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CORRUPTION OFFENCES IN A COMPARATIVE LAW DOGMATIC PERSPECTIVE** di Ugo Pioletti*

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1. *The search for the protected Rechtsgut. Criminalisation, damage of a Rechtsgut and legal remedies. The relationship between goods and sanctions. The "restorative" law*

According to the legal tradition of criminal law in Italy, in Germany and in the other countries whose legal cultures in criminal law are in some measure related to the German legal doctrine[1], any criminal provision protects a “legal good” or, in German, a *Rechtsgut*[2].

It is not easy to specify what is a *Rechtsgut*. The concept of *Rechtsgut* is more and more criticised in the contemporary criminal law science[3]. Recently the validity of the concept (particularly in his “critical” function[4]) is justified with his durability in the time[5], indeed with the tradition.

But the purpose of the dogmatic of law, or legal doctrine, is to verify the efficiency of a concept, independently of the circumstances that it has been used for a long time. In criminal law, there were other concepts that were used for a long time and disappeared suddenly in a determinate moment.

In Europe, for centuries, it was usual to define a criminal offence as an assault against the faith. This definition disappeared almost suddenly with the enlightenment.

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[1] The Spanish- Portuguese- Greek- Japan- Korean-speaking criminal law dogmatics are also closely connected with the German-speaking criminal law dogmatic. For China see, most recently, *Zhao Shuhong*, in *ZStW* 130 (2018), 1264 et seq. In general see E. HILGENDORF, *Die deutsche Strafrechtswissenschaft der Gegenwart*, in *Handbuch des Strafrechts,* vol. 1, *Grundlagen des Strafrechts*, Edit. by Hilgendorf, Kudlich und Valerius, 2019, 855 et seq.

[2] The concept of “Rechtsgut” is - more than any other concept - representing (often in connection with the “Arm Principle”) a "bridge" between the criminal legal science and dogmatic linked to the German-speaking legal literature (and that of the other countries related to the German criminal law dogmatics, see note 1) and the English speaking one. See, for instance, M. DUBBER, *Foundation of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law*, in *The Philosophical Foundations of Criminal Law*, R.A. Duff and S. P. Green (ed.), 2011, 84 et seq.

[3] Cf. the considerations of S. SWOBODA, in *ZStW* 122 (2010), 24 et seq. For the current discussion see C. ROXIN, in *GA*, 2013, 433 et seq.

[4] A distinction is made traditionally between a "descriptive" concept of *Rechtsgut* and a “critical” one. The first is addressed to the existing criminal law provision and the last to the projection *de lege ferenda*. Cf. for all C. ROXIN, *Strafrecht. Allgemeiner Teil*, 4th ed., 2006, 14 et seq.

[5] H. KUDLICH, *ZStW*, 127 (2015), 637 et seq.

Indeed the semantics of the assault against "something" has a long tradition in criminal law. For centuries, in Europe, from the late antiquity until the middle ages, the criminal offence was seen as an assault against the faith, and therefor against God. For the Romans the *crimina publica* were an offence against the religious order, and therefore against God, and the *delicta privata* an offence, or assault, against the individual person.

With the revolution of the enlightenment, in place of the faith, or the religious order, or the interest of the single person, the subjective law comes into force with *Feuerbach,* and with *Birnbaum* comes into force the *Rechtsgut*[6].

The semantics of *Rechtsgut* come from the old and tradition-steeped law dogmatic of civil law, but these semantics have nothing to offer to the dogmatic of criminal law. In the civil law a wrongdoing needs a damage perpetrated against a good, and therefore an assault against a good, for his existence, this damage and the assault against a good is, on the contrary, not necessary for the existence of a criminal responsibility and the correlated punitive sanction.

The inadequacy of the concept of *Rechtsgut* comes from his civil law's origin. But the civil law's protection mechanism corresponds to an other logic than the criminal law[7].

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[6] G. JAKOBS, *Rechtsgüterschutz? Zur Legitimation des Strafrechts*, 2012, 7 et seq., U. PIOLETTI, *Contributo allo studio del delitto colposo*, 1990, 107 et seq., U. PIOLETTI, Lineamenti di uno studio sulla bancarotta, 2015, 25 et seq.

[7] The majority of the criminal law doctrine represents a supposed limiting function of the criminal law of the concept *Rechtsgut*. In his declared limiting function the concept of *Rechtsgut* is often represented like a "manifest" of a "liberal" criminal law. See C. ROXIN, *Strafrecht. Allgemeiner Teil*, 4th ed., 2006, 14 et seq., that on the other hand, also recognises that "the scepticism towards the capacity of the concept of the *Rechtsgut* is not groundless".

The experience of the practised jurisprudence is telling us something else than the supposed limiting function of the concept *Rechtsgut*: this often doesn't work towards a limitation of the expansion of the application area of the criminal law provisions and towards the mitigation of the severity of the penalty in the sentencing, but precisely in the opposite way.

The idea of criminal law as a "tool" constructed with the aim to protect the *Rechtgütern* (the goods) necessarily involves the idea of the criminal law as an instrument conceived to intimidate the others, indeed all the people as potential criminal offenders. This idea was very present and explicit in *Feuerbach* and *Birnbaum*, but is also still present in a not small extent of the contemporary legal doctrine and jurisprudence. In this perspective, the wider the criminal law provisions and the more severe the penalties, the more protected are the "goods".

Different fields of law need different concepts for their operativeness, because each field of law corresponds to his own logic and works according to his own dynamic.

The idea of conceptual autonomy of criminal law from civil law may assume negative connotation due to the polemics against the "liberal criminal law" and the "liberation" of criminal law from civil law's thinking in the 1930's, particularly in Germany[8], but, in some aspect, in Italy too[9].

In my recognition and explanation of the conceptual autonomy of criminal law from the civil law (and from other fields of law too) it is no matter of a non existing superiority of a single field of law from an other field of law. It's no matter of a not principally existing higher degree of indeterminacy of criminal law in comparison to civil law too[10]. It's a matter of the *recognition of the operational differences between criminal and civil law* and, of course, between criminal law and others fields of law.

Also a so-called "liberal" criminal law needs concepts that ensure it's functionality, and this functionality can not be achieved with the concepts of civil law. In other words, here it's not a question of

[8] Cf. particularly H. J. BRUNS, *Die Befreiung des Strafrechts vom zivilrechtlichen Denken*, 1938.

[9] In Italy, on the one hand in criminal law there was a refusal of some concepts (such as that of subjective law) typical of civil law and the "liberal" tradition (V. MANZINI, *La politica criminale e il problema della lotta contro la delinquenza e la malavita*, in *Riv. pen.*, 1911, 9) and, on the other hand, the attempt to use precisely the methodology of civil law, taken as a model, to recover the "legal technicality" (the belonging to the world of law) of the criminal law (AR. ROCCO, *Il problema del metodo e della scienza del diritto penale*, in *Opere giuridiche*, III, 1933, 297). The linguistic and geographic proximity to the great tradition of Roman civil law has led in Italy to a series of (unsuccessful) attempts to use civil dogmatic categories in criminal law.
C. LATINI, *Una legislazione per spot. Dalle idea di riforma del 1944-45 al Progetto Grosso di codice penale*, in *Arch. giur.*, 2019, 766, remember that "follow the safe and trusted way of the scholars of private law, was the remedy proposed by Rocco" for the criminal law. About the influence of civil law dogmatic on the work of Arturo Rocco see also GIOV. DE FRANCESCO, *Il Contributo italiano alla storia del Pensiero* – Diritto (2012), *Rocco, Arturo*, in *Treccani* online, http://www.treccani.it/enciclopedia/arturo-rocco_%28Il-Contributo-italiano-alla-storia-del-Pensiero:-Diritto%29/ (11.07.2020).

[10] The "classical" roman criminal law was far less autonomous from politics than civil law was, and the civil law was then considered the "true" law. Also therefore the criminal law was in this time by far more indefinite than civil law.
At least since the enlightenment (but, indeed, already previously) the criminal lawyers have consistently tried to reduce this distance in the pursuit of the "legality" and the "determinacy" of the criminal law.

liberalism (or "democracy") or authoritarianism (or even "totalitarianism") of criminal law. Here is not pursued a political goal, and even not a merely "legal policy" or a "criminal policy". Here is pursued "only" the goal of a better conceptual and most of all semantic communication capability of the criminal law *dogmatic*. Thereby the communication capability of the criminal law dogmatic is not a goal by itself, it rather pursues a *practical* goal, because it concerns the efficiency of criminal law. This means that an efficient and functional dogmatic is the condition of an efficient and functional law system, and this also is a social good or a social gain[11].

The inadequacy of the *Rechtsgut* concept is not limited to the "new" criminal law provisions. In case of relative recently introduced provisions, like, for instance, Insider trading, it is particularly difficult to find a "tangible" *Rechtsgut*[12]. But also in the case of more traditional provisions, like the criminal offences against the environment or the criminal offence of incest[13], there are significant difficulties for the determination of a tangible protected *Rechtsgut*.

The criminal law doctrine hat invented, as it is well known, the concept of the dangerous, or hazardous, criminal offence. If necessary, the danger may be also "abstract". This rhetorical expression was supposed to save the dogma of the protection of *Rechtsgut* and particularly to save the dogma that a criminal offence is always an assault against a *Rechtsgut*. But this goal is missed. A danger is not a damage, on the contrary, a danger presents the fail to "materialise" the damage, therefore it is an "escaped" damage.

In civil law doesn't exist a wrong, if no damage arises from the abstract dangerous action, even when the abstract dangerous action constitutes a criminal offence. This happens because the sanction of

[11] The communication capabilities of the dogmatic serve not only and not primarily the general public but particularly the communication between the parties of the trial and between the parties and the judge. This is followed by an increased control of the judicial decision and a reduced risk that the decision calls on only the sentiments of the public.
This is also a contribute of the dogmatic for a civilised criminal law, and, if man may put it, a "respectable" or "decent" criminal law, and, what in this time seems to be important, against a populist and demagogic criminal law.

[12] See below paragraph 6.

[13] See the considerations of C. ROXIN, *Strafrecht. Allgemeiner Teil*, 27 et seq. (recital 43 et seq.); C. ROXIN, *Zur Strafbarkeit des Geschwisterinzest*, in *StV*, 2009, 544 et seq.

reparation or compensation obeys to a different logic than the punitive sanction. The reparation reconstitutes a good (as a useful object) that was compromised by a wrongful (guilty) action. The punishment, on the contrary, doesn't reconstitute any good, the punishment indicates *factually* (i.e. 'on the body' of the offender) that an action was faulty and that it shall not be committed. A civil law's wrongdoing without damage is not conceivable, while a criminal law's[14] wrongdoing without tangible and individual damage is not only conceivable but already quite common too.

It may be said, with Hegel "in so far as the infringement of the right is only an injury to a possession or to something which exists externally, it is a *malum* or damage to some kind of property or asset. The annulling of the infringement, so far as the infringement is productive of damage, is the satisfaction given in a civil suit, i.e. compensation for the wrong done, so far as any such compensation can be found"[15].

Here it should be observed that Hegel hat noted the limitations of civil law that consist *in the possibility of the compensation or reparation of an infringed good*.

"The annulling of the infringement, so far as the infringement is productive of damage", is possible, "so far as any such compensation can be found". That means that the civil law, or, better, the civil law's sanctions (reparation or compensation, invalidity or nullity) own a *internal limitation* (the necessity of the presence of a damage) that is not owned by the punitive sanctions, and, for exactly that reason, the criminal law runs permanently into danger to get out of hand to boundlessness. The criminal law sanctions are theoretically able to be applied to any undesired behaviour, because they don't necessarily presuppose a damage (or only a mere result or outcome).

In civil law, in the case that an undesired behaviour remains only dangerous, also without damage, there is no civil law instrument

[14] Whereby, obviously, is intended every wrongdoing sanctioned by a punitive sanction.

[15] G.W.F. HEGEL, *Grundlinien der Philosophie des Rechts*, § 98. Hegel's Philosophy of Right, First Published: by G. Bell, London, 1896. Translated: by S.W. Dyde, 1896. Preface and Introduction with certain changes in terminology: from "Philosophy of Right", by G.W.F. Hegel 1820, Translated. Prometheus Books; Remainder: from "Hegel's Philosophy of Right", 1820, translated, Oxford University Press; First Published: by Clarendon Press 1952, Translated: with Notes by T. M. Knox 1942.

"against" this behaviour, that means that this behaviour remains *necessarily* not relevant for the civil law.

Even from the criminal law perspective an undesired behaviour *without undesired consequences* can be buried into oblivion and can be set aside, if the behaviour not surpasses a certain degree of intolerability. This also means that in criminal law it is easier to evaluate a disappointing behaviour without consequences as not relevant, than to evaluate a disappointing behaviour *with consequences* as not relevant, and this particularly if the consequences are irreversible[16].

But this situation, different from the civil law, has nothing to do with the pure possibility of the application of a sanction, but with the continuances or durability in the time of the "communication" or "sign" of the disappointment of an expectation: the result (or outcome) of a wrongful behaviour *evokes permanently the disappointing behaviour itself* or, if you want, the "violation of the norm". In this regard the criminal law has the propensity - but only the propensity - to focus on crimes with outcome (or result) and in the way the civil law and the criminal law mutually reinforce one another.

Summarising: Whereas the civil law and all the others not punishing fields of law need the damage as condition for their simple existence, the criminal law (and every punitive field of the law) utilises the damage (or only the outcome or result) as instrument for his own limitation, because damage and outcome are not necessary for the application of the punitive sanctions. That is the "legal policy" or "criminal policy" reason, because a "liberal" (i.e. so far as possible "minimal") criminal law emphasises again and again the significance of the outcome (or result) and with this in mind the damage to the *Rechtsgut*.

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[16] The reversibility of the outcome plays an important role in the criminalisation: a reversible outcome is a "restorable" outcome and, in the case that the disappointment brought about by the undesired behaviour is not so relevant, the reparation can replace the punishment: "reparation instead of punishment", see C. ROXIN, *Zur Wiedergutmachung als einer „dritten Spur" im Sanktionensystem*, in Arzt, G./Fezer, G./Weber, U./Schluchter, E./Rössner, D. (ed.) *Festschrift fur Jurgen Baumann zum 70. Geburtstag*, 22. Juni 1992, 1992, 243 et seq.), and also A. MANNA, *Corso di diritto penale. Parte generale*, 3rd ed., 2015, 743 et seq.; R. BARTOLI, *Il diritto penale tra vendetta e riparazione*, in *Riv. it. dir. proc. pen.*, 2016, 96 et seq. From this sample can be seen that in criminal law the "seriousness" - the significance - of the behaviour is always decisive, and not the amount of the damage of a good.

The criminal law has a different relation to the goods than the other fields of law that have the function to reconstitute in a tangible way the tangible goods. The reparation, and also the nullity or invalidity[17] - and so the whole "restorative sanctions" in the proper meaning of the word - reconstitute a good that was compromised (damaged or extinguished) by the unlawful behaviour. The punishment, on the contrary, takes a good away from the offender, but gives to nobody a good. It could be said with Hegel that the punishment *factual* juxtapose two evils[18].

And so says Hegel: "The theory of punishment is one of the topics which have come off worst in the recent study of the positive science of law, because in this theory the Understanding is insufficient; the essence of the matter depends on the concept. - If crime and its annulment (which later will acquire the specific character of punishment) are treated as if they were unqualified evils, it must, of course, seem quite unreasonable to will an evil merely because another evil is there already. To give punishment this superficial character of an evil is, amongst the various theories of punishment, the fundamental presupposition of those which regard it as a preventive, a deterrent, a threat, as reformative, &c., and what on these theories is supposed to result from punishment is characterised equally superficially as a good. But it is not merely a question of an evil or of this, that, or the other good; the precise point at issue is wrong and the righting of it"[19].

For Hegel, in the criminal law comes not into question the evil and the good, but the unlawfulness and the justice, i.e. the answer to the unlawfulness.

With other word: *the dynamic of criminal law may be understood only at the level of the significance and not at the level of the individual benefit or damage*. That does mean again that the criminal law works at the level of communication. But what is the communication of criminal law and of law at all?

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[17] The sanction of nullity or of invalidity eliminates, in interest of the disadvantaged person, a concrete unfavourable situation that was brought about by the wrongdoer, i.e. also in this case a concrete good is restored. The not punitive sanctions take a "good" away from the wrongdoer and give a "good" to the damaged person.

[18] Against the punishment as redoubling of an evil see M. DONINI, *Per una concezione post-riparatoria della pena. Contro la pena come raddoppio del male*, in *Riv. it. dir. proc. pen.*, 2013, 1162 et seq.

[19] G.W.F. HEGEL, *Grundlinien der Philosophie des Rechts*, § 99.

The communication of law is a factual and not a verbal communication. In the case of a verbal communication a question generates an answer and the answer a new question and that leads theoretically into infinity and doesn't create, for this reason, any "structure". Verbal communication presupposes the equality of the communicating subjects.

The law, on the contrary, is a system that, like any social system, decides "over" the individuals. The communication of law is factual, because the factual communication due to the force (the irreversibility) of the performed facts *does not allow any contradiction*; it is a peremptory communication. The law doesn't constitute a "dialogue" or a "discourse" in the proper sense: *Roma locuta, causa finita!*

2. *The "special status" of the "punitive" law. The boundaries of criminal law*

The civil law limits itself from within; the criminal law, on the contrary, needs a limit from the outside. But the concept of *Rechtsgut* is not appropriate for the restriction of criminal law like it is the case in the other legal fields (like civil or administrative law), where good, damage of good and restoration of good depict the proper dynamic of this legal field.

If the punishment could be justified with the harm against a good, it should be explained, why the restoration of the good is not sufficient, and a punishment of the offender must be added to the restoration, and what is the benefit of the punishment of the offender for the good. *The restoration of the good and the punishment of the offender operate at two different levels*. The first operates at the level of individual benefit and the last at the level of the factual representation of the significance of the behaviour.

This doesn't mean that the not-criminal tort is not related with an action[20] but that the last exists only if the behaviour produces a

[20] Every wrongdoing presupposes an imputation and every imputation presupposes the "freedom" of the single person, i.e. the "personal" guilt of the defendant (in the tradition of English speaking criminal law cultures one speaks about *mens rea*). Without personal guilt (or, if we want, *mens rea*) there is no wrong. That is valid in every legal field (also in civil and administrative law) and not only in criminal law.

damage. The criminal law doesn't possess this limitation. The limitation of criminal law can not be found in the damage, but "only" in the reasonability (i.e. the justice) of the punishment of a specific behaviour, namely with regard to the punishment in itself and with regard to its amount or sentencing.

The limitation of criminal law to the behaviours which produce a damage can (perhaps unfortunately) not succeed. A so-called "liberal" or, better, civilised criminal law can trust only the examination of the reasonability of the criminal law provision. This examination and evaluation is not a political but a genuinely juridical evaluation in continental Europe in countries like Germany or Italy, and this takes place through the evaluation of the conformity of a criminal provision to the constitution by the constitutional court.

The social harmfulness of the behaviour, often mentioned in the literature[21], also refers to a valuation that depends of the whole contest. With other words, the valuation of social harmfulness of an action doesn't require that the action has produced a quantifiable damage, but only that the action was to such an extent undesired that its originator deserves to be punished. The decisive element is not the quantifiable damage (this can even be missing), but the evaluation of the action by the society.

The power of the tradition of the thinking of *Rechtsgut* is nevertheless so powerful, that in some opinions in the legal doctrine the corruption provisions don't protect an original *Rechtsgut* but a derivatives one[22].

3. *The alternatives. Reasonability and equality. Goods and expectations, norms and institutions*

See to that U. PIOLETTI, *Lineamenti di uno studio sulla bancarotta*, 2015, 80 et seq.; 153 et seq.

It's true that the law "constructs" and "constitutes" the person, but in this "construction" the law encounters insuperable limits in the whole (and non only national) social communication - if we want: the social moral. The law may always try to proceed in absolute autonomy and in national autonomy, but if this autonomy means a decoupling from social moral and from global moral, this law will, soon or later, fail.

[21] Cf. G. JAKOBS, *Rechtsgüterschtz? Zur Legitimation des Strafrechts*, 2012, 7 et seq., K. AMELUNG, *Rechtsgüterschutz und Schutz der Gesellschaft*, 1972, *passim*.

[22] Under this point of view T. ZIMMERMANN, *Das Unrecht der Korruption. Eine strafrechtliche Theorie*, 2017, 370 et seq., speak about a "frame" Rechtsgut or derivative Rechtsgut. See also T. ZIMMERMANN, *ZStW*, 124 (2012), 1027.

If the doctrine of *Rechtsgut* is inadequate, the question then arises about the alternative, particularly the alternative for the explication and justification of a criminalisation and, if necessary, calling it into question.

The alternative lies in the understanding of *the significance of a criminal provision*, and this significance must be *deduced from the whole context*. The significance of a legal provision can't be deduced from an isolated consideration, but it must be captured and understood from the context of the whole legal system.

According to Günther Jakobs the mechanisms of criminal law must be understood not only "like natural events, like summer and winter, but like social events". "In this view, the task of the criminal law dogmatic lies in the development of expressions which are needed to contradict the criminal offence like a meaningful action (an action with expressive content) with a meaningful act. This contradiction is necessary after a criminal offence in order to restore the validity of the norm which was disavowed by the offender. Like the external infringement is the manifestation of the infringement *of the norm*, so the punishment is the manifestation in which the stabilisation *of the norm* takes place"[23].

In my opinion about the punishment it's not the matter of a stabilisation of the norm, it's the matter of the fulfilment of the norm as such.

The punishment doesn't stabilise the norm, just like the compensation and other not punitive sanctions (like the nullity) don't stabilise the norm.

The sanctions don't comply with the law, the sanctions "speaks" the law, and the law is the "immune system of the society"[24] in the sense that the law system - i.e. the legal remedies or law sanctions - allow the existence of the whole system of the society, because the criminal law (and the law at all) is the *immune* system of the society and *not* the society itself.

The law ensures the continuation of institutionalised expectations of behaviour, despite the fact that occasional and isolated behaviours

[23] G. JAKOBS, *Strafrecht. Die Grundlagen und die Zurechnungslehre*, 2nd ed., 1991, VII.
[24] N. LUHMANN, *Das Recht der Gesellschaft*, 1993, 161, 565 et seq.

don't comply with this institutionalised expectations of behaviour. The law consists in sanctions (not only punitive sanctions!) *that serve the purpose to remove this contradictions with communicational remedies, i.e. with the factual communication of law*.

This removal or elimination can take place with the removal of the material consequences of the disappointing behaviour (non-punitive sanctions) or *with the removal of the value or meaning of the disappointing behaviour* (punitive sanctions) and this happens *with the sole remedy known by the society in this case, namely with the factual representation of the evildoer like a "person not to be envied"*.

If you want to use the semantic of the purpose, then you should say that it is not a matter of external purposes, but of internal purpose, and this concerns all the sanctions and not only the criminal or punitive sanctions.

Every sanction has the "task" of reversing the time: that what should not happen is reversed, albeit with different instruments. In case of non-punitive sanctions, the situation will be *de facto* restored as it should be as if the wrongful behaviour would not have happened (a "good" is restored), in case of punitive sanctions the situation will symbolically (i.a. factual communicatively) reversed *by the representation of the failure of the "offender"*. In both cases the law is "spoken".

For this reason the not punitive sanctions need not only a behaviour but also a good to be effective; on the contrary, *the punitive sanctions need only a behaviour*. Both types of sanctions, however, relate to expectations that are originally "addressed" to "free" behaviours and *not* to goods.

Some decades after the publication of the *Grundlinien der Philosophie des Rechts*[25] of Hegel, the scholar of criminal law Francesco Carrara wrote: "goal of the punishment is not that the Justice is done, not that the victim obtains revenge, not that the damage will be compensated, not that the citizens will be scared, not that the offender will expiate his wrongdoing, not that his recovery will be obtained (…), the real purpose of the punishment is the restoration of the external order in the society"[26].

[25] *The Principle of the Philosophy of Law*.
[26] F. CARRARA, *Programma del corso di diritto penale. Parte generale*, 1860, §§ 614, 615.

In the perspective that I propose, the purpose of the science of criminal law is to look at the criminal law issues from the perspective of the *whole* law science instead only from the perspective of the so-called whole *criminal* law sciences (*gesamte Strafrechtswissenschaften*). Because the criminal law issues are often whole law issues and the criminal policy issues are often law policy issues.

The criminal law often begins where other fields of the legal systems do not manage to ensure some expectations (i.e. institutions) with their specific remedies, expectations which nevertheless have to be ensured ("subsidiarity principle" or "principle of minimum criminalisation"[27]).

On the other hand, criminal law sometimes does not succeed in what other legal fields can do, such as, for instance, to restore "protected goods" (*Rechtsgütern*) or to change structures not "from above" but "from below". Civil law can sometimes change society by mobilising initiatives of the individuals, i.e. through the protection (and also the "creation") of interest of the concerned and "proactive" individuals that are, by civil law, allowed to sue.

However, as we will see, in the case of corruption, the civil remedies are in principle inapplicable, because there is no individual interest or good that can be replaced by civil sanctions.

As we have seen, the limits of criminal law with regard to the legitimacy of a specific criminal offence (and specific legal consequences) are not to be sought and found in the presence of a damage or harm (a damage to a *Rechtsgut*), but in its "reasonability", i.e. taking the whole law system into account.

Sometimes in the scientific literature there can be read of proportionality or of prohibition of excessiveness[28], and it is also mentioned that these concepts - including the concept of "material" *Rechtsgut* - remain "in in the air"[29], i.e. they need to be concretised. The fact that reasonability or proportionality are "vague" concepts does not mean that the concept of *Rechtsgut* is more determined or specific,

[27] This principle is almost unanimously recognised in the English speaking countries too. Cf. D. HUSAK, *Overcriminalisation. The Limit of the Criminal Law*, 2008, see also J. HERRING, *Criminal Law. Text, Cases, and Materials*, 8th ed., 2018, 10 et seq.
[28] See ENGLANDER, *ZStW*, (127) 2015, 625
[29] ENGLANDER, *ZStW*, (127) 2015, 629.

because even the latter can be understood only as significance or “protective purpose” of the norm.

Proportionality is synonymous with reasonability, which in turn is synonymous with justice. What is just, however, depends on the entire context, and the context is not only the immediate context, but the entire social context, and since society is a contingent (that is, historically conditioned) construct, justice is contingent and historically conditioned.

There is no "abstract" eternal formula for deducing justice (the reasonability, the *Rechtsgut*); what was just yesterday (and was a protected *Rechtsgut*) can no longer be just today and vice versa. In a society, such as the Roman one, where there was no “institution” company or enterprise (and therefore no “corporate interest”), the “justice” of punishing criminal bankruptcy was not a imaginable. In a society like today’s Western societies, which can no longer be legitimised by (Christian) religious assumptions, the punishment of denying the historical resurrection of Christ is no longer considered just but absolutely unacceptable; but the punishment of denying the Holocaust is considered just[30].

There is no way around this contingency (if one wants: relativity): the eternal and the absolute are not of this world and certainly do not belong to the judgment and the separation between good and evil. Judgment is of this world and, as such, is contingent, i.e. (historically) relative. The concept of the legal good or *Rechtsgut* as a "descriptive" term leads to the concept of the valid norm and, as a "critical" concept, to the just norm. The content of the "single" norm is decided by the entire legal system, which, for its part, also depends on the overall societal context, that is, for their part, historically conditioned: “Alike as the concept of the norm, the concept of *Rechtsgut* is, as such, empty of content”[31], without referring to the the entire law system and, above all, naturally, the constitutional principle.

[30] See art. 3 bis of the Italian Statute 13.10.1975, n. 654 (Statute n. 115/2016), in the context of conduct of propaganda to ethnic or racial hatred or of instigation to the commission of acts of violence or discrimination for racial, ethnic reasons, etc., and § 130, paragraph 3, StGB (German Penal Code) that punish the denial or the playing down of the crimes committed by the Nazis in a way that is likely to disturb public peace.

[31] G. JAKOBS, *Rechtgüterschutz? Zur Legitimation des Strafrechts*, 2012, 37, stresses, in this respect, the criminal law legitimacy, but the criminal law legitimacy descends

At this point it should be mentioned that the "system conformity" and the "system contrariety" rarely follow a "rational" planning, but rather a historical legitimation. In the field of the "objective or external imputation" - or "allowed risk" - Günther Jakobs was the first to regard historical legitimation as an alternative to rational or conscious risk assessment. In the above-mentioned perspective of Jakobs, however, the balancing of interests (or goods) still remains the basic reason to legitimacy: "It is not the historicity that legitimises, but the tradition suggests that the problem of legitimacy has previously been resolved - a legitimacy spared by history"[32].

The norms presuppose expectations - and that means structures. The norms (or, rather, the sanctions) serve to maintain expectations, i.e. the maintenance of structures. These structures are both social and (in most cases) individual structures, because the human being is a social being. This means that the society lives in "existing" structures, which, as such, determine the "nature" of the society and are anchored in the psychic systems and therefore are not - by and large - "planned" from the outside and not from outside are easily changeable. The power of "historical legitimation" in law is very present in English legal thinking in the form of highlighting the "tradition" even as a legal source[33].

An institution - and, as I said, a norm or an expectation that "build" the social institutions or structures - "is valid", i.e. it is accepted and kept alive with sanctions, very often because it is present as an institution, and because the society and the individuals (first of all as psychic system) in that institution find their form or one of their forms, beyond any conscious or unconscious balancing of goods. Because the consciousness results in a social context even physically (or "organically") [34], the "institutionalized" expectations concurrently represent a psychologically individual and an objective social reality.

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of his accordance with the whole law system that includes eminently, naturally, the constitutional principle. There is also another legitimacy of the entire law system ad this legitimacy descends of the accordance with the moral rules. To that see further.

[32] G. JAKOBS, *Strafrecht Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre*, 2nd ed., 1992, 201.

[33] Cf. H.P. GLENN, *Legal Traditions of the World*, 2010, *passim*.

[34] The brain develops and "lives" in a network of brains where also develop consciousness and knowledge. Cf., from different perspectives, C. HIDALGO, *Why Information Grows. The Evolution of Order, from Atoms to Economics*, 2015, *passim*,

The consideration of the "legitimacy" of a criminal offence from the point of view of the "reasonability principle" is in Germany, Italy and other europeans countries, by no means a political (even a legal political or criminal political) or a "moral", but an original legal consideration, because the contemporary legal systems have the legal remedies, even in this regard, for the judgment of the legality of the offences and their consequences from the point of view of the principle of "equality" - in the sense of the principle of "reasonability" - in accordance with Article 3 of the German Constitution or Article 3 of the Italian Constitution.

It is not, as it is often said, a (constitutional) judicial "control" or "evaluation" of the so-called “discretion" or “discretionary power” of the legislator in the criminal field, but a genuine application of law or, better, an application of specific sanctions (sanctions of nullity) to unconstitutional norms. The Italian Constitutional Court has taken the first steps in this direction already some years ago, including in the field of criminal law[35].

4. *Criminal offences without damage and non-criminal alternatives. Significance of the unlawful behaviour and significance of the punishment*

D.M. EAGLEMANN, *The Brain*, 2015, *passim*; M. PLITT, R.R. SAVJANI , D.M. EAGELMANN, *Are corporation people too? The neutral Korrelates of moral judgments about companies and individuals, Social Neuroscience*, 10 (2), 2015, 113 et seq.

[35] Cf. the judgements of the Italian Constitutional Court n. 306/1993; n. 183/2001; n. 257/2006; n. 393/2006; n. 72/2008; n. 236/2011. See G. INSOLERA, *Principio di eguaglianza e controllo di ragionevolezza sulle norme penali*, in G. Insolera et al. (ed.), *Introduzione al sistema penale*, 1997, 264 et seq.; F. PALAZZO, *Offensività e ragionevolezza nel controllo di costituzionalità sul contenuto delle leggi penali*, in *Riv. it. dir. proc. pen.*, 1998, 350 et seq.; V. MANES, *Il principio di offensività nel diritto penale*, 2005, 209 et seq.

The German Constitutional Court is notoriously still very cautious in the “evaluation” of the so-called discretionary power of the legislator in criminal law matters. Cf. BVerfG, 2 BvR 392/07 of 26.02.2008, Rn. (1-128), so-called „Incest Judgment“. Nr. 306/1993; Nr. 183/2001; Nr. 257/2006; Nr. 393/2006; Nr. 72/2008; Nr. 236/2011. It should be reminded that (contrary to the opinion of the German Constitutional Court) it isn’t the matter of an “evaluation” of a “discretion” but it is about a plain judgment about the conformity of a legal provision with a higher legal provision. In this case the constitutional provision of the right of equality of all citizen before he law (art. 3 of the German Constitution or, for Italy, art. 3 of the Italian Constitution).

Usually a criminal law norm or provision (i.e. a criminal sanction) is needed where non-criminal sanctions - reparation and nullity of the act - *are either insufficient or simply impossible*.

This is of course the case in the impairment of life, but also in corruption. In the case of manslaughter, the annihilation of life is not really replaceable with "other" material utility[36]. In the case of corruption, the damage can not be assessed individually, even in the serious cases of corruption offences, i.e. in the case of corruption according to § 332 of the German Penal Code (StGB) or Article 319 of the Italian Penal Code (c.p.).

Sometimes the violation of the official duties (a characteristic of the corruption according to § 332 StGB) causes no calculable damage in the sense of civil law, or there is no damaged person in its very meaning.

This also applies, of course, in the case of acceptance of undue benefits under § 331 StGB where, by definition, the administrative act should be lawful.

The corruption offences are still serious to medium scale criminal offences, and, of course, *all over the world*.

As in other cases of global recognised criminal offence, one speaks of "universal values". The universal values are universal norms or, better, *universal institutions*. Indeed, there are similar achievements in the social developments around the world, such as the emergence of "public institutions", that allow a complex development of society and of individuals.

Also in societies and legal systems, which are usually portrayed as remote from Western civilisation, and where there has been a different understanding of the position of law and jurists in society, as in China, the understanding (and the "worthlessness") of corruption is

[36] The outcome "death" is an authentic case of irreversibility and, als I have said (U. PIOLETTI, *Contributo allo studio del delitto colposo*, 1990, 87) the punishment is "originally" emerged as a "protest" against the irreversibility of an undesired outcome. The punishment, as "protest", is a conscious, deliberate, and *as an institution planed* public affirmation of the validity of the expectation.
However G. JAKOBS, *Strafrechtliche Zurechnung und die Bedeutung der Normgeltung, in Verantwortung in Recht und Moral*, U. Neumann, L. Schulz (ed.), 2000, 61, retains that the "protest" is the criminal behaviour. But the protest, as I said before, is not the criminal behaviour, rather the protest is the punitive answer of the law system to the disappointing behaviour.

very much like to the “western”, and this happens because (as we will see) the importance of public “institutions”, and the corresponding role division represents an indispensable structural element (and an “achievement”) of a society which has moved away from a primitive “horizontal” and “fragmentary” structure, towards a stratified or hierarchical, to a functional differentiated society[37].

The reason why the corruption offences constitute serious up to medium scale criminal offences, nevertheless they affect no “tangible” *Rechtsgut*, however, is not explained stringently enough by the doctrine of the *Rechtsgut*.

The existence and seriousness of a criminal offence is not primarily explained by the amount or even the existence of a damage (a damage to a *Rechtgut*), but *by the significance of the committed act*.

A criminal offence is not principally a causation of a harm, a violation or a damage to a *Rechtsgut*, but, to use a happy formulation of *Hans Welzel*, a "expression of significance or sense"[38], i.e. an action that means something, that is "effective" by the criminal law point of view, because of its meaning or significance.

Günther Jakobs[39] was the first in criminal law science, following *Niklas Luhmann*[40], to stress that the offence is a disappointment of an expectation, rather than a damage or an assault to a *Rechtsgut*, and that the punishment has not the aim to deter potential perpetrators, but rather to secure the expectation despite the committed disappointments.

This view represents a true Copernican revolution in the science of criminal law and, in my opinion, in the whole science of law. The fact that a criminal transgression refers to a disappointment of an expectation is increasingly represented with different accents in the field of criminal science (sometimes under the term of the so-called “positive general prevention”); although this sometimes happens in

[37] N. LUHMANN, *Soziale Systeme: Grundriß einer allgemeinen Theorie*, 1984, N. LUHMANN, *Die Gesellschaft der Gesellschaft*, 1997.
[38] H. WELZEL, *Studien zum System des Strafrechts*, *ZStW*, 58 (1939), 503, whereby the significance of the behaviour in my view do not rest in the intention of the offender but *in the objective significance of the behaviour in the social context*.
[39] G. JAKOBS, *Strafrecht. Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre*, 1st ed., 1983, 3 et seq.
[40] N. LUHMANN, *Rechtssoziologie*, 1972, *passim*.

connection with the traditional view of the criminal offence as a damage or an assault to the *Rechtsgut* and sometimes also in connection with an alleged “function of stigmatisation” of the punishment[41].

It is now important to recognise that the whole law system, and not just the criminal law, is a system that exists to safeguard the expectations[42], and it is now important to set the functional focus of the law system from the "norm" to the "sanction": it is the *remedium* that characterizes the *proprium* of the law system, and not the "command" or the prescriptive part of the "norm"; and there are always the *remedia*, the remedies, that shape the nature, the possibilities and the boundaries of the different fields of law.

The sanction, in the sense represented here, is not - even in criminal law and in the punitive areas of law in general - a mere tool or instrument to "strengthen" the law (or the expectation), but it represents the law itself: The sanction is not an "aid", a "supplement" of the norm and of the law (as if the norm and the law had an independent existence), it represents the right itself, it is the law as such: *ubi remedium ibi ius*.

The recognition of the fact that not only punitive sanctions but also non-punitive sanctions (such as reparation or nullity) do not serve the protection of goods but the maintenance of expectations in the field of social contacts, i.e. that they serve to secure the future in the field of the social contacts, sheds new light on the issue of subsidiarity and the extrema ratio: the "weight" of the goods or the "importance" of the expectations are not decisive for the need to use punitive sanctions and are not decisive for the inadequacy of non-punitive sanctions. It is often rather the simple impossibility of applying the non-punitive sanctions, which decides the necessity of using the punitive law. The non-punitive sanctions restore illegally destroyed material benefits or goods. Where this recovery is not possible, and society nevertheless needs the assurance of the continuation of behavioural expectations, the punitive intervention often becomes indispensable. As the criminal

[41] For this point of view, among others, cf., recently, G. HOCHMAYR, *Neue Kriminalsanktionen in Rechtsvergleich*, *ZStW*, 2012, 64 et seq. For a discussion about the reputed “function of stigmatisation” of the punishment I refer to U. PIOLETTI, *Lineamenti di uno studio sulla bancarotta*, 2015, 44 et seq. and *passim*.

[42] As “immune system of the society”, N. LUHMANN, *Das Recht der Gesellschaft*, 1993, 161, 565 et seq.

law - unlike non punitive law - is almost universally applicable, it is necessary to limit the punitive law "from outside".

5. *The significance of the unlawful behaviour of corruption. The separation between "public" and "private" roles. The significance of "private" trade with "institutional" powers*

If a criminal offence is a “expression of significance or of sense", i.e. an act that means something, that is "valid" - as wrong - because of its meaning or significance, what does the act of corruption mean?

The act of corruption means that the offender does not adhere to a "public" role and that he falls into the "private" role of exchange or trade.

The ancient societies were "horizontal" societies; if you like, they were "private" societies. Of course, this also applies to the original ancient Roman society.

There were "punishments", there was also "criminal law"; but it was a different criminal law than that of later more complex societies. It was, if one may say so, a “private” criminal law. The punishment was, in principle, replaceable with reparation, which means that at that time a punishable wrongdoing was always a "civil" wrongdoing, i.e. a "damage" or “offence”[43] of a Rechtsgut.

There was no state in these old societies, there were no “public services”, there was therefore no “public administration” and also no “public officials” or “public servants”[44] and no, as it’s also said in the

[43] The English word “criminal offence” reveals the ancient origin of a criminal offence in the early humans society as an impairment of a “tangible” good as an “individual” utility. In the early roman civilisation, for instance, only an impairment of an individual good was a torts and, at the same time, a criminal offences. In that time there was therefore also any difference between a civil and criminal trial, there was only an art of trial. A trial was always brought by the “private”, i.e. individual, initiative and at one’s own (also personal) risk and might terminate with a civil (i.e. restorative) but also with a punitive sanction.

[44] The Italian penal code define the public officer and the person obliged for the public service in the art. 357 - 359. See, above all, A. FIORELLA, *Ufficiale pubblico, incaricato di un pubblico servizio o di un servizio di pubblica necessità*, in *Enc. dir.*, vol. XLV, 1992, 566 et seq.; L. PICOTTI, *Le nuove definizioni penali di pubblico ufficiale e di incaricato di pubblico servizio nel sistema dei delitti contro la pubblica amministrazione*, in *Riv. trim. dir. pen. econ.*, 1992, 274 et seq.; P. SEVERINO, *Pubblico ufficiale ed incaricato di un pubblico servizio*, in *Digesto pen.*, vol. X, 1995, 513 et seq.

German legislation, “especially obliged for the public service” (§§ 331 to 334 German Penal Code: StGB).

The first officers or public servants were persons who had a role between priest and judge[45].

The birth of public power was an evolutionary achievement. A decisive passage from a fragmentary towards a stratified (or hierarchical) differentiated society.

Not infrequently, a new institution, an evolutionary achievement, is “represented”, “constitute” and even “introduced” and enforced “from above” by means of the criminal law. This has to do with the symbolic and, in this sense, genuinely “public” character of the criminal law[46].

On the other hand, a new institution can also be introduced and enforced "from below" through the attribution to the private persons of new legal powers (i.e. by civil law remedies).

[45] Therefore in the ancient or primitive societies there was no separation between political-administrative system, law system, and religion (or religious system), there was also no autonomy of the economic system.
A more complex and therefore developed society needs this separation. The political and administrative system, particularly, has the task to design or project the future of a society in an “open” way. The law system has the task to “ensure” the future in the cases were the future diverge from some crucial expectations. That means that the political and administrative system “looks forward” whereas the law system “looks back”. Both systems are necessary for the society and not any system may be allowed to “invade” the other because the people need certainty in many parts of the life, but they also need to have the possibility to design the future, in other parts of the life, in an “open” matter.
The two systems (the political-administrative and the law system) have therefore different logic and different semantics, they are indeed two separate systems and, in many countries, there are separate roles for the persons that are appointed to the tasks of each system.
These persons are, *in any case*, “public officers” or “public servants” because they are committed to the “public good”. That means that those “officers” must separate their public role from the private and, particularly, they must commit the public powers that are consign to them exclusively in the interest of the public or the whole society and that is non allowed to those people to “sell” that powers, i.e. to exchange those powers with utility for himself.

[46] The transaction from the self administered justice to a judicial administrated justice is still symbolised, in some criminal codes, like the Italian, by a specific criminal provision that have the task in the ancient time to affirm the success of the “new” institution of the judge administered justice. Cf. U. PIOLETTI, *Esercizio arbitrario delle proprie ragioni*, in F. Coppi (ed.), *I delitti contro l’amministrazione della giustizia*, 1996, 635 et seq.

A public power "operate" through "public officials" or public servants, and a public official must play his role, i.e. he should separate his private roles and his public role.

This separation is not only important *but also essential* for the *pure existence* of a *res publica*, a functioning community as we understand and need it today.

Incidentally, the separation of roles is not only essential to understanding the corruption criminal offences, but also important for understanding other criminal offences where the perpetrator falls into a "simpler" and "more private" role, such as, for example, the criminal bankruptcy fraud and, especially now, the criminal breach of trust (in German: *Untreue*) in the field of a business management.

The public officer, who is "bribed", disregards this separation between his private roles and his public role. He falls back into a more primitive role, the "private law" role of trade and exchange[47], and this regression has a significance that even calls into question the mere existence of a functioning public administration (in the broader sense[48]).

For *Urs Kindhäuser*, "essential to corruption (...) is a contradiction between the interest which the agent has to fulfil on account of his particular duties and the interest to which he attaches by accepting the unduly benefit". Corruption represents an "attack form" that "always stresses a conflict of interest between the principal and the agent"[49].

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[47] It's unanimously acknowledged that the activity of trading and exchange of utilities existed and was one of the main human activity as early as in prehistoric times, long time before the emergence of the public powers in the proceeding of the human civilisation. See above all, C. RENFREW, *Trade and Culture Process in European Prehistory*, in *Current Anthropology*, 1969, 151 et seq. ; P.L. KOHL, *The archeology of trade*, in *Dialect Anthropol.*, 1975, 43 et seq.

[48] Under "administration" is to understand the whole public duties and activities, that is, in the language of the 19. century, especially in continental Europe, the "State".

[49] U. KINDHÄUSER, *ZIS*, 2011, 463. See Law Commission, Consultation paper No. 185. Reforming Bribery, in www.lawcom.gov.uk, 31 oct. 2007, § 4.42; A. SPENA, *La corruzione tra privati e la riforma dell'art. 2635 c.c.*, in *Riv. it. dir. proc. pen.*, 2013, 690 et seq.

The Section 3 of the Bribery Act 2010, UK, indicates the conditions that make an act 'improper' under the law of bribery: it is expected that the person performs the function or the activity (also alternatively) "in good faith", "impartially" and "in a position of trust". The advantage of these criteria is that they underline the moment of discretion of the defendant's action and that they can also be used for corruption in the private sector. These criteria are, however, too extensive as they can be

Such an understanding of corruption collects, as conflict of interests, a broad range of breaches of duty that subjects one's own interests to one's own - such as in the case of criminal breach of trust or embezzlement - which go far beyond corruption and, in extreme cases, concern every breach of duty and therefore every criminal offence and every wrongdoing at all.

The *proprium* of corruption, i.e. its specific characteristic, however, is not only the conflict of interests, and not only the unauthorised enrichment, but the predominance of the "private" role of exchange or trade over the "institutional" role that obligates the agent to administrate the institution (be it a "public" or a "private" institution) *in the interest of the institution itself*.

Corruption - even in the "private" sphere - has always to do with managing an "institution" and neglecting the interest of the institution in favour of the "private" interest of the offender *of exchange or trade*[50]. As I said, the "regression" of the "public officials" (or in the case of corruption "between private persons", the manager for running a business of a corporation) to a more "primitive" role.

In the case of corruption, the perpetrator acts with administrative powers that would have been used in the interests of the administered institution, as if those powers were their own "belongings". The manager or representative of an institution (be it public or a private institution such as a company) treats the powers given to him as his own as far as he “sells” them and, in return, receives an advantage or

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applied not only to corruption but to a wide range of very different offences and therefore they do not properly define corruption.
These above indicated approaches - in terms of explaining corruption crimes - are related to the “Agency theory” (S.A. ROSS, *The economic theory of agency: The principal's problem*, in *American Economic Review*, 62 (2), 1973, 134 et seq.; B.M. MITNICK, *Fiduciary rationality and public policy: The theory of agency and some consequences*, Paper presented at the 1973 Annual Meeting of the American Political Science Association, New Orleans, LA, in *Proceeding of the APSA*, 1973; M. JENSEN, W. H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, in *Journal of Financial Economics*, 1976, 305 et seq.). This theory was conceived for the theory of contracts, the corporate organisation and in general to the hierarchical organisations, including public ones, because it focuses on the problem of information asymmetry and hierarchical relationships. In corruption, however, there is not properly a problem of hierarchy or "obedience" but, instead, that of the illegitimate "replacement" of a role with another.
For considering the moment of omission in corruption offences, particularly the omission of a lawful administrative acts, see M. BÖSE, *ZIS*, 2018, 122.
[50] U. PIOLETTI, *NZWiSt*, 2016, 249 et seq.

utility as a “prize”. The perpetrator acts "under private law" with "his" - entrusted to him - powers. Here is briefly mentioned that it is possible in private law, to dispose not only about things but also about the right to disposal (such as rights of use).

This separation between "private" and "institutional" roles is so important that their non-observance - also the trade with institutional powers - is punished, even if there is no objective impairment of public function, as in the case of the so-called “spurious corruption” formerly known in Italy[51] and as in the case of “granting an advantage” in Germany[52].

The negative significance of the unlawful behaviour is followed by the punishment, which also (like the unlawful behaviour) is a significance, a "significative expression" that values the unlawful behaviour "definitively", i.e. evaluates “publicly" the behaviour in a factual and therefore not debatable way.

6. *The separation between accepting advantage and corruption. Corruption in the true sense and in the broader sense. Corruption in business criminal law: criminal bankruptcy, criminal breach of trust and insider trading. Damage, outcome and punishment*

Traditionally, the category of corruption offences has been understood primarily as corruption in the public service or sector, but now also includes corruption in the private sector or in the management of companies.

As already mentioned, the word "corruption" could also be used in an expanded sense, as a simple and general disregard for a "higher" role and as a regression into a "more private" role, and that without exchange or trade of institutional powers.

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[51] Now, after the reform of 2012 (Statute No 190/2012), “*Corruzione per l'esercizio della funzione*”, art. 318 c.p. (Italian Penal Code). Also after the reform receiving a bribe in exchange of a proper performance or function remains a criminal offence (Cf. Cass. Sez. VI, n. 4486, 11.12.2018, Rv. 274984; Cass. Sez. VI, n. 51765, 30.07.2018, Rv. 277562; Cass. Sez. VI, n. 51765, 13.07.2018, Rv. 277562). See, above all, T. PADOVANI, *Metamorfosi e trasfigurazione. La disciplina nuova dei delicti di concussione e corruzione*, in *Arch. pen.*, 2012, 783 ss; G. AMARELLI, S. FIORE, *I delitti dei Pubblici Ufficiali contro la Pubblica Amministrazione*, 2018.

[52] §§ 331 and 333 StGB (German Penal Code). This is the situation also in UK (Bribery Act 2010) and US criminal law (Cf. US v Sun Diamond Growers of California 526 US 398, 1999). Cf. J. HORDER, *Ashworth' Principle of Criminal Law*, 9th ed., 2019, 439 et seq.

In this broader sense, a case of "corruption" also corresponds to the criminal bankruptcy, because the entrepreneur disregards his role as administrator of an institution like a company that has its own interest (the interest of the enterprise itself) and instead serves his "private" interest.

In the same way, the offence of criminal breach of duty (*Untreue*) is to be understood - especially, but not exclusively, in the case of breach of duty in corporations. Even in the case of insider trading, the offender does not consider his role as an investor in a "public" capital market and falls back on his role as a private person.

In each of the above cases, the perpetrator "corrupts" an institution: in criminal bankruptcy and criminal breach of duty, the perpetrator corrupts the "institution" enterprise, which as such needs an administration that is directed towards the purposes of the satisfaction of the interest of the enterprise itself. These purposes are the economic "health" of the company; this health means the functionality of the enterprise, which is socially recognised as an institution that creates wealth or prosperity or, in other words, "objective profit". Otherwise, in the case the company destroys wealth, the enterprise must ceases (if necessary in a mandatory way) its activity[53]. In insider trading, the perpetrator corrupts the institution of the "public" securities and stocks market, which needs investors for its existence, who only use information that is "publicly" available[54].

[53] Cf. U. PIOLETTI, *Lineamenti di uno studio sulla bancarotta*, 2015, *passim*.

[54] The "existence" of a protected *Rechtsgut* is even more contested by the criminal offence of insider dealing as by corruption. For W. WOHLERS, *ZStW*, 125 (2013), 474 et seq., for instance, by insider trading is punished only an immoral behaviour. For G. STRATENWERTH, in *FS Vischer*, 1983, 667 et seq., the offender, in the case of insider trading, is valued like a usurer, i.e. es a person that exploit an unlawful position. In my opinion the reason for the incrimination (the *Rechtsgut*) consists in the circumstance that the offender leaves the role of investor that as such is obliged to use exclusively public information and avail one self to use "private" informations, i.e. informations that derivates from a different role than the role of the "anonimous" investor. Cf. U. PIOLETTI, *Lex mercatoria e diritto penale*, in *Indice pen.*, 2017, 478 et seq.
See also S. SEMINARA, *Insider trading e diritto penale*, 1989; A. MANNA, *Tutela del risparmio, novità in tema di insider trading e manipolazione del mercato a seguito della legge comunitaria del 2004*, in *Riv. trim. dir. pen. econ.*, 2005, 659; L. FOFFANI, voce *Abuso di informazioni privilegiate*, in F. Palazzo, C.E. Paliero (ed.), *Commentario breve alle leggi penali complementari*, 2007; F. SGUBBI, *Abusi di mercato*, in *Enc. dir.*, *Annali*, vol. II, 2008, 11 et seq.

Corruption offences (scilicet, as "official offences") were traditionally divided into so-called "real" and "spurious" corruption offences in Italy.

The distinction lies in the legality, or legitimacy, of the administrative act. In case of the criminal offence of “granting an advantage”(§§ 331, or 333 German Penal Code, StGB, art. 318 Ital. Penal Code, c.p.) the wrongdoing consists "only" in the failing of the separation of the roles (the “sale” of public power), but does not consist in the illegitimacy of the administrative act performed by the public servant. In the case of bribery (§§ 332, or 334 StGB, art. 319 ital. penal code, c.p.) the wrongdoing consists also in the illegitimacy (i.e. the not serve the public interest) of the administrative act. Precisely for this reason, the latter - the corruption offence in the true sense: bribery - is everywhere valued as more serious and treated consequently.

The existence of a damage is not insignificant in criminal law, but it is also not essential, i.e., in criminal law, the existence of a damage - in contrast to civil law, but also to other "non-punitive" areas of law - is not constitutive.

This has nothing to do with the "essence" or “nature” of the criminal law *norms*, but with the "essence" or “nature” of criminal law *sanctions*. The “inherent necessity” that differentiate criminal law from all the other field of law lies in the "mechanism" with which the law restores the disappointed expectations. As the non-punitive areas of the legal system restore disappointed expectations by restoring "lost" material benefits (“goods”), these areas of law can only restore ("protect") expectations that are related to individual material "utilities" (“Rechtsgütern”).

Since criminal law and, more generally, punitive law, reestablishes the expectations in a “symbolic-communicative" matter, the criminal law does not require a "damage" and can also confirm, or “protect", expectations that refer to mere behaviours.

In this respect, the requirement of a damage in the criminal law seems rather to be a "selection mechanism" (a system-required "saving" of punishment and therefore of suffering: extrema ratio principle) as a strict functional necessity, as is the case in other areas of law. Not infrequently, it is well known that the presence of material harm or damage (as "outcome") is a condition, together with the

forbidden behaviour, of the existence of the criminal offence, e.g. in the case of the most negligent criminal offences like the involuntary manslaughter. In other cases, such as in the attempted criminal offence, the absence of the damage, or of the outcome, determinate a reduced sentence (in Germany the reduction is a possibility, in Italy it is mandatory).

Regarding the distinction between bribery and granting of advantages (in Italy "real" and "spurious" corruption, now “corruption for the exercise of a function”), the situation in Germany and Italy was the same, especially before the recent reform of 2012[55].

The most striking difference was - and, as we shall see, in a sense, it still lies - in the presence of another offence in the sections on the offences in office in the Italian Penal Code; this "Italian" official offence is the "extortion or blackmail in office" (art. 317 of the Italian Penal Code, c.p.), a criminal offence that derives its name from the late Roman "*concussio*"[56].

The existence of blackmail in office has traditionally found wide application in the practice.

The reasons are partly formal and partly substantial.

In procedural terms, the indictment of the office of extortion in office offers proof advantages for the prosecutor: where there is no "*pactum sceleris*" (criminal agreement) and where the "private" is a victim and not a perpetrator, he has no interest in concealing the illicit "business".

The risks are obvious, and these are the disadvantages that always arise when the substantial law is deviated in favour of the procedural law. Particularly dangerous are the procedural abbreviations when they are made in favour of obtaining evidence.

[55] Italian Statute No 190/2012.

[56] See, above all, T. PADOVANI, La concussione, 1970; R. RAMPIONI, *Bene giuridico e delitti dei pubblici ufficiali contro la pubblica amministrazione*, 1984; A. STILE, *Amministrazione pubblica (delitti contro la)*, in *Digesto pen.*, vol. I, 1987, 129 et seq.; L. STORTONI, *La nuova disciplina dei delitti contro la pubblica amministrazione: profili generali e spunti problematici*, in *Studi in onore di G. Vassalli*, vol. I, 1991, 519 et seq.; G. INSOLERA, *Corruzione e concussione nella riforma del diritto e del processo penale*, in *Studies in ricordo di G. Pisapia*, vol. I, 2000, 661 et seq.; A. MANNA, *La scissione della concussione in due fattispecie distinte, nell’ambito di un quadro d’insieme*, in *Arch. pen.*, 2013, 13 et seq.; F. GIUNTA, *Prima lettura della legge anticorruzione 6 novembre 2012, n. 190*, in *Giust. pen.*, 2013, 276 et seq.

But there are also substantial reasons for the existence of the above-mentioned criminal offences of extortion in office in the Italian Penal Code. In fact, there can be no doubt that in concrete social events there are often cases where the private person is put in a position by a public official, where he has practically no other choice, unless he follows the unlawful wishes of the public official.

Of course, this is not always an absolute coercion or duress, but often a relative coercion or duress. The legal system on the other hand (and not only the Italian) has for centuries known this fact of "relative" duress in the field of property crime and indeed in the case of extortion. An extortion in the office under the application of the general extortion rules is not only not excluded in the German legal system, but also long been known, even if not used in the practice very often.

The Italian criminal code is, in terms of the facts of the extortion in office, in any case, quite isolated[57]. The Italian regulation on extortion in the office was considered outside Italy (and by some voices also within Italy) as a an unfortunate legal provision, because it contained the danger of mistaking sometimes the private person that bribes a public official as a victim rather than a perpetrator. During the past years the demands of international organisations on Italy to abolish , or at least to limit, the provision of extortion in office have increased.

With the 2012 reform, the Italian legislator has at least partially followed these requirements and has presented a comprehensive reform of the corruption offences[58].

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[57] See G. FORTI, *L'insostenibile pesantezza della "tangente ambientale": inattualità della disciplina e disagi applicativi nel rapporto corruzione-concussione*, in *Riv. it. dir. proc. pen.*, 1996, 476 et seq.

[58] With the Statute 6.11.2012, n. 190, Italy has followed up on international commitments entered into with the "Criminal Law Convention on Corruption", made in Strasbourg on 27.1.1999, already ratified with Statute 28.6.2012, n. 110, and with the "Convention against corruption", adopted by the UN General Assembly on 31.10.2003 with the Resolution No. 58/4 “Merida Convention”, already ratified with Statute the 3.8.2009, n. 116.
About the “new” art. 319 quater c.p. (Italian Penal Code) see, above all, E. DOLCINI, *Appunti su corruzione e legge anti-corruzione*, in *Riv. it. dir. proc. pen.*, 2013, 527 et seq.; P. PISA, *Una sentenza equilibrata per un problema complesso*, in *Dir. pen. proc.*, 2014, 568 et seq.; G. FIANDACA, *Concussione e induzione indebita tra fatto e prova*, in *Foro it.*, 2014, II, 551 et seq.; M. PELLISSERO, *Amministrazione pubblica (delitti contro la)*, *Enc. dir.*, *Annali*, vol. VII, 2014, 48 et seq.; R. BARTOLI, *Le Sezioni unite tracciano i confini tra concussione, induzione e corruzione*, in *Giur. it.*, 2014, 1208 et seq.; M. DONINI, *Il corr(eo) indotto tra passato e futuro. Note critiche a SS.UU., 24*

After the reform, the traditional corruption offence of accepting of unduly benefits (Article 318 of the Italian Criminal Code) and bribery (Article 319 of the Criminal Code) remained practically unchanged. Even the facts of extortion in office has remained, with a tighter formulation and indeed with the absence of one of the two behavioural possibilities. The coercion, duress - or compulsion - has remained, the "induction" has disappeared.

It is, of course, a matter of interpretation, what does coercion mean, and in particular to decide, whether "*facta concludentia*" (i.e. an implicit but unambiguous behaviour, or a meaningful unduly omission) also constitute or not coercion, duress or compulsion.

The real novelty of the reform, on the other hand, is the creation of a new offence (article 319 quater of the Italian criminal code); it is, as we will see, a kind of "quasi coercion in office".

This new criminal offence is characterised by the behaviour of induction. "Induction" is intended to describe the behaviour of a public official who "instigates" a third person to give him benefits. The special charcteristc of this fact is that the "instigated" person is not judged by the law as a victim, but as a perpetrator, albeit with a lesser responsibility, i.e. the private person is less punished than the public official who "instigated" him to give the advantage for himself or for a third party.

7. *The new "quasi" extortion in the office of the Italian Penal Code. Corruption between private or "economic corruption". Criminal bankruptcy and criminal breach of trust. The company as an institution*

The interpretation of such an offence is not easy. The jurisprudence - as always, when a conceptual ("theoretical") solution

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ottobre 2013 - 14 marzo 2014, n. 29180, Cifarelli, Maldera e a., e alla l. n. 190 del 2012, in *Cass. pen.*, 2014, 1482 et seq.; A. SESSA, *Concussione e induzione indebita: il formante giurisprudenziale tra legalità in the books e critica dottrinale*, in *Dir. pen. contemp.*, 2015, 1 et seq.; G. BALBI, *Sulle differenze tra i delitti di concussione e di induzione indebita a dare o promettere utilità*, in *Dir. pen contemp.*, 2015, 1 et seq.; A. FIORELLA, S. MASSI, *Opportunismo del privato e malaffare nella pubblica amministrazione: un dibattito sulle figure del concusso, dell'indotto punibile e del corruttore*, 2016; A. MANNA, *Differenze tra concussione per costrizione e induzione indebita ed ulteriori problematiche circa i delitti dei p. u. contro le P. A.*, in *Riv. trim. dir. pen. econ.*, 2017, 114 et seq.

has not yet been found - decides predominantly so far "case by case" and, in general, can perhaps be noted a trend toward the limitation of the area of application of the extortion in office in favour of the application of the offences of corruption or of the new offence of quasi extortion, particularly when the "private giver" takes an advantage of the undue public act[59].

The new quasi-extortion in office seems to be a disposition in the case of "seduction" of a private person by a public official. However, according to the expression of the offence, it is not necessary for the "private giver" to gain unlawful advantages through the behaviour of the public official. On the other hand, in this case also the "seduced" is wrong, albeit with a diminished responsibility.

In essence, the new offence appears to be a new figure of corruption in which the main responsibility is always attributed to the public official[60], mainly because the latter took the initiative and abused his power towards the private individual, despite the fact that the basic rule in Italy requires that both sides of the illicit business are in principle punished with the same punishment.

It should be added that, in any case, the penalty for bribery and corruptibility (in Italy so-called active and passive corruption), of course, does not have to be the same, because the punishment must be always commiserated with the crime. Of course, this also applies to so-called "bilateral" offences, such as corruption offences, according to the general rules of sentencing.

In any case, the introduction of the above mentioned fact of quasi-extortion in office can not mean that the private person has the duty to resist the constraining public official. Such an interpretation of the criminal offence is contrary to the system (and as such

[59] Cf. Cass. Sez. un., n. 12228, 24.10.2013, Rv. 258473. See the literature above note 58.
Cf., more recently, Cass. Sez. VI, n. 8963, 12.02.2015, Rv. 262503, that, in any case, demonstrate that the (by the lawmaker desired) reduction of the application area of the extortion in office is not be achieved because the sentence affirm that the least criminal provision must be applied also in the case that the private giver take an advantage of the undue public act as long as the latter remain marginal compared to the unjust threatened damage.
[60] This is always the case in the German Penal Code for the serious case of corruptions, see §§ 332 and 334 StGB (German Penal Code).

unconstitutional because of the violation of the principle of equality - reasonability) due to the presence of the extortion.

In other words, it would require an unlawful interpretation of the legal provision (for infringement of the principle of equality or reasonability) that in the case of coercion perpetrated by a private individual, the compelled person has no duty to resist, whereas in the case of coercion perpetrated by an official, the private person is obliged to resist.

In corruption between private, i.e. in the case of the management of a corporation, the Italian legislator has created[61] a new criminal provision in the Italian Civil Code (art. 2635 of the Italian Civil Code, c.c.)[62], which, until the Statute n. 3 of 9.1.2019, was designed like an offence which cannot be prosecuted without a complaint by the victim. That is why this offence works more or less like a remedy to obtain, by penal means, an economic compensation from the perpertator.

Corruption in the corporate sector (so-called "economic corruption") follows, as I said, the same logic as that of corruption in the public sector. This is a further proof that the company is an "institution" that embodies a different interest than that of the entrepreneur as a person. This, in turn, means that corruption in corporate management should also include, *de lege ferenda*, the "selling" of corporate interests on the part of the individual business owner[63].

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[61] With the Statute (Decr. legisl.) n. 61 of 2002. The legal provision of art. 2635 c.c. (Italian Civil Code) was therefore modified by the Statute n. 190 of 2012, n. 202 of 2016 (Decr. legisl.), n. 38 of 2017 (Decr. legisl.), and n. 3 of 2019.

[62] See, above all, F. GIUNTA, *La riforma dei reati societari ai blocchi di partenza. Prima lettura del d.lgs. 11 aprile 2002, n. 61 (II parte)*, in *SIur*, 2002; V. MILITELLO, *Corruzione tra privati e scelte di incriminazione: le incertezze del nuovo reato societario*, in R. Acquaroli, L. Foffani (ed.), *La corruzione tra privati*, 2003; R. ZANNOTTI, *La corruzione privata: una previsione utile nel nostro ordinamento? Riflessioni su un dibattito in corso*, in *Indice pen.*, 2005; L. FOFFANI, *sub art. 2635*, in *Comm. Palazzo, Paliero*, 2. ed., 2007; A. ROSSI, *L'infedeltà a seguito di dazione o promessa di utilità*, in Antolisei, *Manuale di diritto penale. Leggi complementari*, I, 13th ed., C.F. Grosso (ed.), Milano, 2007; S. SEMINARA, *Il gioco infinito: la riforma del reato di corruzione tra privati*, in *Dir. pen. proc.*, 2017, 713 et seq.

[63] For the punishability *de lege ferenda* of corruption also in the individual enterprise cf. K. VOLK, *Die Merkmale der Korruption und die Fehler bei ihrer Bekämpfung*, in *Gedächtnisschrift für Heinz Zipf*, K.-H. Gössel, O. Triffterer (ed.), 1999, 419 et seq., A different opinion in U. KINDHÄUSER, *Voraussetzung strafbare Korruption in Staat, Wirtschaft und Gesellschaft*, in *ZIS*, 2011, 463 et seq.

It should be added that a corruption act of the company representative is considered a violation of the Business Judgment Rules, i.e. an administration of the enterprise against the interests of the enterprise "in itself"[64], and this offence fulfil also, in the case of a bankruptcy opening, a criminal bankruptcy offence.

Criminal bankruptcy and criminal breach of trust are more general norms than corporate corruption. This last criminal offence present in addition the special characteristics the consist in the regression of the offender on the "private" role of exchange or trade. All three criminal offences have in common the unfaithful administration of a company.

As we have seen, trade or exchange is much older than the public institutions (and the role of public servant) and is also much older than the emergence of the "private institution" enterprise or corporation.

Public power is a later achievement of the human societies that used to be organised horizontally or fragmentarily in the early times of the history of the mankind, and this happened all over the word. Corruption is not the mere not-to-serve an institution, corruption is rather a qualified not-to-serve. Corruption is a regression of the public servant (or person in charge of managing an enterprise or corporation)

The fact that the German Statute of 21.1.2015 (see G. DANNECKER, T. SCHRÖDER, *Neuregelung del Bestechlichkeit und Bestechung im geschäftlichen Verkehr. Entgrenzte Untreue oder wettbewerbskonforme Stärkung des Geschäftsmodells?*, in *ZRP*, 2015, 48 et seq.) emphasises, in the context of corruption in company management, the violation of the duties of the person responsible for running a company against the company itself confirms, in my view, that this form of corruption is also primarily about the separation of "private" and "institutional" roles - namely, the protection of the "company interest" (the business's economically meaningful "management": Business Judgment Rule, see K. TIEDEMANN, *Wirtschaftsstrafrecht*, 5th ed., 2017, 14, 195, 265, 566) - and not for the protection of the corporate counterparts.

[64] W. RATHENAU, *Vom Aktienwesen. Eine geschäftliche Betrachtung*, 1917, has shaped this term in correlation with predominantly economic-political and not juridical considerations with special attention to the problematic of large-scale corporations. In my understanding, the concept of "corporate interest", or of "enterprise interest", in the interpretation of central offences of economic criminal law, such as criminal bankruptcy and criminal breach of trust, is not to be confused with the "economic interest" of a "nation" or only a "region", but *it is an expression of the internal logic of function of the company as "institution" in the social context*, and this understanding of course corresponds to the "social benefit" of the company. The explanatory power of the term in the area of law unfolds its significance precisely with regard to the interpretation of criminal bankruptcy and criminal breach of trust. See U. PIOLETTI, *Lineamenti di uno studio sulla bancarotta*, 2015, 355 et seq. and *passim*.

into a more simple role: the "older" and "more private" role of an individual than manage exchange or trade.

Here lies the essential difference between the criminal offence of corruption and that of criminal bankruptcy and also between the criminal offence of corruption and that of criminal breach of trust in the corporate sector. Even in cases of criminal bankruptcy and criminal breach of trust, the perpetrator does not serve the institution (the institution of the enterprise or corporation) but himself as a private person. Again, there is a conflict of interest; but it lacks the trade or exchange and indeed the trade or exchange of administrative powers. Therefore, the conflict of interest is not what qualifies the criminal offence of corruption, but the criminal offence of corruption is qualified by the exchange in the interest of the agent against the "objective" interest of the administered institution (be it a "public" or a "private" institution, i.e. an enterprise or corporation).

This institution can - and this is the novelty of the regulation on private sector corruption - also be a formally "private" institution. At this point it must be stressed that the legal system differentiates and regulates between the "privacy" of an individual with their "own" interest and between the "privacy" of a company that as such (even if it has no "legal personality") "embodies" an institution. This is what distinguishes the "private" institution of company, which has its own interest, which is traditionally protected by law with the criminal provision of bankruptcy and now more and more with the criminal provision of breach of trust. This “corporate interest” consists in continuing the "life" or "activity" of the enterprise itself as an institution that creates wealth - or, in other words, richness or economic goods.

The central role that the criminal offence of bankruptcy has played for several centuries as the guiding principle of corporate management has recently been undermined more and more by other criminal offences.

The most important criminal provision in this regard is the criminal breach of trust. It is an offence that has now - at least in the German legal system - the role of the central criminal offence of the economic criminal law. As a qualified form of criminal breach of trust, the criminal provision of corruption in the private sector also plays an important role. It should be emphasised at this point that both offences and corruption in the private economic activity - especially in Italy,

where these facts are still in an "embryonic" form - when applicable (and in particular in the case of the existence of the objective condition of criminal liability), are covered by the “general" criminal provision of Bankruptcy in the case that the company is declared insolvent.

8. *The question of the advantage or benefit in corruption offences. Criminal law as precursor of morality?*

Crucial for the interpretation of the criminal provisions of corruption is, of course, the concept of “advantage" or “benefit”.

In which measure are favours allowed? And, in particular, in which measure are "exchanges of favours" allowed, which concern “public services” and “public powers”?

The law, and the criminal law in particular, can and should not, as we know, cover everything that is not desired: in particular, criminal law - which, as we have seen, has no "internal boundaries" like the other fields of law - should be used as an *extrema ratio*. In this respect, obviously the limits of acceptance vary depending on the country (depending on "regional morality")[65]. And even if the criminal law wants to act as a precursor or a forerunner of morality, or as an innovative force of society, it must always keep the *extrema ratio* principle in mind. This means that too much discrepancy between criminal law intervention and what is practiced and experienced by the society carries with it the risk of delegitimisation of the entire system because it makes the individual punishment appear like arbitrary and

[65] This is a domain of the “objective imputation theory” that applies not only to offences which legal provisions are characterised by the description of a causal link with an event or outcome, but also to the all offences (to those of “mere behaviour”, too), because no legislative description can eliminate the need for evolution and adaptation to the concrete case of “interpretation”. In this sense all legal provisions are “open provisions”. For the concept of “open provisions”, however limited to some provisions, i.e. those with the description of a causation and an event, see C. ROXIN, *Offene Tatbestände und Rechtspflichtmerkmale*, [1957], 2nd ed., 1970.
To impute an offence, the defendant must be “competent” for the control of the external situation described by the legal provision. To evaluate the subject's “competence”, it is necessary to consider the entire social context in which the subject "acts" and not only his individual "microcosm" - his “body movement” - in relations with the legal provision. See already, in this sense, U. PIOLETTI, *Contributo allo studio del delitto colposo*, cit., 47 et seq.; 94 et seq.; 179 et seq.; U. PIOLETTI, *Causalità (rapporto di)*, in *Dig. pen.*, vol. IV agg., 2008, 82 et seq.; 85 et seq. For the application to legislative provisions that describe conduct and not just a causal link, above all, U. PIOLETTI, *Esercizio arbitrario delle proprie ragioni*, in F. Coppi (ed.), *I delitti contro l’amministrazione della giustizia*, 1996, 642 et seq.

purely random. In other words, in such a case, punishment appears more like a misfortune than like a guilt and, as such, like a deserved punishment.

9. *Law and moral. Social and "moral" change through punishment. Limits and possibilities of criminal law*

Finally, we come briefly to the distinction between law and moral. There are, as it is well known, behaviours that are (still) lawful, but which are considered immoral. Moral in social, i.e. in the objective or external sense, is to be understood as a flanking norm system, as an informal norm system, side by side to the formal norm system, namely the legal or law system.

Law and moral live side by side, and they can not live together for long periods in mutual contradiction. This also means that the function of morality should also be seen as a pioneer or forerunner of the law, i.e. like a preparation of legal changes. What used to be considered a mere “nepotism” must, as the evolution of a society goes on, be regarded as plain corruption, and moral acts as a warning signal in this case like in other cases.

Historia non facit saltus. European countries, like the countries all over the word, have different "habits", they simply have different social development; it is not possible to abolish old "habits" suddenly, not even with criminal law instruments. One can “accelerate" the development with criminal law sanction[66], but not beyond a certain extent, especially if, as in the case of corruption, "milder" legal means (such as civil law, which precedes, as we have seen, "from below" or “diffusely") are obviously lacking.

[66] For the purpose of discourage and of combatting corruption, the Italian legislator has increased the range of punishment for the serious corruption (so-called true corruption, art. 319 c.p., Italian Penal Code, *Corruzione per un atto contrario ai doveri d’ufficio*) from the originally (Penal Code of 1930) two up to five years imprisonment to five up to eight years (Statute n. 190/2012) and, successively, up to six to ten years imprisonment (Statute n. 69/2015). The statutory prescription period were extended too, and a mitigating provision like the domiciliary arrest for convicted older than 70 by the execution of punishment were restricted (Cf. Statute n. 3/2019). In comparison, the maximum penalty for serious corruption in the German Penal Code (§ 332 StGB, *Bestechlichkeit*) amount to six months up to five years of imprisonment and, for the “private” (§ 334 StGB, *Bestechung*) to three months up to five years.

The civil means consist in the creation of "subjective rights", that is, that the civil "protection" acts on the social institutions through the autonomous initiative of the individual acting in his own interest. Of course, it is necessary for the functioning of the civil remedies to have isolatable and replaceable interests of individuals. This is not always the case and this is often one of the reasons (as in the case of corruption) of the indispensability of criminal intervention.

Despite the structural inadequacies of the legal remedies (of any legal remedy), one must still try to foster the development towards a more advanced society. In this regard, of course, the role of criminal law is not only important but indeed indispensable. But one can go ahead with the criminal law only if at least at the same time the whole society (the moral of the society) move in the direction of a more developed level[67].

Abstract

In order to understand corruption offences the civil law perspective is not very useful, because in this perspective an offence is necessarily the infringement of a good as a material utility dependent on a wrongful

[67] Another important condition for the acceptance of a social moral that regards corruption as a wrongdoing is that the public power, i.e. the politics and the public administration, are committed to the well of the whole people and that they are really perceived so by the people.
Otherwise the corrupted person can indeed present himself as more close to the people than the politics or the administration can do. Paradoxically and also tragically, in that way, the corruption presents itself as more “democratic” and close to the concrete interest of the people. And the “politics” and the administration, in that way, are defamed as “abstract” and “far away” from the people.
On the contrary, corruption and democracy (in the truest sense) can not coexist in any way. Corruption favours the rich to the detriment of the not rich. Corruption damages particularly the new generations and in this way steals the future of a Country. Corruption favours the few that have rich and influential parents and relatives to the detriment of those who do not have, or to the detriment of those who do not have parents or relatives which are disposed to pay (in any form) bribes. Corruption damages particularly the good and the bright of a Country. Corruption does not only compromise the future of a society, but makes the whole society regress. The criminal law remedies are essential against the single episode of corruption; the best “medicine” for a society, whose inner values reject from the beginning the corruption, is authentic democratic politics and administration, i.e. politics and an administration that work for the whole people.

conduct. The criminal offence however is primarily a meaningful action, a disappointing behaviour, and not primary and necessary the impairment of a material utility that also can not be present. The dynamic of criminal law may be understood only at the level of the significance of the act and not at the level of the individual benefit or damage. As far as the criminal law is concerned, that what is decisive, is the objective significance of the behaviour of the defendant in the social context. The act of corruption means that the offender does not adhere to a "public" role and that he falls into the "private" role of exchange or trade. The public officer, who is "bribed", disregards this separation between his private roles and his public role. He falls back into a more primitive role, the "private law" role of trade and exchange. Corruption - even in the "private" sphere - has always to do with managing an "institution" and neglecting the interest of the institution in favour of the "private" interest of the offender of exchange or trade. The significance of the various types of corruption, particularly the corruption without and with “damage”. The paper deals with the problem of the extortion in office and the new "quasi" extortion in the office of the Italian Penal Code and it deals also with the relationships between corporate corruption and Criminal bankruptcy. Regarding the relationship between law and moral, the paper affirms that moral in social, i.e. in the objective or external sense, is to be understood as a flanking norm system, as an informal norm system, side by side to the formal norm system, namely the legal or law system. Law and moral live side by side, and they can not live together for long periods in mutual contradiction. This also means that the function of moral should also be seen as a pioneer or forerunner of the law, i.e. like a preparation of legal changes.