



**UnitelmaSapienza**

Università degli Studi di Roma

# **The Abuse of Office and the Italian Criminal Law**

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# Outline

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- The evolution of the Italian criminal offence of abuse of office
- A few meaningful cases
- Strengths and weaknesses of the Italian experience
- New perspectives

# The evolution of the Italian criminal offence of abuse of office

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- First version of the art. 323 of the Italian Criminal Code (introduced with the entry into force of the Criminal Code in the 1930s):

«A public official who, abusing the powers conferred by his office, **commits an act not provided for as a criminal offence by a specific provision of the law**, with the intention of causing damage to others or of obtaining an advantage for them, shall be punished by imprisonment for up to two years or by a fine of between five hundred and ten thousand lire»

# The evolution of the Italian criminal offence of abuse of office

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- Second version of the art. 323 (amended in 1990):

«A public official or a person in charge of a public service **who abuses his or her office** in order to obtain an undue non-economic advantage for himself or herself or for another person or to cause undue damage to another person shall be punished, if the act does not constitute a more serious offence, by imprisonment for a term of up to two years. If the offence is committed in order to obtain an unfair economic advantage for oneself or others, the penalty is imprisonment for a term of between two and five years».

# The evolution of the Italian criminal offence of abuse of office

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- Third version of the art. 323 of the Italian Criminal Code (amended in 1997):

«If the act does not constitute a more serious offence, a public official or a person in charge of a public service who, in the performance of his duties or of his services, **intentionally obtains** for himself or for others **an undue economic advantage or causes undue damage, in violation of the law or regulations, or by failing to abstain** in the presence of his own interest or that of a close relative, or in the other prescribed cases, shall be punished by imprisonment for one to four years. The penalty shall be increased if the advantage or damage is of a serious nature».

# The evolution of the Italian criminal offence of abuse of office



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- Last version of the art. 323 of the Italian Criminal Code (amended in 2020):

«If the act does not constitute a more serious offence, a public official or a person in charge of a public service who, in the performance of his duties or of his services, intentionally obtains for himself or for others an undue economic advantage or causes undue damage, **in breach of specific rules of conduct expressly laid down by law and which leave no margin of discretion**, or by failing to abstain in the presence of his own interest or that of a close relative, or in the other prescribed cases, shall be punished by imprisonment for one to four years. The penalty shall be increased if the advantage or damage is of a serious nature».

# The evolution of the Italian criminal offence of abuse of office

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- Legislative evolution characterised by a commitment to **reduce the scope of the offence** and to **define more precisely** the type of abuse criminalised
- In fact, this offence raises the question of the limits of the criminal judge's control over the activities of public officials, especially when they are discretionary

# The evolution of the Italian criminal offence of abuse of office

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- The experience of its application has often led to a rift between the judiciary and politics. In fact, it is an offence that local administrators are often accused of and which, according to many, has given rise to the so-called phenomenon of “defensive bureaucracy”, whereby officials prefer not to act rather than run the risk of being prosecuted for abuse of office
- Abuse of office is a «closing rule» of the system of offences against public administration: there is proof of abuse by a public official who has favoured or damaged someone, but there is no proof that this is the result of a specific corrupt agreement
- Particularly in recent years, and also as a result of the various reforms that have greatly reduced the scope of the provision, there have often been few convictions for the many criminal proceedings that have been initiated to enforce this offence

# A few meaningful cases



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The extraordinary commissioner of a municipal company uses various forms of pressure to favour the employment of a person close to him in a private company.

Can this act constitute an abuse of office?

# A few meaningful cases



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Italian Court of Cassazione, Sec. VI, 2009, no. 13097:

“With regard to abuse of office, the requirement of violation of rules of law cannot be supplemented by non-compliance with the rules of principle laid down in Article 97\* of the Italian Constitution (case concerning favouritism in the recruitment of employees of a private company). In particular, the Court considers that Article 97 of the Constitution is a rule that does not have direct preceptive force and is therefore not relevant to the application of Article 323 of the Penal Code”.

\* General principles of impartiality and good administration

# A few meaningful cases



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The mayor of an Italian municipality did not renew the appointment of a municipal employee as head of the municipal inspectorate, which resulted in the loss of the relevant allowance and a substantial downgrading of the employee's position. It emerged from the proceedings that the non-renewal of the contract did not constitute a breach of the rules governing the granting of appointments in the PA, but in fact concealed discriminatory intentions by the Mayor.

Can this act constitute an abuse of office?

# A few meaningful cases



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Italian Court of Cassazione, Sec. VI, 21 2019, no. 22871:

The downgrading of a municipal employee, carried out with discriminatory intent, constitutes the offence of abuse of office, since such conduct results in a failure to comply with the constitutional duties of impartiality and good administration, as provided for in Article 97 of the Italian Constitution, as well as the violation of the duty to exercise public functions with discipline and honour, as provided for in Article 54 of the Italian Constitution (in its reasoning, the Court stated that the above-mentioned constitutional provisions impose rules of direct applicability and express the prohibition for public officials to behave in a manner characterised by unjustified preferences and favouritism).

# A few meaningful cases



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The manager of a public economic entity concluded (and then systematically renewed) several fixed-term employment contracts, thereby, according to the Public Prosecutor's Office, essentially circumventing the prohibition on signing open-ended contracts laid down in the internal accounting and administrative rules of the consortium of which the entity was a member.

Can this act constitute an abuse of office?

# A few meaningful cases



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Italian Court of Cassazione, Sec. VI, 2003, no. 1761:

The offence of abuse of office cannot be committed where there is a mere charge of 'excess/misuse of power'.

Excess/misuse of power distinguishes those cases in which a public power is used for purposes other than (or contrary to) those for which it was conferred on the public official.

# A few meaningful cases



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The mayor of a municipality revoked the management position of a municipal employee, citing the need to control the expenditure of the public body, which was in a financial crisis. However, prior to the adoption of this act, there had been no general reorganisation of the offices in order to control expenditure and the employee had stood as a candidate in the elections on a list opposing the mayor.

Can the act constitute an abuse of office?

# A few meaningful cases



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Italian Court of Cassazione, Sec. VI, 2018, no. 19159:  
«With regard to the abuse of office, the breach of law referred to in article 323 of the Penal Code concerns not only the behaviour of the public official that is contrary to the rules governing the exercise of power, but also that which is directed towards the realisation of an interest that is contrary to that for which the public power was conferred» (misuse of powers)

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But see also Italian Court of Cassazione, Sec. V, 13 2019, no. 49485:  
«With regard to abuse of office, a violation of the law can be found in all cases of conflict between the decision and the regulatory provisions contained in primary or secondary sources that define the binding, formal or substantive characteristics of the public power, **and not**, on the other hand, in the excess/misuse of power, which occurs when, in the case of discretionary measures, the public power is used for an objective other than that for which it was granted»

# Strengths of the Italian experience



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- Detailed definition of the criminalised abuse: the legislator has made several attempts to define the scope of criminalised behaviour in a reasonable (?) way
- The offence of abuse of office protects important legal interests that would not otherwise be protected; its abolition would risk creating areas of unjustified impunity, particularly in the face of the most serious abuses by public officials
- In Italy there is a broad criminalisation of unlawful behaviour in the public sphere, ranging from corruption in the strict sense to offences involving public funds, etc. Abuse of office completes this range of offences.

# Weaknesses of the Italian experience



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- The legislature's attempt to narrow the scope of criminalised behaviour has made it very difficult to enforce the law, to the extent that some have spoken of a «substantial sterilisation» of abuse of office
- This last aspect should also be taken into account when assessing what is usually reported as a critical aspect of the Italian experience: namely, the low number of convictions compared to the high number of criminal proceedings opened for abuse of office
- Jurisprudence has often given different (and often strongly conflicting) interpretations of the provision, which has not helped to support enforcement practice and provide certainty to operators

# New perspectives



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- In view of many of the above critical problems encountered in legislative experience and judicial practice, the latest reform proposal still under consideration by the Italian Parliament (the so-called Nordio reform) proposes the abolition of the offence of abuse of office
- This has sparked a heated debate between those who argue that it is a necessary choice given the poor "performance" of this criminal offence in terms of judicial enforcement, and others who complain instead that abolition would risk legitimising areas of unjustified and widespread impunity, especially in the face of the most serious abuses by public officials.

# New perspectives



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- The perspective of abolishing abuse of office seems to conflict, inter alia, with the criminalisation obligation contained in the new proposal for a European anti-corruption directive presented by the European Commission in 2023, where Article 11 states that

«Member States shall take the necessary measures to ensure that the following conduct is punishable as a criminal offence, when committed intentionally: 1. the performance of or failure to perform an act, in violation of laws, by a public official in the exercise of his functions for the purpose of obtaining an undue advantage for that official or for a third party; 2. the performance of or failure to perform an act, in breach of duties, by a person who in any capacity directs or works for a private-sector entity in the course of economic, financial, business or commercial activities for the purpose of obtaining an undue advantage for that person or for a third party»