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ISBN 979-12-5965-047-4



9 791259 650474

ISSN 2724-4784



9 770272 447841

€ 38,00



A. DE VITA INTERNATIONAL ANTI-CORRUPTION STRATEGIES

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Συντέλεια – Diritto

SYNTÉLEIA

Collana del Dipartimento di Giurisprudenza  
dell'Università degli Studi di Napoli 'Parthenope'

a cura di

ALBERTO DE VITA

## INTERNATIONAL ANTI-CORRUPTION STRATEGIES



Alberto De Vita è professore ordinario di Diritto penale nel Dipartimento di Giurisprudenza dell'Università degli Studi di Napoli "Parthenope". È Direttore della Scuola di Specializzazione per le Professioni Legali dell'Ateneo e ha diretto progetti di ricerca nazionali e internazionali.

Europa sul Toro salutata dalle sue compagne prima di giungere a Creta. Affresco, 20-25 d.C. ca., dalla Casa di Giasone (Pompei). Museo Archeologico Nazionale di Napoli. *Dettaglio.*

## SYNTÉLEIA

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Συντέλεια - Sezione *Diritto*

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Il presente volume è stato sottoposto a una procedura di valutazione basata sul sistema di *Double Blind Peer Review*.

Gli atti della procedura di revisione sono consultabili, da parte degli aventi diritto, presso la Segreteria di redazione.

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Collana del Dipartimento di Giurisprudenza  
dell'Università degli Studi di Napoli 'Parthenope'

*Συντέλεια - Sezione Diritto*

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2

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a cura di

**Alberto De Vita**

# **INTERNATIONAL ANTI-CORRUPTION STRATEGIES**

EU TRANSPARENCY AND CORRUPTION  
PREVENTION POLICIES WITHIN PUBLIC  
ADMINISTRATION

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Via Nicolai, 39 - 70122 Bari – Tel. 080/5214220

<http://www.cacuccieditore.it> e-mail: [info@cacucci.it](mailto:info@cacucci.it)

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Alberto De Vita

## The Risk Approach in the fight against corruption

In less than twelve months, the global pandemic has turned the tables, and now the European Union is stronger than it had been in recent years.

This happened because when people are living through very challenging times, as now, they quickly realize that they either stand together or go down alone: as the old saying goes, “strength lies in unity”<sup>1</sup>.

Although this historical moment is tragic for the loss of many lives and the economic crisis resulting from repeated lockdowns, it is also full of opportunities for the future, when all of us will be called upon to rebuild, remake and reinvent our life together. It will then be important to create new instruments to foster civil society in terms of the rule of law, as otherwise there will be no real social development, but only the enrichment of the usual suspects.

Everybody will be asked to choose what their role is in the process of civil progress, and there are only two alternatives: “To be or not to be”. To be citizens, or not to be citizens but merely subjects. Each of us will have to embrace a new mindset or to keep – or slide back to – old habits. Sometimes old habits can feel safer and more comfortable, but it won’t be long before it becomes clear that to keep things as they are will be the worst possible option for national development and people’s prosperity and well-being.

Today’s globalized world is in continual evolution and affords us great opportunities, above all in the post-pandemic future. However, it is also filled with new risks and pitfalls. In this context, inaction is not a neutral stance but a deliberate choice to oppose change, withdraw from the community of the world’s most advanced countries and turn

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<sup>1</sup> Cfr. [https://europa.eu/european-union/about-eu/symbols/motto\\_en](https://europa.eu/european-union/about-eu/symbols/motto_en).

back the clock of history. The hands of the clock will be pointing once again towards international economic integration and an extension of democracy.

Public Administration malpractices and corruption are factors that threaten to slow down or even reverse the process of economic development<sup>2</sup>. However, this is not only an economic issue. There can be no economic growth without recognition of civil rights and *viceversa*. Economic growth requires citizens to move forward.

If we wish to live as citizens and not as subjects, we must enforce the rule of law. But any system based on the rule of law has many enemies, both within and without. The non-transparent behaviours practised by Public Administration often make it its own worst enemy. European Union rules are a powerful weapon to keep in check the temptation to maintain the *status quo*.

For Italy too, the rules of the European Union have often been perceived as an “external constraint”, but at the same time, they have prompted us to get rid of old habits and overcome lazy thinking<sup>3</sup>.

Anti-corruption strategies suffer from the presence of centrifugal forces, processes of regionalization and deadlock in internal integration; the transfer of tasks to sub-state levels destabilizes the fundamental

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<sup>2</sup> See *inter alios* M. HABIB-L. ZURAWICKI, *Corruption and Foreign Direct Investment*, in *Journal of International Business Studies* 2 (2002) 291-307; J. G. LAMBSDORFF, *How Corruption Affects Productivity*, in *Kyklos. International Review for Social Sciences* 4 (2003) 457-474; ID., *How corruption affects economic development*, in *Corporate Governance und Korruption. Wirtschaftsethische und Moralökonomische Perspektiven der Bestechung und ihrer Bekämpfung*, eds. D. Aufderheide-M. Dabrowski, Berlin 2005, 11 ff.; E. AHMAD-M. A. ULLAH-M. I. ARFEEN, *Does Corruption Affect Economic Growth?*, in *Latin American Journal of Economics* 2 (2012) 277-305. Those researches show how some dependent variables of GDP can be influenced negatively by corruption. These variables are productivity, perception, capital inflows. In extreme synthesis, this negative influence is mainly related to the idea that a corrupted public administration causes additional costs and inefficiencies to the economic activity of private investors.

<sup>3</sup> For a programmatic view, cfr. EU COMMISSION, *Fighting Corruption in the EU, Communication from the commission to the european parliament, the council and the european economic and social committee*, in Brussels 6.6.2011 COM (2011) 308 final, eur-lex.europa.eu.



functions of the state as well as national unification and internal pacification.

Bosnia and Herzegovina is at the heart of Europe, and it is in this area, first of all, that the European Union can earn greater credibility as a global actor. This country is home to extremely competent and capable women and men, and this will be a guarantee of the future affirmation of the rule of law in the Public Administration system.

Specifically, in outlining an anti-corruption strategy, the fight against illicit behaviours can be pursued in two main ways.

1) The first way is to reform legislation by improving the regulatory framework to better combat corruption:

1.1) Introducing rules for transparency in Public Administration, thereby empowering citizens to monitor the proper functioning and impartiality of public service officials<sup>4</sup>;

1.2) Strengthening the system combatting crimes against Public Administration, by extending traditional criminal penalties to include the temporary or permanent removal of corrupt public officials and impaired asset measures<sup>5</sup>.

This is a top-down activity, which is fundamental but not by itself enough to carry out the fight against corruption.

2) The second approach is to enhance institutional knowledge and to develop, promote and implement preventive anti-corruptive activities in the public sector, by providing relevant training to all stakeholders (both inside and outside public offices) on the importance – and also

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<sup>4</sup> See J. BRÖHMER, *Transparenz als Verfassungsprinzip. Grundgesetz und Europäische Union*, Tübingen 2004, in part. 372 ff.; F. CINGARI, *I delitti di corruzione*, in *Trattato di diritto penale. Parte speciale*, ed. S. Moccia, 2. *Delitti contro la pubblica amministrazione*, ed. F. Palazzo, Napoli 2011, 141 ff.; M. PELISSERO, *Introduzione*, in *Trattato di diritto penale*, eds. C. F. Grosso-T. Padovani-A. Pagliaro, *Reati contro la pubblica amministrazione*, eds. C. F. Grosso-M. Pelissero, Milano 2015, 1 ff.; M. CATENACCI, *Considerazioni politico-criminali: il bene giuridico tutelato dagli artt. 314-335 c. p.*, in *Trattato teorico-pratico di diritto penale*, eds. F. Palazzo-C. E. Paliero, *Reati contro la pubblica amministrazione e contro l'amministrazione della giustizia*, ed. M. Catenacci, Torino 2016, 5 ff.; M. ROMANO, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*, Milano 2019<sup>4</sup>, 13 ff.

<sup>5</sup> See V. MONGILLO, *Il contrasto alla corruzione tra suggestioni del "tipo d'autore" e derive emergenziali*, in *Riv. it. dir. proc. pen.* 2 (2020) 966 ff.; PELISSERO (nt. 4) 11-15.

the economic advantages – of transparent administrative practices. Information technologies also provide new opportunities to reach this goal<sup>6</sup>.

This bottom-up activity is more challenging, more time-consuming and less visible than the first, but no less important<sup>7</sup>.

These two processes have to go hand in hand.

Corruption in Public Administration is a risk that must be avoided first of all by eliminating the breeding ground where corruption can flourish, and which is fed by: a) a widespread sense of in-group loyalty over citizenship; b) a lack of awareness of the importance and advantages of the rule of law; c) multiple levels of bureaucracy overcomplicating administrative procedures.

Changing the rules is only part of the process. Any change in the rules must be accompanied by a change in mindset at every level of the public sector from senior managers to junior employees.

It is the task of senior and middle managers to implement a continuous process of improvement within their departments using tools such as ethical risk analysis. In this way, public functionaries can be participants in profound social change.

Mapping processes, as well as risk analysis and risk assessment procedures, enhance knowledge of Public Administration, and both promote and improve decision-making processes through the continuous updating of available information.

When carrying out a risk management programme, it is good practice to avoid introducing new control measures but rather to systemically

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<sup>6</sup> See G. RACCA, encyclopedical entry *Corruzione (dir. amm.)*, in *Digesto delle discipline pubblicistiche. Aggiornamemto 7*, Torino 2017, 208 ff. This quote underlines the importance of the role of Administrative law in enhancing this culture of the behaviour as a public official.

<sup>7</sup> It is to underline that criminal law cannot substitute the role of public ethics and cannot design the ordinary functioning of the public administration – being this latter function part of the role of Administrative law, as previously affirmed. About this theme, in the Criminal law literature see M. DONINI, *Il diritto penale come etica pubblica. Considerazioni sul politico quale 'tipo d'autore'*, Modena 2014, 1 ff.; PELISSERO (nt. 4) 17.

rationalize already existing controls, focusing on objectives and not just on formal processes *per se*.

The OECD says that “Traditional approaches based on the creation of more rules, stricter compliance and tougher enforcement have been of limited effectiveness. A strategic and sustainable response to corruption is public integrity. Integrity is one of the key pillars of political, economic and social structures and thus essential to the economic and social well-being and prosperity of individuals and societies as a whole”<sup>8</sup>.

Risk management is a sequential and cyclical process that promotes the improvement of the internal control system.

The process has three key phases: a) context analysis; b) risk assessment; c) and risk treatment. These three phases are followed by two further cross-cutting steps: consultation and communication, and monitoring and review. Because the process develops in a ‘cyclical’ manner, it must take account of the results of the previous iteration at every restart, with a view to improving the system, exploiting accumulated experience and adapting to any internal and external changes. In any event, the proper functioning of the process requires that instruments of criminal law be used only as a last resort. If criminal measures are the only or the principal instruments employed to counter corruption, they amount to nothing more than a paper tiger.

All international conventions on corruption – Paris (OECD) 1997, Strasburg (Council of Europe) 1999, Merida (UN) 2003 – stress the importance of incentives provided by anti-corruption measures. Penalties should be imposed only if and when all other measures have failed to prevent and punish corruption. However, even in this case, criminal sanctions are only effective if they are embedded within a context that enforces their effectiveness and ensures legal certainty.

In his treatise *On Crimes and Punishments*, Cesare Beccaria wrote: «The certainty of punishment, even if moderate, will always make a

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<sup>8</sup> Cfr. OECD, *Recommendation of the Council on Public Integrity*, in *OECD Legal Instruments* 3 (section *Background Information*) and 11 (section *Integrity for prosperity*) 2019. Online at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0435>.

greater impression than the fear of another more terrible punishment combined with the hope of impunity»<sup>9</sup>.

For this reason, when criminal law is necessary to support other anti-corruption measures, it requires several tools for its enforcement. These include, firstly, whistleblower protection: encouraging employees to report wrongdoing (or “blow the whistle”) and protecting them when they do is an important part of corruption prevention in both the public and private sectors.

Employees are usually the first to recognize wrongdoing in the workplace, so empowering them to speak up without fear of reprisal can help authorities both detect and prevent violations. In the public sector, protecting whistleblowers can make it easier to detect passive bribery, the misuse of public funds, waste, fraud and other forms of corruption. In the private sector, it helps authorities identify cases of active bribery and other corrupt acts committed by companies, and also helps businesses prevent and detect bribery in commercial transactions. Whistleblower protection is thus essential for safeguarding the public interest and for promoting a culture of public accountability and integrity.

The second instrument for enforcing anti-corruption measures is the use of undercover agents: Art. 50 of the United Nations Convention of Merida reads: «In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom».

The third instrument includes spyware, Trojan Horses and other cyber-collectors for mobile devices: these investigative resources are very

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<sup>9</sup> See C. BECCARIA, *Dei delitti delle pene*, Milano 1764, § 27 – *Dolcezza delle pene*. Translation by the Author. Original quote in Italian: «La certezza di un castigo, benché moderato, farà sempre una maggiore impressione che non il timore di un altro più terribile, unito colla speranza dell’impunità».

useful to empower corruption investigations. Yet at the same time, they are too intrusive and pose a considerable threat to citizens' privacy and freedom. Until just a few years ago, these tools were only permitted in Italy in trials relating to organized crime, terrorism, and people and drug trafficking. In 2017, their use was extended to investigations into many crimes of corruption<sup>10</sup>.

International conventions on corruption very often draw parallels between corruption and organized crime, above all in terms of the use of investigative tools. In both types of crime, the corruptor and the corrupted engage in criminal acts for their mutual benefit, which makes investigations much more difficult. The last anti-corruption instrument is the so-called '*Pentitismo*': in investigations into bribery it is now possible to use the testimony of so-called '*pentiti*'. The practice of '*pentitismo*' first emerged in Italy during the 1970s, a period marked by escalating terrorist activity. After their arrest, some members of terrorist groups collaborated with the authorities by providing information in return for a reduced sentence, or for reasons of their own. In recent years, it has become common practice for members of criminal organizations to become '*pentiti*', and special legislation has been introduced to provide for the sentencing and personal protection of these informants and their families<sup>11</sup>. This practice is now also allowed in trials involving corruption, as provided for in Article 323-ter of the Italian Criminal Code<sup>12</sup>.

This article states that any person who has committed a corruption crime shall not be liable if they voluntarily provide useful and concrete

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<sup>10</sup> See, in a critical perspective, F. CAMPLANI-O. CALAVITA, *L'estensione dell'utilizzo del captatore informatico ai reati di corruzione: una prima lettura*, in *Istituzioni Diritto Economia* 1 (2019) 170 ff.

<sup>11</sup> See V. MONGILLO, *Crimine organizzato e corruzione: dall'attrazione elettiva alle convergenze repressive*, in *Dir. pen. cont. Riv. Trim.* 1 (2019) 162 ff.

<sup>12</sup> Art. 323-ter c.p.: anyone who committed a bribery offense provided in the articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis, 353, 353-bis and 354 if CP can benefit from the newly introduced non-punishment clause in case he/she makes a voluntary disclosure and provides useful and concrete information to secure the evidence of the crime and to identify other offenders involved. To qualify for non-punishment, the disclosure should be made before the offender becomes aware of the investigation being carried out with regards to the committed offence and not later than four months from the date of the offense.

information to secure the evidence of the crime and to identify other perpetrators involved.

The disclosure must be made before the offender is informed that investigations are being carried out against them in relation to the crime and, in any event, within four months of the crime being committed. Impunity is conditional upon the informant making available any material benefit or, where this is not possible, an equivalent amount of money, or any useful and concrete information to identify the actual beneficiary. Grounds for exemption shall not apply where, from the start, the informant commits the crime of corruption simply to self-report in order to involve a third party. Lastly, the article provides that grounds for exemption do not apply to undercover agents who instigate a crime. However, this is clearly a case of a cross between a *'pentito'* and an agent provocateur not under the direction and control of the public prosecutor<sup>13</sup>.

Our field is the law. We deal with rules and Institutions.

However, it is also true that – as the 2018 OECD 'Report on Public Integrity states'<sup>14</sup> – by focusing on systems and institutions we often overlook the human aspect of integrity. Yet integrity depends on people's choices.

We now know more about how corrupt networks function, how individuals are tempted to profit from corruption and how they react to the incentives provided by anti-corruption measures. Behavioral research provides great insights for policymakers to develop innovative and well-targeted integrity policies.

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<sup>13</sup> See, in the literature before the last reform through art. 23 of the Law-decree 16.7.2020, n. 76, converted in the Law 11.9.2020, n. 120, A. VALLINI, *L'abuso d'ufficio*, in S. Moccia ed. (nt. 4) 257 ff.; G. RUGGIERO, *Abuso di ufficio*, in Grosso-Padovani-Pagliaro eds. (nt. 4) 345 ff.; M. CATENACCI, *Abuso d'ufficio*, in Palazzo-Paliero eds. (nt. 4) 131 ff.; ROMANO (nt. 4) 349 ff. After the reform G. L. GATTA, *Riforma dell'abuso d'ufficio: note metodologiche per l'accertamento della parziale abolitio criminis*, in *Sistema Penale* (2.12.2020), <https://www.sistemapenale.it/it/articolo/riforma-dellabusodufficio-note-metodologiche-per-laccertamento-della-parziale-abolitio-criminis>.

<sup>14</sup> Cfr. OECD (nt. 8).

## **SYNTÉLEIA**

**Collana del Dipartimento di Giurisprudenza  
dell'Università degli Studi di Napoli 'Parthenope'**

*Συντέλεια - Sezione Diritto*

1. **Elio Dove**, *Pensiero cristiano e produzione del ius. L'ultima età teodosiana*, 2021.
2. **Alberto De Vita** (a cura di), *International Anti-Corruption Strategies. EU Transparency and Corruption Prevention Policies Within Public Administration*, 2021.