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8th INTERNATIONAL ANTI-CORRUPTION CONFERENCE

The Papers

Monitoring the Assets and Lifestyles of Public Decision-Makers Can it be Make to Work?

Gherardo Colombo

1. The nature of corruption -judicial experience "Mani Pulite"

In Milan, where I carry out the role of Public Prosecutor's Assistant of the Republic, there are very vast investigations into corruption still underway. These investigations have involved more than five thousand people, amongst which are four ex Presidents of the Cabinet, more than a hundred of ex or actual parliamentarians, ministers, mayors of large and small cities, members of control organisations, magistrates, officials of the tax police, public and private entrepreneurs and so on. From the investigations it has emerged, in substance, that corruption in Italy has become a system through which to have relationships with public administration.

Italian penal law foresees various types of corruption of public officials or civil servants, as well as crimes against public administration. In practically all the cases, the crime ascertained consisted of corruption directed at obtaining the behaviour of a civil servant contrary to the duties of his office in exchange for the payment of a sum of money. Frequently there have been contributions to the commission of the crime even by political figures of notable standing who have been able to condition the behaviour of civil servants. The sectors involved in corruption have been those of public contracts, monitoring of public administration activities, and tax evasion control.

The money obtained in this way has sometimes been destined to sustain expenses by political parties (nearly all the parties have been secretly financed by corruption). Many times it has gone to enrich people, civil servants or politicians who have committed the crime.

The crime of corruption necessarily requires the participation of at least two people: one that pays the money to obtain the favour, and one who receives it in order to carry out the act contrary to his duties. Generally the act contrary to the duties of office, which constitutes the counterpart in the corruption, is formally regular and consequently the systems used to favour the corrupter do not emerge from an analysis of him. Proof of corruption, therefore, can come from the following roads: indirectly, the consequences of the public act, when they are incoherent to its aims; directly, the declarations of those who have participated in the commission of the crime (or, very rarely, possible outsiders who are aware of it), financial reasons, that is to say the transfer of money between the corrupter and the corrupted. Very often the latter leave traces in bank documentation between the two subjects, or they can be supposed on the basis of the living standards of the corrupted civil servant (or politician) which are beyond the means of his lawful income.

2. Ways to prevent corruption

If corruption is systematic, it is illusory to think that the phenomenon can be addressed exclusively via penal repression. This, in fact, is adequate to address marginal criminality, but not widespread criminality to the point where it becomes a system. Sure, penal repression is always useful, but when unlawfulness is particularly widespread this alone is not enough to reduce the deviance to within acceptable limits.

From the system of corruption one emerges through a deep modification of the citizens' deep-rooted convictions. Only if the all

citizens consider that exchanging public functions for money is so inconvenient can corruption be limited. In order to obtain this result it is useful to introduce among other things, rules which prevent corruption as much as possible. It is in fact obvious that rules which make more difficult obtaining an advantage deriving from the commission of acts contrary to one's duties influence convictions because they make corruption less appealing. The same rules, on the other hand, serve to check the phenomenon even if, for the period of time the culture remains unchanged. If it is more difficult to corrupt or be corrupted, and if it is easier to be discovered in cases where one corrupts or is corrupted, the number of people prepared to commit this crime decreases necessarily.

There are various ways to prevent corruption. Even the public servants' level of salary is definitely of importance, because if salaries are so low as not to allow a standard of life proportionate to the office, the temptation to receive money unlawfully is obviously greater. But an adequate salary alone is not sufficient to avert the danger of decision makers falling into temptation. Indeed we have been able to verify that on many occasions people have been corrupted whose lawful income was particularly high. Frequently in fact, unlawfully received money is destined to unnecessary expenses (such as the purchase of a car or luxury boat, large prestigious apartments, precious jewel and so on) or even to acquire power. Therefore other measures of prevention are necessary, amongst which it seems particularly effective to be able to verify - independently of the outcome of a trial - the actual economic availability directly or indirectly come to the public decision maker. The risk of being called to justify the goods owned and one's standard of life is in fact a suitable deterrent against corruption. It would be better still, if at the same time, it was possible to confiscate the sums of money or the goods which the public decision maker (or politician able to influence the decisions) does not know how to justify the origin.

3. Ways to repress corruption

The repression of corruption consists of the discovery of crimes already committed and the punishment of the relative guilty parties. As has already been mentioned, given the characteristics of the crime, its commission can be proved through the declarations of the people who participated in it or of whoever may be aware of it, money transfers leading to the corrupter and the corrupted and the availability of the latter. More rarely the analysis of the acts committed by the public decision maker can demonstrate unlawful agreement. If anything, it is the effects of the acts in question which can be of indirect probatory importance. In this way, if the object of the corruption has been - for example - the sale of a building by a public body to a private person, of particular importance is the fact that the price paid was much less than the market value - or contrarily - if the sale was made by a private person to a public body - the excess price compared to its value is of importance.

Corruption is a crime whose commission is generally surrounded by reservedness or secrecy, and it is not easy - at least in a System like the Italian one - for a person guilty of corruption to talk about it. On the one hand in fact he too would suffer sanctions - in Italy the same penalty is given to the corrupted party as to the corrupter - and on the other he would lose the possibility of corrupting or being corrupted again in the future. It is therefore exceptional that committing corruption is brought to the awareness of the judicial authorities through spontaneous declarations.

If corruption is systematic, it is also exceptional that the crime is highlighted through the effects of the act committed by the public decision maker. In fact sometimes the controlling organisms themselves are corrupted, or rather they are superficial in their controls, or the instruments of control used do not allow for effective verification. Of decisive importance therefore is the proof deducible from the financial transactions of the corrupter and the corrupted and the corrupted party's availability of assets. A check into his assets and standard of life would therefore also be useful to repress the acts of corruption already committed.

4. Control of the availability of assets

The effectiveness of the control of the availability of assets presupposes the completeness of the information concerning the availability of assets, and the effective independence of controlling bodies.

From the point of view of the first item, there are various instruments to thwart the acquisition of complete information and they can be adopted both within the Country in which the public decision maker is working as well as on an international level. On an internal level in fact, the assets can be registered fiducially in the name of third parties, so that the person under examination does not appear to be the owner. It is possible to resort to relations, close friends, but also companies whose shares are registered in the name of third parties. Practices of this kind are very simple when the rules of the country in which the public decision maker is working permit anonymity of the ownership of shares or shareholdings, or rather they provide for the institute of the actions to the bearer, or rather fiduciary intermediacy in relations with banks, so that the actual person having economic right to the assets is not identifiable. Whoever has not got the fortune to live in a country which is not so transparent could however very easily turn to the same financial and commercial markets by establishing international relations.

As far as the first item is concerned, the problems posed regard the sphere of the control, or monitoring, and that is to say how far must monitoring be extended in order for it to be effective; the compatibility of the monitoring with the protection of the confidentiality of third parties who are suspected of having fiducially registered property belonging to the public decision maker in their name; the possibility of extending the monitoring to economic-asset relationship established abroad.

- a. in order for the control to be effective it must not necessarily be addressed solely to the availability directly referring to the public decision maker but also to those referable to persons having strong family or marital ties. It has in fact been

noted that the person who receives money unlawfully exercises at least minimum caution, making it seem that the money or property resulting from the crime belong to people closest to him. Very often the money is deposited into current accounts belonging to the husband or wife (less frequently to children, brothers or parents), and the same happens for the registration of property. The control should be extended however to relatives with fiduciary companies held directly by the public decision maker or his close relatives.

- b. as regards relationships with third parties, the themes regard the identification of the latter and the compatibility of the control with the right for their confidentiality. It is to be excluded that in this case a thorough control, and that is to say aimed indifferently at the search for possible relationships falsely referring to third parties, can be useful, effective and legitimate. In these cases it is necessary for there to be a presupposition, namely, the existence of elements which make it reasonable to suppose there is the existence of hidden availability through false intestations which link such availability with the person to be monitored. In reality, an evaluation is to be made case by case, and in the practicability of the individual case it is the relevance of the elements which have just been mentioned which determine the prevalence of the needs for control or rather, the need for confidentiality.
- c. for monitoring to be reliable and effective it must also be carried out with reference to money and availability possibly kept abroad. From investigations it emerges in fact, that very frequently money unlawfully received following corruption is kept by foreign banks, frequently in current accounts registered in the name of dummy companies residing in off-shore countries, companies which are still used for the false registration of property, frequently luxury commodities. The possibility of carrying out controls on the international level is very difficult because some countries in any case do not believe that bank secrecy can be overcome, others believe that bank secrecy can be overcome only in the presence of a criminal trial, whilst others believe that company secrecy cannot be overcome. The effectiveness of monitoring consequently depends on modification of the conventions and, more generally, international relationships so that these two categories of secret are not opposed for public decision makers. With the warning that, in the case to contrary, even the control within the state to which the civil servant belongs would often be inefficient because it is partial and therefore not meaningful. There is an alternative as we shall see further on.

As already mentioned, for monitoring to be effective it is necessary that the controlling body is completely independent from conditioning, and is itself not subject to the same risk of corruption. Whilst in countries whose rate of corruption is low it is not difficult to obtain this condition; in countries where corruption is particularly widespread the risk that the controlling body is not carrying out its functions effectively is high, because there is the possibility that amongst his members there are some who may be corrupt. In such cases it is not easy to find solutions unless we perhaps resort to international controls on the efficiency and correctness of the internal bodies which provide monitoring.

5. Control of living standards

I do not believe it would be useful and effective to indistinctly subject any public decision maker to a control aimed at his availability of property and finances. It would not be useful because despite the widespread nature of corruption, one can however believe that part of the public decision makers do not take advantage of their power to unlawfully enrich themselves or third parties (and an investigation of them would not give any results); it would not be effective because the exercising of very wide control activities, in addition to being useless in many cases, would lead to such an enormous accumulation of information as to be unmanageable. It would be opportune for the control to be carried out randomly, identifying the cases where it is more probable that the control could have positive results, How can this initial screening be carried out? It is exactly living standards, in my opinion, which is the element to distinguish the situations to be monitored from those to be ignored. The purpose of the crime of corruption, by the public decision maker, is that of receiving money, obviously with the aim of using it. The use of money is highlighted through living standards - of the corrupted party or persons close to him - which is excessive compared to his lawful income. Living standards which are too high are therefore an index of possible (not certain, because the civil servant may have lawful incomes which are not necessarily known) corruption of the public decision maker, or rather the receipt/collection by him of money from an unlawful source. Except for exceptional cases however, the monitoring of the availability of property should be subordinated to the investigation into living standards out of proportion to the civil servant's lawful income.

All this presupposes the carrying out of elementary investigations into the living standards, aimed at verifying the excess. Living standards do not regard the availability (which could be secretly kept in a bank or foreign company) but the use of the availability. The indexes of living standards are intuitable, but perhaps it is worth trying to list them:

- residential homes either owned or rented, even for holiday periods
- cars, boats, planes,
- holiday trips,
- maintenance costs (for example restaurants),
- clothing expenses
- the purchase of works of art and antiques
- the purchase of jewels
- medical expenses
- unnecessary large expenses in general

These are the parameters usually used to verify if the control will be useful or not. One cannot exclude, and in fact it happens, that anomalies in the availability of the public decision maker's assets emerge from something else. But, as such an emergence is in fact exceptional, I believe that it can be negligible in drawing up an effective control system in the majority of cases. The exceptional cases are to be dealt with by providing for the possibility of resorting to control even when standard assumptions do not recur, and however situations are such as to reasonably believe that the control into the availability of the public decision maker gives positive results.

If all this is true, the control into the living standards of the civil servant and the persons who are closest to him, it becomes the natural assumption for the control of his availability. The logical order is therefore inverse compared to the order implied by the title; observation of the lifestyle precedes assets control, and only a disproportionate lifestyle justifies, in general. (i.e. except for the exceptions already mentioned) the resort to controlling assets and availability of property. Except for exceptional cases, therefore, the control of availability must be preceded by the ascertainment that the living standards are excessive compared to the lawful income of the civil servant.

6. How to verify living standards and availability

Living standards can be verified by the parameters listed in the preceding point, and any other parameter allows one to identify that the expenses significantly exceed earnings. The disproportion can be obvious (it is not rare for public decision makers to attract the attention of public opinion, magazines, etc.) or it may have to be investigated. The instruments for investigating the disproportion consist of public registers and contracts which in some way, testify to the use of excessive availability (for example a contract for the lease of a particularly expensive house), in addition to observation, i.e., the concrete verification of goods used or expenses incurred by the public decision makers or persons close to him.

Even availability is verified, in some cases through public registers, and in others through bank and company investigations.

7. Identification of the field of Intervention

The control into living standards and availability. in all cases where the living standards are not obviously excessive, is particularly complex, costly and open to high risks of failure if carried out on a large scale. In order to make it more simple, effective and less expensive, it is worth considering the introduction of some limitations.

a. subjects

I believe it necessary to give in advance a definition of a public decision maker, so as to avoid possible basic misunderstandings. The definition should include anybody, invested with a public function both the holder of powers to make decisions having external consequences. On the one hand therefore we have not only those persons who are defined as public servants or civil servants in various systems, but also political exponents able to influence the decision of the public servant or rather private employees to whom a public function has been delegated. On the other hand we have not only the person who is invested with a public function in economic, financial or commercial sectors, but any person empowered to make public decisions.

Having said this, is it necessary. for any public decision maker to be subjected to the monitoring of his assets and living standards, or is it possible to identify more limited categories?

I believe that a first limitation is evident and obvious: it does not make sense to control the holder of decisional powers whose exercise does not even directly include appreciable economic consequences; or rather the exercise of which is not suited to stimulate corruptive behaviour. A second limitation regards public decision makers who hold powers particularly limited to the economic effects of their acts. This may seem debatable because the reiteration of the behaviour could hypothetically cause the transfer of large sums of money, and however it is just as necessary, in reality, to make monitoring practicable.

Conversely, I believe it is necessary to consider the possibility of subjecting to a constant and generalised control those categories which consist of a very limited number of persons holding particularly incisive powers (in particular I am thinking of some controlling bodies and amongst these the magistracy).

b. monitoring

The question to be asked is does the control have to be generalised and widespread, that is to say, does it have to include any public decision maker defined in the preceding point, or rather must it be carried out on a smaller scale, for example a sample? An implicit, partial answer has already been given by sustaining above, that in various cases, the control would be useless as the public decision maker is extaneous to matters of corruption. It is certainly not possible to know, before the control, what the outcome will be, and therefore targeted screening, which allows only honest public decision makers to be excluded from the control, is not possible.

Moreover it has been mentioned that an initial screening could be carried out on the basis of living standards, in the sense that the disproportion of the latter should be assumed, but should also be a sufficient base, for monitoring assets. This is true if the disproportion in living standards is self-evident, obvious and there for all to see.

However when it is not like this, when can excessive living standards be verified if not by controls ? In this case there are three possible alternatives: a generalised control of living standards by the acquisition of all the elements from which it can be deduced; a generalised control aiming to identify only some indexes of living standards, with a consequent in-depth control, possibly on a sample, of suspect cases only; simple random samples, namely the control of some positions independent of any prior screening. I believe that the first and the third solution are to be discarded, because neither of the two guarantees results proportional to the effort, and the last is very easily open to the risk of controlling (and therefore harm to their privacy) persons who have nothing to hide. In order for the second solution to give appreciable and inexpensive results it is necessary to identify, the previous indexes as best as possible, both in terms of the categories and the method. As far as the categories are concerned, since the availability received unlawfully are destined to be at least partly spent, and there is normally a type of hierarchy of expenses. the parameters to be used should be those which regard assets which have priority use compared to others: In particular I am thinking of the home, possible second house or holiday home, means of transport, expenses for the education of children, and health. As for the method, the investigations should be limited to the information (especially relating to close relations) contained in public registers; the acquisition of information from direct observance should be preferred to the acquisition of documentation (i.e. the practical verification of the house which is lived in, the car which is actually used etc.). Once the suspect cases have been identified, the range of successive controls should be conditioned by their number. If there is a limited number of suspect situations (for example about a hundred) they can all be investigated in depth; If there are a lot, it is necessary to make a selection and limit the control to the most anomalous situations.

In fact prevention does not depend on the number of cases monitored, but on the effectiveness of the results of the monitoring.

8. Characteristics of the controlling authority

Monitoring can work effectively only if the body entrusted with the control is not only independent, but also sum, agile and not bureaucratic. But for such a body to work successfully it is necessary for only a limited number of cases to be brought to its attention.

The characteristics which I have indicated come from experience: the world is full of associations, institutions, authorities and committees whose results are negligible compared to the size and financial obligations required because such bodies, given their plethoric nature, dedicate a great deal of their time and resources to their own management rather than the pursuit of results.

9. Alternatives to the control of availability

As has already been mentioned, the control of assets cannot be carried out effectively in Countries where bank-secrecy and company secrecy are inviolable. For these countries it would often be a problem to modify the provisions of law which allows effective monitoring because the general principles of the judiciary system are contrary.

For countries in which the Situation is different, monitoring within them could be possible by introducing a few provisions of law which however would not be in contrast to the general lines of the judiciary system. However, even the latter countries would come up against insurmountable difficulties every time they have to extend their control of availability, abroad - in countries where bank and company secrecy is impenetrable.

There is an alternative. Once it has been observed that the living standards of the public decision maker are excessive compared to his known lawful income, he could be asked to justify the disproportion, encharging him, and not the controlling body, to produce documentation which give proof of such other lawful income as to compensate for the imbalance. For the system to work it is necessary for particularly noticeable sanctions be provided should he refuse to cooperate.

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