UNIVERSITATEA BABEȘ-BOLYAI

amp ADMINISTRAȚIE ȘI MANAGEMENT PUBLIC

Collaborative Governance, Trust Building and Community Development

Conference Proceedings
'Transylvanian International Conference in Public Administration',
October 24-26, 2019, Cluj-Napoca, Romania

Editors:

Cristina **HINȚEA**
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PUBLIC ADMINISTRATION AND ANTI-CORRUPTION EFFORTS IN ITALY*

Patrizia MAGARÒ
Francesca BAILO

Patrizia MAGARÒ
Associate Professor, Department of Law,
School of Social Sciences,
University of Genoa, Genoa, Italy
E-mail: patrizia.magaro@unige.it

Francesca BAILO
Researcher, Department of Law,
School of Social Sciences,
University of Genoa, Genoa, Italy
E-mail: francesca.bailo@unige.it

Abstract

The paper intends to analyze the evolution of Italy's anti-corruption efforts towards a new balance between instruments of sanction and prevention in public administration.

The study also devotes a special attention to transparency obligations and to the rules aimed at preventing the interferences or the overlaps between politics and administration.

Keywords: corruption, public administration, anti-corruption institutions, anti-corruption measures, transparency.

* This paper is the result of an analysis undertaken jointly; however, paragraphs 1, 2, 3 and 7 were written by Patrizia Magarò and paragraphs 4, 5 and 6 by Francesca Bailo.

1. Trends in anti-corruption enforcement in Italy

Corruption has existed since ancient times, and it is still nowadays a major problem of contemporary society, a real 'world emergency' indeed; the efforts to fight it are widespread not only at national level, as the phenomenon has long been the focus of particular attention by the United Nations (2003)[1], the World Bank, the International Monetary Fund, the OECD (2005)[2], the Council of Europe (1999) and the European Union.

According to the most consolidated accepted definition, given by Transparency International, the leading international NGO in curbing corruption worldwide, corruption is 'the abuse of entrusted power for private gain' (whose main forms are bribery, embezzlement, fraud, extortion), and it constitutes a dishonest action that destroys people's trust and prejudices democratic and moral values.

The phenomenon appears even more odious when it refers to the relationships between citizens and public officials (the specific sphere we will be dealing with in this paper), since it infringes the constitutional principles of impartiality and efficiency of the public administration, as well as the duty to fulfil public functions with discipline and honor.

The indicator most commonly used to determine a country's level of corruption is the 'Corruption Perception Index', developed by Transparency International in 1995 and published every year[3].

The 2019 ranking (Transparency International, 2019) has unfortunately confirmed Italy's critical position: the country scored 53 out of 100 – with zero being highly corrupt and 100 very clean – ranking Italy 51st out of 180 countries worldwide and 25th out of 31 countries in Western Europe.

This negative position is also confirmed by the updated information of the Eurobarometer (2014); the survey (promoted by the European Commission in 2014 and aimed at providing an overview of citizens' opinion and experiences regarding corruption) reveals the image of a country with major problems in terms of legality and public ethics, although with very considerable regional differences.

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1 The 'United Nations Convention Against Corruption' (2003) is the only legally binding universal instrument against corruption, currently signed by 174 countries.

2 According to the 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (2005), 'each Member State must take the necessary measures to ensure that conduct constituting an act of passive corruption or active corruption by officials is a punishable criminal offence'. Many other acts have been enacted by OECD to pursue the objectives to combat corruption developing cooperation efforts, also in the field of public procurement. See e.g. OECD (2008, 2009, 2015).

3 Transparency International, the well-known non-governmental organization dedicated to fighting and monitoring corruption worldwide, publishes two reports of great importance every year: the 'Global Corruption Barometer' and the 'Corruption Perceptions Index (CPI)'.

It should also be pointed out that the economic damage suffered by a country due to corruption appears to be difficult to assess precisely in monetary terms: the estimate is 3% of world GDP, 120 billion euros in the whole European Union and, with reference to Italy, 10 billion euros per year.

Italy's strategic anti-corruption approach has long almost entirely relied on the repression side and still today judicial activity remains strongly engaged towards the suppression of often particularly serious corrupt behaviors (European Commission, 2014, p. 3).

Corruption in public administration is regulated in the Criminal Code (art. 318-322), whereas corruption between private individuals falls within the provisions of the Civil Code (art. 2635), with very severe sanctions which often foresee, as part of the judgment of conviction, the interdiction from public offices.

Even if Italy has long been considered one of the most corrupt advanced economies, according to some scholars (Merli, 2019, p. 342), until the late 1960s, corruption was essentially confined to the country's ruling elite. From then on, 'it became a common and socially accepted behavior, spread across all social strata and involving an even larger number of low- and middle-level politicians and bureaucrats'.

Over the years there has been a change in the panorama of the main actors involved and the corruption system centered on the political parties in the early 90s of the last century has become more pervasive and more difficult to identify (Vannucci, 2019, p. 23).

Many factors have contributed to the spread of corruption, such as especially over-regulation, the complexity of legal rules, the excess and inefficiency of bureaucracy, the proliferation of organized crime, the economic and social gap between the northern and southern part of the country, the tax evasion, the slow delivery of justice.

A significant reinforcement of measures aimed at suppressing corruption took place in 1990s, when a season of judicial inquiry called *Mani Pulite* ('Clean Hands') and *Tangentopoli* ('Bribesville') started. The strongest impact of the active role of the judiciary against corruption was on the political system, as the investigations has led to the downsizing of the leading parties of that time and the disappearance of other smaller parties, leaving the space for newcomers to politics. On the economic side, the effects of the inquiries provided (on the short run) a reduction in corruption cases and in the costs of public procurements, which had been seriously affected by kickbacks.

As on the long run many high-profile cases of corruption continued to emerge, it was considered necessary to start a deeper reflection on the measures taken in Italy until then, recognizing that the efforts could no longer be limited to the field of criminal law but they also had to involve the administrative sector.

2. Towards a new balance between sanctions and prevention

A new area of studies has thus begun to develop and taking inspiration from other countries' experiences the fight against corruption has been oriented not only to hit the *pactum* between briber and corrupt, but also to prevent and contain the 'administrative malpractice', the 'maladministration' (that is, in a broader sense, a series of behaviors that go beyond corruption in a strict sense, such as for example resistance to change, formalism, indifference to efficiency, hostility towards new technologies, overstaffing, nepotism).

Since the cultural background of a person greatly influences his choices regarding illegal behavior, the Italian legislator has thus undertaken a radical change in the approach to the phenomenon of corruption.

On the one hand, it was decided to continue to strengthen criminal law, increasing sanctions related to corruption and including new offences; on the other side, noting that combating corruption is not only a task of criminal courts and police force, internal administrative controls have been foreseen and criminal law was supplemented by other instruments aimed at combating behaviors without criminal relevance, which, however, represent the basis of potential unlawful conducts.

New rules have been thus enacted stigmatizing some specific behaviors and above all aiming at preventing them, in order to create a cultural humus favorable to the consolidation of a culture of legality.

Furthermore, an independent administrative agency – the Italian Anticorruption Authority – has been established and its activity is specifically aimed at combating and preventing corruption.

This institutional progress represents a significant new element in the Italian anti-corruption strategy, to which the important contribution of the constitutional jurisprudence should be added (see Constitutional Court Judgment no. 30 of 2012). The Constitutional Court has better specified the content of some constitutional provisions, affirming for instance that art. 97 of the Constitution must be considered inspired by the aim of guaranteeing both 'good administration' and its efficiency, as well as the 'transparency' of the work of public administrations; this principle, not expressly provided for in the Italian Constitution of 1948, has become, as we shall see later, one of the main tools for preventing corruption (Legislative Decree no. 33 of 2013).

The real turning point occurred in 2012, with the entry into force of Law no. 190 laying down 'provisions for preventing and fighting corruption and illegality in public administration' (the so-called 'Anti-corruption Law'), introducing an anticorruption system which is similar to prevention-based models already applied in other countries.

This is the first Italian legislator's attempt to establish an organic framework to fight corruption, by balancing and coordinating preventive and repressive measures.

The absolute novelty of this new approach is represented by the key role assigned to the administrative prevention of corruption (compared to the few initiatives adopted in the past).

This law was adopted to align the Italian legal system with guidelines in international conventions, but its main purpose was to prevent and fight corruption perpetrated by individuals within the public administration or linked to it.

As concerning the repressive measures, the Italian Criminal Code was amended, introducing – *inter alia* – the new crime of 'trading in influence', reformulating the crime of extortion, increasing the penalties for several crimes (misappropriation of public funds, bribery relating to lawful and unlawful acts, judicial bribery, misconduct).

It should also be mentioned that the Criminal Code has been then further modified, as the Law no. 69 of 2015 (the so-called 'anti-corruption law') reintroduced the crime of 'false accounting' and increased the penalties for crimes related to corruption[4].

However, the major element of significance for our study is that the 2012 law has introduced new instruments aimed at 'preventing' corruption; it represented the legal basis for a series of implementing rules that do not concern criminal law in the strict sense, since the Government was delegated to issue an *ad hoc* legislative decree on transparency, a new regulation on incompatibility (which will be considered further in this paper), and to adopt a national Code of conduct for employees of the public administrations (2013).

Moreover, the anti-corruption law for the first time introduced provisions (which have been strengthened with the passage of Law no. 179/2017) on the protection of whistleblowers for reporting corruption within the public sector. The provisions are applicable to employees reporting wrongdoing under the condition that they do not commit libel or defamation or infringe on anybody's privacy. The information can be disclosed by the employees only to their superior, the judicial authority or the *Corte dei Conti* (the accounting judge).

The new rules apply to all public administrations in a narrow sense, public economic bodies, private-law entities under public control; with regard to the objective

4 The reintroduction of false accounting is particularly important, since it was the simplest and most widespread way to conceal the exit of company money, necessary for the payment of bribes. Now this crime is punished with imprisonment from 3 to 8 years (if the company is listed) and from 1 to 5 years (if it is not listed). The crime of false accounting, which often revealed other illicit activities, including corruption, previously abolished, was reintroduced. Penalties were made harsher for both perpetrators and the beneficiaries of corruption. Further changes concern the rules about collaborators of justice (the discount of the penalty increases), the conditions necessary to access the plea deal (which now provide for the advance and full payment of the price or profit of the offence) and the monetary sanctions that must be incurred by those convicted of embezzlement, extortion or bribery.

scope, the 2012 law covers a generic notion of corruption and illegality in public administration, without specifying behaviors in a strict catalogue.

An important role is played by the National Anti-Corruption Authority. The law provides a system of 'plans' aimed at establishing guidelines and specific measures for the prevention of corruption. The authority (to which we will return later) is responsible for approving the 'National Anti-Corruption Plan' aimed at analyzing the causes and risks of corruption, identifying any action capable of preventing and combating it, providing guidance to public administrations in preparing their specific plans.

Each administration is required to approve its own three-year 'anticorruption plan' and appoint a 'person responsible for corruption prevention' (in addition to the staff rotation in high risk working position, the strengthening of administrative transparency, the adoption of a Code of Conduct, a whistleblowing system).

Consequently, the 2012 law represents an absolute novelty also as regards an ethical perspective, concerning the organization of public administrations. Preventive anticorruption measures reveal an attempt to 'judicialize ethic', as an authentic value to be pursued, together with the strict legality of administrative action and the guarantee of its efficiency and impartiality.

The greater attention devoted to the ethical dimension would allow to better contrast forms of residual administrative malpractice and maladministration, that is to say those practices which are not unlawful in a legal sense, but which are contrary to other rules of efficiency and good performance. This would also require a further effort to better define the content of the code of conduct of the institution, strengthen the training of employees, better clarify a mentoring function, streamline the organizational procedure, enhance the auditing system and the evaluation of ethical behavior.

3. The Italian Anti-Corruption Authority

The Italian Anti-Corruption Authority (ANAC) is a public independent body of composite nature which combines the role of effective public procurement policy supervisor and the role of body in charge for fighting against illegality and corruption by ensuring transparency.

As concerning the public procurement system, we briefly remember that, since the Green Paper of European Commission of 1996 about 'Public procurement in the European Union', EU suggested to Member States to entrust the supervision of its contracting entities to an independent authority, following the model of Sweden. The aim of the introduction of this authority should be to 'prevent behavior giving rise to complaints, thereby reducing the potential burden on national courts and tribunals as well as on the Community institutions'.

These suggestions have been translated into legal rules in 2004, when the Directives 2004/17/EC and 2004/18/EC provided that in order to ensure their implementation Member States may, among other things, establish an independent body endowed with the power to oversight the public procurement procedures, also gathering information and data about public contracts.

Those tasks were (at least formally) already fulfilled in Italy after the establishment of the Authority for the Supervision of Public Contracts (created in 1994 but in operation from 1999), in charge of monitoring public procurements by fostering compliance with principles of fairness and transparency; within the authority an 'Observatory on public procurements', was created as an office in charge of collecting information on public contracts all over the country.

The authority had only oversight powers, as it could not sanction infringements and it never had 'quasi-judicial' competence. Remedies against administrative measures or inaction were, also in the field of public procurement, the judicial ones before administrative courts. In this regard, it should be observed that public procurement litigations still represent a huge part of the workload of administrative courts and the legislator has been always trying to reduce it.

The authority's powers were increased in 2006 (including the power to impose sanctions) but the law of 2012 has provided for the creation of a 'super-enforcement' Anti-Corruption Authority (which was operational in 2013 and then deeply reorganized in 2014), absorbing the competences of the former Italian Authority on Public Procurement, as the legislator wanted to concentrate all powers in the hand of one body (Law no. 125 of 2013, art. 5, c. 3)[5].

As concerning more specifically the anti-corruption and transparency tasks, the authority has now the power to rule, to oversight and to punish in the field of transparency, anti-bribery, public procurement (and referred to this latter field, it has also the power to judge).

Legislative Decree no. 50 of 2016 gave to the authority, *inter alia*, two new competences; the body is actually in charge of issuing guidelines, to support contracting entities and to improve the quality of procurement procedures; it can also issue binding pre-litigation advices, as an optional and ancillary non-judicial remedy in addition to the traditional judicial ones.

However, it should be noted that the main function of the new authority is the prevention of corruption within public administrations and in companies owned or controlled by public bodies.

This activity shall not have the character of a formal control but it takes the form of monitoring contracts and public offices within the most risky sectors, guiding

5 The Authority is now composed by a President and four members and the rules set forth for their appointment ensures a high level of independence and expertise.

behaviors and procedures of public servants, according to a model that has received the consent of the OECD (and which was applied for the first time on the occasion of the monitoring of Expo 2015).

Also worthy of mention is the effort of the authority to develop a new set of corruption risk indicators, which should be differentiated by territory, sector, and level of government and initially applied to the areas of waste management, education, social services and procurement. The objective is to identify anomalies in public contracts relevant for the anticorruption authorities (Merloni, 2019, p. 54).

4. 'Preventive' approach: publication and transparency obligations

Among the strategies carried out in order to prevent corruption, we should mention the mechanisms aimed at ensuring that citizens are able to access data and documents held by the public administration, pursuant to principles of transparency and 'full accessibility'.

Legislative Decree no. 33/2013 enhanced forms of 'civic access', through the publication of such data and documents on institutional websites (usually, there is a dedicated section named 'transparent administration'), with a view to improve 'extensive control on how institutional tasks are carried out and public resources are employed, as well as to promote the participation in public debate' (art. 5, para. 2). Publication and transparency obligations are imposed, among others, to politicians and public officers in managerial positions in general, for example with regard to their financial and income records (the same obligations are imposed to their spouses and their first and second degree relatives).

However, the Constitutional Court has recently ruled on the constitutionality of such legislation (Judgment no. 20/2019), after being asked to decide whether or not this measure was 'proportionate' with regard to another fundamental right, protected by national and supranational law as well, i.e. the right to data protection, read in the light of the equality principle enshrined in art. 3 of the Italian Constitution (as integrated by EU principles guaranteed by Directive 95/46/EC and, nowadays, by Regulation (EU) 2016/679) and, in particular, of the need to respect necessity, proportionality, purpose limitation, adequacy and minimization principles in data processing operations.

Hence, the Constitutional Court clarified that, whilst transparency obligations imposed to politicians are rooted in popular consensus and, consequently, in the need to allow citizens to assess whether politicians, since they took office, benefit from increases in their income and assets (even through their spouses and close relatives), 'and whether this is coherent with remunerations they get for carrying out their duties', imposing the same obligations with regard to all those who have a managerial role in public offices, without any distinctions, is disproportionate to

the objective of fighting corruption in public bodies. The publication of such a huge amount of data would also imply the risk to frustrate the 'same needs to correct information and, consequently, of oversight on institutional responsibilities and on the use of public resources, on which legislation on transparency is grounded'. Hence, the Court agreed with the Italian independent authority tasked with fighting corruption that this measure would generate 'lack of clarity due to confusion' because of the 'unreasonable lack of a prior selection of information that is most appropriate to pursue lawful aims'. At the same time, the Constitutional Court shared the European Court of Human Rights' stance, which, in a similar situation (*Magyar v. Hungary*), held that 'the public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism' (para. 162).

Therefore, the Constitutional Court maintained that the legislator should have 'made a distinction according to different degrees of exposure of different public offices to the risk of corruption, and to the scope of each particular function, providing, coherently, different levels of pervasiveness and completeness of income and financial record to be published'. Consequently, the Court made a distinction itself, keeping these obligations alive only for particular categories of managerial tasks, i.e. those who 'manifestly carry out activities linked to political bodies, with which the legislator assumes the existence of a relationship of confidence, to the point that these offices are conferred by the competent Minister'. However, at the same time, the Court remarked that the legislator should promptly reform this area.

While waiting for a legislative reform after the Constitutional Court's remarks, it is still possible to say that the legislator, in the meanwhile, carried out further 'anti-corruption' strategies, more recently with Law no. 3 of 9 January 2019, named by journalists 'sweeping out corruptions'. This law, besides cracking down sanctions and reforming crimes against the public administration, has also introduced further rules on transparency of political parties and political movements.

In order to deal with the sharp and uncontrolled increase of political foundations and think tanks mainly aimed at financing political parties and political movements, 'also taking into account their capacity to circumvent transparency obligations, accounting provisions and oversight mechanisms' (Ronga, 2019, p. 5) that should instead be applicable to them (it is important to remember that, since 2014, public financing has been prohibited, according to Law no. 13/2014), the legislator imposed that all financing and donations that exceed an established threshold have to be tracked. At the same time, political parties and movements are prevented from receiving financial contributions from people or entities that refuse to publicly acknowledge such transfers of money (the violation of this obligation implies administrative pecuniary sanctions).

The equivalence, with regard to publication and transparency obligations, of foundations, associations and groups, on the one hand, parties and movements, on

the other hand, when the composition of managing bodies depends, totally or partially, on the political decision or, alternatively, when managing bodies are made up of members of parties or movements (even when they took office up to ten years ago), entails – as scholars correctly argued – a 'more or less generalized extension of organizations under scrutiny'. This situation entails that, also in such a circumstance, it is necessary to monitor a very high number of entities, with the additional difficulty to identify which entities are subject to these obligations (Guarantee Committee, 2019, p. 3).

It is furthermore possible to highlight that Law no. 3/2019 also inhibited political parties and movements from receiving contributions, economic aid or other forms of financial assistance from 'government or public bodies of foreign states', as well as from 'legal entities' based in foreign states. Such a prohibition can be easily explained because of the 'need to control transfers that, due to tax reasons related to their different country of origin, are exempted from Italian tax obligations and, therefore, from the scrutiny of Italian authorities on money transfers or on the abovementioned different forms of financial aid in favor of Italian political organizations' (Ronga, 2019, p. 10).

5. Incompatibility regime and bans on assigning a mandate

Among other 'preventive' actions adopted in order to implement Law no. 190/2012, it is also possible to mention obligations arising from Legislative Decree no. 39/2013. In order to prevent interferences or overlaps between politics and administration, as well as conflicts of interests, this decree regulates cases in which it is forbidden to confer some mandates as well as incompatibility, with regard to managerial, administrative or similar roles in local authorities.

A 'ban on assigning a mandate' means, more precisely, that it is (permanently or temporarily) impossible to assign a mandate to those who were criminally convicted on offences against the public administration, or held an office in private entities regulated or financed by public administration, or carried out professional offices in favor of them. In addition, these bans apply to those who have been a part of political bodies, while the reasons of 'incompatibility' – meaning that the person has to choose which office to carry out – apply when there are offices in public administrations and private entities controlled by public actors or financed by them, as well as when professional activity of representative offices in political bodies are carried out.

In order to enforce these provisions, the person who supervises the implementation of the 'anti-corruption plan' for each administration and/or entity has an oversight role and, in cases of potential violation, he has to report to the *Corte dei Conti* (tasked with ensuring administrative accountability), as well as to ANAC,

which will adopt all measures it is competent for. Consequently, when a mandate is assigned in breach of such provisions, the contracts are null and void and, most importantly, it is necessary to sanction the members of bodies that have conferred null and void mandates.

With regard to the implementation of this provision, ANAC has issued a '*circolare*' on May 14, 2015 and, more recently, reported to the Government and the Parliament on February 7, 2019 (ANAC, 2019, p. 1). In this last document, they complained that there is no exception to the ban on assigning a managerial office in local health authorities and those who stood for the European, national, regional and local elections in electoral districts that comprise that territory in which the sanitary authority is located, or to those who, in any way, held political offices that could give them an unlawful advantage with regard to future offices, when they already held managerial offices (with executive functions) in the same administration.

The rationale of Legislative Decree no. 39/2013 is that the legislator wanted to avoid, *ex ante* and from a general perspective, that 'carrying out certain activities/functions facilitates favorable situations to obtain managerial and similar position', in this way 'causing the risk of corruption to unlawfully gain this benefit'. As a matter of fact, in this circumstance, ANAC held that this risk cannot exist. Rather, such ban would violate art. 51 of the Italian Constitution. Therefore, the Constitutional Court urged the legislator to introduce such exception in the cases at issue.

6. 'Repressive' actions bans on standing for elective and government offices

Besides the aforementioned preventive actions, aimed at preventing or, at least, mitigating corruption, Law no. 190/2012 also provides for *ex post* repressive measures, i.e. aimed at banning the possibility, for some people, to stand for elective or governmental offices, if they were definitively convicted on serious crime or, anyway, incarcerated for a certain number of years.

It is true that the first organic legislation on this subject had already been framed by art. 5 of Law no. 55 of March 19, 1990, which provided that conviction for some particularly alarming crimes, incompatible with the exercise of a political right, precluded the possibility to carry on the (already taken) mandate to elective role at the local and regional level; only with amendments brought by art. 1, para. 2 of Law no. 16 of January 18, 1992, convictions for some crimes have been mentioned as precluding circumstance to stand as a candidate, being the rationale (according to a consolidate stance of the Constitutional Court) the need to 'protect public order and public security, free determination of elective bodies, efficacy and efficiency of public administrations in order to deal with a situation of national emergency, involv-

ing the interests of the civil society'[6], with the objective, eventually, 'to prevent and fight the risk that criminal organizations are involved in public administrations' and, hence, to safeguard 'fundamental interests of the State', that could be compromised (Constitutional Court Judgment no. 352/2008). It is necessary to clarify that these preclusions, that the person could not remove, could be considered inadmissible only as long as it is necessary to protect other interests having constitutional rank, following to the general rule of necessity and reasonable proportionality of such a limitation.

However, nowadays, Decree Law no. 235 of December 31, 2012, which implements arts. 63 and 64 of Law no. 190/2012, provides that this preclusion must be applied also with regards to the members of Parliament (both domestic and European one) and to those who hold governmental offices (whose mission is elective).

Such an extension of this legislation, therefore, casts doubts with reference to the same nature of the measure and its retroactive applicability to crimes that took place before the reform. The Constitutional Court[7] ruled many times on this point. It confirmed a previous stance (Constitutional Court Judgment no. 407/1992) and reiterated that measures such as the prohibition to stand for elections, decadence and suspension are not sanctions and, more precisely, they 'are not criminal penalties or consequence of a criminal conviction, but rather consequence of the lack of a subjective requirement to access or keep mandates'. In more detail, 'in cases of decadence or mandatory suspension from elective charges that are provided by the norms at stake, it is not necessary to 'impose a sanction that changes according to the different gravity of the crimes, but rather it is necessary to assess a lack of an essential requirement to keep the public elective mandate' […], within the power to establish eligibility requirements with which art. 51, para. 1, Italian Constitution vests the legislator'.

It is clear that, outside the scope of application of art. 25, para. 2 of the Italian Constitution, 'laws can act retroactively, respecting several limits that this Court established and deal with the safeguard of fundamental values of the society, which protect the addressees of the provision at stake as well as the legal system itself'. In this way, the immediate application of new preclusions to those who were elected before it entered into force, 'is a reasonable answer to the need that the legislation itself tends to accommodate. In cases of evident unlawfulness in the public administration, it is reasonable that a (non-definitive) conviction for some crimes (in this regard, crimes against the public administration) implies the need to temporarily suspend the person convicted from their duty, in order to avoid that the administration is 'biased' and to guarantee the credibility of the administration before the public'.

6 See Constitutional Court, judgments nos. 407/1992, 197/1993, 288/1993, 118/1994, 295/1994, 132/2001, 25/2002, 352/2008, 118/2013.

7 See Constitutional Court Judgments nos. 236/2015, 276/2016, 214/2017.

As a matter of fact, also the idea, which is particularly widespread among scholars, that this measure is substantively 'criminal' in nature (in the light of the well-consolidated substantive approach adopted by the Strasbourg judge, since the well-known case of *Engel v. The Netherlands* (1976), aimed at establishing whether sanctions provided by domestic law are criminal in nature and are covered by arts. 6 and 7 of the European Convention of Human Rights), was held ill-founded by the Constitutional Court with decision no. 276/2016. The Constitutional Court concluded that 'from the framework of guarantees enshrined in the European Convention of Human Rights, as interpreted by the European Court of Human Rights, the obligation to impose a provisional administrative measure, as suspension from elective mandate as a consequence of a non-definitive criminal conviction, do not infringe the prohibition to punish someone without a law'.

If this is the situation with regard to how this measure is legally framed, there are still some difficulties (and in particular) with regard to the prohibition to stand for parliamentary elections.

On the one hand, remedies against exclusion orders adopted by electoral offices appear quite limited. Such orders can be appealed before the National Central Office, but it is not possible to apply anticipatory measures that candidates to other elective mandates can enjoy. On the other hand, when preclusions arise after lists are presented or before proclamation, their existence would be assessed by the Chamber to which the person belongs when elections are verified or even afterwards, respecting what is provided by art. 66 of the Italian Constitution. There is a risk (which has already materialized[8]) that such procedure undermines 'the interest of the Parliament to guarantee the presence of components who respect the requirements to participate in the parliamentary assembly, among which the absence of criminal convictions'.

7. Prevention of corruption and improvement of efficiency in public administration

In attempting to evaluate all the initiatives adopted in Italy against corruption in recent times, we must assume that, almost 30 years after the start of '*Mani Pulite*', something has surely changed in the country. However, some new large-scale in-

8 See, in particular, the Senate resolution (morning session no. 787 of 16 March 2017, available at http://www.senato.it/service/PDF/PDFServer/BGT/1009219.pdf.), that did not approve the forfeiture due to ineligibility proposed by the Council of elections and parliamentary immunity for Senator Minzolini, already definitively sentenced for the crime of embezzlement following the sentence of two years and six months of imprisonment and the measure of temporary interdiction from public offices for a period of the same duration.

vestigations show that corruption is still widespread and also the political system remains vulnerable to it[9].

For this reason, more intense efforts have been made, trying to achieve a better balance between repression and prevention, strengthening the role of the Anti-Corruption Authority (public procurement remains one of the areas most infested with corruption, even if more transparency was introduced) and enacting more severe criminal provisions.

It is probably too early to tell if these measures will bear fruit and have full implementation; it is also true that prevention takes much longer to produce an impact, although it is an indispensable complement to the repression.

The *Corte dei Conti* has stressed[10] its major effort for combating corruption and developing its fundamental function of prevention, aimed at driving public administrations in the proper and responsible use of public resources. The institution's role is particularly strategic with regard to its relationship with territorial authorities and local administrations, to which it provides an independent advice that promotes a culture of efficiency and sound financial management.

The accounting judge has highlighted the urgent need to complete the framework of preventive measures against corruption, simplify the rules, reduce hyper-legislation and support the digitalization of administrative procedures (even if this entails the need to reach new balances between the principle of transparency and that of protection of privacy and personal data, also in light of the new European regulation in this area), in a country where rules on conflict of interest and on lobbying have still not been approved.

Finally, it is worth remembering that the Anti-Corruption Authority has recently published its report[11] on the corruption in Italy in 2016-2019 (ANAC, 2019), based on the measures taken by the judicial authority in the last three years.

Between August 2016 and August 2019, 117 ordinances of preventive detention for corruption have been issued by the judicial authority; 152 cases of corruption

9 We can remember i.e., from the second half of the 1990s, the inquiries on the '*MOSE*' project, the flood-barrier system in Venice, on the Expo in Milan, and on 'Mafia Capitale' in Rome.

10 See the speech of the President of the *Corte dei Conti* at the opening of the judicial year 2019, February 15, 2019, available at https://www.corteconti.it/Download?id=c224ac02-6fb9-4bde-b5d2-404bb7a73390

11 In October 2019, the president of ANAC, presenting this report to the foreign press, said that national corruption has changed its nature, becoming '*pulviscolare*' and slippery, with the frequent dematerialization of bribes. Those last ones are no more only economic compensations, becoming, for example, hiring of relatives, meals, overnight stays, different kinds of benefits (and even sexual services). Their modest value is also indicative of how easily the civil service is 'sold'. The economic counterpart remains instead dominant in the ever wider and labyrinthine world of international corruption.

have emerged, practically in all regions but especially in Sicily, Latium, Campania, Apulia, and Calabria.

74% of the cases of corruption affected the field of public procurement, while 26% were related to different areas (competition procedures, administrative procedures, building permits, corruption in relation to judicial acts, etc.).

The strong engagements of the judiciary could be considered as the evidence of a curios paradox concerning Italy's negative ranking in the Corruption Perception Index (CPI): the more you fight corruption, on the repressive plan, the more you probably increase the citizens' perception of living in a country affected by a high level of corruption.

The CPI is not an objective indicator indeed and it should be differently conceived; it is based on the 'perception' and not on the measurement of real existing corruption (Tartaglia Polcini, 2018, p. 4). Nevertheless, the common use and reference to this marker has unfortunately huge consequences on the national economy, as it discourages investments and innovations, but, more importantly, it weakens citizen's trust toward institutions, which is the most essential and indispensable element to ensure cultural, social and economic development of a country.

References:

1. ANAC, 'La corruzione in Italia (2016-2019). Numeri, luoghi e contropartite del malaffare' (Corruption in Italy (2016-2019). Numbers, places and counterparts of the underworld), October 17, 2019, [Online] available at https://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/News/2019/RELAZIONE%20+%20TABELLE.pdf, accessed on December 15, 2019.
2. Council of Europe, 'Criminal Law Convention on Corruption', adopted in 1999, entry into force July 1, 2002, [Online] available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173, accessed on January 5, 2020.
3. Eurobarometer, 2014, [Online] available at http://data.europa.eu/euodp/en/data/dataset/S2176_88_2_470_ENG, accessed on January 5, 2020.
4. European Commission, 'Annex 12. Annex Italy to the EU Anti-Corruption Report', COM (2014) 38 final, Brussels, 3.2.2014, [Online] available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_italy_chapter_en.pdf, accessed on January 5, 2020.
5. European Commission, 'Green Paper – Public Procurement in the European Union: Exploring the Way Forward', COM(96) 583 final, Brussels, 27.11.1996, [Online] available at https://op.europa.eu/en/publication-detail/-/publication/f49ef575-c032-44de-a7ff-4c21c0b0da28/language-en, accessed on January 5, 2020.
6. Guarantee Committee of Statutes and for the Transparency and Control of the Accounts of Political Parties, 'Annual Report', April 2019, [Online] available at http://www.sen

ato.it/application/xmanager/projects/leg18/file/relazione_30_aprile_2019.pdf, accessed on January 5, 2020.
7. Merli, A., 'Lessons from Italy's Anti-Corruption Efforts', in Spilimbergo, A. and Srinivasan, K., *Brazil: Boom, Bust, and Road to Recovery*, Washington, DC: International Monetary Fund, 2019, pp. 341-348.
8. Merloni, F., 'Corruption and Public Administration. The Italian Case in a Comparative Perspective, Oxon-New York: Routledge, 2019, pp. 54-75.
9. OECD, 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', adopted on November 21, 1997 and entered into force on September 28, 2005, [Online] available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, accessed on January 5, 2020.
10. OECD, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions', adopted on November 26, 2009, [Online] available at https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf, accessed on January 5, 2020.
11. OECD, 'Recommendation of the Council on Enhancing Integrity in Public Procurement', September 25, 2008, [C(2008)105], [Online] available at https://one.oecd.org/document/C(2008)105/en/pdf, accessed on January 5, 2020.
12. OECD, 'Recommendation of the Council on Public Procurement', adopted on February 18, 2015, [C(2015)2], [Online] available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0411, accessed on January 5, 2020.
13. Ronga, U., 'Tentativi di prevenzione della corruzione politica. Utilità e profili critici della legge 9 gennaio 2019, n. 3' (Attempts to Prevent Political Corruption. Usefulness and Critical Profiles of the Law of January 9, 2019, no. 3), 2019, *Federalismi.it*, no. 9, pp. 1-17, [Online] available at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38578, accessed on January 5, 2020.
14. Tartaglia Polcini, G., *La corruzione tra realtà e rappresentazione. Ovvero: come si può alterare la reputazione di un Paese* (Corruption between Reality and Representation. That Is: How Can the Reputation of a Country Be Altered), Eurispes, Bologna: Minerva, 2018.
15. Transparency International, 'Corruption Perceptions Index 2019', 2019, [Online] available at https://www.transparency.org/cpi2019, accessed on January 5, 2020.
16. Transparency International, 'Global Corruption Barometer 2019', 2019, [Online] available at https://www.transparency.org/research/gcb/global_corruption_barometer_2019, accessed on January 5, 2020.
17. Transparency International, Anti-Corruption Glossary, 'Corruption', undated, [Online] available at https://www.transparency.org/glossary/term/corruption, accessed on January 5, 2020.
18. United Nations, 'United Nations Convention against Corruption', adopted on October 31, 2003, New York: United Nations, 2004, [Online] available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed on January 5, 2020.
19. Vannucci, A., 'Corruzione nella politica e corruzione della politica: l'evoluzione del caso italiano' (Corruption in Politics and Corruption in Politics: The Evolution of the Italian

Case), in Pertici, A. and Trapani, M., *La prevenzione della corruzione*, Torino: Giappichelli, 2019, pp. 23-51.

Legislation:

20. Italian Constitution of 1948.
21. Law no. 55 of 1990 laying down provisions for preventing mafia-type crime and other serious forms of manifestation of social danger, published in the Italian Official Gazette, no. 69 of March 23, 1990.
22. Law no. 16 of 1992 regarding provisions about elections and nomination rules in regions and local authorities, published in the Italian Official Gazette, no. 17 of January 22, 1992.
23. Legislative decree no. 33 of 2013, modified by legislative decree no. 97 of 2016, regarding the reorganization of the discipline concerning the obligations of publicity, transparency and dissemination of information by public authorities, published in the Italian Official Gazette, no. 80 of April 5, 2013.
24. Law no. 190 of 2012 laying down provisions for preventing and fighting corruption and illegality in public administration, published in the Italian Official Gazette n. 265 of November 13, 2012.
25. Decree Law no. 235 of 2012 regarding the Consolidated Text on provisions about ineligibility, published in the Italian Official Gazette, no. 3 of January 4, 2013.
26. Legislative Decree no. 39 of 2013 on incompatibility in public administrations, published in the Italian Official Gazette, no. 92 of April 19, 2013.
27. National Code of conduct for employees of the public administrations, adopted by the Decree of the President of the Republic no. 62 of 2013, published in the Italian Official Gazette, no. 129 of June 4, 2013.
28. Decree Law no. 101 of 2013 (converted into law with amendments by Law no. 125 of 2013), regarding rationalization in public administrations, published in the Italian Official Gazette, no. 204 of August 31, 2013.
29. Decree Law no. 149 of 2013 (converted, with amendments, into Law no. 13 of February 24, 2014) on the abolition of public funding for politics, published in the Italian Official Gazette, no. 303 of December 28, 2013.
30. Law no. 69 of 2015 laying down provisions on crimes against the public administration, mafia-type associations and false accounting, published in the Italian Official Gazette no. 124 of May 30, 2015.
31. Legislative Decree no. 50 of 2016 regarding the Public Contract Code, published in the Italian Official Gazette, no. 91 of April 19, 2016.
32. Law no. 179 of 2017 regarding whistleblowing, published in the Italian Official Gazette, no. 291 of December 14, 2017.
33. Law no. 3 of 2019, regarding measures to fight crimes against the public administration as well as on the matter of statute of limitations and transparency of political parties and movements, published in the Italian Official Gazette, no. 13 of January 16, 2019.

Case law:

34. Constitutional Court judgment no. 30 of 2012
35. Constitutional Court Judgment no. 20/2019
36. Constitutional Court, judgments no. 407/1992, 197/1993, 288/1993, 118/1994, 295/1994, 132/2001, 25/2002, 352/2008, 118/2013
37. Constitutional Court, judgment no. 352/2008
38. European Court of Human Rights (ECHR), Grand Chamber, November 8, 2016, *Magyar v. Ungary*, *Application no. 18030/11*
39. European Court of Human Rights (ECHR), Court (Plenary), judgement of November 23, 1976, *Engel v. The Netherlands*