The Polarization of the Italian Criminal Law System Against Corruption*

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Abstract

Three important reforms have changed the Italian criminal law provisions against corruption in the last decade in a more repressive sense, based on rampant penal populism. However, with this scenario in the background, a second countertrend emerges which has so far been little explored. This is a trend due to the progressive come into effect of reward mechanisms for procedural cooperation which can significantly reduce or completely exclude the punishment. This essay analyses the interaction between these two opposing trends, highlighting the effects of the polarization of the anti-corruption criminal law statutes between repressive and rewards tendencies, and highlighting the critical issues concerning the constitutional principles of offensiveness and proportionality of the punishment of a system in which the punishment it is applied mainly due to non-cooperation, and therefore due to the post facto conduct.

Keywords: *corruption, populism, polarization of criminal law, rewards mechanisms, constitutional principles, proportionality*

I. Introduction

In recent years, the Italian criminal law on corruption has undergone a very peculiar evolution, which seems to be oriented towards two antithetical and divergent directions[1]. In fact, on the one hand, there has been a tendency towards hyper-criminalization[2] of the corruption phenomenon, which has translated – as will be better seen later – into the creation of new types of offenses relating to the misuse of public power, the extension of the field of application or in the aggravation of the sanctions for the existing criminal offenses in this field, the creation of afflictive effects resulting from the conviction, in the tightening of procedural rules and the penitentiary system, in terms of preclusion of

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1 In ten years, the crimes of public officials have been affected by three significant reforms in what has been defined as the «permanent anti-corruption construction site» by V. Mongillo, *La legge "spazzacorrotti": ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione*, *Dir. pen. cont.*, 5, 2019, p. 231.

2 D. Husack, *Overcriminalization. The Limits of the Criminal Law*, Oxford, 2007, p. 4 ff.; J.C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101, *Yale Law Journal*, 1991-1992, 1875 ff.; S.H. Kadish, *The Crisis of Overcriminalization*, in *Am. Crim. L. Q.* 17, 1968, p. 17 ff.

access to plea bargain, other procedures, and alternative measures to detention. However, on the other hand, there has been a growing need to introduce reward mechanisms, implemented into law in terms of mitigating circumstances or causes for exclusion of prosecution, to stimulate the emergence of the corrupt pact through new provisions characterized by hyper-rewards[3].

This seems to be an evolutionary peculiar trend characterized by the progressive 'polarization' of the anti-corruption microsystem towards two opposing directions: in the first instance, the discipline seems to be moving towards a model of severe repression of the corruption phenomenon, threatening the use of draconian sanctions to be atoned for rigorously in prison; upon closer analysis, however, it seems to be oriented towards a variable severity model, in which the response of the criminal law system ends up being predominantly graduated, in terms of greater or lesser firmness, based on the *post facto* author's contribution to ascertaining the offense, somehow making clear the ineffectiveness of the populist-repressive model[4].

This essay first aims to analyze polarization as an intersectional phenomenon and then as a feature of anti-corruption criminal law in Italy. So, the first section of the article will focus on the peculiar characteristics of polarization, trying to provide some defining clarifications (§ 2). Having made this clear, the second section of the article will try to outline an overall vision of the polarization in the Italian criminal law provisions against corruption, focusing on all the indicators that distinctly show the pervasiveness of the described phenomenon (§ 3). So, the third section will focus on the effects of polarization, on the reasonableness of the system and the legitimacy of punishment in a polarized legal framework, in conclusion highlighting the unreasonableness of a sanction imposed mainly for the *post facto*.

II. Defining aspects of polarization as a cross-curricular phenomenon

The Oxford English Dictionary describes polarization as «the action of polarizing light or other electromagnetic radiation», under a scientific use of the word, or in a figurative sense «the accentuation of a difference between two things or groups»[5]. However, the word is also used in other fields such as economics[6], sociology[7], political

[3] In a critical sense, see T. Padovani, *La spazzacorrotti. Riforma delle illusioni e illusioni della riforma*, *Arch. pen.*, 3, 2018, p. 8; M.N. Masullo, *L'emersione del patto corruttivo: il nuovo fronte degli strumenti premiali e investigativi*, *Riv. it. dir. proc. pen.*, 3, 2019, p. 1265; D. Pulitanò, *Le cause di non punibilità dell'autore di corruzione e dell'infiltrato e la riforma dell'art. 5 bis*, *Dir. pen. proc.*, 5, 2019, p. 600.

[4] F. Sgubbi, *Il diritto penale totale*, *Punire senza legge, senza verità, senza colpa*, Mulino, 2019, p. 27; M. Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra* lex *e* ius, Modena, 2019; S. Anastasia, M. Anselmi, D. Falcinelli, *Populismo penale: una prospettiva italiana2*, Padova, 2020, p. 1 ff.; E. Amati, *L'enigma penale. L'affermazione politica dei populismi nelle democrazie liberali*, Torino, 2020, p. 138; J. Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear*, Oxford, 2007.

[5] Oxford English Dictionary, s.v. "polarization (n.)," September 2023, https://doi.org/10.1093/OED/3531843274.

[6] G. Aiello, *L'internazionalizzazione delle imprese del dettaglio*, Milano, 2005, p. 15 regarding consumer choices in the globalized economic context.

[7] S. Anastasia (ed.), *Polarizzazione sociale e sicurezza urbana*, Roma, 2021, which describes identity polarizations; A. Accornero, *Era il secolo del lavoro,* Bologna, 1997, which analyses the polarization between white collars and blue collars in the world of industrial relations; see also I. Piotto, *Il diritto allo sguardo. La cultura del controllo nelle relazioni industriali*, Milano, 2010, p. 50.

science[8], communication[9], and psychology[10] with somewhat related meanings. The communication philosopher Massimo Leone defined polarization as an «impetus» – perhaps «innate» or perhaps determined by «time» and «space» coordinates – but still a «destructive and self-destructive force of the extreme» that pushes society beyond all limits[11]. The economist Moisés Naìm defined polarization as one of the three components of the current face of «power» (along with «populism» and «post-truth») which erodes the cornerstones of democracy and society from within, taking it to the extreme towards unsustainable oppositions[12].

The objective of providing a unitary and transversal notion of polarization is beyond the scope of this essay, assuming or not granting that it is possible concerning such different sciences[13]. However, if we do not consider polarization as a strictly scientific phenomenon, two characteristics seem quite recognizable in all these definitions: they are the «duality» and the «diversity» of the poles. Upon closer inspection, these are two essential qualities in a polarized system. The first presupposes that an element (a fact, a concept, any entity physical or metaphysical) cannot be inscribed in a single whole but must be simultaneously traced back to two classes. The second implies that these classes are specular and opposite. This is particularly significant for the discussion in question since it contradicts the principles of identity and non-contradiction at the basis of the legal system[14].

Well, it is important to observe how polarization – as a phenomenon or as a driving force – is not foreign even to legal sciences. In this context, in Italy, the term is often understood as synonymous with «concentration». Such is, for example, the polarization of the legal system around the «creative energy» of case law as opposed to the statutory law in Italian jurisdiction[15], or that «new sensitivity»[16] which has led to the polarization

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[8] D. Palano, *Bubble democracy. La fine del pubblico e la nuova polarizzazione*, Brescia, 2020, p. 156; A.I. Abramowitz, K.L. Saunders, *Is Polarization a Myth?*, in *Journal of Politics*, 70, 2, 2008, p. 542; L. Iannelli, S. Splendore, A. Valeriani, G. Marino, *Studiare la polarizzazione politica nello "shockdown mediale"* in *Mediascapes Journal*, 15, 2020, p. 189.

[9] G. Bobba, *L'Europa contestata. Polarizzazione e politicizzazione delle opinioni in tempi di crisi*, Bologna, 2021, p. 152 in which the A. notes a growing polarization of opinions regarding the European project, ascribing it to the winners and losers' dynamic of globalization.

[10] G. Lago (ed.), *Compendio di psicoterapia*, Milano, 2016, p. 182 who understands polarization as the oscillation between concretism and abstraction.

[11] M. Leone, *I discorsi dell'oltre: fascino e pericoli della polarizzazione*, Trento, 2023, p. 8.

[12] M. Naìm, *The Revenge of Power. How Autocrats Are Reinventing Politics for the 21st Century*, St. Martin's, 2022, p. 5.

[13] In this essay we must limit ourselves to describing the concept approximately rather than asking ourselves, from the point of view of conceptual engineering, what the concept of polarization should mean. On the subject, see S. Koch, *Engineering what? On concepts in conceptual engineering*. *Synthese* 199, 1955-1975, 2021. https://doi.org/10.1007/s11229-020-02868-w.

[14] Aristotle, *Il principio di non contraddizione* (The principle of non-contradiction), Book IV on Metaphysics, trans. it. and commentary ed by E. Severino, Brescia, 2021. *See* also T.E. Tahko, *The Law of Non-Contradiction as a Metaphysical Principle*, Australasian Journal of Logic (7) 2009, pp. 32-47.

[15] *See* among Italian Scholars F. Giunta, *Dal governo della legge al Governo degli uomini? A proposito delle influenze reciproche fra diritto e processo*, in F. Danovi (ed.), *Diritto e processo: rapporti e interferenze*, Torino, 2015, p. 161; Id., Jus legibus solutum*. Ovvero la legge del giudice penale*, *disCrimen*, 12.11.2020, p. 1 ff; F. Palazzo, *Legalità fra* law in the books *e* law in action, in A. Cadoppi (ed.), *Cassazione e legalità penale*, Roma, 2017, p. 75; A. Cadoppi, *Il valore del precedente nel diritto penale: uno studio sulla dimensione* in action *della legalità*, 2nd ed., Torino, 2014; A. Manna, *Considerazioni introduttive su: "Il principio di legalità tra legislatore e giudice*", *Arch. pen.*, 1, 2020, p. 1 ff.; R. Bartoli, *Costituzionalismo e trasformazioni del diritto penale*, *Dir. pen. proc.*, 2021, p. 735; N. Mazzacuva, *Tra analogia e interpretazione estensiva. A proposito di alcuni casi problematici tratti dalla recente giurisprudenza*, *Criminalia*, 2010, p. 367;

of Italian constitutional justice towards more meaningful protection of fundamental rights[17], or again (in a similar sense) the polarization of the criminal justice debate of recent decades concerning the concept of «victims»[18]. This is a type of «univocal polarization», in which a single aspect increases its relevance within the system, taking on a hegemonic and decisive character that leads to significant transformations.

It deserves to be underlined that, not infrequently, polarization instead takes on the meaning of «conflict» between divergent and, as such, recognizable positions, opinions, or interpretations of law. They are, for example, the conceptions of dignity in an objective sense (limit to self-determination) and subjective sense (power of self-determination and self-representation) from which opposite consequences are drawn, for example, on the topic of surrogacy[19], but the examples could be many, all united on the structural level by the duality and the symmetrical character of the positions, and on the ontological level by the irreconcilability and alternativeness of the same, so one of the poles ends up prevailing and the other succumbs[20]. In this case, it is a «dual polarization», in which two aspects (in a contradictory relationship) take on decisive importance to the point of leading to the fracture of the system and the prevalence of one element over the other.

Instead, this essay focuses on a different, apparently new phenomenon, which can be defined as «reciprocal» polarization, in which two different and antithetical tendencies both lead to significant transformations (as in the case of univocal polarization) without producing a fracture (as, however, happens in dual polarization), but rather leading to a systemic tension whose effects deserve to be investigated.

III. The polarization in the Italian criminal law provisions against corruption

The Italian criminal law system against corruption has been affected by three important reforms over the last ten years (in 2012, 2015, and 2019). An analytical

P. Grossi, *A proposito de "il diritto giurisprudenziale"*, *Riv. trim. dir. proc. civ.*, 1, 2020, p. 1 ff.; Id., *Sistema moderno delle fonti del diritto ed esperienza giuridica posmoderna in Italia*, *Riv. int. fil. dir.*, 2021, p. 155 ff.

[16] M. Cartabia, *Relazione sull'attività della Corte costituzionale nel 2019*, p. 8, December 2023, available on: https://www.cortecostituzionale.it/documenti/relazione_cartabia/1_relazione.pdf; in the same sense, spoke of «renewed sensitivity» also G. Lattanzi, *Relazione del Presidente Giorgio Lattanzi*, 21 marzo 2019, p. 14, December 2023, available on: https://www.cortecostituzionale.it/documenti/ relazioni_ annuali/lattanzi2019/Relazione_del_Presidente_Giorgio_Lattanzi_sull_attivita_svolta_nell_anno_2018.pdf.

[17] V. Manes, *Dove va il controllo di costituzionalità in materia penale?*, *Riv. it. dir. proc. pen.*, 1, 2015, pp. 179-181 in which the A. traces the profile of a Court «vigilant on rights, perhaps more than on the geometries of the system»; F. Viganò, *La proporzionalità della pena. Profili di diritto penale e costituzionale*, Torino, 2021, p. 292; R. Bartoli, *La Corte costituzionale al bivio tra "rime obbligate" e discrezionalità? Prospettabile una terza via*, *Dir. pen. cont.*, 2, 2019, p. 139 ff.

[18] L. Cornacchia, *La vittima nel diritto penale contemporaneo tra paternalismo e legittimazione del potere coercitivo*, Roma, 2012, p. 11 ff.

[19] A. Schillaci, *"Le" gestazioni per altri: una sfida per il diritto*, in *Diritto e persone LGBTQI+* ed. by M. Pelissero and A. Vercellone, Torino, 2022, p. 131 G. Giaimo, *La gestazione per altri. Persistenti criticità e prospettive di regolamentazione in chiave comparatistica*, *Dir. fam. e pers.*, 2, 2023, p. 730; R. Bin, *Tecniche procreative, ordine pubblico, interesse del minore. Conclusioni*, *BioLaw Journal – Rivista di BioDiritto*, 3, 2021, p. 147.

[20] The dual concept of polarization as «identification» or «extremization» is well expressed by J.M. Reyes, *Social network, polarizzazione e democrazia: dall'entusiasmo al disincanto*, in *Web e società democratica. Un matrimonio difficile* a cura di E. Vitale e F. Cattaneo, Torino, 2018, p. 25.

description of the individual interventions of the legislator is beyond the scope of this essay[21]. Instead, a transversal element can be noticed by looking at the complex of reforms simultaneously and it is the polarization of anti-corruption criminal law.

A lot of Scholars have highlighted the consolidation of a tendency of the Italian legislator to intervene in a populist-repressive sense22 in the last ten to fifteen years which has affected various areas of criminal law and, among these, in criminal law regarding corruption this tendency is particularly significant[23]. This emerges clearly by adopting an overall vision that manifests the tendency in every corner of the discipline. Some indicators outline well the pervasiveness of this populistic trend in the entire criminal law discipline of corruption.

The changes in criminal offenses against corruption are an outstanding demonstration of the trend described. New criminal offenses have been introduced and some of the existing ones have been expanded. This happened for the Art. 346 bis (Traffic of Influence) and the Art. 319 quarter of the Criminal Code (Unlawful inducement to give or promise benefits) that entered into force in 2012, with the Law No. 190 of 2012. The same law replaced the Art. 318 of the Criminal Code and inserted the new criminal offense of corruption for the exercise of the function, and it also expanded the Art. 322 bis of the Criminal Code (corruption of foreign officials and other abuses) in terms of *actus reus* and *mens rea*[24].

Also, jail time changed several times in this decade, always in a more repressive sense both at the minimum and the maximum. Ten years ago, the Art. 319 – Corruption for

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[21] About the first reform, Law No. 190 of 2012 (called «Anti-Corruption Law») see B.G. Mattarella, M. Pelissero (ed.), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino, 2013, p. 347 ff.; F. Viganò, *I delitti di corruzione nell'ordinamento italiano: qualche considerazione sulle riforme già fatte e su quel che resta da fare*, *Dir. pen. cont. trim.*, 3-4, 2014, p. 9 ff.; S. Seminara, *I delitti di concussione, corruzione per l'esercizio della funzione e induzione indebita*, *Dir. pen. proc.*, 8, 2013, p. 15 ff.; P. Severino, *La nuova Legge anticorruzione*, *Dir. pen. proc.*, 1, 2013, p. 7 ff.

After that, regarding the Law No. 69 of 2015 see F. Cingari, *Una prima lettura delle nuove norme penali a contrasto dei fenomeni corruttivi*, *Dir. pen. proc.*, 7, 2015, p. 803 ff.; V. Mongillo, *Le riforme in materia di contrasto alla corruzione introdotte dalla legge n. 69 del 2015*, in *Dir. pen. cont.*, 15.12.2015, p. 1; A. Spena, *Dalla punizione alla riparazione? Aspirazioni e limiti dell'ennesima riforma anticorruzione (l. 69/2015)*, *Stud. Iuris*, 2015, 10, p. 1115 ff.

Lastly, concerning the Law No. 3 of 2019 see N. Pisani, *Il disegno di legge 'spazzacorrotti'*, in *Cass. pen.*, 11, 2018, p. 3590 ff.; V. Mongillo, *Il contrasto alla corruzione tra suggestioni del "tipo d'autore" e derive emergenziali*, *Riv. it. dir. proc. pen.*, 2, 2020, p. 967 ff.; M. Caterini, M. Roca, *L'agente sotto copertura al limite della provocazione*, *Ordines*, 1, 2022, p. 180 ff.

Although with minor changes, the provisions of Chapter I of Title II of the Italian Criminal Code have been subject to modification by Law 20 December 2012, No. 237; by the Legislative Decree 14 July 2020, No. 75; by the Legislative Decree 27 January 2022, No. 4; by the Legislative Decree 4 October 2022, No. 156.

[22] In this subject, see the pioneering book of J. Simon, *Governing Through Crime. How the War on* Crime Transformed American Democracy and Created a Culture of Fear, supra nota 4, p. 1 ff. Among Italian Scholars see S. Anastasia, M. Anselmi, D. Falcinelli, *Populismo penale: una prospettiva italiana*[2], *supra nota* 4, p. 1 ff.

[23] V. Mongillo, *Il contrasto alla corruzione tra suggestioni del "tipo d'autore" e derive emergenziali*, *supra nota* 21, p. 967.

[24] On these arguments, see S. Seminara, *Sulla distinzione tra concussione e induzione indebita* nell'elaborazione giurisprudenziale, Dir. pen. proc., fasc. 7, 2023, p. 947; E. Dolcini, F. Viganò, Sulla riforma *in cantiere dei delitti di corruzione*, *Dir. pen. cont. trim.*, 1, p. 244; M. Romano, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*[4], Milano, 2019, p. 108; L. Scollo, *I modelli di contrasto alla corruzione internazionale. Prospettive di riforma del sistema penale e della responsabilità degli enti*, Torino, 2022, p. 124 ff.

an act contrary to official duties was punished with imprisonment from two to five years, instead today it's punished with imprisonment from six to ten years. So, the maximum limit is doubled, and the minimum limit is tripled. The progressive tightening of sentences, on the other hand, has reached (and, probably, exceeded) that balance between effectiveness and proportion of the punishment which should lead us to question ourselves on the sustainability of the anti-corruption system considering the constitutional principles and of the fundamental principles of criminal law[25].

The mentioned reforms introduced new perpetual penalties in addition to incarceration and extended the ones already provided by the Criminal Code from a subjective, objective, and temporal perspective broadening the content of the law in a more repressive sense. According to these reforms, disqualification from public offices has become perpetual in most cases of sentences for corruption such as the debarment and exclusion from government contracts. The purpose of the discipline is evidently to expel the perpetrator of corruption from interaction with the public sector, therefore not limiting itself to judging only the wrongdoing, but rather issuing an overall and immutable judgment on its perpetrator[26].

Other criminal law effects of the conviction were implemented by the reforms. For example, a strict ineligibility, forfeiture, or suspension regime for public offices passed with the Legislative Decree 235 of 2012[27]. Even though the Italian Constitutional Court and the Italian Supreme Court have repeatedly excluded the nature of criminal law for this type of measure[28], in compliance with the majority direction among scholars who propose a restrictive meaning on the subject of «criminal law effects of the conviction», questionably denying the nature of a punitive measure and therefore not applicable retroactively, this regime remains an effect of the conviction that must be considered in evaluating the repressive trend mentioned. Also suspended sentence can be considered in this argument, since according to the reforms of 2015 and 2019, they create a sort of anticipated effect of conviction for corruption, because it is expected that to benefit from it in corruption cases, a previous financial compensation is required differently than for other types of crimes.

The repressive trend is tangible looking also at the institution of security and prevention measures. For example, the confiscation for corruption has been progressively extended to some special hypothesis of confiscations, to non-conviction-based confiscations, and confiscation by equivalent[29]. Moreover, according to the Law No. 161 of 2017 which modified the Anti-Mafia Italian Statute (Legislative Decree 159 of 2011), a preventive

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[25] L. Stortoni, *Il diritto penale sotto il segno dell'efficienza del sistema*, *Riv. it. dir. proc. pen.*, 1, 2019, p. 386 has harshly criticized this specific aspect. On proportionality as a principle that guides the choices of incrimination and the measure of the criminal sanction, see, among Italian Scholars, see F. Viganò, *La proporzionalità della pena. Profili di diritto penale e costituzionale*, *supra nota 17*, p. 257 ff.; N. Recchia, *Il principio di proporzionalità nel diritto penale*, Torino, 2020, p. 235 ff.

[26] See M. Romano, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*[4], *supra nota 24*, p. 146.

[27] According to Legislative Decree 235 of 2012, former Italian Premier Berlusconi has decayed as a senator after his conviction for tax fraud.

[28] Corte Cost., 19.11.2015, n. 236, in *Guida dir.*, 2015, 49-50, p. 76, e in *Cass. pen.*, 5, 2016, p. 1884. See also Supreme Court of Cassation, 27.5.2008, n. 13831; S.C., 21.4.2004, n. 7593; S.C., 2.2.2002, n. 1362; S.C., 26.11.1998, n. 12014; Council of State, 29.10.2013, n. 5222; C.S., 6.2.2013, n. 695.

[29] A.M. Maugeri, *La confisca per equivalente – ex art. 322-ter – tra obblighi di interpretazione conforme ed esigenze di razionalizzazione*, *Riv. it. dir. proc. pen.*, 2011, p. 804.

measure is applicable in case of suspects in a criminal association aimed at committing corruption[30].

The institution of pecuniary compensation referred to in Art. 322 quarter of the Criminal Code passed with the reform of 2015 and extended by the reform of 2019 also to the corruptors is another indicator of the populistic and more repressive trend. This institution provides that the sentenced persons (corruptors and public officials) must pay a sum equal to the price or profit of corruption to the public administration damaged by the wrongdoing, without prejudice for compensation for damages. Scholars and Supreme Court's decisions stated that it's a civil penalty with a punitive nature, and with this, the constitutional statute of guarantees specific to criminal law applies to it. It is important to point out that this institute is a further symbol of the gigantism of the repressive measures implemented by the legislator in the field of corruption[31].

Another important point emerged after the reform of 2019. Precisely, I refer to the exclusion of corruption offenses and other crimes of public officials from crimes for which is possible to benefit from alternative measure to detention. In fact, the Law No. 3 of 2019 changed the Art. 4 bis of the Law No. 354 of 1975, according to which with some exception is possible to change the prison sentence to an alternative measure, and in fact it inserted public officials' crimes among the exceptions, with the effect of forcing those convicted of corruption to serve their sentences in prison[32].

Many changes have also affected criminal procedure. In fact, wiretapping is today admitted for all corruption offenses provided by the Criminal Code. The same goes for pre-trial detention, and the plea bargaining is now subject to the full restitution of the price or profit of the corruption and the judge can apply some additional measure with the conviction, derogating from the general rules.

From all these elements we certainly draw a populist-repressive tendency that embraces the entire substantial and procedural discipline on corruption. The sentence framework is emblematic in this argument. As mentioned before, the reform of the last decade shows a rather evident and transversal tendency towards tightening in the minimum and in the maximum, which reverberates on many other consequences both of substantial (statute of limitations) and procedural (wiretapping, pre-trial detention, plea bargaining).

So far, it is a trend that has been well highlighted by many scholars and which constitutes unfortunately an orientation taken by the Italian legislator in almost every area of criminal law, with a penal populism that has little regard for the principles of subsidiarity, offensiveness, and proportionality. But what is important to observe, is that this trend is accompanied by another opposite one which generates in the anti-corruption criminal law system that effect of polarization of the discipline on which it is worth carrying out some reflection.

It refers specifically to two main institutions passed by the legislator during the two last-mentioned reforms of criminal law provisions against corruption. The first is the mitigating circumstance that allows the reduction of the sentence from one-third to two-thirds in the case of cooperation[33].

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[30] M. Pelissero, *I destinatari della prevenzione* praeter delictum: *la pericolosità da prevenire e la pericolosità da punire*, *Riv. it. dir. proc. pen.*, 2017, p. 464.

[31] See Supreme Court of Cassation, 25.1.2012, no. 8959.

[32] The law raised strong doubts and was declared partially unconstitutional to the extent that it also applied to the facts before its introduction by the Constitutional Court, with the decision no. 32 of 2020.

[33] The Law No. 69 of 2015 inserted the mitigating circumstance in the Art. 323 bis of the Criminal Code.

The second is the cause of non-punishment for self-reporting[34]. These provisions, in essence, reward collaboration before and during investigations, assigning significant reductions in sentences (in the first case) and impunity (in the second case) to those who work effectively to identify the other perpetrators and trace and make available the price or profit of corruption.

In this topic, it is necessary to point out that reward institutions in the Italian criminal law system are not new in the last decades. It is known that many areas of criminal law have known and still know reward mechanisms for collaboration: terrorism and mafia are the two areas of choice for reward discipline, and these are cases explored and dissected in detail by Scholars[35]. Therefore, even the reward system is not an absolute novelty in the criminal law panorama. What we observe is that (in the wake of emergency legislation[36]) the reward system has also progressively and distinctively affected criminal regulations regarding corruption.

So, focusing on reward institutions' effects, it's possible to notice a big change in the tendency towards hyper-criminalization that was first observed when looking at the sentence frameworks. Starting from Law No. 69 of 2015 the hyper-criminalization tendency goes down. How is this possible if the sentence frameworks have increasingly tightened? The aspect that arouses curiosity, in this case, is the relationship that exists between these two tendencies and the effect that the mutual interaction causes on the system. To fully understand the effects of polarization we should make a more complex analysis, but let's limit ourselves to grasping the most obvious aspects.

The minimum sentence and maximum sentence frameworks show an interesting fact. It can be found clearly a uniform tendency toward the tightening of the frameworks, as mentioned. But the tendency definitely changes considering the mitigating circumstance and the cause for non-punishment for cooperation provided by the Criminal Code. If we take these rules into account and disaggregate the tendencies a bifurcation is visible: the tendency of sentence frameworks continues to increase more and more from 2012 to 2019, while the quantity of imprisonment progressively decreases because of the possible application of the mentioned mitigating circumstances and cause of non-punishment. So, two different trends appear, the first is upward; the second is downwards. Here is the polarization of the anti-corruption penal system towards two different poles.

We note that after Law No. 190 of 2012, with the reforms of 2015 and 2019, the tendencies open like scissors, one continues upwards, and the other instead heads downwards. This range is nothing other than the amount of punishment one faces in case of cooperation or non-cooperation with the judicial authority. This alternative is quite significant. On the one hand, the increasingly repressive penal populism makes it possible to apply high sentences but, on the other hand, reductions up to two-thirds even to the total exclusion of punishment apply to those who cooperate with judicial authority.

The areas described by the two tendencies, and in particular the difference between them, show how significant and preponderant (after the 2015 and 2019 reforms) is the amount of punishment imposed by the legislator not for the wrongdoing itself, but rather for non-cooperation in the proceedings. A quick calculation shows that up to

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[34] The Law No. 3 of 2019 inserted the cause of non-punishment for self-reporting in the Art. 323 ter of the Criminal Code.

[35] See G. Flora, *Il ravvedimento del concorrente*, Padova, 1984, p. 172; C. Ruga Riva, *Il premio per la collaborazione processuale*, Milano, 2002, p. 451; G. Toscano, Post crimen patratum, Torino, 2022, p. 229 ff.

[36] See S. Moccia, *La perenne emergenza. Tendenze autoritarie nel sistema penale*[2], Napoli, 2000.

71% of the sentence is influenced by cooperation[37]. This means that the polarization of the anti-corruption criminal law statute has created a system in which over two-thirds of punishment is applied because of the post-facto.

III. The effects of polarization on the criminal law system

The polarization of criminal law statutes against corruption shows a polarized system in which the sentence is mainly applied because of the post-facto behaviour and not for the wrongdoing itself.

An effect of this type requires addressing some systemic questions.

First, it is necessary to take note that the rush to tighten discipline based on rampant penal populism proves to be ineffective when tested by facts. The threat of ever-increasing criminal penalties for corrupt conduct, on the other hand, does nothing more than weld the corruption pact even more, making it even more difficult to discover that corruption occurred. In fact, the possibility of being sanctioned so harshly makes it less convenient for either of the two parties to face the risk of a judgment. This is demonstrated by the fact that the reward for procedural collaboration which should be used to stimulate the emergence of the *pactum sceleris* has had, up to now, very little practical application in Italy, both for technical reasons which I cannot dwell on, and because it does not suit the criminological reality of corruption. But what is most important to observe considering the considerations that have been exposed in this essay is the systematic effect that polarization has produced. In my opinion, there is a twofold effect that translates into the violation of the principles of offensiveness and proportionality.

As for the first, a polarized system such as the one described imposes, in the abstract, imprisonment for the fact but applies, in concrete terms, a sentence for the post facto. The theme in the background which, however, remains central in the discussion under examination is whether the sanctioning apparatus shaped over the last decade, considering polarization, reflects the real negative value of the conduct of the misuse of public power or, rather, whether the punishment currently foreseen is, to a large extent, a political instrument.

As for the second aspect, in the past, Italian Scholars have noted that respect for the constitutional principle of proportionality, functioning upwards, as a guarantee for the author, would not be violated by the introduction of a reward for collaboration (which operates downwards)[38]. If these conclusions are acceptable, however, the polarization places the question under a new and different perspective, namely that of the interdependence between reward and punishment, since the reward is appreciated due to the severity of the legal framework, while the latter is aggravated not for an adjustment concerning the real negative value of the conduct and the damage to the legal good, but rather in conjunction with the introduction of the reward. Looking at the

[37] The number is obtained by calculating in Microsoft Excel the area between each of the two curves and the x-axis, setting the 2012 reform at the point of intersection between the Cartesian axes as the starting point of calculation, and indicating two additional points indicating the 2015 and 2019 reforms. Therefore, the area of the trapezoid obtained with each curve has a common base which is the distance between zero and the point indicating the 2019 reform. Also, the left side of the trapezoid is common and constitutes the distance between zero and the maximum punishment that can be imposed with the 2012 reform. The right side of the trapezoid, however, as well as the major base, differ based on the 2015 and 2019 reforms. The sentence frameworks carry the major base of the first trapezoid upwards. The reward rules instead bring the major base of the second trapezoid downwards.

[38] C. Ruga Riva, *Il premio per la collaborazione processuale*, *supra nota* 35, pp. 452-453.

polarized system, as an effect of penal populism, a violation of the principle of proportion emerges which escapes looking at the reward individually, now at the punishment, and emerges looking at the system as a whole.

The Italian Scholar Giorgio Marinucci come to mind who in one of his writings wrote that «in the name of urgency, our criminal policy is inevitably given the movement of a pendulum that swings frantically in radically opposite directions, now towards a boundless meekness, now towards a frenzied severity»[39].

Polarization adds a further element of complexity that goes even beyond the scenario in which Prof. Marinucci gave his shareable reflection. In fact, with the polarization occurs a simultaneous and concomitant oscillation of the pendulum and it generates a polarization in the system that changes the face of crime and punishment and irremediably conflicts with constitutional principles.

Precisely, polarization releases the punishment from the wrongdoing and introduces elements of unreasonableness and disproportion in its measure, leading to a penal system incompatible with the Constitution.

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