

ANTICORRUPTION: A DIFFERENT PERSPECTIVE TOWARDS SPONTANEOUS COMPLIANCE*

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Montesquieu wrote: “there are two sorts of corruptions: one when the people do not observe the laws; the other when they are corrupted by the laws: an incurable evil, because it is in the very remedy itself”¹.

Today we will analyze the second form of corruption: the one fuelled by the law. We will also try to evaluate why, although the great effort made by different Countries, there is little improvement in results; then, we will try to set some points for a different strategy towards spontaneous compliance.

The first assumption of our argument is that nonetheless corruption is a globalized, widespread, and complex phenomenon, mixing social, historical, and legal aspects, worldwide there has been a constant effort in facing the problem through “formalistic legalisms”². Indeed, over the years, corruption has been faced by several international regulations: the OECD anti-bribery convention, the Council of Europe conventions, the UN convention against organized crime, and finally the UNCAC. Moreover, there are numbers of regional and national legal tools aimed at preventing or repressing corruption.

Therefore, we could claim that the best answer to fight corruption is the introduction of new legislation³.

As we will try to demonstrate, putting too much emphasis on the law turns to be a short-sighted approach⁴ and jeopardize the likelihood of succeeding.

In doing that, within the European scenario we will mainly focus on the example of the Italian anticorruption policies.

This is due by the fact that, over the last nine years, three anti-corruption laws have been enacted in Italy, and other rules to restrain discretion within the Public Administration are constantly released. As a result, Italy has been referred to as the “Country with over 200 thousand laws”⁵.

As one would imagine, this should foster great results in terms of how the phenomenon is perceived.

Instead, the last Corruption Perception Index (CPI) 2020 places Italy at the bottom of the European ranking with a score of 53, where 100 indicates a country perceived as completely

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¹C. De Secondat, *Baron de Montesquieu. The Complete Works of M. de Montesquieu*, London, T. Evans, 4 vols. Vol. 1: *The Spirit of Laws*, 1777, 120. Available at: https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/837/Montesquieu_0171-01_EBk_v6.0.pdf.

² N. Passas, *Anti-Corruption Beyond Illusions: The Pressing need to Make a Difference*, in E. Makowicz (Ed.), *Yearbook of Global Ethics, Compliance and Integrity*, Peter Lang, 2020, 329-330.

³ H. J. Albrecht, M. Kilchling, *Crime Risk Assessment, Legislation, and the Prevention of Serious Crime - Comparative Perspectives*, in *European Journal of Crime Criminal Law and Criminal Justice*, 10 (2002) 23-38.

⁴ L. Pasculli, ‘*Corruptio Legis*’: *Law as a Cause of Systemic Corruption. Comparative Perspectives and Remedies Also for the Post-Brexit Commonwealth (April 4, 2017)*, in *Proceedings of 6th Annual International Conference on Law, Regulations and Public Policy (LRPP 2017)*, 5-6 June 2017, Singapore 2017, 189.

⁵ S. Cassese, *Troppe norme, spesso inutili: 200 mila leggi dal 1861 in poi*, in *Corriere della Sera*, 11th February 2018, 1.

transparent, and 0 stands for a country seen as endemically corrupt. Therefore, Italy stands in 52nd position in the Global Ranking.

Despite the effort in terms of laws and rules, from 2012 to 2020, Italy only gained 11 points, keeping one of the highest levels of perceived corruption in Europe.

Also in East Africa, Central Asia, and the Caucasus, it has been highlighted how corruption remained endemic “despite the introduction of adequate laws and institutional arrangements”⁶.

A study in Uganda’s mining sector “demonstrates how the law and the institutions called to enforce it can become a major enabler of systemic corruption, not only when influenced by undue political pressure, but also, and perhaps more frequently when they pursue legitimate policy objectives. On a situational level, the law can increase the opportunities for the proliferation of corrupt practices, as it happens when a statute offers incentives or concessions on taxes, attributes excessive powers to public officials or undermines law enforcement capacities or when it is insufficient, ambiguous, contradictory or however uncertain”⁷.

In conclusion, we discovered that, despite normative implementation, funding, people, and agencies involved, there are little improvements (sometimes also steps backward) in fighting corruption.

The first question rising from those studies is: why is the law ineffective?

The first intuitive answer is that there are poor laws and poor law-making processes.

European Scholars have already examined and confirmed that the approach to the crime-issue is not only ineffective, but it turned to be unintendedly criminogenic in some European countries like Belgium, Denmark, England, and Wales, Finland, France, Germany, Greece, Italy, Netherland, Portugal, Spain and Sweden⁸.

Trying to explain why police-makers put too much emphasis in enacting new laws (namely, anticorruption laws), we should consider the impact of the so-called penal populism, already rising worldwide⁹.

Penal populism could, in fact, twist a phenomenon in two steps: a) glamourization, which means the spectacularization of the problem, simplistically explained by the media as something wrongful; b) destatisticalization, namely talking about the phenomenon without a scientific base, but referring about with prejudice¹⁰.

⁶ B. C. Camargo, N. Passas, *Hidden agendas, social norms and why we need to re-think anti-corruption*, in 2017 *OECD Global Anti-Corruption & Integrity Forum*, 2017, 10. Available at <https://www.oecd.org/cleangovbiz/Integrity-Forum-2017-Baez%20Camargo-Passas-hidden-agendas-social-norms.pdf>.

⁷ L. Pasculli, *Foreign Investments, the Rule of Corrupted Law and Transnational Systemic Corruption in Uganda's Mineral Sector*, in R. Leal-Arcas (Ed.), *International Trade, Investment and the Rule of Law*, Chişinău 2020, 109.

⁸ H. J. Albrecht, M. Kilchling. E. Braun (Ed.), *Criminal Preventive Risk Assessment in the Law-Making Procedure*, Freiburg 2002, *passim*.

⁹ J. V. Roberts, L. J. Stalans - D. Indemaur - M. Hough, *Penal Populism and Public Opinion: Lessons from Five Countries*, Oxford 2002, *passim*.

¹⁰ M. Anselmi, *Populismo e populismi*, in S. Anastasia, M. Anselmi, D. Falcinelli (curr.), *Populismo penale: una prospettiva italiana*, Padova 2015, 17.

Therefore, the mix between media coverage on bribe reports and the anecdotal approach to the problem may increase the perception of a deep-rooted phenomenon¹¹ and justify simplistic and routine remedies, such as proposing new legislation.

In other words, the increase of journalistic inquiries make corruption more visible and fuel a sense that things are getting worse, thereby emphasizing the perception that politicians are corrupted¹².

It also increases the pressure on politicians “to do something” and affects the strategies put in place.

Therefore, politicians rely on the law “as a medicine” to fight corruption by creating new penalties or burdensome procedures to limit discretionary powers within the public administration.

Instead, the overproduction of anticorruption laws ends to curb the willingness in reporting corruption in different ways: a) because of the so-called normalisation process, which “includes denial of responsibility (‘everybody does it’), denial of the harm (‘it does not hurt anybody’), denial of the victim (‘they deserve it’ or ‘they agreed to it’) and, significantly, the belief that a corrupt practice is not actually illegal (‘if the law does not forbid it, then it is permitted’) or denial of the legitimacy of the law and legal authorities (‘the law is wrong’ or ‘they are all corrupt’)”¹³; b) as people feel less pressure to report wrongdoings. In other words, it creates a sort of “pass the buck” attitude¹⁴.

All these circumstances may affect the people's bias towards cooperation and, therefore, how corruption is perceived in a Country.

Only these considerations could justify the need for changing strategies. In truth, there are even more reasons.

Indeed, sometimes the law is used to target political opponents¹⁵.

The law also creates new opportunities and incentives to circumvent the rules and engaging in corrupt practices¹⁶. This side effect is partially due to the bureaucratization and the increased complexity of the anticorruption systems. In fact, anticorruption regulations created several obscure rules to comply with, which turn into a formalistic “tick all the boxes” attitude and “lawful but awful” practice¹⁷.

In this regard, the law could be unintendedly criminogenic in three ways:

- Creating new opportunities for the commission of crimes;
- Facilitating the commission of crimes by creating new chances to immunity;

¹¹ A.R. Castaldo, *Beauty Is in the Eye of the Beholder: Different Perspectives on Fighting Corruption*, in *Criminal Justice Network*, 9 April 2020. Available at: <https://www.criminaljusticenetwork.eu/en/post/beauty-is-in-the-eye-of-the-beholder-different-perspectives-on-fighting-corruption>.

¹² A. Persson, B. Rothstein, J. Torell, *Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Problem*, in *Governance* 26.3 (2013) 449-471.

¹³ L. Pasculli, N. Ryder, *Corruption and globalization: towards an interdisciplinary scientific understanding of corruption as global crime*, in L. Pasculli – N. Ryder (Ed.), *Corruption in the global era. Causes, sources and forms of manifestation*, London 2019, 14.

¹⁴ Xuhong Su, Xing Ni, *Citizens on Patrol: Understanding Public Whistleblowing against Government Corruption*, in *Journal of Public Administration Research Theory* (2018) 2.

¹⁵ Camargo – Passas, *Hidden agendas* cit.

¹⁶ N. Passas, *Globalization, Criminogenic Asymmetries and Economic Crime*, in *European Journal of Law Reform* 1.4 (1999) 399-423; J. Claro – N. Passas, *Effects on the Anti-corruption Agenda on Public Procurement Practices*, Washington DC, 2013, *passim*.

¹⁷ N. Passas, *Lawful but Awful: “Legal Corporate Crimes”*, in *Journal of Socio-Economics* 34.6 (2005) 771-786.

- Inducing people to commit a crime by circumventing the law when main human needs are made difficult to reach because of the burdensome piece of regulations.

If making more laws could end in generating poor laws and being criminogenic, we suggest a radical inversion in the anticorruption strategy, following some starting points.

Firstly, we would stress the need of evaluating the shape and the effectiveness of legislation in the context of the specific country in which it will operate¹⁸, especially its legal environment.

As already stated, the "failure to consider the peculiarities of a given country's judicial system" was found to "render even the best of intentions and the strictest legislation ineffective or, in the worst-case scenario, actually lead to crime"¹⁹. In fact, cross-national studies suffer an "ecological fallacy"²⁰ as the correlation between certain variables could not exist in other countries.

Hence, beyond the need to meet the anticorruption international standards, the law shall address the country's social and legal peculiarity.

A different issue regards the "quality-standards" the law shall comply with to be immune to the criminogenic risk.

The European study proposes a new law-making strategy, based on additional principles (adding to the fundamental ones regulating the rule of law).

Every policymaker shall receive specific training on the risk of unintended criminogenic effects of the law. Moreover, it is proposed a mechanism intended to prevent the legislative crime risk in Europe (CRAM), which consists in two phases: a) the risk assessment on the criminogenic effects of the law; b) measures to "close the loopholes" in the legislation²¹.

Finally, Pasculli²² highlighted the importance of sensitizing all the actors of the "law sharpening" process (also the judiciary power) on the problem and sharing a common culture of good law-making mechanisms.

The second principle seems to be summarized in the need for periodical scrutiny of the enacted regulation to remove any criminogenic factors.

We truly appreciate the effort to create a step-by-step process to be followed to verify whether the legislation meets the anti-criminogenic standards. Moreover, the training on the risks and the possible remedies could be beneficial.

It remains the problem of finding solutions outside the scope of the law. Instead of creating new compelling rules, we suggest making the existing ones more appealing.

Along this path, we foster the introduction in the anticorruption system of some psychological elements used in the marketing strategy²³.

In fact, we could rely on the power of cognitive nudging in the decision-making process²⁴. As the choice of locating a certain product in a more visible position could direct people decision

¹⁸ Passas, *Anti-Corruption Beyond Illusions* cit.

¹⁹ A.R. Castaldo – F. Coppola, *The ethical 'dilemma' of Whistleblowers in the Italian legal environment*, in *Diritto Penale Contemporaneo – Rivista Trimestrale* 3 (2021) 142-143.

²⁰ W.L. Miller, *Quantitative Methods*, in D. Marsh – G. Stoker (Ed.), *Theory and Methods in Political Science*, Macmillan, 1995, pp. 154-172.

²¹ E.U. Savona, *The Crime Risk Assessment Mechanism (CRAM) for Proofing EU and National Legislation Against Crime, Final Report of Project MARC – Developing Mechanisms for Assessing the Risk of Crime due to legislation and products in order to proof them against crime at an EU level*, 2012. Available at: https://www.transcrime.it/wp-content/uploads/2013/11/MARC_Legislative_CRAM_Finale_report1.pdf.

²² Pasculli, *Corruptio Legis*, cit.

²³ Castaldo, Coppola, *The ethical 'dilemma'* cit. 149 ss.

in buying, giving them the cognitive illusion that they are making a choice, while they are induced to the one preferred by the manager, we may approach the problem of anticorruption by promoting virtuous examples in the Public Administration. As Castaldo claimed, "if policy makers and the media nudge people in the direction of best practices rather than threatening public officials with punishment for every mistake, or practically emphasizing only the investigative phase of corruption cases (with the allegations having to be proved at trial), it is more likely that a virtuous circle will be created that is finally able to break the sub-cultural prejudice whereby this is the way we act, this is the system, we cannot do anything about it and perhaps discourages the ones really affected by the corruption germ, as they will be marginalized by the majority consisting of the virtuous custodians of the public interest"²⁵.

These assumptions seem to be particularly true after the Covid-19 pandemic, which forces changes in the governance at all levels.

As the pandemic has taught, more than rules, the people's compliance (or self-restraint), driven by shared value, makes the whole difference between a winning strategy or a great failure.

Then, we shall focus on the people, rather than the rules, trying to address the socio-cultural factors that drive people's attitude to crime, such as education, poverty, inequalities, and opportunities.

Using as example the anti-covid experience, we would point out that, despite the confusion, the massive number of rules at the national and local level there has been great spontaneous compliance, particularly in the first phase of the pandemic: the images of Italians accepting a strong lockdown singing in their balconies were shared worldwide.

Summarizing the major "game-changer" factors in accepting these freedom restrictions, we would stress the importance of awareness and shared values.

On the one hand, it is undeniable the media's impact in sharing information about the pandemic effects and the need for urgent and strict measures to take under control the risk of a large infection. The daily, quite compulsive set of guidance and information made people aware of the issue.

Secondly, the common interest in safeguarding people's health fuelled their spontaneous observation of rules. The "living or dying" alternative made the "call for cooperation" successful.

The keywords of the compliance in the anti-pandemic experience could offer a practical lesson to the anticorruption strategy.

If we deeply consider it, anytime a bribe is paid to build a road or a bridge; anytime funds are misspent to build or refurbish a hospital, we do not only have interests such as transparency or public trust at stake. Every single act of corruption could indeed have a practical impact on our health. Imagine, for instance, the collapse of a bridge because of the lack of controls, an inefficient healthcare service because of the endemic tax evasion or corruption practices.

Apparently, all these cases regard only a vague "public interest". On the contrary, when we finally see the correlation to our primary interests like safety and health, they finally regard all of us.

²⁴ R. Calo, *Code, Nudge, or Notice*, in *Iowa Law Review*, 99.2 (2014) 783; A. Brunon-Ernst, *Use of Social norms in the production of legal norms: genealogical and critical approach to nudges*, in *Cahiers de Droit* 59.1 (2018) 121.

²⁵ Castaldo, *Beauty Is in the Eye of the Beholder*, cit.

In conclusion, the new challenge for anticorruption is making crystal clear this connection, explaining how corruption can impact our personal life, and in this way turn the anticorruption measures into the common interest in taking care of the *res publica*.