Investigative tecniques and rules of assessment of corruptive phenomena.

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Corruption is the new mafia?

- The phenomenon of corruption has **changed** over time.
- Corruption has undergone a **metamorphosis,** becoming a "system", that is, a consolidated and structured practice, a complex **warp of illicit** relations and commodities diffused in the various social groups, which has revealed contiguity with organized crime and economic crime. So much so that, in the light of the criminological pecularities of the phenomenon in Italy, for years, the idea of **facing the phenomenon with the same modalities** with which Italy has faced the phenomenon of the mafias has begun to make its way.
- In the last years, the corruption was considered like an serious emergency for the country. So the legislator and the Government started to create "emergency law" to face the problem, exactly like there was political internal terrorism (Brigate Rosse – Nar in 1960-1970) and Sicilian Mafia's attack to the Italian State (1980-1990).

The Bonafede reform: the extension of undercover operation to the corruption crimes.

- In this context, the **use of undercover** or **infiltrated agents** represents a valid investigative tool towards the mafia associations and, recently, the **Bonafede reform** - renamed "**SpazzaCorrotti**" - has sanctioned its legitimacy also in the anti-corruption operations.
- Law N° 3/2019 extends the Italian discipline of undercover operations also to the crimes of corruption, concussion, illicit induction and trading in influence, **excluding the punishability of the officers of the Judicial Police** who, in the course of specific and authorized investigations, and for the sole purpose of acquiring evidence in order to commit crimes already concluded by other subjects, "correspond money or other benefits in execution of agreements concluded by others".
- The reform law has modified **article 9,** paragraph 1, letter a) of Law 146 of 16 March 2006 on the Ratification and Execution of the United Nations Convention and Protocols against Transnational Organized Crime.

The Bonafede reform: the extension of undercover operation to the corruption crimes.

- In the intentions of the legislator and the Government, the extension of the field of application of undercover operations is justified by the fact that these are crimes - such as corruption, extortion, trafficking in influence, etc. - characterized by an appreciable seriousness, very widespread, and **difficult to ascertain**, as they are often bilateral crimes, because they are characterized by the close commonality of illicit interests and by the **submerged bond** that protects them.
- The consensual nature of such crimes makes their reporting very rare and consequently difficult to emerge. Traditionally, there is an important "**dark number**" of corruption undiscovered.

The Bonafede reform: the extension of undercover operation to the corruption crimes.

- Today, usually, the discovery of facts of corruption **emerges in an absolutely random way**; the phenomenon emerges in the context of **judicial activities born for other purposes**. Indeed, it is in the context of investigations that involve other contexts, especially when telephone or environmental interceptions are carried out, that we see the emergence of corruption events.
- All the main investigations of corruption in our Country were born with a different original imputation and almost always the typical investigative tool to be able to bring out such facts were the telephone or environmental interceptions.
- The objective difficulty of delineating facts of corruption poses the problem of what could be the best tools, from the regulatory and technical investigative point of view, for their emergence.
- In this sense, undercover operations constitute an undoubted instrument of contrast.

The risk of the undercover operation.

- However, undercover operations carry a risk: that the **legitimate purpose of obtaining evidence** will result in a real incitement to commit crime, with an intolerable sacrifice of freedom and the right of self-determination of the citizen on the altar of an alleged "hypereffectiveness" of criminal law.
- A risk, as we shall see, known to the Court of Human Rights.

Undercover operations vs Entrapment: the differences.

- The **undercover operation** are a different model from that of the **agent provocateur**, i.e. a person who, by definition, must carry out an activity of determining or instigating the commission of the offence by means of simulated illicit proposals to bring to justice those who adhere to it. The idea of using provocative agents is based on the **fiction of an illegal relationship** - in reality non-existent - with the aim of testing, attempting and then punishing those who fall into the provocation - the unfaithful public official; a crime is **artfully created** that otherwise would not have been committed.
- The agent provocateur creates the crime by means of a fiction, the undercover agent **disveal it**, collecting evidence against the guilty party, protected by the provision of non-punibility of conduct attributable to complicity in the crime and yet still allowed as a legitimate method of fulfilling the duty of investigation.

Undercover operations vs Entrapment: the differences.

- The undercover agent is a person who, **belonging to the police forces** or formally collaborating with them, acts in the context of an **official preliminary investigation** of which the authorities are aware, in the presence of plausible suspicions against one or more persons about the future commission of a crime. The undercover agent acts merely for observation and containment purposes.
- On the other hand, an agent provocateur is one who, even outside an officially authorized mission controlled by a judge, with the sole purpose of proceeding with the arrest if the instigation is accepted, engages in **"active" conduct**, that is, of instigation, induction, conception or execution of one or more criminal acts, which without his decisive intervention would never have occurred.

Undercover operations vs Entrapment: the origin.

- Investigative tactics of this kind - introduced for reasons of efficiency in the response to organized crime - in a welfare state governed by the rule of law must always be **carefully balanced** with its constituent principles, which recognize the task of law enforcement agencies to prevent and suppress crimes, but **never to provoke their commission**. To allow full legitimacy, without any restrictions whatsoever, would mean overwhelming the latter and undermining the fundamental rights of the people.
- In this case, we are faced with an institution with fairly recent origins, from the until the 1990s, the Italian legal system did not reserve any regulatory space for the agent provocateur, either codicistic or extra codicem, since it always and only represented the product of an **inexhaustible domestic torment** on the part of the doctrine" and "from a systematic point of view(...) an institution without a country."

Undercover operations vs Entrapment: the origin.

- In this legislative silence, the **jurisprudence had however cut out** an area of non-punishability in favour of the agent provocateur for any offences committed in the course of a judicial police operation, relying on the cause of common justification for the **fulfilment of the duty** referred to in article 51 of the Criminal Code and on the **obligation for the police to prevent the commission of offences**, evidence of offences and to search for the perpetrators referred to in article 55 of the Criminal Code.
- This thesis met with the easy objection that members of the police force have a duty to general to prevent the perpetration of crimes, but **certainly not to provoke their perpetration.**

Undercover operations vs Entrapment: the origin.

- For the first time this special technique of searching for and discovering the evidence of crimes has found a rules in the reformed **narcotics legislation**, when in 1990, with the art. 25, law 162/1990 in Presidential Decree 309/1990, rubricated in principle "**Purchase simulated drug**", a hypothesis of non-punishability has been dictated for the so-called **fictus emptor** of substances and the fact that you're a drug addict.
- Subsequently - almost always in compliance with supranational agreements - **similar figures of agents provocateur or infiltrator were introduced** in a selective manner, according to a random pattern of leopard spots dictated by the contingent emergencies of the moment, with reference to the kidnapping for extortion purposes, to the recycling and receiving of weapons, ammunition and explosives, to illegal immigration, to the prostitution and child pornography and sex tourism to the detriment of minors, terrorism, crimes against the individual and concerning prostitution.

The first organic reform of undercover operation: the law n. 146/2006

- By the mentioned article 9 of law 146 of 16.3.2006, ratifying the aforesaid Convention, in compliance with the indications contained therein, which invited the States to adopt all the special techniques investigation - including undercover operations - that are instrumental in effectively countering the effects of the transnational crime, **has replaced the previous**, fragmented, now recalled legislation with a new and **unitary regulation of undercover operations**, expressly repealing with art. 11 almost all the pre-existing cases and, as will be seen further on, clarifying - in compliance with the indications proliferating from the CEDU jurisprudence - the notion of infiltrator and its difference with respect to that of agent provocateur, as well as the legal nature of the non-punishability of this special 'extinguishing agent'.
- However, this reform, although it has ensured a significant simplification of the previous state of confusion and disorder that characterized the matter, has **not fully achieved the objective of its reductio ad unitatem**, since it did not involve certain special cases of agent the Commission has taken the view that the European Union is not a provocateur in the field of drugs, prostitution, pornography and tourism. to the detriment of minors.

The first organic reform of undercover operation: the law n. 146/2006

- Well, the law seems to make a clear choice of field on this controversial point. Firstly, in the heading of Article 9 it speaks only of 'undercover transactions', underlining that immediately the need that the intervention of infiltrators should never be carried out in an extemporary or autonomous form (as could happen in the case of the agent provocateur), but only within **operational services previously planned and coordinated** with any other similar activity in progress.
- This option of the legislator does not have a substantially innovative value, since it limits itself to incorporating, positively, the indications of the jurisprudence of the Court of Strasbourg, which, on several occasions, has faced the problem of the limits of lawfulness of the conduct of the infiltrator, ending up seeing them precisely in the border with the conduct of the agent provocateur.

The European Court of Human Rights against the entrapment.

- In particular, with the well-known **Teixeira de Castro judgment** of 1998, the European Court CEDU preliminarily clarified that in modern democratic societies the function of the investigative bodies is that of **protect the community against existing crime** and crime that is ready to take action, not even to create crime, leading to the commission of crimes that would never have been committed by any person of any kind if they weren't provoked.

The European Court of Human Rights against the entrapment.

- The **European Court of Human Rights** has always affirmed, in principle, the line of **demarcation between** the general theme of the use of **special investigation techniques** (undercover agents, informers, cover practices) and that of the **agent provocateur** (or entrapment), confining only the latest in the **area of violation** of the right to a fair trial pursuant to article 6 of the European Convention for the Protection of Human Rights.
- In particular, with regard to special investigative techniques, the Edu Court has demonstrated in all its pronouncements a full awareness of the difficulties connected to the research and acquisition of the evidence of the crimes, with particular reference to those in matters of organized crime, terrorism, narcotics and corruption, noting how the commission of crimes in the aforementioned sectors can potentially inflict feral blows to the economy of a nation, affecting its social fabric and democracy.

The European Court of Human Rights against the entrapment.

- Therefore, although aware of the **high social, economic and democratic alarm** of particular spheres of criminal activity, **nevertheless the CEDU** has unequivocally **sculpted the principle** according to which the right to a fair trial and the expectation of a loyal and correct administration of justice **cannot be sacrificed for any reason of criminal policy**, resulting in irrepressible guarantees for every type of crime, from the simplest to the most complex in terms of evidence.
- Therefore, reasons of public interest or of political-criminal opportunity **can never be camped in order to justify the usability** (and, upstream, the regularity of the relative procedure of search and acquisition of evidence) **of evidence obtained through "agents provocateurs"**, in such a way as to deprive an individual of his right to a "fair trial".
- In this specific context, therefore, is placed the *summa divisio* between the use of "special investigative methods" (in particular, techniques "undercover") fully recognized and allowed for the purpose of seeking evidence in particularly sensitive and complex areas of criminal phenomenology, and the technique of "agent provocateur", explicitly prohibited and whose evidentiary results can not be legitimately used in a "fair trial".

The European Court of Human Rights and the test for the assessment of entrapment

- In order to ascertain whether the conduct of the undercover agent was causally relevant to the commission of the offence, the CEDU carries out the so-called **but-for test of causation**, which seeks to ascertain whether the agents simply gave the applicant the opportunity to commit the offence which he **would have committed in any event** or whether they exercised decisive influence by instilling into the applicant's mind a **criminal intention which did not exist before**.
- The Court then examines whether or not there **were suspicions of previous criminal activity**, whether it was the agents who took the initiative and contacted the complainant, whether there was an initial refusal, whether the agents offered exorbitant sums of money, the degree of intensity of the renewal of the offer over time.

The second reform of undercover operations: the law n. 136/2010.

- The path towards the **enlargement and unification of the discipline** was concluded only a few years later, when, with **art. 8 of the law 13 August 2010, n° 136**, "Extraordinary Plan against the mafias, as well as delegation to the Government in matters of anti-mafia regulations", the legislator modified, under multiple aspects, the formulation of art. 9 of the Law 16 March 2006, n. 146 and, above all, **has re-determined the ambit of applicability, including** - together with new crimes, such as the activities organized for the illicit traffic of waste and the not aggravated hypotheses of aiding and abetting clandestine immigration - **also the cases previously excluded because they are subject to special regulations** and proceeding to the parallel abrogation of the last ones.
- Following the reform, art. 9 of Law no. 146 of 16 March 2006 has become the general and unitary discipline of undercover operations.

The legal requirements of the 'undercover procedure: the offences for which it may be ordered.

- The new text of Art. 9, Law 146/2006 contains, in the first paragraph, the **complete and exhaustive list of the only criminal cases of particular gravity** for which the use of the special investigative technique undercover op. can be ordered, moreover, to the implicit, but important conditions that the same cases have already been previously **realized**, or - on the basis of a framework of circumstantial evidence of a certain gravity - **it is possible to presume their next commission**, and that the **ordinary investigative instruments are not effective or sufficient their verification**. Otherwise there would be the risk of transforming these techniques of investigation conceived for the discovery of specific forms of crime already in existence as a source of further offences not yet committed.

The legal requirements of the 'undercover procedure: the subjective area of application.

- With the reform of art. 9, Law 146/2006, the discipline was also unified as regards the following aspects concerns the **subjective scope of operation** of this special cause of justification, proceeding to the analytical and exhaustive identification of the persons entitled to carry out undercover transactions.
- Pursuant to the first paragraph, letter a), of this article, **only the following are counted**: "the officers of the Judicial Police of the State Police, of the Carabinieri Corp and of the Corp of the Financial Police, belonging to the specialized structures or to the Anti-Mafia Investigative Direction", who act, moreover, in the course of specific police operations, "with the sole purpose of acquiring elements of proof in order" to any of the offences referred to in the same article.
- Pursuant to letter b), for crimes with the purpose of subversion or terrorism, "the officers of the Judicial Police belonging to the investigative bodies of the State Police and the Carabinieri Corps, specialized in the activity of countering terrorism and subversion, and of the Corps of the Financial Police, competent in the activities of countering the financing of terrorism, are identified".
- Alongside these subjects, the possibility is provided for of involving also **the auxiliaries and the persons interposed**. (confidants, interpreters and members of an association).

The legal requirements of the 'undercover procedure: the allowed activities.

- In art. 9, paragraph 1, l. 146/2006, the legislator proceeded to list the same, through a double exhibition scheme: in the first part of the aforementioned article, **exhaustively lists the typical activities that can be carried out by the infiltrated agents**, stating that they are not punishable **only in the case** in which "they give refuge or in any case provide assistance to the associates, purchase, receive, replace or conceal money, arms, documents, narcotic or psychotropic substances, goods or things that are the object, product, profit or means to commit the crime or otherwise hinder the identification of their origin or allow their use"; in the second part - grafted with the 2010 reform with the aim of collecting the precise requests coming from the Police Forces to be able to enjoy greater freedom and tranquillity of action - **renunciation of the analytical description and proceeds to a description for general clauses at the limits of the indeterminacy**, foreseeing that the infiltrators are not punishable also when "they carry out prodromical and instrumental activities".

The risk that undercover activities become provocation in the investigation of corruption offences.

- The existence of the risk of provocation is exacerbated in relation to offences against the public administration.
- Corruptive phenomena occur in most cases in a context in which all the people involved have apparently irreproachable positions.
- Corruption investigations often involve administrators and politicians and there is a risk that they will be exploited.

The risk of undercover in the investigation of corruption: the comparison with the purchase of drugs.

- The difference between **simulated conduct of corruption** and, for example, **simulated purchase of drugs** should also be highlighted.
- The holder of a significant quantity of drugs was in possession of it even before the intervention of the police who simulated the purchase. Article 73 of Presidential Decree 309/1990 punishes not only the sale but also the possession of the substances.
- If art. 73 punished exclusively the transfer of narcotics and not also the detention, it would be much more difficult to demonstrate that the suspect would have carried out the sale even without the intervention of the police forces.

The risk of undercover in the investigation of corruption: the comparison with the purchase of drugs.

- In the crimes against the public administration, on the other hand, it is not possible to **find a preparatory conduct** (an antecedent) similar to the possession of drugs that is punishable autonomously (corruptibility is not punishable): the question arises of whether the suspect would have participated in a corrupt exchange even if the police had not intervened.

The art. 323*ter*: cause of non-punibility against corruption.

- An innovative tool to combat the corrupt phenomenon was introduced a few months ago by law 3/2019, although with several criticisms by the authors: that is, a **new cause of non-punibility** in the italian criminal system for those who **self-declare corrupt acts**, disciplined by art. 323ter c.p.
- The reason for the legislative intervention lies in the attempt to contrast the so-called "dark number" of corruption offences.
- The solution aims to break the "bond of solidarity and silence" that binds the participants of the corrupt pact, discouraging in advance the commission of illegal conduct and introducing "a factor of insecurity with dissuasive effects" in the relationship of trust between intraneus and extraneus of the public administration.

The art. 323*ter*: cause of non-punibility against corruption.

- The main objective, however, is above all that of **favouring the discovery** of corrupt facts; recognizing the impunity of those who denounce, the aim is to stimulate the conduct of resipiscence of the parties to the pact and, through self-reporting, the consequent identification of the notitia criminis.
- The choice of the institute had as an indirect positive effect the renunciation of the introduction of the other, even if finalized to the same objective, and that is, of the so-called agent provocateur, whose use, in a first phase, had also been feared, and the turning towards the very different and more reassuring figure of the infiltrator agent.

Art. 323-ter c.p. - Cause of non-punibility.

- 1. Anyone who has committed any of the offences referred to in articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis, limited to the offences of corruption and undue induction indicated therein, 353, 353-bis and 354 **is not punishable if**, **before being informed that investigations are carried out** against him in relation to such offences and, in any case, **within four months of the commission of the offence**, he **reports it voluntarily** and provides **useful and concrete indications** to ensure proof of the offence and to identify the other persons responsible.
- 2. The non-punishability is subject to **the provision of the benefit received** by him or, in the event of impossibility, of a **sum of money of equivalent** value, or to the indication of useful and concrete elements to identify the beneficial owner, within the same period referred to in the first paragraph.
- 3. The cause of non-punishability **does not apply** when the report referred to in the first paragraph **is predetermined** with respect to the commission of the crime reported. The cause of non-punishability **shall not apply in favour of the undercover agent** who acted in violation of the provisions of Article 9 of Law no. 146 of 16 March 2006.

Art. 323-ter c.p. - Cause of non-punibility.

- Paragraph 1 of the provision explicitly identifies the **time limit** within which a self-disclosure must be submitted. The "repentance" must, in particular, manifest itself before being informed of the progress of the investigations and, in any case, within "four months" of the commission of the fact. The **maximum four-month** term should ensure, first, that the "regression of the offence" is useful, because it is timely and carried out before the effects of the crime are consolidated; in secundis, that the subsequent behaviour appears, however, as an observance, altough late, of the precept ignored or violated previously.

Art. 323-ter c.p. - Cause of non-punibility.

- Paragraphs 1 and 2 of the provision indicate the **conduct that the agent must adopt** in order to benefit from the exemption from the penalty. In particular, what is requested is a sort of **double resipiscence**; the first consists in an active **collaboration in the investigations**; the second is aimed at the **restitution of the obtained usefulness**, in function, obviously, of the future confiscation. The first step to be taken by those who want to obtain the reward benefit is, therefore, the **voluntary submission of a report**, in which all the circumstances must be indicated to reconstruct the fact and to identify the (possible) other persons responsible.

Art. 323-ter c.p. - Cause of non-punibility.

- Finally, the third paragraph of the provision specifies that, despite the fact that the self-disclosure meets the above requirements, the cause of non-punishment **cannot be invoked** if it is established that the complainant has **premeditated the commission and the delation of the fact**.
- The reason of the provision is related to the concern - expressed by several parties already in the phase of examination of the bill - of an instrumental use of the institute such as to be able to return from the window the figure of the "agent provocateur", driven, instead, from the main door.
- In the same objective, the last part of the provision provides for the exclusion of its **application to undercover agents** who have acted in breach of Article 9 of Law No 146 of 16 March 2006.

Measuring corruption in a country. It's possible?

- The issue of measuring corruption is a very complex one.
- It should be pointed out at the outset that incorrect data are often circulating on this subject.
- For example, the recurrent assertion that in Italy the damage resulting from corruption amounts to 60 billion - a data that has also been included in numerous official documents - is the result of a misunderstanding.
- What is the source of this misunderstanding?
- The hypothesis of the possible extent of the damage caused by corruption was based on the assumption that the phenomenon could account for up to 3% of GDP. Given that at that moment, on the basis of 3% of GDP, corruption was equal to 60 billion, it was said that this was the value.
- From that moment on, the data has been "handed down"

Measuring corruption in a country. It's possible?

- How to measure corruption? Which mechanisms are used?
- The first thing to highlight is the difficulty of detecting the crime by means of a report.
- The crime of corruption, because of its characteristics, as mentioned, is difficult to emerge. Of the two contractors, in fact, no one has an interest in reporting because if he did, he would denounce himself. Therefore, if we wanted to identify the facts of corruption on the basis of the reports made, we would have absolutely insignificant results.
- To complicate matters, there is also the variety of ways in which corruption takes place: in many cases, in fact, there is no immediate benefit and the official receives the benefit regardless of the immediate favor (the so-called official on the payroll).

Measuring corruption in a country. It's possible?

- In theory, the only certain data are judicial data. The judgements, in fact, testify to situations in which a judge ascertains the corrupt act: an act of corruption has occurred and the subjects who participated in it are known.
- These data, however, alone are not enough, would show a false picture of the situation. Criminal proceedings for corruption are about 5 % of the annual total.
- What are the other elements or a high level of evidence from which we draw evidence that there are so many more facts of corruption than those discovered?

Measuring corruption in a country: the CPI of Transparency International.

- The world's most famous system for measuring corruption is the Transparency International, **Corruption Perceptions Index** (CPI), which refers to the level of corruption that citizens perceive within their own country.
- In fact, these are surveys: respondents are asked if they think that their country is corrupt and based on the answers, rankings are drawn up. Those who believe that there is a high level of corruption in their country are then asked if they have direct knowledge, or through others, of the facts of corruption. In other words, the question is whether there is actual knowledge, beyond perception, of individuals who have suffered and paid for corruption.
- Well, the answer to 90% was negative. Most people who claim to be convinced of the existence of a very high level of corruption are not able to report any episode in this sense for direct or indirect knowledge, but only to feel common.

Measuring corruption in a country: the CPI of Transparency International.

- This is a demonstration of what the perception index of corruption is: it is, that is, only a feeling, not a real figure. However, this is the most important instrument for measuring corruption.
- Although there is no lack of concern, the data obtained from this system cannot be underestimated.

The importance of CPI of Transparency International.

- In fact, they show the mistrust that citizens have towards their own institutions and mistrust is one of the main causes of corruption.
- That mistrust represents the way in which the citizen interfaces with the institutions and leads the citizen who comes into contact with the PA to move with a logic that is not to understand what is the procedure to follow but to see if there is a means to achieve the result.
- This is why distrust of institutions is the main driver of corruption; the subject interfaces with the administration, doubting that the institutions are acting correctly. And this condition induces the citizen, even in unambiguous situations, to use non-linear means, typical of corruption.

Thanks for your attention and time!