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ARTICLE

Abuse of Abuse of Office: An Italian Tale

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Abstract

This article outlines the Italian experience with the offence of abuse of office as a lens through which to analyse broader questions of accountability and discretion in public governance informed by the rule of law. While rooted in domestic legal history, the long-standing controversies surrounding this offence illuminate the political and legal sensitivities that have recently emerged in response to the proposed European directive on corruption, particularly the resistance voiced by several founding Member States. Beyond this contingent trigger, the contribution advances a more general claim: criminal misconduct in office lies at the core of the problem of holding public officials – both national and European – accountable in accordance with rule of law standards. The article argues that abuse of office occupies a distinctive position at the intersection of political discretion, administrative decision-making, and judicial review. Alongside acknowledging that the formulation of such an offence faces concerns relating to legality, fair trial guarantees, and the subsidiary role of criminal law, the article underlines that behaviour amounting to abuse carries a specific and serious wrongfulness that may justify criminalisation. Finally, drawing upon authoritative legal scholarship and interdisciplinary insights, the article offers an unorthodox account of abuse of office, suggesting that – even more than bribery – it undermines not only the legality but the very legitimacy of public power, thereby occupying a prominent position within the broader constellation of corruption-related crimes.

Keywords: abuse of functions; abuse of power; criminal misconduct in office; EU proposal directive on corruption

I. Preliminary remarks

This article aims to outline the main features of the Italian experience with the application of the offence of abuse of office. Despite the inevitable simplifications involved in presenting such a complex legal, political, and social history,[1] an account of the long-standing controversies surrounding the application of this offence retains relevance beyond the boundaries of domestic law. Indeed, this story can explain the general context in which the proposed European directive on corruption reform has met with opposition from some of the founding countries of the European Union,[2] with

[1] For a broad historical overview see U Gentiloni Silveri, *The History of Contemporary Italy 1943-2019* (Springer 2022) especially pp. 265–306; P Ginsborg, *L'Italia del tempo presente. Famiglia, società civile, Stato (1980-1996)* (Einaudi 2007). On the importance of Ginsborg's studies on Italy, that carefully considered judicial occurrences from the 'mani pulite' era to the so-called Berlusconism, see J Foot and S Gundle (eds), *Paul Ginsborg and the Historiography of Modern Italy* (Palgrave MacMillan 2024).

[2] Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council framework decision 2003/568/JHA and the Convention on the fight against corruption involving officials

Germany and Italy at the forefront (Section II).[3] To acknowledge the deep roots of this opposition could help highlight strengths and drawbacks of the EU draft definition. More general thoughts about the policy pursued by the EU proposal are far beyond the limits of this contribution.

Beside this contingent trigger, this contribution makes a more general claim. By presenting to a broader audience the Italian experience of a long-lasting struggle between State powers (Section III), it aims to show that the topic of criminal misconduct in office is closely linked to the problem of holding public officials accountable according to rule of law standards. This should concern domestic officials and EU officials as well. While the first aspect (as of domestic public officials) might be widely accepted as a matter of principle, accountability of– especially high-level –European public officials is still an open issue.

Bearing that in mind, this contribution aims to make three key points.

First, the Italian experience suggests that abuse of office is not just one offence among many others that can be committed by a public official. It specifically lies at the intersection between, on the one hand, politics and administrative bodies entrusted with discretionary powers, and, on the other hand, the judiciary as the state power entrusted with the task of judicial review of public bodies' decisions to ensure that they are lawful. Therefore, it can be expected that to lay out an offence of abuse of functions at supranational level will entail sparking fierce opposition. To understand its reasons could prove useful if the EU wants to effectively push forward a credible political agenda of accountability of EU decision-makers along a path intrinsically fraught with difficulties and hurdles.

Second, I would like to stress that behaviour amounting to abuse carries a specific *Unrecht*, a bold wrongfulness that makes it worth criminalising, and legitimately so. However, to craft a criminal provision on abuse of office is a sensitive issue if considered from the angle of the safeguard of fundamental tenets of criminal law and procedure: substantive legality requirements (strict construction, void-for-vagueness rule, non-retroactivity and the like) and fair trial requirements. Moreover, at stake is the nature of criminal law as a *last resort*. As we shall see, all these aspects played an important role in the debates that lasted over more than eighty years in the Italian scholarship and practice (Section IV).

Finally, I will briefly sketch a quite unorthodox account as regards the rank of abuse of office within the galaxy of corruption-like crimes. In a nutshell, my claim is the following: not only does abuse of functions directly affect the legality of action of any public power (meaning here legality as the "law of rules"), it infringes the rationale of the rule of law at a deeper level, that is, it undermines the legitimacy of any public institution. Accordingly, criminalising behaviour amounting to abuse of power is *necessary*. In sketching this account, I will partly draw upon Jeremy Horder's claim about the nature of "constitutional fundamental" of the offence of criminal misconduct in office. Pushing this account even further, I maintain that abuse of functions ranks even higher than bribery itself, as abuse undermines the legitimacy of the political power (be it democratic, or not) precisely *because* it is not even "justified" by greed or the drive of any other economic interest (Section V).[4]

of the European Communities or officials of Member States of the European Union and amending Directive EU 2017/1371 of the European Parliament and of the Council: COM (2023) 234 final, 3 May 2023.

[3] See specialised media reports: A Hoxhaj, in: <https://www.politico.eu/article/eu-anti-corruption-directive-scandals-penalties/>. Extensively Id., *The EU Anti-Corruption Report. A Reflexive Governance Approach* (Routledge 2020); K Carlson, in: <https://www.politico.eu/newsletter/politico-eu-influence/headwinds-for-the-aviation-industry-in-paris/>.

[4] This does not compellingly imply that abuse deserves a higher penalty than bribery. See briefly Section V.

II. Setting the framework

1. The proposal directive on abuse of functions

The Commission has recently put forward the proposal for a new Directive on corruption of – to be more precise, "involving"– EU public officials. The overall focus of the Directive is on preventive and repressive mechanisms:

> To root out corruption, both preventive and repressive mechanisms are needed. Member States are encouraged to take a wide range of preventive, legislative and cooperative measures as part of the fight against corruption. Failings in integrity, undisclosed conflicts of interests or serious breaches of ethical rules can lead to corrupt activities if left unaddressed. The prevention of corruption mitigates the need for criminal repression and has wider benefits in promoting public trust and managing the conduct of public officials.[5]

It is worth highlighting that the notion of corruption is a broad one, not limited to the crime of bribery. The Proposal acknowledges that

> There is no single definition of corruption as corruption exists in different forms involving different participants. Indeed, corruption is an endemic phenomenon that takes multiple shapes and forms across all facets of society, for example bribery, embezzlement, trading in influence, trading of information, abuse of functions and illicit enrichment.[6]

As for the abuse of function in particular, the Proposal considers that – despite the apparent widespread agreement on the wrongfulness of a public official's misconduct and the need to address that kind of behaviour through criminal law measures[7] – an harmonisation effort is needed because "definitions have many variations," and this is especially true when looking at embezzlement or abuse of functions.[8]

In light of this, the recital 13 states the content of the harmonisation measure:[9]

> Moreover, it is necessary to define the offence of abuse of functions in the public sector as a failure to perform an act by a public official, in violation of laws, to obtain an undue advantage. In order to comprehensively fight corruption, this Directive should also cover abuse of functions in the private sector.

The relevant provision defines abuse of functions and failure to act (hence, an omission) as a criminal offence when committed intentionally.[10] Harmonisation is

[5] Proposal for a Directive of the European Parliament and of the Council on combating corruption (supra note 1), Explanatory Memorandum, at 2.

[6] Proposal for a Directive on corruption (supra note 1), Explanatory Memorandum, at 6.

[7] The offence is criminalised in 25 Member States. On the results of this comparative survey see critically F Zimmermann, "Just Call It Corruption and Criminalise . . . An Assessment of the Commission's Proposal for an EU Directive on Combating Corruption (COM [2023] 234 final)" (2024), 14 European Criminal Law Review 27–48 at p. 36.

[8] Proposal for a Directive on corruption (n 1), Explanatory Memorandum, at p. 12.

[9] The legal basis is provided by Art. 83(1) and Art. 83(2) TFUE.

[10] Art. 11 reads as follows: "Member States shall take the necessary measures to ensure that the following conduct is punishable as a criminal offence, when committed intentionally:

1. the performance of or failure to perform an act, in violation of laws, by a public official in the exercise of his functions for the purpose of obtaining an undue advantage for that official or for a third party;

pursued only as regards abuses committed with the purpose of obtaining an undue advantage (art. 11).[11]

2. *Frontline opposition*

The opponent States' argument is threefold. First, it is claimed that the provision is *vague*, overly broad and open to misuse, as it could be used to target and charge public officials in order to create a public show of fighting corruption.

Secondly, it might entail the *counterproductive* effect to discourage officials from working for public administration or approving publicly funded projects for fear of facing criminal prosecution.

Thirdly, it is argued that abuse of functions should amount to an administrative offence at most. This argument is arguably based on the last resort principle.[12]

Here surfaces the more general import of the Italian experience. These objections can be better understood if we consider the history of the offence of abuse of office in Italian criminal law. Obviously, this can only be done here in broad strokes.[13]

III. Understanding the background: an Italian tale

Let's start from what looks like the (apparent) end of the story. Italy repealed the offense of "abuso d'ufficio" (abuse of office) in 2024, after it had been part of its criminal law for almost a century. Whether the provision's inclusion in the EU directive would require its reinstatement in their state law is a different issue that I cannot address here. More

2. the performance of or failure to perform an act, in breach of duties, by a person who in any capacity directs or works for a private-sector entity in the course of economic, financial, business or commercial activities for the purpose of obtaining an undue advantage for that person or for a third party."

[11] See Proposal for a Directive on corruption (supra note 1), Recital Nr. 13: "it is necessary to define the offence of abuse of functions in the public sector as a failure to perform an act by a public official, in violation of laws, to obtain an undue advantage. In order to comprehensively fight corruption, this Directive should also cover abuse of functions in the private sector." Offences must be crafted in a way that enables exerting jurisdiction over facts committed in or conncted to the territory of the Member States: "Given the mobility of perpetrators and proceeds stemming from criminal activities, as well as the complex cross-border investigations required to combat corruption, all Member States should establish their jurisdiction in order to enable the competent authorities to investigate and prosecute this crime in a sufficient wide range of cases. including when the offence is committed in whole or in part in its territory. As part of that obligation, Member States should ensure that jurisdiction is also established in situations where an offence is committed by means of information system used on their territory, whether or not that technology is based in their territory" (Recital n. 26).

[12] The literature on the *ultima ratio* principle is immense, being this principle one the fundamental tenets of modern criminal law theory (as well as an unvaluable legacy of the philosophical adventure of the Enlightenment). Among the most recent contributions I only quote here D Husak, "The Criminal Law as Last Resort" (2004) 24 Open Journal Systems 207–235; P Minkkinnen, "'If Taken in Earnest': Criminal Law Doctrine and the Last Resort" (2006) 45 The Howard Journal of Criminal Justice 521–536; specifically for the European context see JW Ouwerkerk, "Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?" (2012) 3 New Journal of European Criminal Law 228–241; from a specific angle in international criminal law see S Zink, "Ecocide as a New Core Crime in the Rome Statute? An Ultima Ratio Lens on Legal Policy in International Criminal Law" (2024) 128–158.

[13] A comprehensive bibliography on the Italian provision on abuse of office can be found e.g. in E Mattevi, *L'abuso d'ufficio. Una questione aperta. Evoluzione e prospettive di una fattispecie discussa* (Editoriale Scientifica 2022). Short before the abolition see with different views, among many, B Romano, "La prospettata abrogazione dell'abuso d'ufficio. Più pro che contro" (2023) *La legislazione penale* <https://www.lalegislazionepenale.eu/wp-content/uploads/2023/12/ROMANO-Definitivo.pdf>. (last accessed 3 January 2026); M Parodi Giusino, "La proposta di abolizione dell'abuso d'ufficio: discutibili ragioni e dannose conseguenze" (2024) *La legislazione penale* <https://www.lalegislazionepenale.eu/wp-content/uploads/2024/05/Parodi-Giusino-2.pdf>. (last accessed 3 January 2026).

interesting to a wider audience is the purported backdrop lying behind Italy's choice to repeal the offence. The law, according to a widely accepted narrative, hindered decision-making at the local and central levels of government, with officials afraid of being charged for allocating public resources aimed at implementing public policies, especially when public procurement procedures are required.[14] In addition, critics maintained that it had become a politically driven instrument of prosecutorial harassment, with recent figures showing just nine in 5000 criminal cases resulted in convictions.[15] This shall mean that too many prosecutions were initiated without a solid factual basis, hence politically or ideologically motivated: judicial smear campaigns.[16] This latter objection (prosecutions as a political tool for getting rid of opponents or undesired high/middle-level administrative staff) is meant to be quite compelling given the broader complex framework of tensions between the legislature – especially, but not exclusively, right-wing parties which held for a long time the majority in parliament – and the judiciary. Public prosecutors and judges sentencing public officials, at least at the trial or appeal stages,[17] were (and are) often labelled with the term "toghe rosse" ("red robes," being red the colour of the communist party's flag). Once politicians have been bound over for trial on a charge of abuse of functions, especially shortly before elections, they cannot stand for elections, and the career has come to a stop – if not an end. Which is not always the case in Italy, by the way.

1. Legislative quiet and growing discontent (1930–1990)

Originally, the offence of abuse of office was residual in respect to other offences intended to punish offences committed by public officials. Since some of these offences were, on the one hand, vague and, on the other, applied extremely rigorously by the courts, the effect was to replace the court's review with the exercise of discretionary power by the public administration. Or, at least, this was the accusation that the political class levelled at the judiciary. Vagueness of legal provisions, intrusiveness of the judiciary, criminalisation of trifles, were diagnosed as systematic flaws that poisoned the relationship between public bodies and the judiciary, blurring the boundaries between the scope of legitimate administrative discretion and the scope of judicial review. The judiciary has been steadily accused of trespassing into areas which should not be their preserve, as Lord Dyson, a former Judge of the Supreme Court of the United Kingdom, put it.

The cases concerning the control of legality in the strict sense consisted of three criminal provisions: embezzlement, private interest in the performance of official duties and abuse of official duties (see Appendix A).

[14] I only quote here an interesting paper expressing a view from 'inside' the Corte dei Conti (the Italian jurisdictional organ vested with control over the expenditures of the public administration): V Tenore, "La 'paura della firma' e la 'fatica dell'amministrare' tra mito e realtà: categorie reali o mera giustificazione per l'impunità normativa degli amministratori pubblici? Dalla 'corte dei conti' alla 'corte degli sconti'," (available online: <https://www.corteconti.it/Download?id=cc764b76-d667-4cca-9837-05fabecd541f> (last accessed 10 September 2025) [the Author is President of a Section of the Court].

[15] This information has been widely spread: see e.g. R De Paolis, <https://globalanticorruptionblog.com/2025/01/02/guest-post-italys-misguided-and-possibly-illegal-repeal-of-the-abuse-of-office-offense/>. However, the gathering of reliable official data is a structural problem in Italy; correspondently, their interpretation remains contested. Anyway, official statements by the Minister that trigger policy debates are based on data conveyed (directly or indirectly, e.g. through elaborations by the National Statistics Institute) by the same Ministry of Justice: see <https://www.istat.it/wp-content/uploads/2024/05/Ettore-Sala-La-misurazione-della-corruzione.pdf>. Different set of data of the Ministry of Interior is available here: <https://www.interno.gov.it/sites/default/files/2024-06/i_reati_corruttivi_maggio_2024.pdf> at pp. 8, 18.

[16] This is a recurrent objection to prosecutions based on 'corruption' charges in a broad sense: see N Hogic, *Judicial Anti-Corruption Campaigns. Prosecutions in Italy, Brazil and Romania* (Routledge 2024).

[17] Especially when a conviction has been quashed by the Court of cassation.

(i). Embezzlement criminalised a twofold behaviour, before the last reform of 2024 (see Appendix B): the conduct of a public official who, by virtue of his office, is in possession of movable property or money belonging to the public administration, appropriates or diverts it. In practice, the public prosecutor could investigate how the sum of money allocated in the budget for a certain item had been in fact used and registered. This proved to be very controversial in cases of budget transfers still intended for public purposes: eg, if a sum allocated for building roads was earmarked for the construction of a building, this would fall under the scrutiny of the Public Prosecutor's Office because diversion would have raised the suspect of misappropriation unduly beneficial to a third party.

(ii). "Taking a private interest in an official act" criminalised public officials who "directly or through an intermediary or by means of simulated acts, take a private interest in any act of the public administration in which they exercise their office." The prohibited conduct was not defined by law and unfortunately left to case law. In fact, case law had run wild: upon the interpretative premise that "private" interest means any kind of non-public interest, if the public destination had not been precisely identified this would have been sufficient to argue that the interest pursued was a private one.

A more restrictive interpretive trend postulated that "private" should be understood as meaning personal to the public official or to a person directly related to him, and that the interest must be expressed in a personalistic exploitation of the public office for a private purpose. This was the final conclusion reached by case law in the 1980s.

The provision criminalising other (s.c. "unnamed") kinds of abuse of office played a residual role, in the sense that it was intended to cover minor abuses in which no money was involved (otherwise embezzlement would apply) and there was no personal or personalised interest on the part of the public official (relevant in the same way as private interest).

(iii). Any other abuse of power: a mayor cuts off your water supply, or blocked your way, because you voted for another party – countless cases. Small favours with no (proven) financial motive: a prison guard takes a prisoner's letter to his relatives, violating his duty to deliver it; acts of patronage, such as hiring people to benefit one's political supporters, and so on.

Overall, abuse was deemed a petty offence, whose nature explained the broad "subsidiarity clause." Thus, the abuse covered precisely that extreme range, but like all "borderline" cases, it marked the boundary between what was lawful and what was unlawful. It is in fact the less serious cases that mark the boundary. Similarly, for example, in the protection of the person, the boundary between lawful and unlawful is not marked by murder: there, the extreme boundary is marked by assault.

2. *First reform: the keystone delusion (1990–1997)*

The struggle between state powers lasted for about sixty years. In 1990, Parliament decided to abolish the offences that had been most used by the judiciary to control the exercise of administrative power and abuses of political power: embezzlement by diversion and taking private interest in official acts. The only offence that was amended but not abolished was abuse of office. What matters is to highlight that the effect of the reform on the system had been quite revolutionary: whilst the subsidiarity clause was maintained, as

a matter-of-fact abuse of office suddenly became the main instrument of control by the judiciary over the conduct of public officials.[18]

Thus, as the authoritative scholar Tullio Padovani puts it, the poor man of the family, i.e. abuse of office, suddenly found himself the rich heir to all the specific cases that could not be repealed but should no longer be confused in the mare magnum of private interests and embezzlement by misappropriation.[19] It was reformulated as a two-tier offence. Abuse of non-financial nature, heir to the old "unnamed" abuse, envisaged all abuses by public officials or public agents aimed at obtaining a non-pecuniary advantage for themselves or to the detriment of third parties. Behaviour such as distortion of power, improper influence, and clientelism would amount to this form of abuse.

Financial abuse, on the other hand, concerned abuses aimed at obtaining a financial advantage for the public official or a third party.

> The advantage of this new formulation was that it was now considered to have been clarified that the old offence of embezzlement could only be punished when the destination of the property for the financial gain of the public official or third parties depended on abusive conduct and was intrinsically 'unjust' (improper). The offence was based on a 'twofold illegality' requirement: in terms of conduct, the abuse was intrinsically a distortion of powers, an illegality inherent in the conduct; with regard to the event, the illegality was expressed in the fact that the advantage had to be unfair and had to be so on the basis of a parameter other than that which characterised the conduct.
>
> It was therefore exemplified that if a public official, in violation of regulatory provisions or office rules, paid a debt to a person who was actually entitled to receive it, even if not in that form and not in that manner, this could certainly not be considered a punishable abuse because there was no injustice in the advantage obtained by the private individual.

But: what is meant by "abuse"? Since abuse of office is historically identified with a functional distortion of public functions – power is used for a purpose other than that for which it has been conferred upon the public official – it was clearly left to the interpreters to inquire in the ultimate purpose of the public official in deploying their power in the specific situation under scrutiny. This assessment is carried out, in the first instance, by the prosecution authorities.

The question of establishing whether there was administrative merit remained, because if the public official acted on the basis of "private merit," nothing would prevent the investigator from charging her under that statute. The *actus reus* was too loosely crafted: to prove abuse it is *mens rea* that comes to the forefront.

3. *A reform for a VIP and, then, business as usual (1997–2019)*

A very influential politician, who would become even more influential over the years not only at domestic but also at European level, had found himself in a bit of a mess because,

[18] Actually, embezzlement by diversion could not be completely abolished, because diversion could also consist of behaviour through which the sum of money or the movable property was intended for a purely private purpose, perhaps for a third party, not for the public official. Either embezzlement through appropriation, or abuse of office.

[19] T Padovani, "L'abuso d'ufficio e il sindacato del giudice penale" (1989), *Rivista italiana di diritto e procedura penale* 76; on the law repealing the offence: *Id*, "Vita, morte e miracoli dell'abuso di ufficio" (2020), *Giurisprudenza penale* (available online: <https://www.giurisprudenzapenale.com/wp-content/uploads/2020/07/Padovani_gp_2020_7_8.pdf>).

while managing a large public body, he had sold a large state-owned industry for a price that amounted – at least according to an officially filed expert report – to a quarter of its actual value. In short, this sale had taken place at a bargain price; a public asset had been sold off, and this had happened, according to the prosecution's reconstruction, for reasons that were not entirely commendable: there was a very high risk that the offence of abuse would be considered to exist under the 1990 reform.

Hastily, in 1997, the Ministry of Justice issued a law-decree (*decreto-legge*) reforming Article 323, which had nothing to do with the draft presented by the Commission; it became the text in force until the 2020 reform.

In the new offence definition, any reference to abuse has been removed from the text of the provision (although it remains in the heading, but the heading has no prescriptive value). The provision *revolves around the intentional*[20] *violation of a parliamentary law or of regulations* (therefore, the law or regulation that expressly prohibits such conduct is required), or around conflicts of interest, i.e. situations in which one has acted in the presence of one's own interest or that of a close relative, or in other cases expressly prescribed by law (the identification of one's own interest or that of a close relative is entrusted directly to judicial assessment).

> Consequently, the proceedings were immediately closed at the preliminary hearing[21]. The outcome was that the act was no longer considered a crime under the law, because in that case it was a matter of discretion exercised in a certain way, but in a situation where no law or regulation required sale at a specific price.

Initially, the case law seemed to take note of the change. However, it was quickly realised that in this way all favouritism, abuse of power, clientelism would become legal, because laws and regulations prescribing behaviour in certain cases existed, while in other cases they did not. However, these were often situations linked to the disarray, so to speak, of administrative legislation, which is varied, has multiple sources, and presents differences between regions, municipalities: by and large, administrative law in Italy is a mess. Administrative legislation is so variable that it is difficult to imagine that similar situations are envisaged by a clear, fitting regulatory framework.

This gave rise to a conflict in case law which, to simplify the issue, revolved around the relevance of the functional distortion of power: did those who exercised the power for a purpose other than that prescribed by law violate the law? The matter was finally settled by the Court of Cassation (Grand Chamber, s.c. Sezioni Unite) in 2011: when addressing the interpretation of the requirement of "violation of any parliamentary law," it established that any misuse of power amounts to such a violation, since it is not exercised in accordance with the regulatory framework that legitimises its attribution.[22] Back to square one.

This ruling by the Joint Divisions corresponds to the rulings of the old case law on abuse, leading to an overlapping between the criminal misconduct and the administrative judicial review on excess of power (*détournement de pouvoir*). Here, however, the assessment of objectively symptomatic situations is not in itself sufficient; it is necessary to verify whether that power has suffered this functional distortion.

[20] The crime requires 'direct intent' (*dolo intenzionale*). J Horder, *Criminal Misconduct in Office. Law and Politics* (OUP 2018) p. 93 criticises the requirement of a specific intent (purpose of gain or of causing a detriment to third parties) in corruption-focused offences, because 'a much broader swath of wrongful acts in political contexts are excluded from the scope of the offence'.

[21] G.I.P. Court of Rome, 22 December 1997, Prodi, *Cassazione penale* (1998), no. 1263.

[22] Criminal Cassation, Joint Divisions, 29 September 2011 (filed 10 January 2012), no. 155/12, Presiding Judge Lupo, Reporting Judge Di Tomassi, appeal Rossi, para. 18.1, (2012) *Giurisprudenza italiana*, p. 2141.

4. The final fight (2020–2024)

In the attempt to curb this trend in case law, the provision was amended in 2020. Administrators complained because they were afraid to sign, because prosecutors were intrusive, and because the truth was that there were indeed numerous proceedings for abuse. And of these proceedings, as we have seen, only a relatively small proportion resulted in a final conviction. Why was the protest led especially by city mayors protest?

One reason is of sociological nature:

> In many small Italian towns, many people—particularly at the elite level—know each other socially and often have family ties, and as a result many decisions that local politicians make could be characterized as helping their friends or relations or otherwise involving a conflict of interest. Consider a mayor who announces a tender for public construction project, and the best bid comes from an acquaintance of the mayor. If the city government accepts that bid, the local political opposition could report the decision to the authorities and assert that the mayor abused her office by favoring an acquaintance in the tender procedure. As a result, according to critics of the abuse-of-office offense, many local public officials were discouraged from implementing socially valuable public works projects, out of fear of ending up under criminal investigation.[23]

Another reason might be seen in that many funds are managed at the local level, where public officials do not benefit of initiatives of "continuing education" on the steadily changing administrative rules, especially public procurement regulations, and where technical expertise often must be hired from outside the public body.

Be it as it may, the new law aimed explicitly to clip the wings of the judges. By anchoring the offence to an activity or a task whose execution is not discretionary, the provision in only able to address the lowest and almost insignificant level of the public administration, that of mere execution, where there is no room for choice. Mere execution is the stage at which the offence is immediately identifiable (e.g., an office was supposed to open at 8 a.m. but opened at 9 a.m.) and is mostly easily punishable through hierarchical channels or by recourse to the police. It is worth adding that individuals operating at such a level are not envisaged by the abstract definition of public officials.

If one looks back at case law in which a conviction judgment is handed down, one finds cases about which no one would have any doubts as to their seriousness. Let us look at a few examples:

> –A municipal council decides to charge the municipality for the renovation costs of a privately owned garage belonging to an opposition councillor, considering the expense justified on the grounds that the owner would then rent the garage to the local health authority's veterinary service; thus, the renovation of a private property at public expense, on which the private individual will then profit further by renting it to a service of the same municipality. A senseless connection with a public service which ends up representing a double cost for the public body.

> –A municipal council directly hires a number of people to collaborate on a special company project, but the project has not even started, it does not even exist, and the employees, who are regularly paid, stay at home or are used for various odd jobs in the service of this or that councillor, i.e. they have taken on waiters. This is a clear case of mediocre clientelism.

[23] R De Paolis (supra note 15).

–The head of the finance department of a municipality, who is a candidate in the next elections for an opposition party, is dismissed pending the adoption of a different organisational model aimed at curbing expenditures. The different organisational model is never even set up; it was just an excuse to get rid of the lad.

Cases of this sort became lawful under the 2020 reform. However, criminalisation of abuse under the heading of the conflict of interest could have been usefully rediscovered. In fact, the area susceptible to referring to abstention in the presence of an interest of a close relative or "in other cases prescribed" can also be very broad, because if one identifies an interest of a close relative, the offence becomes applicable as there is no longer any administrative merit. Here, only the conflict of interest is relevant.

So far, cases based solely on conflict have been very few but, precisely because of that interpretation, they could become the majority and be subject to a process of hermeneutic expansion.

Out of the fear that this expansion would take place, the provision was stroke out.

5. On the "fear of signing" official decisions

A much less debated aspect (or one that has been debated in a wrong manner, without adequately involving economic, statistical and sociological analysis of the available data) is the analysis of the factual data supporting legislative choices (*Tatsachenforschung*).[24]

As we have already pointed out, one strong argument in support of the decision to repeal the law is the number of criminal proceedings for abuse of office and the percentage of convictions following the initiation of such proceedings. Correlatively, the decision wanted to meet, in a rather populistic way, a social psychology phenomenon, the so-called "fear of signing," that is, the reluctance to approve acts –broadly, to take decisions – out of fear of criminal liability. This fear is purportedly documented on the part of mayors and, in any case, of those statutorily entitled to be "responsible for proceedings" (especially regarding investments, e.g. in infrastructures) at local level. Such socio-psychological phenomenon has been labelled as defensive administration, referring to behaviour aimed at protecting the decision-maker from the risks, both financial and non-financial, associated with the decision to be taken. This attitude implies that the option chosen is the one that avoids potential negative consequences for the decision-maker, even if it is not the best choice for the organisation in which he or she performs his or her duties – indeed, a bad and often counterproductive choice (that is, one that leads to more costs in the long-term). A statistical and sociological survey carried out by two Italian economists, albeit only partial but no less significant, shows that the behaviour complained of (i.e. defensive administration) seems to be attributable not so much to the risk of being involved in criminal proceedings.[25] The defensive attitude is explained by the difficulties in applying

[24] P Noll, *Gesetzgebungslehre* (Rowohlt 1973).

[25] S Battini, F Decarolis, "Indagine sull'amministrazione difensiva," 3 *Rivista italiana di public management* (2020), n. 2, 342ff. (available online: <https://www.rivistaitalianadipublicmanagement.it/wp-content/uploads/2021/06/08_RIPM_V3-N2_CloseUp_Art.8.pdf> last accessed 30 December 2025). The study presents an empirical investigation based on the administration of a detailed survey questionnaire, comprising both situational vignettes and questions measuring risk perception. Although this type of survey-based methodology remains relatively uncommon in criminal-law scholarship, it is of significant interest from a risk-regulatory perspective. The study's findings –explicitly presented as provisional and subject to further validation – suggest that reliance on so-called defensive administration cannot be explained primarily by exposure to criminal liability. Rather, it appears to be associated with a combination of factors: first, the complexity and opacity of the administrative regulatory framework; and second, insufficient professional training, particularly in the area of public procurement. A further noteworthy result concerns the sensitivity of responses to question framing. When defensive behaviour is not addressed explicitly, practices attributable to defensive administration appear

administrative law, which is often insurmountably complex and confusing, as well as complaining about the lack of adequate training courses, specifically – for example – in the field of procurement. In addition, criminal proceedings are only one of the sources of risk indicated by the interviewed, alongside other factors such as control by superiors, intervention by the Anti-Corruption national Authority, media coverage of inappropriate news, intervention by the Court of Auditors.

It is interesting to note an outcome of the different techniques of interviewing used by researchers. When the question about the reasons for this behaviour is asked *indirectly* to those concerned, and therefore refers in general to the scenario in which the administrative activity is carried out, the course of conduct that can actually be attributed to defensive administration do not seem particularly significant: this is particularly true for those respondents who belong to the "category" of high-level decision-makers, for whom the behaviour reported and described as "defensive" amounts to no more than 10–20% of the decisions taken. When, on the other hand, the question is asked *directly* and, so to speak, head-on, the answers paint a picture of 30–50%. The survey of the solutions indicated by the respondents, when specifically asked about this aspect, is also of particular interest. The respondents themselves mainly indicated the strengthening of training, the improvement of incentives to reward rapid decision-making, the improvement of career incentives, and the strengthening of the professional insurance system against the risks of financial liability. Furthermore, from a quantitative analysis perspective, the study shows that, in reality, despite a clearly identifiable type of defensive administration, the slowdown in procurement procedures has been relatively modest.

In short, the responses to the so-called "situational" questions do not seem to confirm that defensive administration is truly a problem and it could therefore be the result of a *false belief* due to prejudice, i.e. due to the widespread idea that defensive administration is indeed a significant problem, even though this is not confirmed by the behaviour of those involved. In other words, it would be a kind of cognitive *bias* that produces the reality of the phenomenon itself as it is linked to false perception.

In conclusion, the lack of factual analysis has led to a radical legislative solution, neglecting different actions on the real causes of the operational problems of the administration.

6. Last resort: from theory to reality

It could be argued that judicial review by administrative courts is available in these situations. But first of all, private individuals must give evidence of a direct legal interest in activating it. Secondly, it has subject matter limitations as jurisdiction in vested in administrative courts over formal decisions, not behaviour. As Jeremy Horder underlines, "the accountability of the authority [. . .] depends, amongst other things, on whether the conduct at issue either has the kind of normative character that makes it judicially

relatively limited within the category of *responsabile unico del procedimento* (the single point-of-responsibility officer in charge of the administrative procedure), accounting for no more than approximately 10–20% of reported decision-making. By contrast, when respondents are directly prompted on defensive conduct, the proportion of such responses increases markedly, reaching levels between 30% and 50%. This divergence highlights the importance of survey design and question formulation in eliciting self-reported risk-avoidance behaviour. With regard to policy responses, the remedies identified by the respondents themselves are predominantly non-penal in nature. They include enhanced and targeted training, improved incentive structures aimed at rewarding timely decision-making, strengthened career-progression mechanisms, and the expansion of professional insurance coverage against the risks of financial liability towards the public administration (*responsabilità erariale*). These findings point towards regulatory and organisational interventions rather than criminal-law reforms. This stands in contrast to the legislative debate, which has largely focused – often in highly polarised terms – on criminal-law solutions.

reviewable, or has been the cause of loss or harm for which someone may claim a remedy in civil law. *Public sector wrongdoing may, however, manifest itself through conduct that does not have the normative characteristics that will make it judicially reviewable, or through conduct that has not caused actionable loss or other harm. It is here that criminal law [. . .] may play a legitimate role.*"[26]

Finally, it is more expensive for individuals than civil or criminal jurisdiction. Neither scholars nor the general public really think that Administrative Courts can provide any remedy to these situations. Not to mention disciplinary justice, which is even less suitable. Against this backdrop, it can be consistently argued that the last resort principle of criminal law is not affected by the criminalisation of abuse of functions. Conversely, downplaying the importance of the trust relationship between public authorities and the citizens can entail seriously adverse consequences as to the legitimacy of the public power. Indeed, the idea of erecting like a wall around administrative discretionary powers amounts to a flagrant and glaring violation of the principle of equality. This is because it essentially amounts to granting public officials discretionary powers which, precisely because they are discretionary and therefore more susceptible to arbitrary distortions, are exempted from judicial review. As Lord Dyson tells us,

"*Judicial Review is a critical check on the power of the State, providing an effective mechanism for challenging decisions of public bodies to ensure that they are lawful.*"[27]

By avoiding this scrutiny, the public official is vested with discretionary power as an absolute feudal sovereign.[28] This is because she, in the name of the public interest, can intervene where the private individual cannot, backed by the force of the Authority. Clearly, this understanding of public power predates the rule of law and characterises a feudal system. It is, in other words, a pre-modern arrangement.

7. On abolition: Misconceived enforcement of criminal law principles?

This is a fundamental issue that has not been directly brought up to the constitutional court even though a constitutional challenge has been lodged against the repeal. Critics argue that the repeal be incompatible with the Constitution and Italy's supranational as well as international obligations.[29]

> The abolition would, first of all, be incompatible with the requirements of Article 4(3) of European Directive 1371/2017, according to which Member States must take the necessary measures to ensure that the misappropriation of funds or assets entrusted to a public official, committed intentionally, constitutes a criminal offence, in such a way as to damage the financial interests of the Union. Furthermore, according to some interpretations of case law, the repeal would be incompatible with the UN Convention against Corruption (the so-called Merida Convention, 31.10.2003, ratified

[26] J Horder (supra note 20) at 34 (italics added).

[27] <https://www.judiciary.uk/wp-content/uploads/2015/12/is-judicial-review-a-threat-to-democracy-mr.pdf>.

[28] This acknowledgment is not meant to deny that officeholders' discretion per se, as E Ceva and MP Ferretti, *Political Corruption. The Internal Enemy of Public Institutions* (OUP 2021) point out, "is an important feature of the uses of a power of office in order to avoid turning officeholders into mere executors of the mechanical application of the rules [. . .] When the margins for an officeholder's discretion are (sometimes dramatically) reduced, we risk the paralysis of institutional action, which typically involves the implementation of cumbersome proceedings for monitoring and enforcing the application of this (over)regulation [. . .] [T]he most powerful argument against excessive reduction of office discretion is probably that enforcing legality in an overregulated system is very cumbersome for the judiciary [. . .] The unwanted, paradoxical effect is that, in this way, the legalistic approach may hinder rather than foster legal anticorruption action" (pp. 175f.).

[29] This argument underpinned the judicial decisions to refer the question to the Italian Constitutional Court, in light of the envisaged violation of Article 117 of the Italian Constitution ('Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations': <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>).

> by Italy with Law No. 116/2009), insofar as it encourages States to consider as a criminal offence the fact that public officials abuse their functions by acting or failing to act in violation of the law (in the broad sense) in order to obtain an undue advantage.[30]

Once again, this is not the place for an in-depth analysis of the issue. However, as regards the conflict with the European directive, it can nevertheless be observed that the failure to protect some of the interests for which the directive requires criminal protection does indeed constitute a breach of the Community obligation to protect; but this obligation concerns only the protection of the financial interests of the Union. From this point of view, there would not even be a need to raise a question for a preliminary ruling, because the absence of criminal protection measures is quite clear: even the offence of embezzlement applies only in the case of movable property; the same applies to the offence of misappropriation, which also concerns money or movable property. It should be noted, however, that the conflict would concern a somewhat marginal aspect, as it is limited to assets that are not movable. Correspondingly, the violation of the directive could not be complained of unless the financial interests of the Union are actually at stake, i.e. when the issue is relevant to the specific case. But even in this case, the decision of the Constitutional Court, which has been asked to rule on the matter under Article 117 of the Constitution, could only consist in a declaration of unconstitutionality of the repeal in so far as it entails the non-punishability of abuse of office to the detriment of the financial interests of the Union; which would raise further questions of violation of the principle of equality with regard to other cases of abuse in which financial interests are at stake different from those of the Union. As regards the conflict with the Merida Convention, it has been convincingly argued that it does not lay down a genuine obligation to criminalise. However, the discussion on this point is fuelled by the further question, under international law, of whether or not there is an obligation to maintain and strengthen provisions that are in conformity with the Convention and pre-exist it (Article 7(4) of the Convention: "Each State Party shall endeavour . . . to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest"). However, the scope of this obligation is also debated, and it has been convincingly ruled out that it could render the repeal incompatible with international treaty law[31].

The issue must be addressed by the legislator. Indeed, the decision handed down by the Constitutional court (dec. 95/2025) points to that direction.[32]

[30] This case law is always promptly recorded on the website www.sistemapenale.it.

[31] In case law, see Court of Reggio Emilia, Criminal Section, order 7.10.2024, no. 600/22 R.G. Trib. Indeed, this is the opinion of the Constitutional court: "Neither the literal wording of the provisions of the Mérida Convention referred to by the referring courts, nor their rationale and systematic placement, nor – again – the related travaux préparatoires support in any way the thesis that the Convention itself gives rise to an obligation to introduce the offence of abuse of office or a prohibition on repealing any criminal provision already provided for in domestic law. In the opinion of this Court, the absence of any interpretative doubt in this regard dispenses with the need to assess the possibility, insisted upon by the civil party acting in support of the prosecution, of referring the matter to the Court of Justice of the European Union for a preliminary ruling on the interpretation of those provisions, which, moreover, are binding on the Union only within the limits of its competences." (Constitutional Court n. 95/2025).

[32] "On this point, it should first be emphasised that the legislator enjoys broad discretion in defining punishable conduct (. . .) which must be recognised in very broad terms with regard to decisions not to punish certain types of conduct that were previously criminalised, even if they are harmful to constitutionally relevant interests or otherwise worthy of protection, provided that the legislator provides other means of protecting those interests. from the perspective of criminal protection as a last resort (. . .) it has always ruled out the possibility that a ruling by this Court could modify the boundaries of criminally relevant facts drawn by the legislator, with an extensive effect on the criminal liability of those subject to criminal law, solely to remedy any disparities in treatment between punishable conduct having, in theory, similar or lesser negative value. The constitutional

IV. No best practices, but lessons learned

Let's summarize at the end of this short descriptive journey why the Italian experience could be of interest for a broader audience in the EU framework.

1. Abuse of office – as a misconduct that involves the wrongful exploitation of the public functions –[33] is precisely the crime through which the line is drawn between a proper exercise of authority and power and the realm of "corruption" of public powers.
2. Because of this place at the frontline, its distinctive feature is that it carries a constitutional significance: abuse "casts a blight on the health of the constitutional relationship between the state and the citizens." It amounts to a "betrayal of the role as a public servant."[34]
3. This distinctiveness sets the offence as the bulwark against the full-fledged use of official powers without being effectively subjected to judicial scrutiny.
4. This prominent position is fraught with external and internal difficulties. External difficulties relate to the potential of triggering a struggle of powers at the domestic level (which transpires in countries other than Italy, too). Internal difficulties relate to the contentious compatibility with fundamental tenets of criminal law. Vagueness and last resort have been considered here.

I have examined above how Italian enforcement practice has addressed the concern, widely shared within European criminal law scholarship, regarding the vagueness of the offence definition and compliance with the principle of *ultima ratio*. Against this background, it is easy to understand why the proposal to introduce the offence of *abuse of functions* has been criticised on several grounds.[35] First, it has been argued that such an incrimination would be inappropriate because it is foreign to certain major legal systems within the European context (Germany being a frequently cited example).[36] Moreover, even in jurisdictions where comparable conduct is criminalised, the definitions of the offence vary considerably, reflecting divergent legal traditions and cultural backgrounds;[37] levels of enforcement likewise differ substantially. From this perspective, it has been observed that the United Nations Convention against Corruption is well founded in refraining, under Article 19, from imposing a binding obligation to criminalise, instead merely requiring States Parties to consider the introduction of corresponding criminal law provisions.[38]

While the reservations expressed with regard to the comparative analysis contained in the Commission's preliminary study may be shared,[39] it nevertheless amounts to a *petitio principii* to conclude that, because at the global level it was deemed preferable not to impose a direct obligation to criminalise, the different solution envisaged at the European level necessarily lacks legitimacy. Such a conclusion overlooks at least the distinct

requirements of protection underlying Article 97 of the Constitution do not necessarily require the activation of criminal protection, as they can be satisfied through a variety of alternative preventive and punitive instruments other than criminal law: instruments which must, in fact, be preferred – in accordance with the principle of – provided that they are capable of ensuring effective protection of assets as a last resort": Constitutional Court n. 95/2025, para. 5.2.3.

[33] J. Horder (supra note 20) refers to "special formal or bureaucratic features of the office held, features associated with the dignity and authority of the office" (pp. 27 ff.).

[34] J Horder (supra note 20) pp. 36, 51.

[35] See e.g. F Zimmermann (supra note 7), pp. 36–38; V Mongillo, "Strenghts and Weaknesses of the Proposal for a EU Directive on Combating Corruption" (2023) 7 Sistema penale 1–21 at pp. 5–9, 11, 14–15, 19–21.

[36] F Zimmermann (supra note 7) p. 37.

[37] V Mongillo (supra note 35) pp. 6f.

[38] F Zimmermann (supra note 7) p. 37.

[39] F Zimmermann (supra note 7) p. 36.

political, legal, and institutional context within which European criminal law and policy develop.

A further objection concerns the fact that the Commission's proposal does not limit the offence by reference to the type of advantage pursued by the public official. Correlatively, it has been asked "whether the Member States should not remain free to react with disciplinary law in such cases."[40] This objection might be countered, first, by noting that there are sound reasons not to confine the offence of abuse of functions to situations involving strictly pecuniary advantages. Political or clientelistic benefits – particularly in cases of political corruption – may in practice be more significant than advantages measurable in solely economic terms. Second, as regards the last-resort criterion, criticisms should be dismissed, since a generalising assessment would be excessively abstract. In fact, the legitimacy and the need for a criminal offence[41] exist whenever the citizens lack remedies against "spontaneous or demonstrative conduct, however offensive or objectionable it may be"[42] as well as whenever the behaviour for whatever reason is not judicially reviewable.[43] Moreover, preventive regulatory tools might have the counter-productive effect of enhancing the burden of bureaucratic procedures and improperly cast the suspicion of corruptive practices.

As for the censure about vagueness, it may be worthy recalling Jeremy Horder's opinion. He argues that "it is not, nor even has been, and could not ever be an essential feature of the criminal law to provide a complete statement in every case of when someone will incur liability."[44] This seems a far-fetched account; but it is worth pursuing the suggestion that "the aim of achieving greater certainty can be substantially achieved through indicative statutory guidelines."[45]

It has also been argued that the boundaries of a punishable breach of duty are often less clear-cut than they may initially appear, with the consequence that errors committed in the exercise of complex discretionary powers might result in findings of criminal unlawfulness.[46] This concern, however, appears readily surmountable once it is recalled that, as with all offences requiring intent (*dolo*), error negates the requisite *mens rea* and thus excludes criminal liability. An analogous conclusion may be reached, in terms more familiar to common law systems, by reference to the defence of (reasonable) mistake. In this respect, the objection concerns not the conceptual soundness of the offence, but rather the conditions of its application.

This shift in perspective is even more evident with regard to the further concern that the offence might be applied to senior officials and especially legislative office-holders.[47] Unlike the preceding objections, this argument does not challenge the doctrinal coherence

[40] Ibid.

[41] In terms of both *Strafwürdigkeit* (deservingness of punishment) and *Strafbedürfnis* (opportunity and necessity).

[42] J Horder (supra note 20) pp. 19–21; 34

[43] It is easy to share the opinion that "changing the law to an administrative offense would make it easier for public officials to engage in clientelism, nepotism and outright corruption, potentially opening the door to more white-collar crime and muddying the waters on possible conflicts of interest. This is a major issue in the EU, and until now, it has repeatedly failed to introduce robust legislation to target the problem, let alone effectively enforce it": A Hoxhaj, https://www.politico.eu/article/eu-anti-corruption-directive-scandals-penalties/ (supra note 2).

[44] J Horder (supra note 20) p. 32.

[45] J Horder (supra note 20) p. 19. The German debate on *Qualifikationstatbestände* can be further recalled here: see only J Eisele, *Die Regelbeispielsmethode im Strafrecht. Zugleich ein Beitrag zur Lehre vom Tatabstand* (Mohr Siebeck 2009). F Zimmermann (fn 7) at 37 concedes that "the provision in no. 1 [of Article 11] may still be defended on the grounds that intentional breaches of duty in the exercise of a public service are usually significant due to the administration's commitment to the rule of law." That this conclusion cannot be extended to the private sector is a topic that falls beyond the limits of this article.

[46] F Zimmermann, ibid.

[47] F Zimmermann, ibid.

or normative justification of the offence, but raises issues of criminal policy, such as the appropriate scope of criminal intervention and the distribution of institutional responsibility. As such, it can be adequately addressed precisely in light of the fundamental character of the offence, as conceptualised in this work, rather than by denying its legitimacy in light of criminal law principles. I return on the specific wrongfulness of abuse of functions and the related character of the offence as a "fundamental constitutional" in the next section.

A similar observation can be made if one anticipates the risk that the provision on abuse might be invoked in a pretextual manner against administrative officials – or, say, members of the judiciary[48] – on account of decisions that are not aligned with, or are contested by, the political level, especially within the context of political struggle against opponents. This concern, while understandable, is ultimately unfounded. First, the instrumental use of criminal accusations for political purposes is possible with respect to any offence, most notably political crimes such as treason, but also ordinary crimes such as bribery in the strict sense. Secondly, it must be reiterated that not every breach of the law amounts to an abuse of power: what is required is precisely an abuse, that is, a distortion of the purposes for which the power is conferred. Finally, the offence is characterised by a special intent, which precludes its application in the risk scenarios outlined above.

V. Unorthodox corollary

Conclusively, this paper seeks to advance, albeit sketchily, the idea that the offence of abuse of office encapsulates a betrayal of citizens' trust in public institutions. This betrayal of the citizen should not, however, be understood in a purely subjective sense, but rather in an objective one, grounded in the institutional framework within which the duty not to abuse power – that is, not to betray citizens' trust – is situated. From this perspective, criminalisation safeguards the legality of governmental action as a precondition for accountability and as a structural guarantee of democratic legitimacy and institutional impartiality.

This way of conceiving abuse of power reveals its axiological homogeneity, as it were, with bribery: from the perspective of the public official, both practices call for a similar evaluative assessment, namely that a breach of the duty of loyalty owed to the public interest occurred. In this sense, they fall within a broader understanding of corruption, conceived primarily as political corruption. As Stuart P. Green has observed, the acceptance of a bribe constitutes indeed a form of disloyalty, i.e. a "*violation of a duty of loyalty arising out of the bribee's office, position, or involvement in some practice*"[49] in addition to the "commodification of government." This rationale of betraying the trust in public institutions can be retrieved in the abuse of public power as well. Besides, it applies to all public institutions, including international organisations and, of more immediate

[48] See e.g. <https://www.telegraph.co.uk/politics/2025/12/27/civil-servants-let-criminal-migrants-in-lose-pension-reform/>. (last accessed 31 January 2026).

[49] Stuart P. Green, "What's Wrong with Bribery," in RA Duff and SP Green (eds), *Defining Crimes. Essays on the Special Part of the Criminal Law* (OUP 2005) p. 153 (italics in original). The author underlines that not every breach of positional duty involves disloyalty, which requires 'that the agent charged with being loyal "go over" to the other side: that is, act in a way that is intended to further the interests of someone or something other than the party or cause to which he is charged with being loyal' (at 160). However, even taking this clarification into account, it remains difficult to identify a radical distinction between bribery and abuse of office. In Italian legal scholarship, for example, it is commonly argued that the *specific* interest protected by the offence of corruption is either the non-venality of public office, or the proper functioning and impartiality of the public administration (see e.g. S Fiore and G Amarelli (eds), *I delitti dei public ufficiali contro la pubblica amminisrazione* (2d Edition, UTET 2021) pp. 157–159.

relevance here, the European Union, with respect to which a substantial and growing body of scholarship has long identified a persistent deficit of accountability.[50]

On this understanding, the criminalisation of abuse of office should be regarded as a baseline mechanism for communicating to the civic community the legitimacy and impartiality of the exercise of public power. Were this precondition not safeguarded, every regulatory burden would be deprived of any sense. By this statement, I do not intend to deny the profound inadequacy of a purely legalistic and specifically punitive, as well as merely regulatory approach to the abuse of power. As the political scientists Ceva and Ferretti have pointed out, anticorruption (in a legalistic sense, encompassing all offence definitions relevant to the punitive system) "is one component of what it takes for a public institution to oppose political corruption by the officeholders' direct engagement". In this broader sense, "[a]nticorruption properly called thus designates the mechanisms of self-correction that a public institution should implement to restore a normative order of just interactions."[51] On this understanding, clearly persuasive is the proposal that points

> to the importance of internalizing these practices [of self-correction] by conceptualizing them as the components of a public ethics of office accountability capable of giving officeholders practical guidance for their institutional action [. . .] This conception is an important complement and a corrective to current, mainly legalistic and regulatory, approaches to political corruption and anticorruption.[52]

On the other hand, research in behavioral economics found "that punishment has a striking influence" on contributions to the public goods; moreover,

> the severity of punishment directly correlates with the magnitude of increased contributions. These patterns persist across different treatments, indicating punishment as an effective motivator for increased contributions.[53]

It follows from the foregoing that criminalisation may be regarded as a necessary, though not sufficient, condition both for sustaining the legitimacy of public institutions and for preventing abuses of power within the legal order and society at large.

From this theoretical angle, the offence of abuse of office is even "more fundamental" than that of bribery. In other words, I argue that the abuse of power – starting from the very acquisition of power for private gain – is more serious than "corruption" understood narrowly as bribery or *quid-pro-quo* arrangements. The latter should rather be seen as a means, an "intermediate stage" in the pursuit of the officeholder's ultimate objective, namely, the exploitation of institutional power for illegitimate private gain.[54] This is why I maintain that abuse of functions lies at the basement of the building of the legal order as a key component of its very foundations from a political-constitutional point of view.[55]

[50] See for instance the essays collected in the European Law Journal, *Special Issue: The external borders of the European Union: Between a rule of law crisis and accountability gaps* (2024) 1–254.

[51] E Ceva and MP Ferretti (supra note 28) p. 201.

[52] *Ibidem*.

[53] L Hoeft and W Mill, "Abuse of Power. An Experimental Investigation of the Effects of Power and Transparency on Centralized Punishment" (2024) 220 Journal of Economic Behavior and Organization 305–324 at p. 318.

[54] I thank the Italian legal theorist Alessandro Spena for an exchange of views on this point.

[55] E Ceva and MP Ferretti (supra note 28) pp. 198–200 underline that 'the corrupt conduct of some officeholders may trigger institutional dynamics that can corrupt entire institutional practices. Political corruption is thus a property of public institutions that cease to be well-functioning, a dysfunction that undermines them from within [. . .] political corruption is inherently wrong from a moral point of view in a relational sense: It constitutes an interactive injustice' (see 104: 'political corruption constitutes an interactive injustice because it is a violation of the duty of office accountability'). The concept of interactive injustice is explained by clarifying that: 'Generally

This foundational nature – the constitutive dimension of its wrongness[56] – does not necessarily entail that it deserves a more severe penalty than bribery. As contrasted to bribery, however, abuse of function appears to encompass a broader range of concrete behaviour, from the most serious to instances of lesser gravity. It is more gradable along a scale. For instance, causing harm to private interests directly involved – which might not be the case of bribery – could be considered peripheral (as Horder writes) but it is perhaps only statistically so. Bribery might be considered more serious due to its systemic impact upon (internal or international) economy and society as a whole. Abuse might be considered more serious when considered from the viewpoint of its systemic effects on the stability of institutional trust that underpins every political system: the more so if democratic states are at issue.

Gravity issues of concrete instances of abuse can be dealt with at the stage of sentencing especially if above mentioned indicators are graded along a scale of seriousness.

Appendix A The progressive narrowing of the offence's purview: a synopsis

speaking, interactive justice is a normative property of interpersonal relations' (p. 99). Conversely, 'interactive injustice occurs when someone is not given the kind of treatment owed to her in virtue of her normative status [. . .] On the basis of this characterization of interactive justice, the duty of office accountability can be explained as a duty of interactive justice (because it qualifies the deontic relations between officeholders) and, conversely, political corruption as a form of interactive injustice(because it qualifies a failure of those relations and the normative order they instantiate)' (pp. 99–100).

[56] I draw this expression from E Ceva and MP Ferretti (supra note 28) p. 200.

1930 Royal Decree No. 1398 of 19 October 1930	1990 Art. 13 Law No. 86 of 26 April 1990	1997 Art. 1 Law No. 234 of 16 July 1997	2020 Art. 23, Decree Law No. 76 of 16 July 2020	2024 Art. 1, paragraph 1, letter b) of Law No. 114 of 9 August 2024
Art. 323 (Abuse of office in cases not specifically provided for by law)	Art. 323 (Abuse of office)	Art. (Abuse of office)	Art. 323 (Abuse of office)	Repealed
A public official who, abusing the powers inherent in his office, commits any act not provided for as a crime by a specific provision of law in order to cause harm to others or to procure an advantage for them, shall be punished with imprisonment for up to two years or with a fine of between five hundred and ten thousand lire.	A public official or person in charge of a public service who, in order to procure for himself or others an unjust non-pecuniary advantage or to cause unjust damage to others, abuses his office shall be punished, if the act does not constitute a more serious offence, with imprisonment for up to two years. If the offence is committed to obtain an unjust financial advantage for himself or others, the penalty shall be imprisonment for a term of two to five years.	Unless the act constitutes a more serious offence, a public official or public service employee who, in the performance of his or her duties or service, in violation of the law or regulations, or by failing to abstain in the presence of a personal interest or that of a close relative or in other cases prescribed, intentionally procures for himself or herself or for others an unjust financial advantage or causes unjust damage to others shall be punished with imprisonment for a term of between six months and three years. The penalty is increased in cases where the advantage or damage is of a particularly serious nature.	Unless the act constitutes a more serious offence, a public official or public service employee who, in the performance of their duties or service, in violation of specific rules of conduct expressly provided for by law or by acts having the force of law and from which no margin of discretion remains, or by failing to abstain in the presence of an interest of his own or of a close relative or in other cases prescribed, intentionally procures for himself or others an unjust financial advantage or causes unjust damage to others, shall be punished with imprisonment for a term of between one and four years. The penalty is increased in cases where the advantage or damage is of a serious nature.	–

APPENDIX B

2024 Decree Law No. 92 of 4 July 2024 (Official Gazette No. 155 of 4 July 2024 – in force since 5 July), converted with amendments by Law No. 112 of 8 August 2024 (Official Gazette No. 186 of 9 August 2024 – in force since 24 August)	2024 Art. 1, paragraph 1, letter b), Law no. 114 of 9 August 2024 (Official Gazette 10.8.2024, no. 187 – in force since 25.8)
Art. 314-bis (Misappropriation of money or movable property)	Repeals Art. 323
Except in the cases provided for in Article 314, a public official or public service employee who, by virtue of their office or service, has possession or availability of money or other movable property belonging to others, uses them for a purpose other than that provided for by specific provisions of law or by acts having the force of law from which no margin of discretion remains, and intentionally procures for himself or others an unjust financial advantage or causes unjust damage to others, shall be punished with imprisonment for a term of between six months and three years. (The penalty shall be imprisonment for a term of between six months and four years when the offence is committed against the financial interests of the European Union and the unjust financial advantage or damage exceeds 100,000.)	–

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