Rocco Alagna

Democracy in the Undertow

Models and Criticism of the Anti-Corruption Criminal Law

Giappichelli

Chapter I

INFLUENCING A PUBLIC OFFICER: THE FUNCTIONAL EQUIVALENTS OF A BRIBE

Index: 1. From the profane of the bribe-bag to the sacred of the bride-bag: Matter of exchanges. – 2. On influence: Stories of Reciprocity and *Mikro-Politik*. – 3. Disciplining the influence over elected representatives and civil servants. – 4. The European league of lobbying: The German-case and the Italian-case. – 4.1. Deregulation and privileges: The German-case. – 4.2. Fiction of regulation and friction with Criminal Law: The Italian-case. – 5. Nature and paths of the American regulation on influence over public officials.

1. *From the profane of the bribe-bag to the sacred of the bride-bag: Matter of exchanges*

Exerting influence and exchanging things leads us to the anthropological and juridical spiral of the so-called principle of reciprocity [1]. And even if the search for the essence of the concept of democracy is a bold challenge, it's hard to deny that this very essence has to do with exchanges and with the tools we handle during the decision-making process [2].

Thus, the decision of a person which affects the juridical-economic sphere of another person, raises the question of the actual degrees of independence and autonomy with respect to advantages of any kind that the decision-maker obtained (or would

[1] C. LEVÌ-STRAUSS, 18.

[2] A.W. GOULDNER, 260.

like to obtain) from that very decision. And we can't even begin to talk about corruption if we don't face the question of the utilitarian nature of human interrelationships. So that considering suspicious an exchange between social actors affected by the decision made by one out of those two, can be seen just as a matter of the chosen time frame.

This is then the place where the Marcell Mauss principle of reciprocity takes the floor and begins to play [3]. And it translates into the countless possible functional equivalents of the bribe [4]. Resulting it into the choice to formally define them or not, to be inclusive or not in regulating them, to trace or not an area of (social) juridical acceptance [5].

As long as we have to deal with bags full of wads of cash, there is no matter at all. It's a bribe, and exchanging it results into an action of corruption, into a crime of corruption. Things, though, begin to get more complicated once we left the profane of the bribe-bag and we have to understand if a gift for a bride who happens to be the daughter of a decision-maker is to be considered a kind of bribe. As well as the special dinner served in a starred restaurant where took place a meeting, or presents given during a particular occasion and because of a special personal relationship, or like being invited to a glamorous charity gala, or attending corporate conventions or private parties: is that something we should consider as a functional equivalent of the profane bribe? For certain, phenomenologically we are here far beyond the sour smell of wrinkled cash kept inside a bag.

There are forms of interactions and influence that are not classic forms of *corpus delicti*. It's possible to feel their ambiguity but this doesn't suffice if we have to prosecute and punish actual criminal activities. That's why, at the judicial as well as at the legislative level it's necessary to qualify those ambiguous actions by means of elements of special unlawfulness. Thus, adjectives like *improper*, *un-*

[3] T.M. SUSMAN, 10 ff.

[4] A.W. ALSCHULER, 463 ff.

[5] *McDonnell* v. *United States*, 579 U.S. (2016).

due, *illicit*, *unlawful*, *corruptive*, *abusive*, *inadequate*, *anomalous*, tend to be used to criminally qualify exchanges characterized by the use of potential functional equivalents of a bribe [6].

This being suspicious shows an actual phenomenology that is truly countless. Let's take the case of the pharma industry and consider the sponsoring of clinical trials or studies, the medical conferences, or the pharma marketing made possible by using opinion leaders and sales agents. Or the case of the tools and weapons of the defense industry or of the investment funds that support corporations which are in a business dominated by public contracts, like public infrastructures.

And there is more than that.

There are cases in which the complexity we've just mentioned goes beyond and enters the very heart of the democratic political process and its conditions: here we find issues related to the campaign finance and, in general, to the funding of politician and political activities. And this going beyond depends at least on two reasons: on the one hand, here we're directly dealing with money and not with something else that is a functional equivalent of money; on the other hand, that funding serves the highest social purpose possible, i.e. it transforms a political thinking in the actual election of representatives that can enact actual policies. If it's true, limiting this form of expression and political participation touches the holy grail of the democratic freedom.

That's why this book focuses on the issues related to funding and financing of politicians and political activities, and on the actions of influencing and lobbying public decision-makers by using money, information, and relationships.

Money, information, and relationships are the three main instruments of influence that professional servants of private interests use in their lobbying activities towards public decision-makers [7]. Activities that can have three forms. The lobbyist may use money, relationships, and information to support the public decision mak-

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[6] G. MORGANTE, 27 ff.

[7] D. APOLLONIO-E.C. BRUCE-L. DRUTMAN, 20.

er in the dossier he or she has on the table, in the negotiations he or she must conclude, or, if it is an elective office, in the campaign efforts. The lobbyist, though, may use money, relationships, and information to persuade the public decision maker of the goodness of the position he or she is advocating. Money, information, and relationships, finally, can be used as a bargaining chip. And although this is not in itself unlawful or criminal, it should not be forgotten that of the three indicated ways of influence, the *exchange* is the one that stays at the limits of the democratic representation of competing interests, the most inclined one of causing a potential twist of a freedom into an abuse [8].

The question of the concept of influence and exchange, however, leads the criminal law thinking to enter a thicket of anthropological and sociological questions of big importance. Because if the criminal law of political-administrative activities wants to protect the trust of citizens in the State and even wants to stand as a defender of social cohesion itself, it must firstly address the question of the principle of reciprocity [9].

2. *On influence: Stories of Reciprocity and* Mikro-Politik

The logic of gift, the principle of reciprocity and the sense of personal obligation linked to social interrelationships, stimulate criminal reflection by imprinting it with opposing forces. On the one hand a restriction of the area of criminal relevance is caused by pushing towards the qualification of every exchange as a normal and inescapable form of social relationship. On the other hand, it can be faced the danger of provoking an increase in the pressure of criminal responsibility on freedom by arguing that there are no social interrelations without an unlawful exchange of goods.

Let's start talking about the theory of gift.

The principle of reciprocity was described for the first time by

[8] J. COHEN-M. ELIYA-Y. HAMMER, 269 ff.

[9] A.W. GOULDNER, 260.

ethnologist and anthropologist Marcel Mauss [10]. His assumption is very simple: far from being a behavior without purpose and being a mere liberality, the gift creates a very strong link between people [11], and those bonds reveal themselves in the three obligations: to *make it*, *receive it* and *return* the gift. The violation of these social obligations would not only lead to an injury to one's own reputation, but even to an offence to the honor of the other party in the relationship of gift [12]. If it is true that sociologically the gift is a donation made without a guarantee of reciprocation but with the purpose of creating and keeping social ties [13], it seems that once this bond is established, the gift always tends to come back, under other forms, to its original giver [14].

It is precisely on this reciprocity, on these ways of building social ties, that the society is founded as a community [15]. And not only philologically, since *cum-munus* is the etymological filigree of the term *community*, but precisely because the reciprocity is the paradigm of every society of every time [16]: it is with gifts that marriages were contracted, and it is with mixed marriages that people move from hostility to alliance, from fear to trust, from war to trade and peace [17]. Unlike what happens in the market of goods where obligations can be extinguished, the bonds made by the reciprocity translate into a *payment* that cannot ever be extinguished and that tends to persist for a long time [18].

In essence, if it is an undeniable truth that many people ask for favors, many others treat public officials with respect and generosity, and that sometimes among the officials is possible to find a pat-

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[10] M. MAUSS, 3.

[11] M. MAUSS, 73; J.I. ENGELS, 32-33.

[12] P. VERHEZEN, 7 ff.

[13] I. CAILLÈ, 47.

[14] P. VERHEZEN, 15 ff.

[15] G. SIMMEL, 39.

[16] C. LEVÌ-STRAUSS, 18.

[17] C. LEVÌ-STRAUSS (b), 137.

[18] J.I. ENGELS, 32.

tern of exchanged *courtesies*[19], this reality becomes more complex when we have to deal with political relations, with politicians and politics[20]. Kindnesses, honors, designations to official roles on religious sacraments, invitations to private parties, votes during elections and contributions to electoral campaigns, are to be understood as improper gifts even if they are expression of freedom of private life, if not even freedom of speech and association?

Forget for a moment the corruption understood as the trade of a public office, and focus on the question how criminal law should approach the exchange of these other gifts. Especially given the fact that a public agent decision-maker will sooner or later make a decision that may affect the economic-legal fate of one of his (*lato sensu*) benefactors. This anthropological foundation of reciprocity, in fact, can theoretically be used both to corroborate and to depress the incriminatory incidence with respect to the exchanges of utility that are found at the two ends of the lobbying. With a series of personal and social favors, you can always put the politician in a situation of personal obligation, that can lead him in a place where it tends to abandon his public mission to show loyalty to his benefactor[21]. Thus, decisions made out of friendship and personal loyalty can be seen at the same time as entirely unrelated and as completely connected to those sort of favors[22].

It seems that here also the action of giving and receiving gifts has a strong duplicity: gift as an act of generous solidarity and gift as an act of violence. A generosity that brings relationships closer, and that by invading the existential sphere of a person, forces him/her to get a social obligation. This tension between solidarity and hierarchy is also revealed by the same etymology, since the term that in English identifies the free giving, *gift,* is the root of the German terms *das Gift* and *vergiften*, indicating the poison and the act of poisoning[23].

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[19] B.T. HUGHES, 26.

[20] J.I. ENGELS, 33.

[21] P.H. DOUGLAS, 44.

[22] R.B. CIALDINI, 23, 30 ff.; T.M. SUSMAN, 16-17.

[23] P. VERHEZEN, 32.

The principle of reciprocity isn't alone in this social influence. In all the countries of all the times public offices are sometimes assigned because of interpersonal connections, because personal loyalty is considered more important than having some professional skills. Alongside the reciprocity of Marcell Mauss, then, we can't deny the existence and the effects of what Wolfgang Reinhard has called *Mikropolitik*, dimension in which personal connections are the very tools of power [24].

These two aspects certainly stimulate the thinking of the criminal law, the thing is to understand whether it is brought towards more punishment, or it is brought towards more social comprehension.

Because the truth is that those who want to be bribed do not want to be influenced. They can accept that, in order to be bribed, they have to be influenced, but there is no real interest in being influenced; all the interest is put on the bribe [25]. Officials that want to be bribed ask for a bag full of cash. And every overwhelming and irrational regulation on donations and campaign contributions only risks creating an illusion of protection [26], and the chance to intercept just careless actions and not corruptive ones [27].

But the truth is also that in the field of political activity it has been, is and will always be, extremely difficult to separate social reciprocities from bribes, except for clear unlawful agreements. And this is because of the very nature of politics. Thus, we must focus on what's the difference between a corruptive donation and a righteous donation. And here we can identify that bribing needs secrecy when usually donation pairs with publicity [28]. It seems to be, then, the secrecy of the exchanges that can be seen as a clue of unlawfulness.

In the political field what changes a gift into a bribe is of vital

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[24] W. REINHARD, 231 ff.

[25] A.W. ALSCHULER, 470.

[26] A.J. GAUGHAN, 764 ff.

[27] A.J. MIKVA, in *Washington Post*, November 26, 1995.

[28] P. VERHEZEN, 121 ff.

importance: the donation could be, and usually is, the expression of freedom of speech and freedom of thought, such as funding campaigns, paying homage to friends and notables. Here the danger is to turn a fundamental right into a crime, to punish the establishment and maintenance of social ties, and to searching for a public officer estranged from the relations that his office should take care of [29].

3. *Disciplining the influence over elected representatives and civil servants*

It's at the crossroads between ruled, rulers and legislator that the influencing (which is of interest for criminal law) is located. And perhaps more than this: it is the professional tool of communication between these social actors [30]. And it is not only concerned with communicating to public officials, but also with the activity of preparing for such meetings [31]: research and analysis on the topics of general regulation, monitoring of legislative procedures, communicating to privates the possible implications of proposals and options for modification [32]. These activities provide the public official with very valuable information [33], increasing their prestige and credibility [34]. On the other hand, those activities allow the influencers to stay close to the most precious commodity: the drafts of the legislative measures which will go to discussion and approval, firstly in the restricted commissions and then in the larger assemblies [35].

That's why in the most advanced systems, like the United States,

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[29] *McDonnell* v. *United States*.

[30] E. CARLONI, 378; S.L. FATKA-J.M. LEVIEN, 566 ff.

[31] M. MAZZONI, 23 ff.

[32] N.W. ALLARD, 46.

[33] T.M. SUSMAN, 12.

[34] L.H. MAYER, 522, 527 ff.

[35] C. HOLMAN-J. CONRAD, 25 ff.

influencing is not only a social phenomenon, but also a normative institution, which specific rights and obligations are tied to. Usually, we can find an actual qualitative-quantitative threshold of lobbying activities which is able to trigger the system of the obligations of *disclosure* and *compliance*. But it doesn't mean we necessarily need a proper organization [36]: those who for profit engage in contacts with public officers to influence the decisional processes are already carrying out a lobbying activity, even though they don't meet any of the normative thresholds. So, this is anyway an activity which the criminal law focuses on [37], except for those criminal offences which describe and punish violations of specific provisions connected to formal threshold, such as specific obligation of transparency and specific prohibitions [38].

Organized or not, the influencers and the lobbyists must carry high professionalism, extraordinary technical skills, because every topic which is regulated or is about to be regulated has its own technical specificity which the lobbyists cannot fail to know. Therefore, much of the activity of lobbying is based on competence and reputation, which, in the case of contacts with the public apparatus, is a very easy thing to damage and a very difficult one to restore [39].

In this arena, we have to maintain a dynamic equilibrium: political representatives should pay attention to the claims of the private individuals; but no one could seriously accept that such activities may take place without regulation and control [40]. At least, this is the reality in the United States instead of the influencing regulation system of the European Union which is more than two centuries behind it.

Because if the word *lobby* appeared in England already around 1640 to identify those who waited outside the meetings rooms of

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[36] M. DENQUIN, 125; R. SCHWATZENBERG, 540.

[37] N.W. ALLARD, 35, fn. 32; A. BOROI, 10.

[38] N.W. ALLARD, 34-35.

[39] N.W. ALLARD, 25.

[40] W.N. Jr. ESKRIDGE, 5-6.

the *Chambers*[41], it was in the United States at the beginning of the nineteenth century that the term took on the meaning and complexity that it still shows today[42]. And to tell the truth, it is not even a question of linguistic primacy. The American link to lobbying, in fact, is unique and unrepeatable, due to historical reasons tied to the very foundation of the American Nation and State.

It was James Madison and his *Essay Number 10* published in 1787 to convince the delegates of the State of New York to approve the text of the Constitution approved in Philadelphia: *the causes of factionalism are planted in the nature of man and can only be removed by destroying that freedom which is essential to his existence*[43]. The regulation of private interests was not only present to the Founding Fathers, but the entire American system of powers was built around the need to regulate the competition between different rights[44].

This precise cultural sensibility, historically, was then combined with the other founding idea of the American State, that is the right of petition[45]. Which is not a mere consequence of the independence, but one of its historical premises. Twice, in fact, George III did not respond to the petitions of the American colonists aimed at avoiding full independence from the United Kingdom: the first time the petition was buried in Parliament; the second time, in 1775, he refused to receive the delegates who went the long way in person to give him the document with the petition. And (also) with these words was motivated the declaration of independence and, therefore, the war: *In every stage of these Oppressions, We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince*

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[41] J.M. NORRIS, 450.

[42] N.W. ALLARD, 37.

[43] J. MADISON, in *New York Packet*, November 23, 1787.

[44] N.W. ALLARD, 37.

[45] S.L. FATKA-J.M. LEVIEN, 562 ff.

whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people[46].

This right of petition was later incorporated into the *First Amendment* with the *Bill of Rights of* 1791.

During the first Congress, more than six hundred petitions were submitted; and since the right to petition had no socio-political restrictions, it was the only way to let speak up women, African Americans, Native-Americans. For the first hundred years, petitions were not symbolic requests at all, but documents that were hand-delivered to members of Congress, who first read them aloud on the floor of the House and then entrusted them to a committee to instruct the process for Congress' official response[47]. As the petitions became more complex, however, the role of the lawyers who were assigned to draft them, grew considerably; many of them were also required to deliver them personally, and some found it convenient to do so by meeting with elected members[48]: this was the birth of lobbying as a phenomenon.

The individual experiences of assistance to those who had grievances and petitions to advance to Congress were progressively substituted by small organizational structures. They also began to want to be properly remunerated, and to do this, the so-called *contingent fee* clause was written in the lobbying contracts[49]: the lobbyist was paid only when the result was obtained[50]. Abuses, influence peddling and experiences of corruption date back to this period. Two of the very first great monothematic lobbying campaigns were also suspected of being criminally relevant: that of the Quakers for the abolition of slavery[51], and that of the *Anti-Saloon League* in favor of prohibition[52]. In particular, the behavior of this last

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[46] THE DECLARATION OF INDEPENDENCE, Philadelphia, 1776, paragraph 4.

[47] M. MCKINLEY, 1136 ff.

[48] J.L. PASLEY, 57 ff.; Z. TEACHOUT, 149.

[49] T.M. SUSMAN, 289 ff.; T.M. SUSMAN-M. MARTIN, 341 ff.

[50] T.M. SUSMAN-M. MARTIN, 341.

[51] M. MCKINLEY, 1154 ff.

[52] D. OKRENT, 39 ff.

powerful association is the reason for the bad reputation of lobbying [53]; and it was in 1853 when, with reference to the *contingent fee* clause, the Supreme Court already began to introduce the concepts of *undue influence* and influence using *improper* means [54].

In more than two centuries of American history of lobbying, the turning point can be traced back to 1946, when the *Federal Regulation of Lobbying Act* introduced a complex discipline made up of prohibitions and obligations of *disclosure*. The jurisprudence of the Supreme Court, from the case of *United States* v. *Harriss* onwards, a case in which the opinions of jurists of the caliber of judges Warren, Douglas and Jackson have been compared, had always underlined advantages and disadvantages of limitations [55].

The result was a monumental law library, which the heirs of the former American colonists now offer to the European debate.

Let's have a look at it.

4. *The European league of lobbying: The German-case and the Italian-case*

Beginning with some simple facts [56]: The activities of twenty of the fifty largest lobbying firms are not in any way traced by any register or list or report formally addressed to the institutions of the European Union. And not only that.

The lobbying expenses reported by the companies that, instead, have chosen to register in the voluntary system of transparency in force in the Union since 2011, are significantly underestimated. Even lower than the costs that the same companies claim to have incurred in the United States. If the same consultancy firm, registered in both *disclosure* systems, declares that it spends 17 times less

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[53] B. VAN DER VOSSEN, 359 ff.

[54] *Marshall* v. *Baltimore & Ohio Railroad Company*, 57 U.S. 314, 297 (1853); M. SUSMAN-M. MARTIN, 346 ff.

[55] T.M. SUSMAN, 39 ff.

[56] E. LIPTON-D. HAKIM, in *The New York Times*, October 18, 2013.

than in Washington to lobbying in Brussels, that is, in the regulatory heart of the largest economic market of the world [57], then we are facing a sort of non-existence of the European transparency system [58].

Five years after the *White Paper* which in 2001 recognized the need to foster trust and participation of European citizens, and thus contain the serious lack of democratic legitimacy [59], the European Commission also began to take action with respect to the relationship with lobbyists active in Brussels [60]. However, it was not until the *Green Paper of* 2011, which was the result of an agreement between the European Parliament and the European Commission, that the register of lobbyists was established, and registration was, and still is, purely voluntary.

But the main weakness is perhaps not even the fact that membership is merely optional. Rather, it is the fact that those who can join just voluntarily include *law firms* and all consultancies that promote contacts with the European institutions for the purpose of informing them about the general state of legislation or the position of their clients. It is not, therefore, so much the fact that the register is voluntary, as the fact that those who do most of the lobbying cannot even be registered [61]. For this reason, the obligation introduced at the end of 2014 for Commissioners, their staff and the Directors-General of the European Commission to keep a register of meetings with lobbyists is not very effective [62].

The annexed code of conduct for lobbyists contains, at least for those who decide to register, two ethical provisions with a vague resemblance to criminal law: according to *paragraph b*), the lobbyist is prohibited from obtaining information or influencing decisions dishonestly, or by using undue pressure, or by inappropriate

[57] E. LIPTON-D. HAKIM, *ibid*.

[58] E. EFIMOV, 28.

[59] P.M. KOO, 111 ff.

[60] E. EFIMOV, 25.

[61] E. EFIMOV, 26.

[62] P.L. PETRILLO, 64.

conduct. According to *paragraph f*), lobbyists must not induce members of the European institutions or their staff to violate their respective rules of conduct.

To sum it roughly up, the entire European regulatory system of transparency in the contacts between private interests and public decisions is based on the self-regulation of certain lobbyists and the moral character of European officials[63].

The profile which, however, almost makes the European legislation close to ridiculous, it's that the most powerful and important of all lobbyists in the world can engage in secret contacts with decision-making public officials in a context in which they have a genuine ban on transparency. Because that is what this is all about: the European institutions have provided for a ban on transparency by shielding lawyers throughout client confidentiality. We certainly do not wish to diminish this sensitivity towards the fundamental right to the confidentiality of communications between lawyer and client; however, we must point out that a different sensitivity was shown when, about European money laundering legislation, lawyers (and all professionals) were required not only not to keep secrets but even to file reports against their clients. Making a mockery of all confidentiality, of the right of defense and of professional ethics itself.

The transparency initiative, which was in fact a reaction to the mistrust of the European institutions that resulted in the 2005 negative referendums in the Netherlands and France[64], was supposed to bring more legitimacy both, in and out[65]. The result has been a bewildering system in which all those who want to continue to operate in secrecy can safely do so, a system in which the major *players* even have a ban on transparency. This system, which guarantees the permanence of privileged situations in favor of certain stakeholders, is even deceptive insofar as it induces the idea of transparency when, in reality, nothing that is to be kept confiden-

[63] E. EFIMOV, 27.

[64] M. GODOWSKA, 181.

[65] F. SCHARPF, 6; D. CHABANET, 209.

tial is to be revealed [66]. And the data on the underestimation of expenditure reported by lobbyists who have chosen to adhere to the system of transparency are irrefutable proof of this.

But the structure that contributes to making the European situation even more distant from the American one, does not even lie in the contrast between obligations and prohibitions of transparency. Rather, it lies in the presuppositions of the lobbying contacts between private interests and public decision-makers. Wanting to distinguish between active and passive lobbying, understanding by active lobbying the effort of the private parties to reach a contact or an exchange of information with the public decision-maker, and by passive lobbying the invitation to inform and represent the interests addressed to the lobbyists by the public agents, it can be affirmed that today, the European system is the realm of passive lobbying, and therefore, of all lobbyists [67]. The European institutions, in fact, suffer from a shortage of financial and human resources. And they have to deal with enormously complex dossiers, and they are spread all over a territorial perimeter which is not only very wide but also characterized by significant normative and cultural differences. In the EU we have even the need for specialists to bring their experience to bear on the institutional regulatory process of the Union [68]. And in this satisfaction of a structural need of the European institutions, lobbyists must gain access and consideration for the identity of the private interests they represent in Brussels. And together with it, a certain guarantee that they might continue to maintain their privilege of secrecy [69].

The regulation on the European level is anyway doubled by the regulation of single states member of the EU. We will now focus on the German and Italian systems of (no) regulation of the lobbying activities [70].

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[66] J. GREENWOOD, 45.

[67] M. MCKINLEY, 1135, Fn. 7.

[68] H. HAUSER, 680, 691-692.

[69] G. MACRÌ, 475 ff; A. LANG, 119 ff.

[70] S. SASSI, 101 ff.

4.1. *Deregulation and privileges: The German-case*[71]

While in the *other world* of lobbying the rule that garners the most consensus is precisely that of the prohibition of lobbying for members of Congress during and (for a certain period also) after the end of their mandate, German representatives have no incompatibilities at all[72]. Revealing once again a certain surprising moral agility[73], as well as a certain inclination to (not) decide on matters of self-regulation[74], Germans have no limitations or conflicts between elected officers, federal state or local, and the carrying out of other income-producing activities[75]. And, as far as it is known, it appears that today they are the only congress representatives who are allowed to carry out a different work activity during their mandate: a real *privilege*[76].

Here we are not questioning the fact that this option also has positive repercussions, such as the possibility for the most qualified to enter Parliament without losing their social positions, or such as the economic (and therefore ideological) independence of the elected representatives with respect to their parties. And the argument of the subtraction of physical and mental energies to the detriment of the *supreme* public cause. The issue here is different. And it has to do with the fact that German representatives can remain entrepreneurs, executives of multinationals and partners of global lobbying giants without the slightest request for *disclosure* of the activities in which (possibly) such a *servant* has directly brought his *two masters* together.

German lobbying, in short, is not only legitimate but intercepts real areas of privilege[77]. Even to the point of being able to imagine

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[71] G. PASQUINO, 419 ff.

[72] E. CARLONI, 390, Fn. 77.

[73] R. ALAGNA (a), 1 ff.

[74] T. STREIT, 53-54.

[75] H.H. VON ARNIM, 388 ff.

[76] M. AINIS, 9 ss.

[77] M. GERIG, 247 ff.

a kind of alteration of the lobbying market by a position of dominance, given that some figures are at the same time legislators, public decision-makers, private interested parties, and lobbyists. The discipline for lobbying is, in the end, completely obliterated by a paradigm which is only centered on criminal law criteria: the only limit is the commission of criminal acts. There is, in essence, a kind of removal of the boundary zones between freedom and crime, fundamental grey areas in which, instead, it would be appropriate to chisel out and interpolate regulatory norms and watchdog cases [78].

And except for some recent proposals regarding the punishment of *harmful lobbying* [79], the question of lobbying is reduced to the fulfillment of one of the forms of crime that the *Strafgesetzbuch* places for the protection of the activity of the public administration [80]. With only two nuances: the absence of an offence that incriminates *per se* the trafficking on influence [81], and the reformed norm of congress corruption [82].

In such a context of opacity, the suspicion of abuses and bartering can just rise [83], regarding a regulatory system which shows a rather poor conception of transparency [84].

In the absence of a regulation of lobbying, it is not possible to obviate the fact that criminal cases will be the only normative signs which can interact with the most fragile of democratic loops, that of the contacts between *nature* and *culture*, between *personal* and *general*, between *private* and *public*, between *interests* and *welfare*. And without regulation, any lobbying hypothesis will always appear as a subtle form of corruption, and any gross corruption could

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[78] G. SGUEO,153.

[79] K. PETERS, 669 ff.

[80] F. ECKERT, 271 ff.; J. PHILIPP, 572 ff.

[81] J. PHILIPP (b), 33 ff.

[82] K. PETERS, 81 ff.

[83] T. LEIF-R. SPETH, 29 ff.

[84] U. VON ALEMANN, 135 ff.

always be seen as a very democratic promotion of private interests in front of public decision-makers [85].

4.2. *Fiction of regulation and friction with Criminal Law: The Italian-case*

Alike the German system, the Italian field can be seen as an area in which lobbying and influencing are experimenting a sort of fiction of regulation, which raises even higher risks of criminal law intervention.

Here we can say there's a *cultural removal* of the topic of lobbying and its consequent perennial waiting state for a real and comprehensive regulation [86]. One of the main reasons is the absolute centrality of the Italian political parties which, strengthened also by a solemn constitutional rooting in art. 49 [87], have always benefited from that traditionally corporativist culture which saw in the liberal character of competition between interests a factor of disturbance of their ideological *purity* [88], which should remain the original character of Italian political intermediation [89]. A culture that probably both fomented and expressed what has been well described as *Jacobin constitutionalism* [90]. Perhaps an almost metaphysical, and not so much mythological, vision of the concept of general interest, of public good and, above all, of the concept of law [91]. A vision that wants to deform the view to the point of being able to show them all, general interest, public good and law, as concepts preexisting to the system and to its institutions [92].

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[85] G. HOUILLON, 56.

[86] E. CARLONI, 371; E. CARLONI (b), 108.; P.L. PETRILLO (a), 13 ff.; P.L. PETRILLO (b), 51 ss.; P.L. PETRILLO (c), 471.

[87] L. FASANO, 11 ff.; F. SGRÒ, 149 ss.

[88] G. COLAVITTI, 28.

[89] P.L. PETRILLO (c), 465.

[90] P.L. PETRILLO (d), 12 ss.; P.L. PETRILLO (a), 20.

[91] P. RIDOLA, 293; S. SERGIO, 73.

[92] P.L. PETRILLO (c), 466.

From here comes a sort of concealment or removal of the theme of lobbying, which although alive and operating, has never received regulatory attention, perhaps for fear that regulating it, even for the sole purpose of limiting it, could be equivalent to a distorting legitimization of the cultural and political foundations of our system of powers [93]. This impossibility of its *entry into society* has ended up feeding superficial, legendary, pathological visions of lobbying as the identification of the diversion of the process of individuation and promotion of the public good towards the *filth* of private interests [94]. Almost a proverbial example of *what* is meant by corruption (administrative and criminal) of public decisions. When, instead, the real difficulties of lobbying in Italy are, perhaps, tied to the intrinsic serious opacity of the public decision-making process, both political and administrative, of which the activity of influencing decisions is the victim and not the offender [95].

One should not even question the fact that the absence of regulation has done nothing (and does nothing) but nourish this opacity, and nothing (and does nothing) but strengthen Italian lobbying relations and their being an elitist and unequal dangerous socioeconomical phenomenon. The cultural hostility to lobbying, in this way, has allowed only certain private interest bearers to act and influence behind closed doors [96]. In this sense, certain private interests have benefited, even to the detriment of real lobbying and lobbyists; and these private interests had and have an objective interest in continuing to move in a position of privilege and in the absence of competition [97].

And beyond the differentiation which would seem to exist in the *de iure condendo* perspectives of the doctrine of public law [98], certainly the Italian situation has its notable peculiarities with re-

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[93] T.E. FROSINI, 228.

[94] E. CARLONI, 375.

[95] E. CARLONI, 374.

[96] P.L. PETRILLO (c), 466-467.

[97] G. SGUEO, 115.

[98] L. DELLA LUNA MAGGIO 34.

spect to the European legislations, of whose family (with a vocation for the non-discipline and non-transparency of lobbying) it is, however, rightly part, at least for the sensitivity of the scholar of criminal law. The first of these peculiarities is that in Italy, two areas of (non)regulation of lobbying can be distinguished: one state and one local; or, if preferred, one centralized and one peripherical, or one political and one administrative [99]. Because even though a specific discipline is absent, and even though it is almost completely disapplied where present, it is possible to trace a disorganized and fragmented series of obligations of transparency and rights of participation in public decision-making processes [100], which, in a (very) broad sense, can be traced back to the activity of lobbying [101], and which also enjoy indirect constitutional coverage [102].

At a state and central level [103], it is noted, in the first place, that the *Giunta per il Regolamento della Camera dei Deputati* has recently issued a discipline of the activity of representation of private interests within the institutional buildings. This regulation has provided for the institution, only in the case of meetings within the structures of Parliament, of a register of the subjects who professionally carry out the activity of representation of interests towards the Members [104]. Then there is the system of hearings, through which the Camera and the Senato can invite third parties to introduce information into the procedures for preparing and negotiating legal regulations [105]. Another example is the government's obligation to assess government-initiated legislation in advance, i.e. the analysis of the impact of regulations provided for by article 5 of Law

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[99] E. CARLONI, 403.

[100] P.L. PETRILLO (e), 6.

[101] P.L. PETRILLO (b), 67-68.

[102] P.L. PETRILLO (a), 319 ff.

[103] E. CARLONI, 393 ss.

[104] E. CARLONI, 399-400.

[105] J. PONCE SOLÉ, 35 ff.; P.L. PETRILLO (c), 477-478; P.L. PETRILLO (b), 22.

no. 50 of 1999, as amended by Law no. 246 of 2005 [106]. And to the rules concerning private funding of politics and the obligations for elected officials to some disclosures [107].

All these centralized forecasts, though, are either ineffective or not implemented [108].

Hearings are managed in a totally arbitrary manner, such as the access to institutional buildings, and the same applies to the open inquiry into the legislative process and to the regulatory impact analysis itself, which does not actually work [109].

Not to mention that businesses and private individuals have no quantitative limits on their contributions to individual politicians, whether or not they are involved in electoral campaigns, and that, compared with the ordinary funding of parties, businesses have a limit of EUR 100.000,00 per year overall, while private individuals are only subject to this limit with regard to single parties but do not have an overall ceiling.

There are also critical issues regarding the transparency of contributions to politicians, given that the publication on the websites of Parliament is subject to the consent of the donor. This rule reveals an unreasonable privilege for confidentiality over transparency in economic relations between private individuals and politics.

The same opacity is also experienced regarding the obligation to disclose the assets of elected representatives, which, in any case, cannot be disclosed without their consent [110]. These are all elements which have led to the belief that Italy can be qualified as a form of government *with dark interests* [111].

The only notable exception is the discipline adopted in 2012 at the Ministry of Agriculture, which introduced a real list of lobbyists and a procedure of permanent consultation with the obligation

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[106] P.L. PETRILLO (c), 480.

[107] G. MARCHETTI, 171 ff.

[108] P.L. PETRILLO, 129.

[109] P.L. PETRILLO, 485-486.

[110] P.L. PETRILLO, 130.

[111] P.L. PETRILLO, 74.

to justify, in the analysis of the impact of the regulation, whether or not the proposals made by registered lobbyists were followed [112].

Of a partially different nature, because based on self-regulation, is the obligation of mapping the administrative and criminal risks connected to the relationship with the bearers of private interests, which characterizes the anti-corruption plans that the public bodies and the participated companies are required to adopt. Mapping which, as a prevention measure, must consider, on the specific indication of the National Anticorruption Authority, precisely the relations with the representatives of specific interests. Thus, self-regulations of relations with stakeholders are being developed, mostly based on the institution of registers; among these, the recent regulation adopted by the Ministry of Economic Development's worthy of note [113].

The more the rules for lobbying are hidden, fragmented and numerous, the higher will be the risk of hyper-penalization of the behaviors at the intersection between private interests and public decisions. Because diffused and multiplied will be the possibility offered to the investigators of tracing the violation of any one of the irrelevant peripheral norms, and from here constructing an unlawfulness of influence ready to open up to a real and proper criminal responsibility for lobbying.

The current proportion between no central rules and many fragmented peripheral rules should rather be reversed: to maintain a high profile of attention on the central powers of the State through a single and homogeneous set of rules, leaving the *peripheral contacts* greater degrees of freedom in the weaving of relations between local private interests and the public good [114]. The risk of reversing the nexus of political-administrative subsidiarity by means of law and prosecution, in fact, is not otherwise negligible [115].

And this problematic relation between the political communica-

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[112] P.L. PETRILLO, 481-482.

[113] E. CARLONI, 407.

[114] T.E. FROSINI, 43 ff.

[115] R.M. HILLS, 113 ff.

tion with the central power and that with the local powers, is one of the constants of any analysis of lobbying relations, particularly, if carried out from a criminalistic point of view.

Lobbying is the exact same phenomenon everywhere: private interests approaching public agents by having themselves represented and sponsored by professionals in order to obtain a more favorable or less unfavorable decisions. And yet, there are two worlds of this single phenomenon: the European one, which lives with conceptual, political, and even linguistic taboos and which is asphyxiated by a historical corporativism which opposes any pluralist thrust, just as every bureaucracy opposes change and decentralization; which lives with transparency by alternating fictions, illusions and prohibitions; all of which is cloaked in clear signs of ineffectiveness.

And then the US world, where the level of legislative quality of reflection and institutional introjection, even before regulation, simply belongs to another dimension. Not to mention the nature and extent of disclosure obligations, and their combination with specific prohibitions and a sophisticated discipline of private financing of politics. All in a system that exercises constant balancing between the federal and local dimensions of the discipline of each of its states [116].

One does not deny that, depending on the parameters chosen, and on the rigor and conceptual fidelity to the terms selected to draw the lines of comparison, a comparative analysis can also unite, in passing, things from this world [117] and things from that other world. But neither is it forgotten that sometimes comparisons, in bringing such different worlds together, in photographing them side by side, ends up altering them. And perhaps in such cases it might be useful to remind the warning of those that about the theory of literature said that the aim of all comparisons should be to conclude that it is impossible to unite, to compare, to find similarities; that the aim of all comparison, in essence, would be to fail [118].

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[116] C. WISEMAN, 534 ff.

[117] G. SGUEO, 30; E. CARLONI, 380 ss.; P.L. PETRILLO, 60 ss.

[118] M. BLANCHOT, 80 ff.

5. *Nature and paths of the American regulation on influence over public officials*

If the exhortation of a certain North American literature to go *where things happen on a large scale* [119], could be read as a desire to take possession of every present, then the present of lobbying could only be that one of the United States. And not only for the historical reasons mentioned above and for the fact that the only truly complete discipline of this phenomenon can be found *there*, but also for the tension with which this matter revealed to be a general problem of relations between public law and criminal law and an intricate democratic enigma for legislators, legal doctrine and jurisprudence [120].

If in the United States lobbying is an expression of the right to speech, of the freedom of thought, of press and of the right to petition [121], exercising those freedoms can actually show forms of a corruptive nature [122]. So, there is the necessity of balancing the protection of the fundamental rights with the protection of the integrity and correctness of the political and administrative action [123].

And it is here, again, that arises the inseparable link between criminal law and lobbying, which not at all is an accidental and pathological link [124]: given the constitutional coverage offered by the First Amendment to the activity of advocating private interests to public decision-makers, the only possibility of deeming reasonably the limitations and obligations connected to the lobbying is to prevent corruption and the appearance of corruption [125].

Only the obligations and prohibitions which are oriented to-

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[119] F. SCOTT FITZGERALD, 2.

[120] R. BRIFFAULT, 160 ff.

[121] N.W. ALLARD, 36.

[122] T.M. SUSMAN, 39.

[123] D. APOLLONIO-E.C. BRUCE-L. DRUTMAN, 19.

[124] N.W. ALLARD, 39-41.

[125] R. BRIFFAULT, 20 ff.

wards this purpose can be considered not unconstitutional. This was the result of the case *United States v. Harris* in which [126], in 1954, the Supreme Court saved from unconstitutionality the American discipline of lobbying introduced by the *Federal Regulation of Lobbying Act* of 1946 [127].

There is, therefore, a teleological link between the possibility of providing for obligations and prohibitions that are limiting the lobbying, and the protection against crimes of political-administrative corruption: it is only the aim of preventing and punishing crimes which threaten the integrity of the political system which can justify the need for transparency and containment of the activity of those who are remunerated (and those other who spend money) to influence legislative processes in favor of private interests [128]. That is, the need for the public and public decision-makers to be informed about *who* and *how* and *how much* and *why* worked to influence the legislative or administrative decision-making [129].

When the *Lobbying Disclosure Act of* 1995 entered into force, the only area of legitimate limitation of lobbying remained confined to the prevention of acts of corruption and to the avoidance of the appearance of corruption [130]; with the risk that as a result of a misunderstood feeling of gratitude, public decision-makers are too sensitive regarding the needs of certain lobbyists and certain private individuals [131]. With the consequent twofold tension applied to criminal law: on the one hand, the risk that the interpreter (judge or legislator or scholar) who wants to hinder lobbying will produce a mere instrumentalization of the prevention of corruption in order to introduce limitations which are in fact disconnect-

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[126] *Harriss* v. *United States*, 347 U.S. 612 (1954).

[127] W.N. Jr. ESKRIDGE, 7 ff.

[128] W. MCGINLEY, 7.

[129] E. GARRETT-R.M. LEVIN-T. RUGER, 144.

[130] S.L. FATKA-J.M. LEVIEN, 576.

[131] *Buckley* v. *Valeo*: 424 U.S. 1, 300 (1976); *McConnell* v. *Federal Election Commission*, 540, U.S. 93, 150 (2003); R. BRIFFAULT, 40 ff.; E. GARRETT-R.M. LEVIN-T. RUGER, 146.