

THE CRIME OF ELECTORAL POLITICAL - MAFIA EXCHANGE: DISCIPLINE, CRITICAL ISSUES AND REFORM

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ABSTRACT: *The mafia is characterized by the ability to take root in the social context, creating areas of nearness that are indispensable to the strategies and purposes of it. In order to counteract these areas of nearness, the legislator has introduced a new and autonomous case: the crime of electoral political - mafia exchange governed by art. 416 ter penal code.*

The purpose of this study is to analyze the legal aspects related to this crime by examining the decisions of the Italian Supreme Court and the complex parliamentary process that led to the law reform of 2014.

The law reform of 2014 has introduced important law innovations that affect many aspects of this crime, changing the physiognomy of the law itself.

The results of the study show the importance of disrupting these areas of nearness between policy and mafia starting from the moment in which the actors of the agreement are put at each other's disposal, taking note of the process that led to the evolution of organized crime. The aim of the case study mentioned above is to untie the connection nodes of mafia networks and moreover to firmly punish contacts between politicians and mafia gangs.

KEYWORDS: *policy, institutions, collusions, crime of political exchange electoral - mafia.*

JEL CODE: *K42*

1. INTRODUCTION

The *mafia* is a multidimensional phenomenon both in terms of the different ways in which it can occur and in the various spheres in which it can effectively operate (SCIARRONE, 1998).

The *mafia* is a very complex reality that affects different aspects of society such as economy, culture and political (SCIARRONE, 1998).

The *mafia* began, over time, a process of infiltration and camouflage in the economic and social plot.

Awarding tenders and performing construction activities, the *mafia* has become enterprise (ARLACCHI, 1983). Becoming enterprise, the *mafia* began a true work of contagion of the institutions and democracy.

A major feature that distinguishes the *mafia* is the close connection with political power.

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In fact the *Mafia*, during this recent years, has successfully penetrated in the areas of public administration weaving relationships with members of political - administrative power and giving rise to a real convergence of interests (SCIARRONE, 1998).

It is the collusive phenomenon in which each power, the *mafia* and politics, uses the other to achieve their own goals and their own interests.

The legislature of '92 has tried to untie the relationship between *mafia* and politicians by using a dual action: on the one hand, by placing the 3rd para. of art. 416 *bis*¹, among the possible purposes of *mafia* association also that "to prevent or hinder the free exercise of the vote, or procuring votes for themselves or others on the occasion of elections"; on the other hand explaining that purpose in a new and autonomous case, the art. 416 *ter* which introduced in the penal code the crime of "electoral political - *mafia* exchange".

The vote trading is the phenomenon for which the voter, for personal reasons, gives his vote to a political candidate, receiving in exchange money or others favors, lawful or not lawful.

In this case, the opposing party of the political candidate is not a single voter but the *mafia* association.

The electoral political - *mafia* exchange is the model in which the phenomenon of collusions and nearness is realized.

The situation governed by art. 416 *ter* extends the penalty provided by the 1st par. of art. 416 *bis* also "to those who obtains the promise of votes pursuant to the third paragraph of art. 416 *bis* for money".

In this context of collusions, the relationship that is established between the politicians and the *mafia* organization represents an agreement based on vote exchange for political favors. However, between the person and the organization itself, there are no previous reports of vote trading factor to agreement. The political subject is not organic organization itself.

Agreeing with a politician to pursue electoral purposes, using the "*mafia* methods", members of a *mafia* organization are proposed: or to prevent the free exercise of the vote,

¹ The article 416 *bis* introduced in our legal system the crime of *mafia* association. The article 416 *bis* provides that: "Whoever it is part of *mafia* association formed by three or more persons, shall be punished with imprisonment from three to six years.

Those who promote, manage or organize the association are punished, so alone, with imprisonment from four to nine years.

The association is of the *mafia* type when its members use the intimidating power of associative bond and the condition of subjection and code of silence to commit crimes, for acquire the management in direct or indirect way, or otherwise control economic activities, concessions, authorizations, contracts and public services or to obtain unlawful profits or advantages for themselves or for others.

If the association is armed, the penalty of imprisonment from four to ten years in cases provided for in the first paragraph, and from five to fifteen years in cases pursuant to the second paragraph.

The association is considered armed when the participants have access, for the achievement of the aims of the association, of weapons or explosives, even if hidden or stored in storage areas.

If the economic activities of the association intends to take or maintain control are financed in whole or in part with the price, the product, or profit from offenses, the penalties established in the preceding paragraphs shall be increased by a third to a half.

Against the convict is always mandatory confiscation of the things that served or were destined to commit the offense and the things that are price, product, profit, or which constitute the use. (...)

The provisions of this article shall also apply to the Camorra and other associations, a local derivation, that making use power of intimidation of the associative link pursue aims corresponding to those of *mafia* type association.

or to obstruct the free exercise of the vote, or to procure votes for themselves, or to procure votes to others (BARGI, 2013).

With the aim of protect public policy the legislature has introduced the art. 416 *ter* in our system.

It represents one of the cardinal principles of the political constitution of the our country and that is the rule of law and democratic representative political institutions.

2. THE ORIGIN OF THE ARTICLE 416 TER

Emergency and alert is the context in which the choice of the legislature to enact the case in question is gained.

The legislative innovation tried to be a show of strength and continuity by the State against the excessive power of the *mafia* when the massacres of Capaci and street d'Amelio seemed to have folded the State².

Despite this, the present case was criticized for its ambiguousness referring to serious technical defects (FIANDACA, 1993).

So, right now, the new criminal case was inadequate compared to the goal to be pursued: to hit, in a genetic phase, the relations between political representatives and members of *mafia* associations, by extending of severe penalties in cases of so-called vote trading.

In fact the text did not contain, however, any reference to the relationship between *mafia* and political. In this regard and according to a literal reading of the case, the offense consists of a mutually binding agreement in which a person belonging to a criminal organization promises votes to a candidate subject in an electoral contest for money or political favors. Actually, it never happens that the political support electoral returns of mafia associations through the money but, on the contrary, this is done through the granting of other benefits.

Second, the offense was consumed in the time to delivery of money by the political against the *mafia* only following the successful election and then once, the type of conduct that the standard is to repress, it has already been realized.

For these reasons, the new crime seemed to have revealed yet another pointless product legislation symbolic nature of emergency forged by our legislature (AMARELLI, 2014).

A new reform in order to clarify and redefine the norm itself was necessary.

2.1. The structure of the article 416 *ter*

Active subject of the crime is therefore the politician candidate in an electoral competition or his supporters. It must therefore be a person external to *mafia* organization, that does not play an active role.

For the purposes of the criminality of the act is sufficient that the candidate follows the promise of being helped in the election and that he pays money for the support received.

So the political performance is only limited to the payment of money. This decision therefore limits the potential repressive incriminating rule since the giving of money is a form of exchange of all possible than what is offered by the political counterpart to the *mafia* and that is the acquisition of public resources.

² In the massacre of Capaci and way of Amelio the judges Giovanni Falcone and Paolo Borsellino died.

Objective element of the offense is therefore unlawful contract of agreement signed between politicians and the *mafia* referring to the promise of votes and moreover to money supply.

With reference to the time in which the offense was committed, the crime of electoral political - *mafia* exchange, according the Italian Supreme Court, Section V, 30 January 2003, n. 4293, is perfected at the time of the formulation of the mutual promises, regardless of their realization, being relevant, as regards the conduct of the politician, his willingness to come to terms with the *mafia* faction, in view of the future and the concrete fulfillment of the commitment made in exchange for election.

The next phase of the collection of votes and the conduct of the politician is insignificant for the purposes of the art. 416 *ter*.

The Italian Supreme Court ordered that, for the crime to exist, it would require only an electoral agreement between the politician and the *mafia*, which relates to the promise of votes in return for payment of money, it is not required the conclusion of further agreements that commit the politician to work in favor of the association in the event of election victory.

The Italian Supreme Court, Section VI, 9 November 2011, n. 43107 stated that, in the event that such additional agreements are concluded, it must be determined whether the conduct, subsequently put in place by the politician in support of the interests of *mafia* association that promised or procured votes, assumes the characters of the investment or the collusion association itself, taking shape, over the offense under the art. 416 *ter*, also that of the art. 416 *bis* of the penal code.

According to the statutory rule, the contract ends when the proponent becomes aware of the acceptance of the proposal by the recipient.

The usefulness of the norm is gathered in terms of evidence: for the punishment of an offense it is sufficient that the political candidate accepts the promise of votes, or rather the package of votes by the *mafia* association.

2.2. The acquisition of the vote by the mafia method

Under the art. 416 *bis*, *mafia* is set up as such by virtue of the means used and the ends pursued.

The third para. of the art. 416 *bis* states: "An organization can be considered as *mafia* type when its members use the force of intimidation of the associative bond and the condition of subjection and conspiracy of silence to commit crimes, to acquire directly or indirectly the management or the control of economic activities, of concessions, of authorizations, contracts and public services or to realize profits or unjust advantages for themselves or for others, or in order to impede or obstruct the free exercise of the vote, or to procure votes for themselves or others on the occasion of electoral consultation".

This is the so-called *mafia* method which, so that it can constitute the crime of association, it includes three necessary and essential elements that are: the force of intimidation, the condition of subjection and the code of silence.

Intimidation can be defined as the capacity of the State, of an organization or of an individual to intimidate according to widespread opinion of his strength and his willingness to use it.

Intimidation derives from the associative bond. The use of power of intimidation not constitutes a mode of realization of conduct of members but it constitutes the instrumental element compared to the achievement of the goals of the association.

According to the Italian Supreme Court, it does not seem necessary that the members of the association give direct and concrete execution to specific acts of intimidation and it does not seem necessary the intention of producing an intimidating effect to configure the crime.

The capacity of intimidation products terms of subjugation and code of silence.

These are two elements closely connected between them because the state of denial is expressed in behavior assumed by him who is being subjected to the power of *mafia*.

The term "code of silence" refers to the attitude of refusal to cooperate with the state authority because of a situation of fear and psychological pressure that prevails on the civic duty of social solidarity.

The power of intimidation, subjugation and code of silence are influenced each other: the power of intimidation determines subjugation and code of silence, also, the subjugation and code of silence feed the power of intimidation. For the configuration of the crime, it is not enough the supply of money, in exchange of electoral support, towards *mafia* organization but it must also make use of *mafia* methods.

In a ruling the Italian Supreme Court has stated that the purpose of the existence of the crime in question is not necessary that during the election campaign are made violent behavior, specific threats or is still externalized in the form mandatory indication of the vote, as opposed to just that the said information is still perceived from the outside as *mafia* organization and as such supported by the force of intimidation of the associative bond: as noted by the Italian Supreme Court attitudes servile and conspiratorial induced in the population are in fact the result of the prestige of the criminal association that, for the only reason to exist, to operate and to function, because of its negative reputation, for the ability to throw warnings (also symbolic and indirect) bills itself as effective, formidable and influential power center (GARGANI, 2007).

The statement therefore become preponderant, according the Italian Supreme Court, section I, 30 january 2004, n. 227476, considers sufficient for the existence of the crime, an indication that voting is perceived from the outside as a *mafia* faction without the need that it makes use of specific acts of violence and abuse.

3. THE REFORM OF THE ARTICLE 416 TER

In recent years several bills has been presented to Parliament with the aim of overcome for the defects of the original formulation of the incriminating and to return to crime of electoral political - *mafia* exchange a scope of application sharper and more effective (AMARELLI, 2014).

The need to change the case arose from the widespread acknowledgment of its disappointing outcomes applications, significantly lower than the expectations placed on the provision designed to guard vital interests for democracy (SQUILLACI, 2013).

Since its introduction, the crime in question has been criticized because it is considered unfit to pursue the set goal: to hit, in the genetic moment, the inception of collusive relationships between politics and *mafia*.

The main weaknesses of the article 416 ter were the following:

a) the introduction of the following engraved "promise of votes specified by the third paragraph of the article 416 bis" involved problems of interpretation. This is because the third paragraph of the article 416 bis did not refer to a "promise of votes," and therefore the question of interpretation is that it could refer instead or in the use of the "*mafia* method" - described by the third paragraph - or in the activity of procurement of votes.

b) the object of the performance of the active subject was not included the concept of "other benefits". The application environment of the crime was very confined because is the ability to obtain favors that drives *mafia* associations to interact with politicians.

c) difficulties in terms of evidence about the performance of the active subject. It was not clear whether this provision was to be effective or even worse, the simple promise of performance.

As happened in 1992, the gestation of the reform was not peaceful and linear.

Four days of discussion, four readings of the chambers, amendments and parliamentary sessions were needed to arrive on April 16, 2014 for approval by the Senate of the bill S.948 - B and the promulgation of the law on April 17, 2014, n. 62, on the "Amendment of the article 416 *ter* of the penal code, relating to electoral political - *mafia* exchange".

The "new" art. 416 *ter* provides two separate criminal offenses.

In particular, in the first para., it shall be governed the conduct of "anyone who accepts a promise to procure votes by the manner described in the third para. of the art. 416 *bis* in return for the delivery or promise of payment of money or other benefits", in consequence of which it is established the penalty of imprisonment from four to ten years.

In the second paragraph, however, it is governed by the same penalty the conduct of "who promises to buy votes in the manner specified in the first para."

The legislative news of 2014 has affected many aspects of the crime of electoral political - *mafia* exchange and has changed the physiognomy than the wording of the past.

The electoral political - *mafia* exchange is configured as a multi-offensive crime. The law protects, on the one hand, public order, on the other hand, the principle of democratic legality and representative of public institutions through the guarantee of the freedom of the right to vote (SQUILLACI, 2014).

3.1. The punishment of promisor

The first changing elements of the reform refers to the structure of the case.

The original provision, as we have seen, while describing an agreement to correspondent performances, punished only one of the parties to the agreement: the politician.

No penalty was instead envisaged for the promisor, one who belonging to a *mafia* organization strove to procurement of votes.

It is true that the case discipline conduct multi-person, necessary for the conclusion of an agreement between promisor and promisee, but it limited the punishment of the crime to a foreign person to *mafia* organizations, assuming that the conduct of the participant would be punishable under the art. 416 *bis*.

Now, with the wording of the new case, one who promises to procure votes in favor of the politician is punished not only for the participation in the *mafia* association, even for the mere conclusion of the agreement. It is foreseen for the punishment of the subject with the same penalties as the person who accepts the promise of votes.

3.2. The criminal conduct: the acceptance of the promise to procure votes by the mafia method

The most controversial changes were those related to criminal conduct. As regards the identification of the threshold of the criminal case, it is in fact discussed which were the conduct to be punished and so if only one accepting the promise of the procurement of votes, or even to work to get that promise. In the text finally approved the first option for single acceptance of the promise to procure votes is emphasized.

The new provision, on the one hand, requires the "promise to buy votes", without any nod to the actual procurement of the votes themselves, on the other hand, it equates "delivery" and "the promise of delivery" of money or other benefits, dissociating once again of the events occurring after the conclusion of the agreement.

So the fulfillment or non-fulfillment of the performance does not seem to be influential for the configurability of the present case.

The redefinition of the law seems to be able to learn that its integration is not necessary to prove actual reliance by the promisor to *mafia* methods but is simply necessary the promise of its possible use during the signing of the agreement.

This aspect is a requirement of the agreement that necessitate the assessment, on the objective level, that the politician accepts the promise that are procured in exchange for money or other benefits, and votes, on the subjective level, it is necessary to ensure that the promisee is aware of the fact that the other party can provide the same through the possible use of *mafia* methods.

The changing legislation excludes, for the configuration of the offense, the verification that the promisor has actually resorted to the *mafia* method during the elections.

It is in fact a requirement of the promise and not the subsequent conduct of the executive same promise.

For the integration of the case under the art. 416 *ter*, it is not relevant to its actual use by the promisor in the activities of procurement of votes, but it is sufficient that the *mafia* is committed to procure votes saying, or implying with allusions or eloquent gestures, to avail themselves for the purpose of power of intimidation deriving from his membership of a *mafia* organizations (AMARELLI, 2014).

3.3. The expansion of the content of the performance: delivery or promise of payment

Another innovation concerns the expansion of the content of the performance of the politician. The legislature, as we have seen, has extended the number of offenses, alongside the provision of money also promise delivery. Regarding the term "supply" the jurisprudence has analyzed the problem whether understood in the strong sense, that is asking for the actual payment of money from the political to the *mafia* or in the weak sense, that is satisfied with a promise of payment material, with the consequence to consider what time of perfection of the crime concluding the pact with taking mutual commitments (VISCONTI, 2013).

According to the Italian Supreme Court the second priority is dominant.

The concept of supply continues to be considered ambiguous and controversial aspect of the crime of electoral political - *mafia* exchange. Although it is not indicative of actual giving of money, it was decided to again use the concept of delivery.

The new case identifies the time the offense was committed in the acceptance of the promise. The fact that the legislature has continued to regulate the present case around the mere acceptance of the promise does not mean that the offense can be built from any kind of agreement between political and *mafia*, on the contrary, it seems necessary to limit such conduct to those harmful of the legal protected by the standard.

So it is not as configurable integration of the crime the mere acceptance of any promise of aid as part of the election campaign, but there must be a commitment by the contractors face hoard votes by *mafia* method.

3.4. The expansion of the object of the performance of political: money or other benefits

The most important reform of the contested provision concerns the object of the performance promised or delivered by the political.

While in the past, the art. 416 *ter* circumscribed the consideration of who obtains the promise of votes by *mafia* organizations to mere delivery of money, now it is extended to other "utility". It is an absolute novelty since almost never the performance of political flowed in giving of money but, on the contrary, in behaviors that are non-cash forms that are forms of collusion much more insidious such as the award of contracts, delivery funds etc.

Therefore it is an element that integrate the original intention of the legislator at the time of the first formulation of the crime of electoral political - *mafia* exchange. In fact, the legislature had initially expected, as the service supplied the political candidate who obtained the votes, not only the supply of money but also "the promise of facilitating the acquisition of concessions, contracts, contributions and public funding or at least the realization profits", but this expression was then eliminated during the legislative process that led to the conversion into law of decree n. 306 of 1992.

In the concept of "utility" it seems to be understood, not only currency and economic utility, but also utility without economic relevance. The promise of jobs, the allocation of contracts, the assistance to adjustment processes etc comes within the concept of "utility".

3.5. The new frame sanctioning

So there was a radical change of the crime of electoral political - *mafia* exchange.

The law came in, as we have seen, on the side of the incriminating conduct, widening significantly extending the criminal liability of the facts and to include the acceptance of the promise of votes in exchange for the promise or delivery of money and other benefits.

Despite these positive aspects, the reform presents problematic aspects.

The law came in fact also on the side of the penalty prescribed by law reducing it.

So among the controversial aspects of the reform will be just a drop in frame sanction of punishment in relation to the article 416 *bis*: the penalties were reduced and from 7 to 12 years provided for in the original formulation increased from 4 to 10 years.

The reason for this is the diversity of the offending conduct.

In contrast to the thesis of the "favor the *Mafia*", often modeled by the public and by the political forces, the choice seems to represent, instead, the result of a careful and thoughtful evaluation of the different non-value of the relevant facts and the proper application of the principles of proportionality, adequacy and gradualness of the penal answer (AMARELLI, 2014).

Provide the same penalty provided for in the first paragraph of the art. 416 *bis*, according to some, it would expose the norm at risk of violation of the constitutional principle of proportion, which prohibits punishing likewise conducted ontologically different.

The provision of a frame different penalties thus prevents to equalize two different offenses: an offense of mere conduct (as defined the art. 416 *ter*) and one of event (as was considered the collusion).

If the penalties provided for in art. 416 *bis* and 416 *ter* were equal, the risk would be to assist the absurd paradox of seeing punished the conduct of the foreign of the *mafia* organizations externalized in the mere acceptance of the promise more seriously than those of concrete support or help clans (AMARELLI, 2014).

Resize the framework of penalties prescribed by law for the crime of electoral exchange would reflect well on the gravity of the two different standards in terms of the potential offensiveness because the art. 416 *bis* involves a stable and continuous participation in a criminal association, an organic inclusion and a personal, intimate sharing of methods and aims of the *mafia* association; the art. 416 *ter* consists in a limited behaviour only to the time of the collusive agreement.

4. CONCLUSIONS

The frequent and severity cases of corruption of politicians with *mafia* organizations have made necessary and urgent intervention of the legislature in order to stop these cruel forces and to overcome the inadequacies of the previous legislation.

Despite these good intentions, the parliamentary initiative on the issue, over the years, has been inadequate. In fact, during these twenty years, the bills direct to modify the framework were only eight and they have never reached the phase of discussion.

Since the entry into force of the law of 92 until the approval of the 2014 reform the sentences for the crime of electoral political - *mafia* exchange were very scarce.

The article 416 *ter* has been a difficult rule to be applied to concrete cases: the Italian law have preferred in fact to contest the political, colluded with the *mafia*, other offenses (for example the article 96 and 97 of presidential decree 361/1957).

With the reform of the article 416 *ter* the legislature intended to implement the law against *mafia*, ensuring a more effective repression of relationships between policy and *mafia*.

A few months after its approval, the new case has found itself at the center of strong criticism following the decision by the Italian Supreme Court to annul a judgment against a politician, Antonello Antinoro.

The ruling of the Italian Supreme Court applied for the first time the article 416 *ter* reformed.

In this case the payment of money by the political against the *mafia* association who were engaged in an activity of procurement of votes was assessed.

The conclusion of the *pactum sceleris*, the giving of money and the procurement activities of the votes were sufficient evidence, according to the Court, for the integration of the case under the article 416 *ter*. Against the Court's decision, the defense had appealed to the Italian Supreme Court pointing out how the reformed case requires, as a constitutive

element of the crime, the use of "*mafia* methods" mentioned in the third paragraph of the article 416 *bis*.

The Court accepted the appeal on the basis of *jus superveniens* annulling the decision of the second degree and returning to another section of the Court a new assessment.

The Italian Supreme Court considered that the new incriminating case requires that the *mafia* method is the subject of the agreement "in light of the requirement that the candidate can count on the concrete deployment of intimidation of its power of criminal association and that the latter undertakes to make recourse, where necessary"; so it is not only sufficient the conclusion of the agreement but it is necessary that the *mafia* association should strive according to the typical mode of the organization itself.

The Italian Supreme Court annulled the judgment and sent back to the trial court for a new trial claiming that "in terms of electoral political - *mafia* exchange crime, the law April 17, 2014, n. 62, amending art. 416 *ter* has introduced a new constituent element in this case incriminating on the content of the agreement, which shall include the commitment of the *mafia* group to take action against the politic body also deploying concretely, if it is necessary, their power of intimidation".

It is not possible to express a serious judgment on the reformed case because the law has a recent formulation. It is not possible now to look at the actual cases in which it was applied (there are only two cases of application of the rule: Antinoro case and Polizzi case).

The hope is that the new norm is up to the expectations and needs that the old article 416 *ter* has not been able to pursue: hit the relationship of collusion between politicians and *mafia* organizations.

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