

# Crimes against Public Administration in Italy

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# A brief introduction

Italy has a long story of “corruption scandals”.

In 1892, just 30 years after the birth of modern Italy the so called scandalo della Banca Romana arose.



In 1992

“mani pulite” (clean hands) reshaped the political landscape of the country. All major parties representatives were arrested, because of a large corruptive system.



In this 100 years several several reforms were made, in order to tackle the issue. We are still facing a constant rewriting and reshaping process.

Last major reform has been made in 2012, l.190, that modified all major crimes against the P.A. In 2019 the law n. 9/2019 “spazzacorrotti” (litteraly swipe away the corrupted) that toughen up the penalties.

Italian Criminal code is from 1930, it has been drafted during fascism and, at that time, public administration was considered a fundamental asset of the State, the protected good was basically its prestige, any crime should be considered a threat to its prestige.

After WWII with 1948 Constitution new constitutional value ("Rechtsgut ") had to be found.

## Art. 97 Cost.

*The public offices are organized in accordance with the law, so that the good performance and impartiality of the administration are ensured.*

*“good performance”*: is a principle that sets out a criteria of efficacy of the public action. Any human action that goes against it can be considered worthy to be punished

*“Impartiality”*: no one can exploit his position to receive an undue advantage. Every citizen must have the same opportunities from the public administration

# Public official

According to the art. 357, c.1, c.p.,

"for the purposes of criminal law, those who exercise a legislative, judicial or administrative public function are public officials.

To the same effect, the administrative function governed by rules of public law and authoritative acts is public and characterized by the formation and manifestation of the will of the public administration or when it's carried out with authoritative or certification powers

# Crimes against PA

- Embezzlement
- Concussione (bribery through extortion)
- Corruption (4 different hypotheses)
- Use of inventions or discoveries known for service reasons
- Disclosure and use of secrets known because of the service
- Rejection of an official act. Omission
- Trafficking of illicit influences
- Abuse of the office



# Embezzlement

Art. 314 cp.

“The public official, who, having for his office or service the possession or otherwise the availability of money or other mobile thing belonging to others, appropriates it, is punished with imprisonment from four years to ten years and six months.”

Conduct: the usage of the thing “*uti dominus*”(as if he were the owner).

What about the distraction? Major problem

# Abuse of the office

*“Unless the fact constitutes a more serious offense, the public official who, in the performance of the functions or service, in violation of the law or regulation, or failing to abstain in the presence of an interest own or of a next relative or in the other prescribed cases, intentionally procures to oneself or to others an unfair patrimonial advantage or cause to others an unjust damage is punished with the imprisonment from one to four years”*

# Concussione

Article 317 of the Italian Criminal Code (Text amended by Law 190/2012):

- *The public official or public service representative who, abusing his quality or his powers, forces someone to give or promise unduly, to him or to a third party, money or other benefit is punished with imprisonment from six to twelve years .*

# Concussione

- The crime of “concussione” is the most serious among those against the Public Administration and responds to the need to prevent the exploitation of the role of public official. The conduct is based on the aim of forcing someone to give or promise not due services. It is a multi-offensive crime since the protected legal asset is either the good performance and the impartiality of the Public Administration and the protection of the free determination of individuals in relation to the management of their assets.

# Concussione

- active subject is the public official or public service officer; Passive subjects are the Public Administration and the private subject (concusso).
- Actus reus: Abuse of quality or powers by the public entity
- Metus publicae potestatis is the state of fear or fear that is generated in the private subject by the pre-eminent situation enjoyed by the public subject; under his influence the will of the passive subject is determined for the concern of unjust damage

- Constriction

There is a single "compulsion" conduct. The residual mode of "induction" has been relocated in art. 319 quater cp

**Mental element** required by this crime is intent: that is the conscience and will of the public subject to force the private individual to give himself or a third party unduly money or other benefit, abusing his public role.

- Corruption and bribery

The criterion of distinction between corruption and bribery must be recognized in the fact that in case of corruption there is a position of equality between the parties, a free agreement which gives rise to a pactum sceleris that involves the private citizen and the public agent; while the Concussione (bribery) is characterized by the superiority position of the public official that allows him to instill fear towards the private individual

- ART. 318. - (Corruption for the exercise of the function).Text amended by Law 190/2012

"The public official who, for the exercise of his functions or powers, unduly receives, for himself or a third party, money or other benefit or accepts the promise is punished with imprisonment from one to six \* years".



## Changes made by Law 190/2012:

- a) Elimination of the necessary connection of the utility received or promised by an act, to be adopted or already adopted, of the office, thus becoming possible the configurability of the crime even in cases where the exercise of the public function should not materialize in a specific act
- b) The reformulation of the crime in a single paragraph no longer provides for the distinction between the crime of improper prior corruption and subsequent improper corruption
- c) use of the term "money or other utility" instead of the term "salary" to define the subject of the donation received by the public official
- d) is no longer required, due to the simultaneous amendment of the art. 320 c.p.p., that the public service officer (as a possible perpetrator of the crime alongside the public official) has the "quality of public employee".

# Art. 318 c.p.

- It is the c.d. improper corruption. The protected good is the good performance and impartiality of the Public Administration

- Active subjects are the public official and the public service officer (according to Article 320 of the Italian Criminal Code)
- The actus reus consists of:- by the public official, in unduly receiving money or other benefits or in accepting his promise- by the private sector, in giving or promising money or other benefits
- Article. 321 of the Penal Code sanctions the punishment of the (private) briber  
Subjective element is the generic intent consisting in the awareness of the public official to unduly receive money or other benefit or in accepting its promise

- Corruption due to an act contrary to official duties (Article 319 of the Italian Criminal Code)
- "The public official who, in order to omit or delay or have omitted or delayed an act of his office, or to perform or to have performed an act contrary to the duties of office, receives, for himself or a third party, money or other benefit , or accepts the promise, is punished with imprisonment from six to ten "

- It is the c.d. “proper corruption” that is characterized by the opposition of the deed to office duties.

The protected good is the good performance and impartiality of the Public Administration

- Active subject: public official and public service representative (pursuant to Article 320 of the Italian Criminal Code)
- Objective element: Act contrary to official duties: that is any concrete explanation of the powers-duties inherent in the office whose opposition is identified with regard to specific duties of office in relation to the proper functioning of the PA. Money or other benefit
- Article. 321 of the Penal Code sanctions the punishment of the (private) briber. The subjective element of proper corruption is the specific intent, characterized by the purpose of omitting or delaying a due act or performing an act contrary to the duties of offices

- Differences with bribery:
- Conduct: undue induction to give or promise money or other benefits
- Punishment also of the subject who gives or promises money or other benefit (paragraph 2)

- the Supreme Court (judgment of 10.24.2013 (dep. 14.3.2014), n. 12228) resolving an interpretative conflict arising in the jurisprudence of legitimacy following the reform of the crimes against the public administration by the l. n. 190 of 2012, identified the difference between the offense of extortion and that of undue induction, considering, in particular, that:

*The first offense exists in the presence of a constricting abuse of the public official implemented through violence or threat, from which derives a serious limitation of the freedom of self-determination of the recipient who, without receiving any advantage, is faced with the alternative of suffering the prospective evil or to avoid it by giving or promising utility*



- *the second, instead, consists in the inductive abuse brought about by the public official or by the public service officer who with a conduct of persuasion, suggestion, deception or moral pressure conditions the freedom of self-determination of the private individual more tenuously having ample margins of decision-makers, he agrees to give acquiescence to the request for an undue payment, with a view to personal advantage;*
- *in ambiguous or borderline cases, the criteria for assessing unlawful damage and undue advantage must be used in their dynamic operations and the outcome of an overall and balanced assessment of the fact.*

- Penalties for the briber (Article 321 of the Italian Criminal Code).The penalties established in the first paragraph of article 318, in article 319, in article 319-bis, in art. 319-ter, and in article 320 in relation to the aforementioned hypotheses of articles 318 and 319, also apply to those who give or promise the public official or the person in charge of a public service money or other utility.

# Art. 322 cp

- Article 322 - Incitement to corruption - Anyone who offers or promises money or other benefits not due to a public official or a person in charge of a public service, for the exercise of his functions or powers, is subject, if the offer or the promise is not accepted, to the penalty established in the first paragraph of article 318, reduced by a third. If the offer or promise is made to induce a public official or a person in charge of a public service to omit or delay an act of his office, or to make an act contrary to his duties, the guilty subject, if the offer or the promise is not accepted, to the penalty established in article 319, reduced by a third. The penalty referred to in the first paragraph applies to the public official or the person in charge of a public service who solicits a promise or giving of money or other benefit for the exercise of his functions or his powers. The penalty referred to in the second paragraph applies to the public official or the person in charge of a public service who solicits a promise or giving of money or other benefit from a private person for the purposes indicated in article 319 "

