2020); A. Mattarella, 'Il contrasto alla corruzione nelle fonti internazionali ed il rapporto tra mafia e metodo corruttivo nell'ordinamento italiano' *Sistema penale*, 5(2022).

[20] For a concise review of the measure's contents, see F. Rippa, 'Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in materia di prescrizione del reato e in materia trasparenza dei partiti e movimenti politici' *Processo penale e giustizia*, 292 (2019). On the extra-criminal measures of the Bonafede reform, see M.C. Ubiali, 'Le disposizioni extra-penali della legge cd. spazza-corrotti: trasparenza e finanziamento dei partiti politici e norme sulla regolamentazione delle fondazioni' *Diritto penale contemporaneo*, 21 January 2019.

[21] On the political use of criminal law E. Dolcini, 'La pena ai tempi del diritto penale illiberale' *Diritto penale contemporaneo*, 1 (2019). While on the relationship between criminal policy and law, it remains a point of reference C. Roxin, *Politica criminale e sistema penale. Saggi di teoria del reato* (Napoli: Edizioni Scientifiche Italiane, 1991).

[22] On the issue of the instrumentalization of substantive norms for procedural purposes, ie, the tendency whereby incriminating cases are constantly enslaved to evidentiary needs or configured directly by the legislature on the basis of such needs, see the still relevant reflections of T. Padovani,

bribery is punishable by imprisonment of three to eight years.

The penalty aggravation for the crime *under* Art 318 of the Criminal Code responds to the need - left unmet by legge no 190 of 2012 - to harmonize (in this case upward) the overall penalty levels among the various corruption crimes. The Bonafede reform, in this sense, responds to the demand that has emerged from the jurisprudence of wanting to equip functional corruption with a system of penalties appropriate to the seriousness of the behavior it describes, namely the overall commodification of public function. In a sense, it was intended to provide a response to the orientation of legitimacy which, as we shall see below - not caring about the legislative intervention of 2012 - had continued to bring back into the area of Art 319 of the Criminal Code so much conduct that, according to the new *littera legis,* should have been framed under Art 318 of the Criminal Code.

IV. The Internal Boundary Between Functional Corruption and Proper Corruption in the Jurisprudence of Legitimacy

Coming, now, to the central theme of our analysis, the Supreme Court has returned to the need to mark an exact line between functional corruption and proper corruption, especially in cases where the corrupt dynamic lacks specific reference to the act of office, in order to once again provide clarity.

The 2012 legislature's choice to read the disvalue of the *pactum sceleris* by centering it on the functional profile of public activity would seem to suggest that - in all cases in which there is no explicit reference to specific acts contrary to official

'La disintegzione del sistema sanzionatorio e le prospettive di riforma: il problema della comminatoria edittale' *Rivista italiana diritto e procedura penale*, 419 (1992), who points out that when 'the stage of the dumb servant was succeeded by that of the talkative servant (...) the criminal process began to constitute a problem for criminal law and its punitive instances' (ibid 431). When the trial became an 'equal partner (...) the cycle of legal production (settled) permanently within the trial' (ibid 433): '(...) the conceptual moment from which criminal law expresses itself as law is the historical moment in which the process activates its mechanisms; and in their dynamics it is criminal law that presents itself as the 'instrument' of the criminal process, within the scope of which the object of the investigation is identified and specified and the sanctioning consequences are determined' (ibid 434). Finally, when special judgments are established ('plea bargaining, abbreviated proceedings, proceedings by decree'), which in themselves 'have a very strong substantive repercussion (...)', the trial, 'directly intervening on the substantive institutions' from 'equal partner' becomes 'tyrant partner' (ibid 435-436). As well, T. Padovani, 'Il crepuscolo della legalità nel processo penale. Riflessioni antistoriche sulle dimensioni processuali della legalità penale' *Indice pen*ale, 527 (1999); G. Lunghini, 'Problemi probatori e diritto penale sostanziale. Un'introduzione', in E. Dolcini and C.E. Paliero eds, *Studi in onore di G. Marinucci* (Milano: Giuffrè, 2006), 409, who at the beginning of his work speaks of the 'shaping function of substantive criminal law performed by evidence problems'. Recently, on the subject of the 'processualization' of criminal law, see, V. Garofoli, 'Il servo muto e il socio tiranno: evoluzione ed involuzione nei rapporti tra diritto penale e processo' *Diritto penale e processo*, 1457 (2004); F. Ruggieri, 'Processo e sistema sanzionatorio: alla ricerca di una "nuova" relazione' *Diritto penale contemporaneo Rivista trimestrale*, 89 (2017), who recalls how 'jurisprudence when the facts (...) do not meet the needs of ascertainment, allows itself exegesis to the uncertain boundaries of the prohibition of analogy, in defiance of the principle of legality'.

duties - bribery should always be framed in the new Art 318 of the Criminal Code: both in cases of bribery for the exercise of the function and in those in which the conduct integrates an act that would have fallen under the old improper bribery for an act in accordance with official duties. It would be decidedly reductive to read the new Art 318 of the Criminal Code as a corruption limited only to cases of trading in functions in accordance with official duties. This approach would betray the turning point made by the Severino Law, ending up relegating Art 318 of the Criminal Code to entirely marginal cases of corruption, in some cases even irrelevant in terms of offensiveness.[23]

Therefore, while initially the two rules on bribery stood on a level of absolute bilaterality and distinguished themselves in relation to the seriousness of the behavior, with the 2012 amendment we could say that Art 318 of the Criminal Code takes on the role of a general rule with respect to Artt 319 and 319-*ter* of the Criminal Code.[24]

The judges breaking of the symmetry and their binary reference to the legitimate or illegitimate act of office on which the balance between the various corruption offenses had always been based, is important because of the consequences for the regulation of the succession of criminal laws over time and the correct *actio finium regundorum* between the new criminal cases: the absence of the reference to the act only in bribery for the exercise of the function, and its simultaneous presence in bribery proper, generated - as we shall see below - the question regarding the correct use of the two norms in application with respect to the concrete conduct taken into consideration from time to time.

According to a strict reading of the new literal normative datum, the novel change regarding the disappearance of the element of the act of office in the general provision would make it absolutely necessary to identify the act in cases of corruption proper.

Nonetheless, to a large part of the jurisprudence following the Severino reform, the overall punitive treatment provided by the new law (from 1 to 5 years), on which - as we have seen - the Bonafede reform also intervened later (raising the sentencing range from 3 to 8 years' imprisonment), did not seem suitable. Because - while it is true that the new Art 318 of the Criminal Code can also include the old conduct of improper bribery for acts in accordance with official duties - the disvalue of the sale of the entire public function, repeated over time, on closer inspection, cannot be placed on a very different treatment level from the sale of a single act contrary to official duties (Art 319 of the Criminal Code provides for imprisonment from 6 to 10 years). Moreover, the punishability of functional bribery was precisely the main reason that prompted the 2012 legislature to intervene in

[23] On this point see G. Amato, 'Corruzione: si punisce il mercimonio della funzione' *Guida al diritto*, 48 (2012); A. Gargani, 'La riformulazione dell'art. 318 c.p.: la corruzione per l'esercizio della funzione' *Legislazione penale*, 611 (2013).

[24] See M. Gambardella, 'Profili di diritto intertemporale della nuova corruzione per l'esercizio della funzione' *Cassazione penale*, 3857 (2013).

the area of criminal bribery.

For this reason, with respect to this new, wholly *sui generis* sanction structure, in the years following the law's enactment, a prevailing orientation of the Supreme Court[25] - now decisively superseded by more cautious jurisprudence - has not fully accepted and internalized the scheme of allocation of conduct between Arts 318 and 319 of the Criminal Code, as outlined earlier.

In fact, the Supreme Court on several occasions,[26] - disregarding the *voluntas legis*, ie, the obvious choice of the legislature that had tried to mend the rift created in the matter between positive datum and jurisprudential formant - showing itself unwilling to repudiate its initial approach, has shown itself to be opposed to the reconduction of all cases of functional corruption within the new case, by virtue of the consolidated orientation that already framed in the case of corruption proper *under* Art 319 of the Criminal Code the subjugation of public functions aimed at the performance of acts contrary to official duties.

According to this interpretative guideline, the stable subservience of the public official must be brought under the umbrella of corruption proper if systematic recourse to acts contrary to official duties, even if not predefined or identifiable *ex post facto*, or omissions or delays in due acts, is found.[27]

For post-reform jurisprudence, therefore, the new Art 318 of the Criminal Code would retain a subsidiary and general character with respect to all conduct that would otherwise not fall under the umbrella of bribery proper: subjugation of the function, for the Court, is an exceptionally serious act not to be included in Art 319 of the Criminal Code.

[25] On the jurisprudential evolution after the Severino reform, see A. Gargani, 'Le fattispecie di corruzione tra riforma legislativa e diritto vivente: il sentiero interrotto della tipicità del fatto' *Diritto penale e processo*, 1029 (2014) who points out how the jurisprudence following legge no 190 of 2012 sterilized the reform itself while maintaining the orientation that brought corruption for the exercise of function under the paradigm of Art 319 of the Criminal Code; cf F. Rippa, 'La corruzione per l'esercizio della funzione tra rilievi sistematici e primi assestamenti della prassi' *Nel Diritto*, 299 (2015) who expresses his criticism of the counter-reform work of the post-Severino jurisprudential formant.

[26] 'The stable subservience of the public official to the personal interests of third parties through the systematic use of acts contrary to the duties of office that are neither predefined nor specifically identifiable *ex post facto* configures the crime under Art 319 of the Criminal Code, and not the milder crime of bribery for the exercise of function under Art 318 of the Criminal Code. Cf Corte di Cassazione 15 October 2013 no 9883, *Cassazione penale*, 2442 (2014), with note by G. Stampanoni Bassi, 2447. See also, the note to Corte di Cassazione 20 October 2016 no 3606, with note by G. Marra, 'Lo stabile asservimento del pubblico ufficiale agli interessi dei privati integra la fattispecie della corruzione cd. Propria' *ilpenalista.it*, 17 February 2017, which recalls how 'the Supreme Court has (...) concluded that the crime of bribery for an act contrary to the duties of office is committed when the stable subservience of the public official has also resulted in the performance, for the benefit of the private party, of one or more acts that are formally legitimate, but not strictly predetermined in the *an*, *when* or in the *quomodo*'. For the author, 'the Supreme Court with this ruling has (...) reiterated a now well-established line of jurisprudence, according to which the revised Art 318 of the Criminal Code, rubricated with the title bribery for the exercise of the function, would find application only for those residual situations in which the sale of the function has as its object with certainty one or more acts of the office, or the finalism of the public official's mercy is not known'.

[27] See Corte di Cassazione 28 February 2014 no 9883, in www.dejure.it.

We could see - according to the logic espoused by this orientation - cases in which the conduct of a public official who commits a single act contrary to the duties of office is punished with a rather hefty penalty, while the conduct of a public servant who stably sells his function and powers in the service of private interests for a prolonged period of time is punished with a much milder treatment.[28] The risk of unequal treatment between those who commit a single act contrary to their official duties and those who stably serve on the *payroll* seems obvious, yet the solution put forward by this line of jurisprudence does not seem fully satisfactory. On this point, an attempt will be made in the proposal to provide an alternative *de jure condendo* solution.

In this view, on the basis of a purely jurisprudential approach - oriented primarily toward repressive and evidentiary needs and contested by a large part of the doctrine - whenever, in the context of bribery by stable servitude, the act is identifiable even only by *genus* at the time of the agreement and both parties to the agreement are aware of the contrary to official duties of future activities, the conduct must be configured within the perimeter of bribery proper.

The possibility that bribery by subservience - in cases where the contrary act is identified - may fall within the scope of bribery proper *under* Art 319 of the Criminal Code, does not pose relevant problems, although the identification of the act is not always easy, since in Art 318 of the Criminal Code the stable remuneration of a public subject represents a mode of realization of the typical case, while more complex are the cases in which, even in the presence of the stable enslavement of the public agent, it is not possible to determine with certainty the specific act that is the object of commodification.

The approach that intends to bring this hypothesis, too, within the scope of proper bribery would end up defeating the reform intended by the legislature, relegating to the margins the scope of application of Art 318 of the Criminal Code, which, instead, assigned the functional element of bribery a key and central role in the new system, albeit punished (erroneously) less severely than in Art 319 of the Criminal Code.

While, in principle, the remarks made by the aforementioned case law on the subject of sanction dosimetry seem sharable, since bribery by subservience is indeed much more detrimental to the proper functioning of the PA than the commodification of the individual contrary act, the 'counter-reform' made by this orientation of the Court does not appear to be in line with the principle of taxativity of criminal law.

What is more, today, as a result of the 2019 legislative intervention, the penalty levels of the two corruption offenses are almost homogeneous, and equally serious, so that it may no longer be justifiable to bring many functional corruption behaviors

[28] L. Furno, 'Riflessioni a margine di Sez. VI, n. 4486/2018, nel prisma della recente legge c.d. spazza-corrotti e delle tre metamorfosi dello spirito' *Cassazione penale*, 3501 (2019); A. Bassi, 'La Corruzione', in Id et al eds, *I nuovi reati contro la P.A.* (Milano: Giuffré, 2019), 123.

back into the area of corruption proper in the post-Severino enforcement practice.

It is precisely on this aspect that the judgment under comment intervened, which, by distancing itself from the post-Severino orientation of the Court less in line with the normative dictate, and embracing a different and more recent orientation[29] of the Supreme Court itself, constitutes a new and final jurisprudential *step* on the subject, recognizing a space of more pronounced autonomy for Art 318 of the Criminal Code.

According to the judges of legitimacy, the approach

> 'that reduces to the minimum the scope of application of the crime of bribery for the exercise of the function punished by Art 318 of the Italian Penal Code (...) does not consider that even the mere acceptance of the giving of money or other utility always constitutes in itself a conduct detrimental to the public official's duties of probity and impartiality, while for the purposes of the configurability of the crime of corruption proper, referred to in Art 319 of the Italian Penal Code, it is necessary that the unlawful agreement between public official and private corruptor provides for the performance by the former of an act specifically identified or identifiable as contrary to the duties of office, with the consequence that where the content of the corrupt pact is not ascertained, and even in the presence of systematic payments by the private party in favor of the public agent, the conduct must be brought back within the scope of corruption for the exercise of the function pursuant to Art 318 of the Criminal Code'.

For the Court - having emphasized the nature of the crime of functional corruption as a crime of danger, which is substantiated by the public official's taking charge of a private third-party interest, regardless of the identification of the performance of a specific act - the public official's stable subservience to third-party interests should be brought within the scope of the provision of Art 318 of the Criminal Code 'unless the making available of the function has concretely produced the performance of acts contrary to the duties of office'.

Ultimately, according to the Supreme Court, the stable subservience of the public official, carried out through an indistinct series of acts that can be linked

[29] This is a guideline, initially a minority one, which in recent years is becoming more firmly established. See, for example, Corte di Cassazione 11 December 2018, no 4486 and Corte di Cassazione 19 September 2019 no 45184. Similarly, more recently, Corte di Cassazione 22 October 2019, no 18125, in www.dejure.it, returned to the topic, for which functional corruption, given its nature as a crime of danger, sanctions 'the violation of the principle addressed to the public official not to receive money or other benefits by reason of the public function exercised and, specularly, to the private individual not to pay them'. On the ruling, see the comment by M.C. Ubiali, 'Sul confine tra corruzione propria e corruzione funzionale: note a margine della sentenza della Corte di cassazione sul caso "mafia capitale" ' *Rivista italiana diritto e procedura penale*, 662 (2020), who recalls how 'this norm incriminates the programmatic understanding between the public official and the private party, an understanding that can also be 'mute' from the evidentiary point of view'.

to the function, integrates the crime referred to in Art 318 of the Criminal Code, since with this provision the legislator wanted to include all forms of buying and selling of the function that are not connected to the performance of acts contrary to the duties of office. From this perspective, the crime of bribery proper fits into a kind of criminal progression in which there is a shift from a situation of danger (under Art 318) to a case of damage (under Art 319) that expresses the maximum offensiveness of the crime, by virtue of the exact determination of the content of the commitments made by the public official.

According to the now-majority approach of the Supreme Court, the undue gift, by conditioning the loyalty and impartiality of the public agent who broadly puts himself at the disposal of the private individual, puts the proper performance of the public function at risk; and, on the other hand, the gift-being synallagmatically connected with the performance of a specific act contrary to the duties of office, realizes a concrete injury to the protected legal asset, meriting a more severe punishment. In conclusion, according to the Court's approach, the mercimony of the function is, as a rule, referable to the case provided for in Art 318 of the Criminal Code, and this is not because such conduct is not serious, but rather because of a problem of typicality in the absence of the identification of an act contrary to the duties of the office, evokes either a mere danger or, if anything, the injury of an instrumental good, which is that of the fairness and impartiality of the public agent, without yet determining an injury to the good performance of the Public Administration.

However, as we shall see later, the order of severity that motivates the current penalty treatment of bribery cases is not convincing, just as both the internal boundaries of functional bribery and the literal tenor of the case (Art 318) remain unclear.

V. The Problematic Points of the Bribery Under Art 318 of the Criminal Code

In light of t the relationship between functional corruption and proper corruption, it is necessary to sketch the a few essential aspects of this system, fueled by the Bonafede reform, considering the progressive trend toward combination of the elements of anti-corruption criminal law and emergency criminal law.

First, the new corruption for the exercise of function is taking on the characteristics of generic corruption (a true *catch-all provision*), which raises doubts about the compatibility of the norm with the principles governing criminal intervention: it is, in the wake of the criminal policy direction that is increasingly equating mafia crime with corrupt crime, gradually turning into a kind of environmental corruption without typicality.

The lack of a reference to the act of office in Art 318 of the Criminal Code, along with the broader and more discretionary reference to the powers and

functions of the public official as the object of the bargaining, determine, in detriment to the principle of typicality and fragmentary nature, a pan-penalization of *lato sensu* corruptive conduct progressively eroding the boundaries between the different types of corruption, with the ultimate effect of reducing physiological gaps in protection and subsuming under the area of the criminally relevant any behavior that could endanger the Public Administration.

The criminalization, by means of a single case, of such heterogeneous conducts makes a large part of the doctrine[30] fear expansion of the margins of discretion in the judicial identification of what is or is not lawful, especially in relation to the so-called *munuscula* or donatives of use of modest amounts, which would be - on closer inspection - inevitably not only drawn into the area of the criminally relevant but, moreover, would end up being punished through the (very serious) form of systematic and lasting corruption *ex* Art 318 of the Criminal Code[31]: punishing conduct characterized by a nonexistent or tenuous disvalue of the fact would not only render irrelevant or disproportionate the sanctioning character of the rule under consideration, but would also disproportionately broaden the sphere of punishability, causing excesses of criminalization in violation of the principle of offensiveness.

On closer inspection, the circumstance that the material conduct is unrelated to the performance of an official act - with the shift toward the relevance of the corrupt pact and the centrality of the functional qualification - could induce the interpreter to bring within the area of application of the case hypotheses in which the donation provided by the private party is bestowed because of the functional qualification held by the public subject. This is in contrast to the prior condition that the donation is bestowed in relation to concrete exercise of powers and functions. The concrete identification of the exercise of powers is not always entirely easy, and in any case would end up narrowing the scope of the rule intended by the 2012 legislature, which has consciously decided to exclude, in relation to Art 318 of the Criminal Code, the need for a clear and direct identification of the act being commodified. Here the boundary between inoffensive and offensive conduct of the protected good, in the case of functional bribery, does not appear easy to find.

[30] Thus, V. Manes, 'Corruzione senza tipicità' *Rivista italiana di diritto e procedura penale*, 1126 (2018), for whom 'after the laborious cultural emancipation from the obsession with the prestige of the P.A. and after years of troubled reconversion of the interests protected in a constitutionally oriented key in the framework of the principles of good performance and impartiality (...) the current preference seems to go a rebours, towards immaterial and spiritualized objectivities, where the image of incorruptibility of the p.a. (...) according to a precise design of "moralization" and pedagogy of society, pursued through the law and in parallel through the criminal process'; Cf M. Donini, 'Il corr(eo) indotto tra passato e futuro. Note critiche a SS.UU., 24 ottobre 2013-14 marzo 2014, n. 29180, Cifarelli, Maldera e a., e alla l. n. 190 del 2012' *Cassazione penale*, 1482 (2014), according to whom 'it is increasingly clear that the legislature believes that only by strengthening the protection of values is the protection of goods possible. Not knowing how to do this society, one resorts to the criminal. If it is not criminal, there is no real obligation'.

[31] See also F. Palazzo, 'Gli effetti "preterintenzionali" delle nuove norme penali' n 5 above, 19.

The so-called generic corruption would, on closer inspection, fit into that normative trend-crystallized by the '*spazzapacorrotti*', that relies on 'early deflagration' offenses, characterized by authorial logic and a low coefficient of determinacy, to respond to emergency criminal phenomena. This is hinged on the basis of elastic and poorly descriptive concepts.

The excessive criminalization of conduct that is only potentially offensive with respect to the goods of impartiality and good performance of the PA but concretely unsuitable to intervene in the deviation of administrative activity, caused an anachronistic return to the protection of goods such as loyalty, prestige of the PA or trust itself in the PA, which are more suitable to justify the punishability of certain conduct that is only abstractly dangerous.

In this way, the criminal law undergoes a major expansion through the typification of crimes as danger hypotheses and sees its function as an *extreme ratio* distorted, becoming increasingly a weapon of control[32], pacification of social problems and issues, and an instrument of 'political and social pedagogy'[33].

VI. The Cernobbio Project and the Macro-Corruption Case

Before presenting a hypothetical alternative regulatory proposal, it is necessary to check what further solutions have already been put forward by the doctrine to overcome the critical relationship between the two main corruption offenses in the system.

On prominent solution is the so-called Cernobbio Proposal or Statale Proposal[34]

[32] T. Padovani, 'Il confine conteso. Metamorfosi dei rapporti tra concussione e corruzione ed esigenze "improcrastinabili" di riforma' *Rivista italiana di diritto e procedura penale*, 1302-1318 (1999), according to whom: 'only in the pathology of an omnipotence delirium can the criminal law be attributed the function of a priority instrument of social control: it must essentially be recognized above all as a function of limitation against the potentially infinite needs of criminal policy'.

[33] The expression is from C.E. Paliero, 'L'autunno del patriarca. Rinnovamento o trasformazione del diritto penale dei codici?' *Rivista italiana di diritto e procedura penale*, 1232 (1994). It is worth mentioning here the thought of T. Padovani, n 32 above, 1315, according to whom the criminal law is 'the crudest, the most painful, the most costly and the least effective of the tools that a civilized community can deploy to guide conduct; precisely because of this, its use conforms (or should conform) to the canon of the *extrema ratio*, namely the recognition of inevitability with no reasonable alternatives'; cf instead, S. Moccia, n 18 above, 54, for whom, 'the symbolic function of the criminal law (...) discourages an extra-criminal solution, less 'representative' than the criminal one, which, on the other hand, for most cases is the most suitable to solve the problem at the root'; even harsher is the judgment on this tendency by L. Eusebi, 'L'insostenibile leggerezza del testo: la responsabilità perduta della progettazione politico-criminale' *Rivista italiana di diritto e procedura penale*, 1668-1688 (2016): 'a society that affirms values only with criminal law-which does not take steps to ensure that those values conform every aspect of the regulatory apparatus and that the avenues, or preconditions, for access to crime are minimized-results, paradoxically, in a criminogenic society, since it attests precisely in this way to citizens that such an affirmation of values is in essence declamatory in nature'.

[34] Elaborated as *Proposals on the Prevention of Corruption and Illicit Party Funding*, they were presented on 14 September 1994 by G. Colombo, P. Davigo, A. Di Pietro, F. Greco, O. Dominioni,

which, although launched in the years immediately following the *Clean Hands* scandal of 1992 - with the investigations and related prosecutions resulting from *Tangentopoli* still in full swing across the country - still finds strong support today, albeit with some significant variations.

The proposal was not only the fruit of those very intense years, in which the diffuseness of the phenomenon emerged, and of the work of a *pool* of magistrates, lawyers and professors who had closely followed the judicial events, but originated heaviness and rigidity of the anti-corruption instruments that the legislature, even after the reform operated by Legge no 86 of 1990, had left as a legacy to counter the phenomenon of corruption on a repressive level. It is from this context, and from the limits of the fourfold division of improper bribery and corruption proper (antecedent and subsequent), that the Cernobbio Project arose, which cultivated the goal of achieving a new, simpler and possibly more effective discipline on the subject.

As part of the package of regulations aimed at strengthening the strategy to crack down on corruption, the Proposal defined an alternative path for corruption that could overcome the mercantile model, a paradigm that was still unshakable, legislatively speaking, throughout the 1990s.

The Cernobbio reformers, in the wake of the inadequacy of the 'act-centric' structure of the current case, launched, in Art 1 of the Proposal, the idea of the so-called single macro-case, which provided for the unification of all cases in a single rule.[35]

D. Pulitanò, F. Stella, and M. Dinoia. They are also known with reference to the city of Cernobbio because a few days before their official presentation during the Milan conference, magistrate Di Pietro anticipated their realization at the annual seminar organized by Studio Ambrosetti in Cernobbio. For more extensive references, see 'Proposals on the Prevention of Corruption and Illicit Party Financing' *Cassazione penale*, 2348 (1994); 'Note illustrative di proposte in materia di corruzione e illecito finanziamento di partiti' *Rivista trimestrale di diritto penale dell'economia*, 920 (1994). On this point, see also the intense debate that has ensued in the doctrine, with essays by F. Stella, 'La filosofia della proposta anticorruzione' *Rivista trimestrale di diritto penale dell'economia*, 935 (1994); D. Pulitanò, 'Alcune risposte alle critiche verso la proposta' *Rivista trimestrale di diritto penale dell'economia*, 948 (1994); Id, 'La giustizia penale alla prova del fuoco' *Rivista italiana di diritto e procedura penale*, 3-42 (1997); T. Padovani, 'Il problema Tangentopoli tra normalità dell'emergenza ed emergenza della normalità' *Rivista italiana di diritto e procedura penale*, 448-462 (1996); G.M. Flick, Come uscire da Tangentopoli: ritorno al futuro o cronicizzazione dell'emergenza? *Rivista trimestrale di diritto penale dell'economia*, 945-947 (1994); F. Sgubbi, 'Considerazioni critiche sulla proposta anticorruzione' *Rivista trimestrale di diritto penale dell'economia*, 941 (1994); G. Zagrebelsky, 'Dopo Mani Pulite tanti interrogativi' *Cassazione penale*, 508 (1994); C.F. Grosso, 'L'iniziativa Di Pietro su Tangentopoli. Il progetto anticorruzione di Mani Pulite fra utopia punitiva e suggestione premiale' *Cassazione penale*, 2341 (1994); G. Insolera, 'Le proposte per uscire da Tangentopoli' *Critica al diritto*, 17 (1995); S. Moccia, 'Il ritorno alla legalità come condizione per uscire a capo alta da Tangentopoli' *Rivista italiana di diritto e procedura penale*, 463 (1996).

[35] It is stated in Art 1 of the Proposal, 'It shall be punishable by imprisonment from four to 12 years for a public official or a person in charge of a public service to unduly receive for himself or a third party money or other benefits or accept a promise thereof in connection with the performance, omission or delay of an act of his office, or the performance of an act contrary to the duties of his office, or otherwise in connection with his position, duties or activity. Conviction shall entail perpetual

The 'Cernobbio' idea therefore, espousing the evolution that was already taking place in practice, fell within the logic of overcoming the mercantile model, but not of completely setting it aside: by eliminating all reference to the distinction between the four modes of corruption, in fact, it tried to impose a rigid logic according to which public agents would be prohibited from receiving any form - however minimal - of utility by reason of their subjective position, regardless of the act adopted.

Thus, a macro-case was delineated within which to bring together not only all existing forms of bribery but also additional *side* manifestations of corruption, such as trafficking in unlawful influence and extortion by inducement.

The doctrine most attentive to the constitutional guarantees of criminal law[36] stigmatized the replacement of the overall subsystem of bribery offenses with a single macro-fact, considering such a solution to be seriously detrimental to the principle of typicality and the essential guarantee it plays in the system. So much so that, by punishing in the same way any type of corrupt agreement, heterogeneous facts with diametrically different disvalue would suffer the same punitive treatment, to the detriment also of the principle of proportionality of punishment.

Moreover, the offensive content of such an incriminating case would be particularly 'rarefied', meaning that it would rest on the official's duty of nonvenality and, specifically, on the duty not to accept any benefit in connection with the office held. In such a normative scenario the simple fact of disvalue of the unjustified gift would have been sufficient not only to bring back *tout court* into the typical fact of bribery every borderline contact between public official and private individual, but also to demand an almost homogeneous punishment.

The Proposal still retains its validity today and gains space in scholarly debate in light of the difficulties still present in its application. On the subject, recently, more prudent doctrine,[37] has attempted to revive the idea of the macro-fact,

disqualification from public office'.

[36] On this point, we highlight the critical remarks that have been made toward the constitution of a single incriminating provision for bribery that come from, among others, E. Musco, 'Le attuali proposte individuate in tema di corruzione e concussione', in *Revisione e riformulazione delle norme in tema di corruzione e concussione. Atti del Convegno di studi di diritto penale* (Bari: Cacucci, 1996), 43; F. Sgubbi, 'La semplificazione ed unificazione delle norme sulla concussione e corruzione nel progetto di riforma', ibid 60; G. Contento, 'Altre soluzioni di previsioni normative della corruzione e concussione', ibid 68; E. Gallo, 'La proposta del pool' *La Repubblica*, 30 September 1994, 10; A. Pagliaro, 'Per una modifica delle norme in tema di corruzione e concussione' *Rivista trimestrale di diritto penale dell'economia*, 55 (1995). *Ex plurimis*, for A. Manna, 'Corruzione e finanziamento illegale ai partiti' *Rivista italiana di diritto e procedura penale*, 116, 136 (1999), 'the construction of an all-encompassing and indefinite incriminating case would also end up making the borderline between licit and illicit truly uncertain'. Similarly, critical of the unitary solution A. Spena, ' "Chi lascia la strada vecchia per la nuova" Perché una riforma dei delitti di corruzione non dovrebbe abbandonare il modello mercantile', in A. Castaldo et al eds, *Scritti in onore di Alfonso M. Stile* (Napoli: Editoriale Scientifica, 2013), 1081. On different positions, R. Borsari, *La corruzione pubblica. Ragioni per un cambiamento della prospettiva penale* (Torino: Giappichelli, 2020), 379.

[37] See, for example, M. Gambardella, 'Il nodo della "stabile messa a libro dell'agente pubblico" in tema di corruzione' *Penale. Diritto e procedura*, 1-21 (2020), for whom 'it would be advisable in

trying to calm the criticism that had been advanced in previous years and proposing the solution of including different sentencing frames within the single case, so that the different conducts and their penalties can be differentiated.

It should be noted, however, the risk that such a solution, if not well implemented, while helping to reduce the evidentiary burden during the trial application of the norms, could constitute a further injury to the principles of typicality and offensiveness, standardizing decidedly heterogeneous behaviors and disvalues and 'flattening' the injurious content of the norm.

In the case of an ill-considered calibration of the various conducts included within the single macro-corruption offence, the disvalue of the latter would ultimately be based on the acceptance of an undue utility, falling into the category of crimes against state security and thus becoming a true 'crime of disloyalty',[38] where the core of the disvalue would reside in the disloyal behavior of the public official.

Finally, Cernobbio's proposal-inevitably including the crime of influence peddling within the scope of unlawful conduct-would, pending a desired legislation on lobbying activity, end up making the boundary between such 'generic bribery', trafficking in unlawful influence (should it not be permanently abolished) and any other lawful lobbying activity extremely vague.

VII. A *De Jure Condendo* Proposal for a New Systematization of Public Corruption Offenses

In light of the reasons stated so far, it cannot but be noted that the current arrangement of public corruption offenses in our criminal system does not fully satisfy.

For this reason, from a reform perspective, we consider it useful to share some *de jure condendo* considerations we hope would lead to a reformulation of the cases currently in force, keeping well in mind the twofold objective of providing operators with a clearer and more effective regulatory framework of ensuring the

the near future to try to construct a general hypothesis of incrimination of corruption, inclusive of the figures of corruption for the exercise of the function, for an act contrary to the duties of office and the hypotheses of undue induction. (...) This is a simplification that is indispensable to practice and that could contribute to guaranteeing citizens greater certainty and equality in the judicial application of the law (...) The use of Occam's razor (...) would, moreover, make it possible to avoid abolitionist profiles (...) The different criminalistic disvalue of the types of facts, could be designated through different edictal frames; with punishments sometimes diversified for the corrupters'. See again M. Gambardella, n 17 above, 44, who - rightly pointing out the paradox according to which systemic corruption is punished through the milder figure of bribery - proposes to 'concentrate rather than fragment'. *Contra*, V. Manes, n 30 above, 1129, who reminds of the risk of penalization, with no room for fragmentation, directed at hitting every suspicion or symptom of illegal conduct.

[38] Thus, R. Rampioni, 'I delitti di corruzione e il requisito costitutivo dell'atto d'ufficio: tra interpretazioni abroganti e suggestioni riformatrici' *Cassazione penale*, 3406 (1999), who - commenting on the hypothesis of the container case of corruption - already alluded to the transformation of the criminal law of the fact into the criminal law of authorship by virtue of the loss of typicity of the fact.

safeguarding of the fundamental principles that govern criminal matters.

The current set-up, which is mainly the result of the 2012 intervention designed to give legislative cover to the jurisprudential creation of bribery by subservience, has failed to contain the interpretive contrasts on the boundaries between the two cases of corruption. On the contrary, despite an overall structure of the reform that is very attentive to the administrative prevention side of the phenomenon, it has given the impetus on the criminal law front, to a slide of anti-corruption towards emergency shores, providing legal practitioners with a new case of functional corruption that is far too generic.

One of the objectives of the new arrangement to be proposed is to redraw the internal and external boundaries of corruption norms, which, however, is not limited only to the subsystem under consideration here.

The hoped-for intervention cannot but also set itself the goal of harmonizing and simplifying the entire system of crimes against the Public Administration, starting with the repeal of the case of undue induction, which is inevitably drawn into the sphere of corruption, and a new legislative intervention in the area of trafficking in illicit influence, which also suffers from critical profiles from the point of view of criminal typicity.

On the other hand, as far as corruption offenses are concerned, the current wording does not make it possible to meet either the needs of repressive action or those of ensuring compliance with the principle of legality and its corollaries.

From this balancing perspective (and for the reasons already analysed above) it is necessary to rewrite the rules to create - within the code - a kind of ascending *climax* of seriousness among the different 'variants' of corruption.

For the purpose of further clarification, it is useful to briefly anticipate the content and the 'final' solutions and then proceed to explain in detail the various forms of corruption that are proposed.

The proposed new Art 318 should contain a new offence under the heading 'bribery by an act of office', within which various forms of manifestation of corrupt behaviour should find a place, linked to an appropriate penalty treatment.

The proposed new Art 319 should be entitled 'bribery by subservience' and contain two new forms of corruption structured in the form of a habitual offence.

On the lowest rung of this new arrangement would be the crime of bribery by an act of office, reformulated with the dual provision of punishability with respect to an act that complies with or is contrary to the duties of office. Note, however, the new norm, on the subject of bribery by a conforming act, should provide for punishment, albeit mild, only for the hypothesis of improper antecedent bribery. We argue that such conduct, testifies to far more than a 'wake-up call' with respect to the possibility of more serious future misconduct or venality that harms the prestige of the PA, eroding citizens' trust in the fairness of the administration and placing itself to some extent in opposition to the proper conduct of the Public Administration. In these marginal cases, the act strictly, insofar as it complies, is not

vitiated, yet the fairness of the administrative activity - *fueled* by undue compensation or benefit to the public official - appears to be called into question. On the other hand, the genesis of bribery offenses is to be found in the need to 'protect the public interest that the acts of public officials do not constitute the object of private trading or buying and selling'.[39]

Doing so to the proposed rule would create a threefold level of sanctioning disvalue, that could also dispel doubts about the non-punishability of subsequent bribery by a compliant act[40] which should find no place in the code. With the exception, however, of a sanction of temporary disqualification against the public official, since it is incapable of generating a significant offense to the protected good. Possibly, the preferred solution of an administrative sanction could be considered.

Such a reform hypothesis to replace the current Art 319 of the Criminal Code would, on closer inspection, allow for the construction of a basic case of bribery endowed with a greater grip on the concrete reality of administrative activity, (re)anchoring bribery to the act requirement, central to the mercantile typification model, and rooting the mini-corruption system in the realm of the criminal law of the act. This was always the case from the Rocco Code to the Severino Law.

The idea of including on the first step of the *climax* only improper antecedent bribery or by a conforming act, makes it possible to rebalance the sanction framework of the current Art 318, which - paradoxically - then encompasses all the old improper bribery hypotheses, punishing them with a punishment that has now become extremely severe after the Bonafede reform.

The current sanction paradox is not limited exclusively to corruption for the exercise of function. In fact, as pointed out earlier here, it is completely unreasonable-in the all-internal relationship between the two hypotheses of corruption, to deem corruption proper more serious and damaging to the system and to punish it with a higher sentence range than the systemic one.[41]

To prevent such a situation from continuing, and to avoid the task of legislative substitution being carried out by the judiciary, it is appropriate to provide for a

[39] See C.F. Grosso, n 8 above, 154.

[40] This solution was advanced by a large part of criminalist doctrine, including F. Bricola, 'Tutela penale della pubblica amministrazione e principi costituzionali' *Temi*, 578 (1968); R. Rampioni, *Bene giuridico e delitti dei pubblici ufficiali contro la pubblica amministrazione* (Milano: Giuffrè, 1984), 313; S. Seminara, 'Gli interessi tutelati nei reati di corruzione' *Rivista italiana di diritto e procedura penale*, 3, 951 (1993).

[41] As also pointed out by M. Gambardella, 'Considerazioni sull'inasprimento della pena per il delitto di corruzione per l'esercizio della funzione (Art 318 c.p.) e sulla riformulazione del delitto di traffico influenze illecite (Art 346-bis c.p.) nel disegno di legge Bonafede' *Cassazione penale* 11, 577 (2018), 'systemic corruption (...) has an immense disvalue: it is lethal for economic growth, it affects the cost of public works and the morale of ordinary people. Systemic corruption should then not be brought under the milder figure of bribery, as provided for in Legge no 190 of 2012. (...) And in the reformulation of the corrupt subsystem, the hypotheses of stable putting on the payroll and lasting subjugation of public functions to private interests - even if no specific illegitimate act bought and sold is identified - must be assigned their rightful place as hypotheses of greater disvalue of corruption: undermining, the latter criminally illegal conduct, the foundations of public ethics'.

new crime of 'bribery by subservience' that would stand on the top rung of the new mini system, replacing the current bribery for the exercise of function with a new case that takes into account the new phenomenology of corruption. Such a hypothesis, in addition to providing the system with more reasonableness, would make it possible to overcome the resistance of certain jurisprudence (now in the minority) to bring the conduct of stable subservience back into the sphere of corruption proper, avoiding friction between the powers of the State in such a delicate matter as crimes against the Public Administration.

In conclusion, the two norms currently in force should be inverted, placing corruption for acts of office on the lower rung and corruption for stable servitude on the higher level, to limit the applicative scope of the current arrangement, which risks, inclusion of functional corruption criminal facts of lesser intensity and to underestimate instead the seriousness of systemic corruption, sanctioning it as a minor form of corruption. Such a solution, moreover, would make it possible to keep out of the area of the criminally relevant so-called *munuscula*, ie, gifts of modest value, gratuities, which also could be attracted, with the current arrangement, into functional corruption, which, as a crime of danger, runs the risk of opening up even to facts of particular tenuousness if not completely irrelevant to the system.

Such a solution would, finally, make it possible to overcome the *tension in application* that also emerged from the Supreme Court ruling under comment and strike a balance between the cases, committing legal practitioners and jurisprudence to identify, in cases of bribery by an act of office in the version proposed here, the public act (albeit understood in the broadest sense of activity) ascribable to the conduct of the public official who is the subject of the illicit purchase.

VIII. (*Follow*) Corruption by 'Subservience' as a Habitual Crime

By virtue of the highlighted shortcomings of the current wording of Art 318 of the criminal code and the interpretative contrast that still creeps into jurisprudence, the new bribery by subservience should be given a greater grip on factual reality through the identification of suitable elements to delineate the stability and continuity of the relationship between the private party and the public party.

The *ratio of the* proposal is twofold: there is a need to respond adequately to the demands coming from reality, where systemic corruption is of particular alarm, but also to prevent the current functional corruption, due to an inherent indeterminacy of the case, from allowing harmless behavior to enter the area of criminally relevant.[42]

[42] This was also mentioned recently by G. Fidelbo, 'La corruzione "funzionale" e il contrastato rapporto con la corruzione propria', in Id ed, *Il contrasto ai fenomeni corruttivi. Dalla spazzacorrotti alla riforma dell'abuso d'ufficio*, (Torino: Giappichelli, 2020), 48, according to which 'the crime of bribery for the exercise of the function encloses within it conducts endowed with profoundly different degrees of offensiveness, ranging from corruptions of an almost bagatelle nature (...) to much more

The new rule should expressly provide that the agent's placement on the payroll is accomplished through the giving-receiving of money or other utilities in exchange, alternately, for the generic availability or for the performance of multiple acts of office included within a criminal reiteration.

The proposed new normative construction would, on closer inspection, fall within that category of doctrinal creation known as habitual offenses,[43] ascribable among the so-called crimes of duration, which requires the existence of the 'interspersed repetition of several identical and homogeneous conducts'[44] objectively linked to each other.

Specifically, this new corruption by subservience could be articulated into two offenses of different severity.

The former would fall under the umbrella of the so-called habitual proper offenses and would consist of the repetition of conduct which, if taken individually, would not constitute a different offense but, possibly, conduct punishable by a measure of a disciplinary or administrative nature, the systematic repetition of which would alone give rise to a figure of crime. Only such a unitary offense, such a 'system of offensive conduct', outside of which there is no serious prejudice to the system, can give criminal relevance to the habitual proper offense. It would, therefore, integrate the new crime in question simply the stable and generic subservience of the public official to interests unrelated to the administration, achieved through a permanent commitment to perform or omit an indistinct and unidentifiable series of acts and activities on the part of the corrupt public official.

In the second case, on the other hand, the so-called improper enslavement - equivalent to a complex crime *pursuant to* Art 84 of the Criminal Code[45] - would be expressed through several criminal conducts, having the same nature and

serious conducts, falling within the figure of corruption for subservience to the function'.

[43] As is well known, no provision of the Penal Code expressly mentions the category of habitual offense. For a dommatic analysis, *ex plurimis*, refer to G. Leone, *Del reato abituale, continuato e permanente* (Napoli: Jovene, 1933); G. Fornasari, 'Reato abituale' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXVI; M. Petrone, *Reato abituale* (Padova: CEDAM, 1999); P. Siracusano, 'I reati a condotta reiterata. Spunti per una rivisitazione', in *Studi in onore di Mario Romano* (Napoli: Jovene, 2011), 1239; see, also recently, the study by A. Aimi, *Le fattispecie di durata. Contributo alla Teoria dell'unità o pluralità di reato*, (Torino: Giappichelli, 2020). Lastly, a critical reinterpretation of the category of habitual crime has been advanced by F. Bellagamba, *Il reato abituale. Prospettive per una possible lettura rifondativa* (Torino: Giappichelli, 2023).

[44] The definition in these terms is reported by F. Mantovani, *Diritto penale. Parte Generale* (Milano: CEDAM, 10th ed, 2017). Similarly, G. Cocco, 'Unità e pluralità di reati', in Id and E.M. Ambrosetti eds, *Manuale di diritto penale. Parte generale, I/2, Il reato* (Padova: CEDAM, 2012), 53, which identifies the conducts of the habitual crime 'not as a sum of isolated and sporadic episodes but as an event in which each individual occurrence constitutes a moment of development of a broader reality and accesses the previous one with characteristics of persistent frequency', although they 'may not have the same morphological structure'. See also V. Manzini, *Trattato di diritto penale italiano* (Torino: UTET, 1986), 573, who qualifies habitual crime precisely because of the 'habitual or professional repetition of facts, which, taken individually, would not be crimes'.

[45] Cf F. Ramacci, *Corso di diritto penale* (Torino: Giappichelli, 2017), 478, who characterizes the improper habitual offense as a complex crime.

constituting as many crimes, carried out in a given time frame and indicative of an subordination of the public function to private interests. It is precisely such subjugation that would constitute - from a normative point of view - the figure of the disvalue of the conducts unitedly considered.[46] Alternatively, on closer inspection, it is the very concept of 'subservience' that requires at least a relationship between the two parties to the corrupt pact that is temporally appreciable, since instantaneous enslavement cannot be conceivable. It appears, therefore, evident that in the customary case proper a single isolated act would not integrate a hypothesis of enslavement of the public function to private interests, since it lacks the minimum character of offensiveness necessary to assume criminal relevance. Eventually, it would have to be verified that that single act was not commodified, thus integrating the different and autonomous case of corruption by an act of office.

In terms of sanctions, improper or complex subservience in which the performance of multiple acts in accordance with or contrary to official duties is part of a generic willingness to instrumentalize the public function to favor private interests would assume a greater disvalue than the new proper subservience, hinged only on the 'making available' of one's function by the public servant, which would not result in conduct that, outside the context of servitude, would not constitute a crime but possibly mere administrative or disciplinary offenses.

In relation to the identification of the *tempus commissi delicti*, which is fundamental for the determination of the law applicable to the concrete case in hypotheses of succession of laws, the crime of '*necessarily* habitual bribery' could be said to be perfected with the performance of the act that - when added to the previous ones - is capable of exceeding the 'threshold of intensity of disvalor of

[46] Thus, F. Bellagamba, 'L'eclettica struttura del reato abituale nel labirintico contesto delle fattispecie di durata' *Legislazione penale*, 1 (2020), who also recalls, on the subject, the heated doctrinal debate in relation to the issue of the *dies a quo* and the statute of limitations of the crime: 'with regard to habitual offenses, the prevailing doctrine and the entire jurisprudence are oriented in the sense of considering that the statute of limitations begins to run from the day of the last anti-juridical act, which closes the (*post*) consummative period that began with the one that, combined with the previous ones, determines the minimum series of relevance (c.d. cessation of habituality), because it is only at that time that the injury or the danger of injury to the legal goods protected by the incriminating norm taken into consideration from time to time ceases'. *Contra*, see, most recently, M.G. Rutigliano, 'La prescrizione dei reati abituali con particolare riferimento allo ius superveniens sfavorevole' *DisCrimen*, 1-13 (2022), for whom 'it would seem reasonable to identify the *tempus commissi delicti* at the moment in which the actions put in place assume relevance for the first time for the criminal system. Indeed, it is at this instant that the conduct (or the minimum series of relevant conducts) becomes tainted with anti-juridicality causing for the first time a crack to the legal good protected by the norm'. Cf also R. Catena, 'Reati a consumazione prolungata e profili problematici nella contestazione cd. "aperta". Equivoco interpretativo in una recente sentenza della Cassazione' *Giurisprudenza penale web*, 13-14 (2020), for which 'the habitual crime is marked, in fact, by the repetition of conduct interspersed over time, even in a different form, directed against the same legal good; the qualifying element of the said constitutive plot, is identified, in the normative narrative, by the unidirectionality of this reiterative sequence whose components do not constitute isolated and sporadic episodes, but rather dowels of a broader affair, in which each one accesses the previous one with characteristics of persistent frequency, that is, of habituality, which is accompanied, on the subjective level, by a single criminal intention'.

action and event',[47] integrating that *minimum* necessary for the concretization of the offense to the protected good. From that moment on, the consummation would begin, which would end with the cessation of the repetition of the enslaving conduct, that is, with the breaking of the link of habituality.

This threshold of disvalour [see above], in any case, in order not to run the risk of remaining an assertion lacking substance and concreteness, must be easily identifiable through factual elements characterising the new regulatory construction. These elements must be identified by the legislature, leaving a residual space for interpretation to the jurisprudence.

Thus, as with the necessarily habitual offences, the new habitual bribery cannot consist of a single criminal manifestation, which, if anything, may be taken into account as another less serious form of bribery.

On close inspection, the temporal element turns out to be essential in order to realize the greatest possible offense to the system and to the protected goods of impartiality and good performance, as well as to underscore the characters of the necessary temporal continuity of the corrupt pact and the persistence of the offending conduct.

In conclusion, reversing the order of severity of the two offenses proposed here - bribery by act of office and bribery by subservience - should commit the legislature, to both rewrite the norms with a high degree of determinacy, and to review and harmonize the penalty system of all the provisions included in Chapter I of crimes against the PA, which in recent years have experienced a decidedly substantial aggravation that, when tested in practice, has not brought significant benefits even in terms of deterrence.

[47] See M. Romano, *Commentario sistematico del codice penale* (Milano: Giuffrè, 2004), 347.