

# Petty and high ranking corruption in Italy

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# 30 ANNI di Mani Pulite



# «Mani pulite»: 17 February 1992

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- “The overall picture that emerged from the investigations provided indisputable evidence of a widespread system of malfeasance based on a mix of centralised administrative corruption and decentralised administrative corruption, involving many political parties and major Italian companies. (...)» (Davigo).
- **HIGH CORRUPTION!**
- **Transparency International:** “grand corruption refers of acts committed at a high level of the state apparatus and it may distort policies or the central functioning of the state, enabling leaders to gain high value benefits, for example through diverting public funds.
- Petty corruption refers to everyday abuse of public power by low- and mid-level of public servants in their deed to provide basic goods or services, such as in hospitals, schools, and so forth”.

## «Mani pulite»: 17 February 1992

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“(...) Criminal justice should be asked to ascertain, with the high level of proof required for a conviction, in full respect of the guarantees of defence, specific criminal acts and individual responsibilities and **not to investigate and claim to solve political and social problems**”. (Bruti Liberati)

«**The justice with the helmet**» (Amodio); precautionary coercive measures as an instrument to obtain the confession.

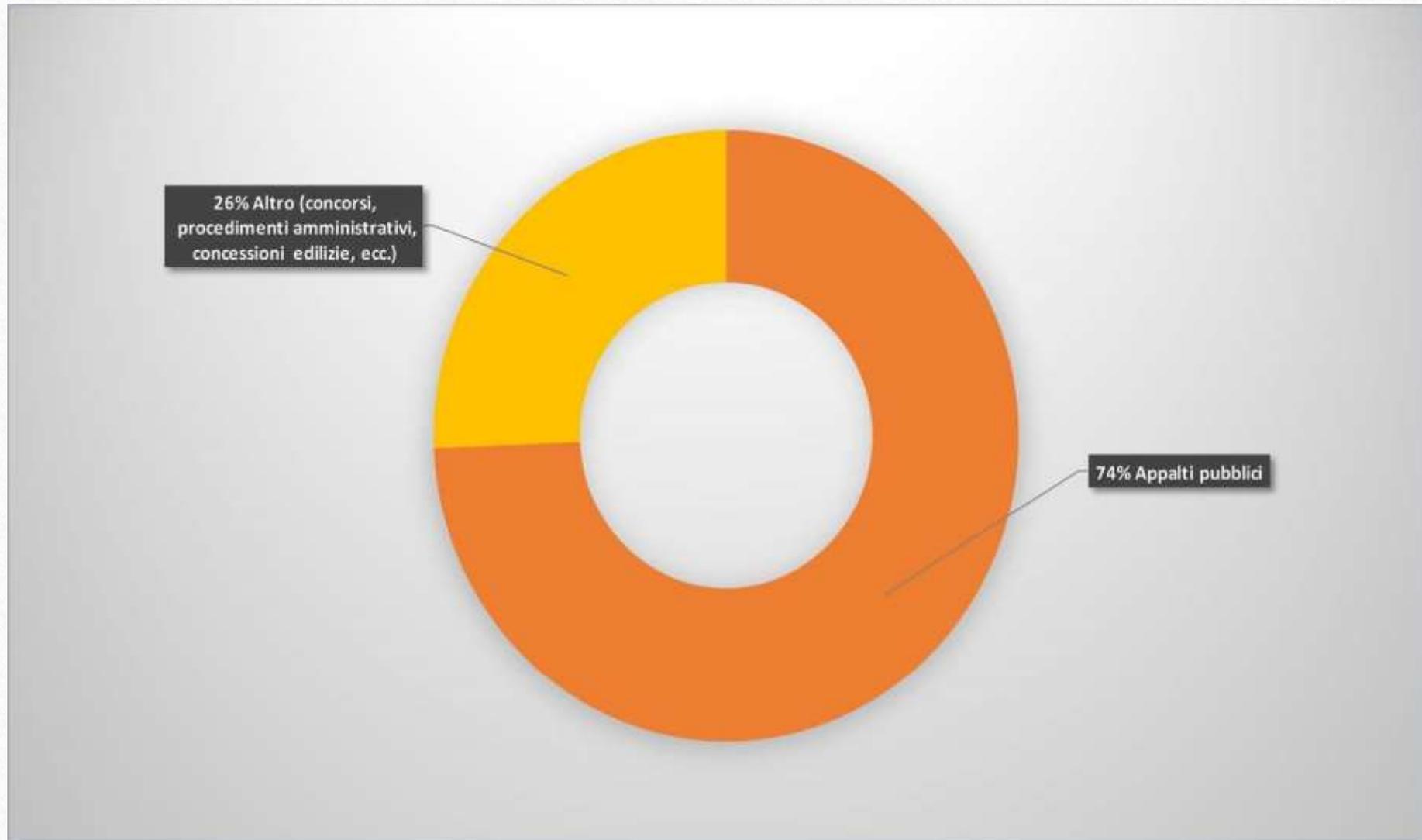
## After «mani pulite»

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- **Political parties as such have lost their centrality** both as organisers and as beneficiaries of corrupt exchanges, while corruption has become **decentralised and privatised**, i.e. it has taken root to a greater extent at local level and has as its main purpose private enrichment and the strengthening of personal power; however, this more decentralised, widespread and fragmented nature does not mean that the networks of relations between politicians, public officials and professionals (as well as, especially in southern Italy) are more fragile and occasional, since these networks are **structured and relatively stable** (Fiandaca).

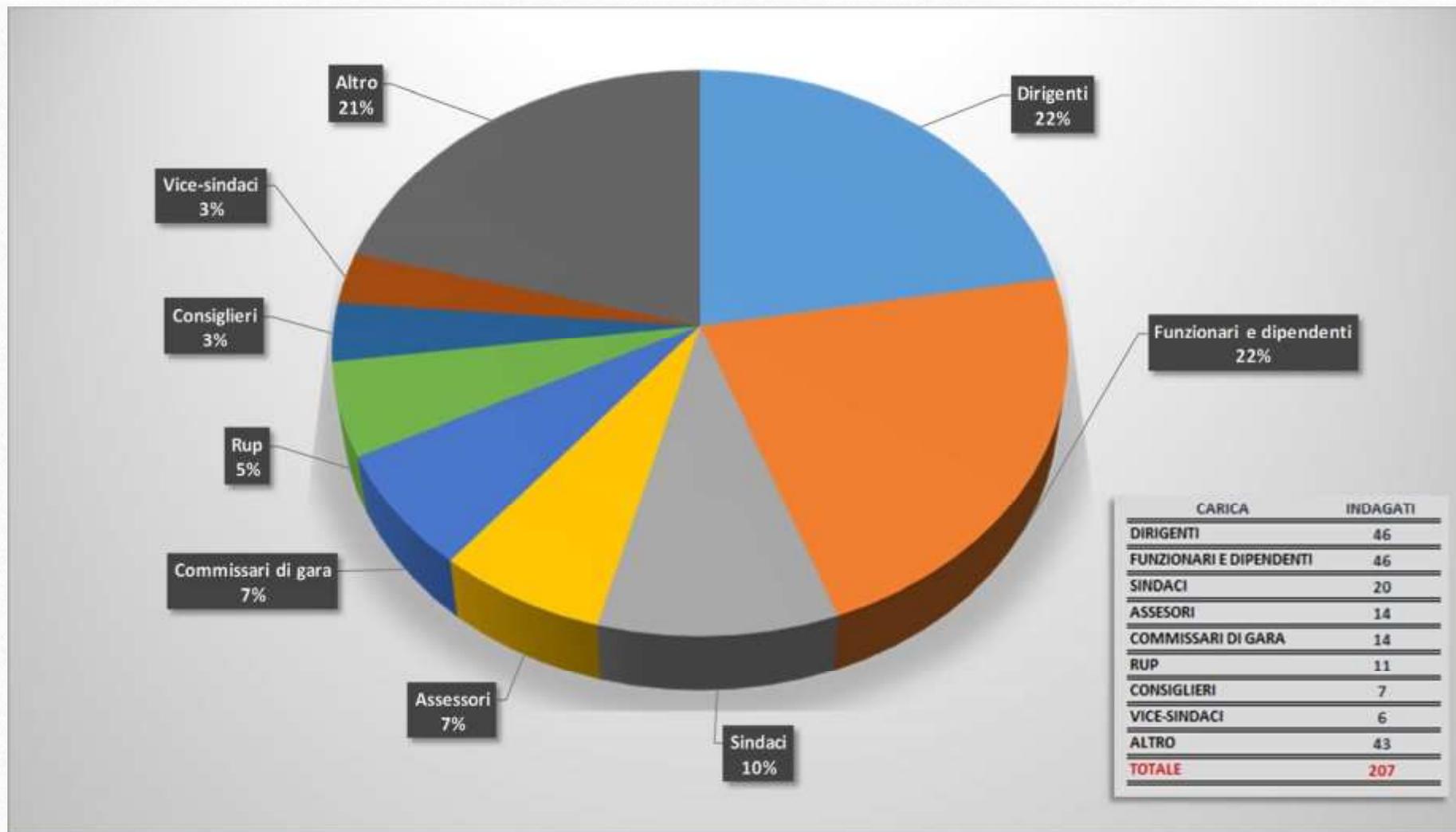


**Tab. 2 - AMBITO DELLA CORRUZIONE**



Tab. 2 shows the sectors in which corruption mostly occurs. 74% of the cases involve public procurements and the remainder 26% concerns administrative proceedings, construction licenses, public contests, etc.

**Tab. 4 - TIPOLOGIA DEGLI INDAGATI**



Tab 4. shows the professional profile and qualification of those who are involved in investigations for corruptive conducts.

# What is «corruption»?

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- is like a prism with many surfaces. It can be seen from different angles.
- Sometimes leads to a broad definition, so to include also embezzlement....

# What is corruption?

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- Art. 318: “improper bribery” or “bribery for the performance of the function”
- Art. 319: “proper bribery” or “bribery for the performance of an act contrary to the duties”
- Art. 319 *ter*: “bribery in judicial actions”
- Art. 319 *quater*: “undue induction to give or promise a benefit”
- Art. 322: “aiding and abetting bribery”
- Art. 322 *bis*: “international corruption»
- Art. 346 *bis*: “illicit trafficking of influence»
- Private bribery in Art. 2635 of the Italian Civil Code.

# Strategies

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## Criminal law instruments

- increase of sanctions; ancillary sanctions; pecuniary reparation; forms of confiscation...
- New instruments of investigation (undercover operations, interceptions by means of trojan virus...)
- Low attractiveness of rewarded special proceedings, such as plea bargain

## Administrative instruments

- Specific Agency (ANAC)
- Wistleblower

# Strategies

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- Tendency to **privilege the punitive response**
- Tendency to **assimilate** the fight against **corruption** to the fight against **mafia-type organisations**:
  - 1) interceptions through trojan virus;
  - 2) undercover operations;
  - 3) non punishment clause for persons who cooperate with the justice;
  - 4) preventive measures (*ante-delictum*)

# How to make a distinction

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## **Key role of the judge**

- Specific mitigating circumstances
- General mitigating circumstances
- Clause of non-punishment
- Application of ancillary penalties in the plea bargaining

# Mitigating circumstances

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- Art. 323 *bis* § 1 CC: offences under Articles 314, 316, 316-*bis*, 316-*ter*, 317, 318, 319, 319-*quater*, 320, 322, 322-*bis* and 323 of the CC that are **particularly slight**, the sanction is reduced by up to one third.
- It occurs when the **whole offence is barely offensive** and, therefore, not very serious, with reference to the **conduct** carried out, the **amount of economic damage or profit** attained, the **subjective attitude** of the perpetrator and the **event**.
- Distinction with the **general mitigating circumstance** provided for by art. 62 n. 4) CC: to assess only the damage or the economic advantage

# Non punishment clause

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- **Art. 131 *bis* CC:**
- for offences punished with a prison penalty **not exceeding a maximum of 5 years**, or with a pecuniary penalty, the punishment is excluded where for the particular modality of the conduct as well as the low level of damage and danger, the offence is of **particular tenousness** and the **conduct is not habitual**.
- § 5. **it is applicable also where the law provides the particular tenousness of the damage or danger as a mitigating circumstance.**
- Cass. n. 37645/2021: applied to the private corruptor but excluded for the corrupted as a consequence of the systematic nature of the conduct.

# Non punishment clause

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## CONSEQUENCES AT PROCEDURAL LEVEL

- At the end of preliminary investigations: request to discontinue the case
- At the end of trial: judgment of acquittal (the person cannot be punished)

Application in consequence of a different qualification of the offence by the judge

# What is the relation?

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**Aiding and abetting bribery (art. 322 cc):** a doctor envisages the release of a medical prescription, without examining the patient, under money....

the recognition of **mitigating circumstances is not in contrast with the exclusion of the non-punishment clause**, being the former based on the low relevance of the fact, while the non punishment clause requires an overall assessment of minimal offensiveness, made on the basis of a joint evaluation of the manner of conduct, the degree of culpability and the extent of damage or danger (n. 46255/2016).

# Consequences?

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- **Cass. n. 6391/2020**: has excluded art. 131 *bis* because the request for money came from a medical professional who was called upon to protect the primary good of health and in respect of whom the performance of an act contrary to his official duties, namely the prescription of a medicine, omitting to examine the patient, in return for payment of a sum of money, 'under the table', caused **damage to the image of the public authorities which was not so minimal as to be considered 'irrelevant'**.

# Plea bargain

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- It depends on the judge to apply ancillary sanctions for certain crimes also in case of the so called «traditional plea bargaining»: i.e. application of a penalty upon request that **do not exceed 2 years....**

# The new approach

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- Reduction of penalty in case of cooperation *post-delictum* (323 bis CC): any effect?
- *Breaking the “wall of silence”*
- *Article 323 ter CC: what is the rationale behind?*



# The new non punishment clause

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- **«Progetto di Cernobbio» 1994**
- **WHICH OFFENCES?**
- Bribery for the performance of the function;
- bribery for the performance of an act contrary to the duties;
- bribery in judicial acts;
- undue induction to give or promise a benefit”;
- aiding and abetting bribery, concerning corruption and undue inducement;
- freedom violation in public trade....

# The new non punishment clause

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## **Time limit:**

Before having knowledge that there is an investigation;

however within **4 months** by the commission of the fact

## • **Conditions:**

- **Voluntary report - Provides useful** and concrete indications to ensure the evidence of the crime and to identify the other responsible persons.
- The person has to put under availability the utility obtained or, in case of impossibility, an amount of money of equivalent value, or has to indicate useful and concrete elements to identify the actual beneficiary.

# Why should I cooperate?

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- **High sanctions/ancillary sanctions/pecuniary reparation/confiscation measures/limits to special proceedings**
- **Plea bargaining:** Embezzlement, extortion in office, corruption for exercising a function, corruption in judicial acts, unlawful inducement to give or promise anything of value, international corruption
- Admissibility of the request is subject to the **full restitution** of either the price of the offence or any profit made thereof.
- **But in a case regarding the unlawful inducement to give or promise anything of value (art. 319 *quater*), the Judge has applied the rule only to the public officials, excluding private persons induced by the public official.**

# High corruption=organised crimes?

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## INVESTIGATIONS

- Undercover operations (art. 9 Law no. 146/2006)
- With respect to **petty corruption** - for example, small payments to obtain a license, a concession, a visa or a health service by circumventing waiting lists - it is perhaps simpler that the corruptive relation is established without the functional conduct of the infiltrator trespassing into a real and proper incitement.
- It is very difficult for a member of the judicial police to infiltrate and gain credit in the eyes of potential criminals, especially in the context of **big corruption**

# Criminal law of emergency: risks

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- Unreasonable over-deterrence
- Proportionality of the criminal reaction
- Erosion of guarantees, such as re-educational function of penalty
- At procedural level «double track»: i.e. reduction of guarantees

# Final remarks

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- **TRANSPARENCY INTERNATIONAL:**
- 25 January 2022: Italy is **n. 42** on 180 Countries (the year before n. 52)
- Integrated approach: **not only criminal law enforcement instruments**
- **Prevention of corruption:**
- Inefficiency of PA
- The progressive digitalization of PA, the use of electronic tools and the standardisation of tender procedures, represent powerful tools to support transparency, competition and corruption prevention.
- Reinforce transparency of political parties/rules on judges and prosecutors aimed at avoiding conflict of interests

# Final remarks

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- We need **adequate indicators** to detect corruptive phenomena at territorial level, to support the prevention of and fight against illegality and to promote transparency.



*Thank you for  
your attention!!!*