

THE CONTRIBUTION OF ITALIAN CASE LAW IN DEFINING THE NOTION OF “MAFIA”

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SUMMARY: 1. The origins of the legislative definition of mafia-type association. – 2. The structure of the offence of mafia-type association. – 3. Organizational aspects of the mafia-type association. – 4. The power of intimidation. – 4.1. The conditions of submission and silence. – 4.2. The exploitation of the power of intimidation and of the related conditions of submission and silence. – 5. The objectives of the mafia-type association. – 6. The *actus reus*. – 7. Conclusive remarks.

1. The legislative definition of mafia-type unlawful association in the Italian legal system is currently given in Article 416-*bis* of the Criminal Code (Cc), which was introduced by Law n. 646/1982¹. Article 416-*bis* Cc, headed «Mafia-type Unlawful Association, including where foreign», prescribes that:

«1. Any person participating in a Mafia-type unlawful association including three or more persons shall be liable to imprisonment for 10 to 15 years.

2. Those persons promoting, directing or organizing the said association shall be liable, for this sole offence, to imprisonment for 12 to 18 years.

3. Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power stemming from the bonds of association and of the resulting conditions of submission and silence to commit criminal offences, to manage or in any way control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for other persons on the occasion of an election»².

(...)

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¹ Law 13.9.1982 n. 649, in *Gazzetta Ufficiale* 14.9.1982 n. 253. In the literature see generally G. Insolera, *Considerazioni sulla nuova legge antimafia*, in *Politica del diritto* 1982, 681 ff.; G. Fiandaca, *Commento all'art. 1 l. 13 settembre 1982, n. 646*, in *La Legislazione Penale* 1983, 256 ff.

² Paragraphs 4 to 6 of Art. 416 Cc establish aggravating circumstances. In particular, paragraphs 4 and 5 provide that the penalty will be increased in the case of armed association; paragraph 6 provides that the penalty will be increased if the economic activities the control of which the participants in the association aim at achieving or maintaining are financed by the proceeds of criminal offences. In its turn, paragraph 7 prescribes that the offender is liable to confiscation of the things that were used or meant to be used to commit the offence and of the things that represent the price, the product or the proceeds of such offence or the use thereof.

8. The provisions of this article shall also apply to the Camorra, 'Ndrangheta and to any other associations, whatever their local titles, including foreign ones, seeking to achieve objectives that correspond to those of Mafia-type unlawful association by taking advantage of the intimidating power of the association».

The current text is the result of many law reforms introduced since 1990, which have however only brought about symbolic changes or increased the penalties, while not modifying the structure of the offence.

As will be seen further below, the influence of case law proved to be essential to the origin and formulation of the aforementioned legislative provision, as well as to the understanding of the constituent elements of the concept of “mafia-type association”³.

In this respect, the roots of the offence of mafia-type association started to develop long before the legislative bill of 1980. Indeed, a parliamentary Commission of Inquiry on the phenomenon of the Sicilian Mafia, established in 1962, had already called for a law reform aimed at addressing the shortcomings of existing legislative instruments⁴. Although mafia criminal activities had been affecting the country for many decades⁵, the original version of the Criminal Code enacted in 1930 did not contain any explicit reference to the mafia itself.

Nonetheless, this does not mean that during the long period before the introduction of Article 416-bis participation in mafia-type organizations had been left unpunished. In fact, both the literature and case law called for such organizations to be included within the scope of application of the provisions against the offence of «unlawful association to commit a crime» (Article 416 Cc), which applies when «three or more persons associate together in order to commit more than one crime».

Notwithstanding the abundant case law concerning the application of Article 416 Cc, the latter provision showed to be insufficient to effectively tackle the rapid spread of mafia-type criminal activity, especially in some areas of the country. Many reasons were behind this unsatisfactory outcome.

Firstly, as the literature has repeatedly emphasised, a mafia-type criminal organization might also be set up for the pursuit of apparently licit purposes, such as

³ With regard to Art. 416-bis see generally G. Borrelli, sub *art.* 416-bis, in G. Barbalinardo, S. Benini, G. Borrelli and C. Del Re (eds.), *I delitti contro l'ordine pubblico e i delitti contro l'incolumità pubblica*, Milano 2010, 140 ff.; R. Cantone, *Associazione di tipo mafioso*, in *Digesto delle discipline penali*, VII, Torino 2011, 30 ff.; A. Cavaliere, *Associazione di tipo mafioso*, in S. Moccia (ed.), *Delitti contro l'ordine pubblico*, Napoli 2007, 381 ff.; G.A. De Francesco, *Associazione per delinquere e associazione di tipo mafioso*, in *Digesto delle discipline penali*, I, Torino 1987, 289 ff.; A. Ingroia, *L'associazione di tipo mafioso*, Milano 1993; Id., *Associazione di tipo mafioso*, in *Enciclopedia del diritto*, Agg. I, Milano 1997, 135 ff.; M. Pelissero, *Associazione di tipo mafioso e scambio elettorale politico-mafioso*, in M. Pelissero (ed.), *Reati contro la personalità dello stato e contro l'ordine pubblico*, Torino 2010, 277 ff.; V. Spagnolo, *L'associazione di tipo mafioso*, Padova 1997; G. Turone, *Il delitto di associazione mafiosa*, Milano 2015.

⁴ The Parliamentary Commission was established by Law n. 1720 of 20.12.1962, the first statute of the Republic using the word “Mafia”; for an overview of the legislative initiatives preceding the introduction of Art. 416-bis Cc, see G. De Cesare, *Mafia*, in *Enciclopedia del Diritto*, XXV, 1975, 138 ff.

⁵ See S. Lupo, *Storia della mafia: dalle origini ai giorni nostri*, Roma 2004.

the control of economic activities⁶, whereas Article 416 Cc only applies when the purposes of the association are in themselves unlawful (i.e., the commission of crimes)⁷. What is more, regardless of the lawful or unlawful nature of the objectives, the capacity for intimidation typical of mafia-type organizations often makes the use of explicit threats and violence unnecessary, so that the criminal activities of the group are frequently carried out “under the radar” and are therefore untraceable.

Secondly, whenever mafia-type organizations were investigated under Article 416 Cc, there were many obstacles hindering the collection of evidence on the constituent elements of the offence itself. In particular, although such organizations are mainly geared toward carrying out a criminal plan, providing evidence of this at trial could prove to be very challenging, due to the impenetrable halo of silence that always surrounds these criminal groups, both internally and externally. The obstacles became practically impossible to overcome when it came to collecting evidence on the subjective element (*mens rea*) of the offence. Indeed, in order to hold a single defendant liable under Article 416 Cc, it was not sufficient to prove the existence of an unlawful association and the individual’s adherence thereto. It was also necessary to demonstrate the specific state of mind required under the provision in question, i.e., that the defendant had joined the criminal group with the specific intent (*dolo specifico*) to participate in the commission of more than one crime. A burden of proof that is all the more complicated given that mafia-type associations, and so their individual participants, can have lawful purposes too: in order to overcome the obstacles to collecting evidence, Italian courts then often automatically assumed the existence of the peculiar *mens rea* (the intent to take part in the commission of a number of specific crimes) once the mere adhesion to a mafia-type criminal group had been demonstrated⁸.

For all the foregoing reasons, Article 416 proved to be inadequate to encompass the whole range of situations and actions characterising mafia-type criminal groups⁹: therefore, the Parliamentary Commission of 1962 proposed a set of legislative reforms intended to provide the public authorities with suitable tools for combating mafia crime, ones that were as flexible as the criminal phenomenon they were up against.

However, the proposals of the Parliamentary Commission were only partially implemented through the adoption of Law n. 575/1965, significantly headed “Provisions against the Mafia”. Law n. 575/1965 did not change the Criminal Code in any way, but it only amended the personal “preventive measures” already in force¹⁰. However, this law was still of crucial importance, as it was the first to introduce the crime category of “mafia-type association” into the Italian legal system: in particular, Article 1 prescribed that the new rules concerning personal preventive measures

⁶ See § 5 below.

⁷ See, among others, A. Cavaliere, *op. cit.*, 447 ff.

⁸ Some legal scholars have criticized this practice, as it is not fully consistent with the principles of due process in regard to the burden of proof: see G. Turone, *op. cit.*, 10 ff.

⁹ A. Cavaliere, *op. cit.*, 386; G. Insolera, *Diritto penale e criminalità organizzata*, Bologna 1996, 66 ff.; V. Spagnolo, *op. cit.*, 6 f.

¹⁰ Namely, special surveillance, compulsory residence and the prohibition of residence, already introduced into the Italian legal system by Law n. 1423 of 27.12.1956.

should apply to “suspected members of mafia-type associations”, though a definition of the latter was not provided for.

The lack of a legislative definition left the problem of providing a clear interpretation of the legal meaning of the expression “mafia-type association” unresolved¹¹. It was thus up to the courts to address the issue every time it was necessary to outline the scope of application of the preventive measures envisaged under Law n. 575/1965. In interpreting and applying the latter, the courts endeavoured to identify the features of the “mafia-type association”, and on the basis of the resulting case law the Legislator subsequently formulated the correspondent legal definition as it is now conceived under Law n. 646/1982. A significant example of this creative interpretative process is provided by a 1974 decision of the Court of Cassation, according to which a mafia-type association is:

«any grouping of individuals who, by criminal means, aims to gain or retain control over areas, groups of people or production activities through the use of systematic intimidation and the infiltration of its members, in such a way as to create a situation of submission and silence that makes the ordinary punitive intervention of the State either impossible, or extremely difficult»¹².

“Systematic intimidation” as the method, “submission” and “silence” as the consequences (and, at the same time, instruments), control of production activities as the final purpose: these features are evidently the forerunner of the constituent elements of the offence of “mafia-type association” as subsequently described under Article 416-*bis* of the Criminal Code.

2. As was pointed out earlier, the text of Article 416-*bis* adopted in 1982 drew amply from previous case law: in particular, not only the decisions implementing the law on preventive administrative measures, but also those interpreting the offence of “generic” unlawful association as defined under Article 416 Cc were taken into account¹³.

The new category of offence introduced in 1982 displays a number of innovative features.

Firstly, the two crimes, “mafia-type unlawful association” and the more generic “unlawful association”, are characterized differently: the offence under Article 416 is centred on the objectives of the association, whereas the offence under Article 416-*bis* is structured on the method exploited by the affiliates in order to accomplish the objectives of the association.

Secondly, as was noted earlier, the objectives themselves can be different: the purpose of a generic criminal organization is inevitably to commit more than one criminal offence; the purposes of a mafia-type association can be many and include

¹¹ In particular, Art. 1 of the law in question specified that, under the new rules, the preventive measures would be targeted against “suspected members of mafia-type associations”.

¹² Court of Cassation order 12.11.1974 n. 1709, in *Giustizia penale* 1976 (III), 151 ff. This judicial decision anticipated a further feature of the forthcoming legislative interventions, namely, the superseding of a “regionalistic” approach to the mafia phenomenon and the acknowledgement of its national dimension; see G. Turone, *op. cit.*, 22 f.

¹³ See G. Fiandaca, *op. cit.*, 258.

both the perpetration of criminal offences and engaging in licit behaviour, like managing economic activities.

Thirdly, the moment at which the offences take place is also dissimilar: the offence of unlawful association is considered to have taken place at the very moment when an agreement to commit more than one crime is entered into; on the other hand, the offence of mafia-type association is considered to have taken place when an already existing association starts using a particular method¹⁴ to attain its objective, which may also be legitimate.

According to a majority of legal scholars and case law, whenever a mafia-type association also has the purpose of committing more than one crime, so that the two categories overlap, only the offence under Art. 416-*bis* should apply due to the principle of speciality. Contrarily, Art. 416 will apply whenever the special constituent element of the mafia-type method is not fulfilled¹⁵.

In light of the wording of Article 416-*bis* and its interpretation by the abundant case law produced after the entry into force of Law n. 646/1982, the discussion that follows will focus on the constituent elements of the offence of mafia-type association on the basis of which the concept of mafia can be inferred in the Italian legal system.

The following elements will be individually examined:

- a) The organization of the mafia-type association;
- b) The power of intimidation stemming from the bonds of the association, and the resulting conditions of submission and silence;
- c) The exploitation of the intimidating power;
- d) The purpose of committing crimes or of attaining the other objectives, including legitimate ones, as mentioned under Article 416 (3) *bis* Cc¹⁶;
- e) The elements of the conduct of participation in the association.

3. With reference to the structural element of the association, Article 416-*bis* only requires the presence of three or more affiliates. A number of legal scholars have consequently assumed that there need not be a peculiar internal organizational structure in order for a criminal association to fall within the scope of application of Article 416-*bis* Cc¹⁷. However, such an interpretation does not reflect reality, given

¹⁴ The so-called “Mafia method” (*metodo mafioso*), see § 4 below.

¹⁵ In case law, Court of Cassation 14.1.1987 n. 5771, *Fiandaca*, in *CEDCass*, m. 175927, in *Foro italiano* 1988, II, c. 451; in the literature, A. Ingroia, *L’associazione*, cit., 129; V. Spagnolo, *op. cit.*, 112 ff; G. Turone, *op. cit.*, 199 ff. On the contrary, whenever the specializing element of the *metodo mafioso* is lacking, only Art. 416 will apply.

¹⁶ The same elements are outlined in the sociological literature, according to which additional key features of mafia-type associations are the offer of protection to the affiliates and to anyone accepting the condition of subjugation to the criminal group, and the connection between the latter and political power: see N. Dalla Chiesa, *La convergenza. Mafia e politica nella Seconda Repubblica*, Milano 2010, 35 ff.; G. Fiandaca, *Il concorso esterno tra sociologia e diritto penale*, in G. Fiandaca and C. Visconti (eds.), *Scenari di mafia. Orizzonte criminologico e innovazioni normative*, Torino 2010; F. Varese, *Mafie in movimento*, Torino 2011, XIII.

¹⁷ G. Neppi Modona, *L’associazione di tipo mafioso*, in *Studi in memoria di Giacomo Delitala*, II, Milano 1984, 898 ff. *Contra* V. Spagnolo, *op. cit.*, 22.

that all mafia-type groups are set up with a multilevel organization, which is usually much more complex than that of a common criminal organization falling under the scope of application of Article 416 Cc.

Moreover, this interpretation has been rejected in case law, which has also recently endorsed the opinion that:

«For the purpose of identifying a mafia-type unlawful association pursuant to Art. 416 *bis*, the following elements shall be decisive: the group of individuals (and the hierarchical division of roles), the logistical and organizational structures, the territorial scope of influence and the category of projected offences¹⁸».

In addition, the key element of the mafia-type association (i.e., exploitation of the power of intimidation in order to attain the final objectives) logically depends on the existence of enduring bonds between the affiliates and a solid and stable organization¹⁹. Given the strict interdependence between a real ability to intimidate and a stable internal organization, some authors contend that evidence of the existence of an organized mafia-type association can also be provided indirectly, precisely by demonstrating the criminal group's power of intimidation: in other words, the power of intimidation is considered a telling symptom of the territorial roots of an organization and of its capacity to be active in the long term²⁰.

In short, the absence of an explicit legislative description does not mean that the legal concept of mafia-type association under Article 416-*bis* does not embrace a stable internal organization among the elements of the crime. Possibly, since the structure of Italian mafia-type organized crime groups is very complex and at the same time very variable, due to their different historical and geographical origins (Sicilian Mafia, Camorra, 'Ndrangheta), the legislator chose to focus on their common ways of acting, instead of attempting a cumbersome and wordy description of their common way of being²¹.

4. As was observed above, the power of intimidation is the key new element of the category of offence introduced by Law n. 646/1982; at the same time, it is also the most important difference between the mafia-type association and the generic offence of criminal association punished under Article 416 Cc.

¹⁸ See, eg, Court of Cassation 21.12.2012 n. 5143, *Nicoscia*.

¹⁹ G. Turone, *op. cit.*, 188 ff. The relevance of a stable internal structure is partially confirmed by the wording of Article 2 *a* and *c* of the UN Convention against Transnational Organized Crime (Palermo, 2000), according to which an «organized criminal group» shall mean a «structured group» (let. *a*), i.e., «a group that is not randomly formed for the immediate commission of an offence». The structural element is taken into consideration also under the analogous definition of organized criminal group provided by Art. 1 (2) of Framework Decision 2008/841/JHA, of 24.10.2008, on the fight against organized crime.

²⁰ In the literature, see G.M. Flick, *L'associazione a delinquere di tipo mafioso. Interrogativi e riflessioni sui problemi posti dall'art. 416 bis*, in *Rivista italiana di diritto e procedura penale* 1988, 855 f.; in case law, see Court of Cassation 9.12.1994, *Imerti*, in *CEDCass*, m. 200903.

²¹ G. Turone, *op. cit.*, 189 ff.

The wording of the phrase «intimidating power stemming from the bonds of the association» refers to the capacity of the criminal group to instil fear by its mere presence; in other words, the capacity to cause a permanent feeling of threat in a specific social environment even without making use of direct violence or coercion²².

Obviously, this autonomous power of intimidation does not appear all of a sudden, but rather originates from previous human behaviour: in particular, the capacity of an association to make itself feared today is based on a systematic resort to violence and threats in the past and over a certain period of time, in a specific geographical or social context.

In particular, the “old-style” mafia-type associations enjoy their power of intimidation over everyone living in a specific geographical context, so that they are basically able to control and exploit the whole territorial community. Given the importance of the territorial influence, case law has traditionally excluded the immediate application of Art. 416-bis Cc when a group of participants in a mafia-type organization set up a new cluster in a part of the country other than the one where the association was established, and begin to make use of violence and threats in order to carry out criminal activities: in such cases, the provision at issue will be applicable only after a certain period of time, when the association gains a sufficient “criminal reputation” to be able to enforce a code of silence and intimidation in the new territory too²³.

However, case law is no longer unanimous on this matter. In some recent decisions, the Court of Cassation applied Art. 416-bis to the affiliates of a newly-established cluster of a mafia-type association even without evidence of the existence of an effective power of intimidation in the new territory, it being sufficient to prove a stable connection with a mafia-type association with a notorious reputation. This is the so-called “silent Mafia”, acknowledged by the Court of Cassation in recent decisions, one of which established that:

«once it is demonstrated that the new cluster displays the typical features of the *Ndrangheta* and is strictly linked with the territory of origin, it can be assumed that it is dangerous in itself for public safety, regardless of whether the power of intimidation has been already exerted in the new territory²⁴».

Moreover, in the last fifteen years, case law has expanded the interpretation of the concept of the “territory” where a mafia-type association exerts its power of intimidation: in particular, the “territory” can mean not only a geographical context, but also a *social* context. Accordingly, Art. 416-bis has been applied to certain criminal groups of foreign origins that use mafia-style methods to exert control over

²² G. Insolera, *Diritto penale e criminalità organizzata*, cit., 72 ff.; G. Turone, *op. cit.*, 123 ff.

²³ See Court of Cassation 13.2.2006 n. 19141, *Bruzzaniti*, in *CEDCass*, m. 234403.

²⁴ *Court of Cassation* 3.3.2015 n. 31666, *Bandiera*, in www.penalecontemporaneo.it, 5.10.2015, with critical commentary by C. Visconti, *I giudici di legittimità ancora alle prese con la “mafia silente” al nord: dicono di pensarla allo stesso modo, ma non è così*; see also R.M. Sparagna, *Metodo mafioso e c.d. mafia silente nei più recenti approdi giurisprudenziali*, in www.penalecontemporaneo.it, 10.11.2015; L. Fornari, *Il metodo mafioso: dall'effettività dei requisiti al “pericolo d'intimidazione” derivante da un contesto criminale? Di “mafia” in “mafia”, fino a “Mafia Capitale”*, in www.penalecontemporaneo.it, 9.6.2016, 14 ff.

large groups of illegal migrants, even though such groups do not have the power to intimidate and control the whole community living in the geographical area where they operate²⁵.

Eventually, the Legislator, through Law n. 125 of 12.7.2008, introduced an explicit reference to foreign association in the last paragraph of Art. 416-bis: «The provisions of this article shall also apply to the Camorra, 'Ndrangheta and to any other associations, whatever their local titles, even foreigners, seeking to achieve objectives that correspond to those of mafia-type unlawful association by taking advantage of the intimidating power of the association»²⁶.

By virtue of its “criminal career”, at some point the organization becomes able to intimidate on the basis of its reputation alone, with no need for the further use of force. Therefore, anyone acting on behalf of the organization is automatically feared and their requests are immediately accommodated by other people²⁷, who suffer a condition of subjection (see next paragraph). The following decision of the Court of Cassation is illustrative of the case law on this issue:

«In order to apply the offence of mafia-type association, which the legislator has conceived as a crime of danger, it is sufficient that the criminal group be potentially capable of intimidating, and is perceived as such from the outside; it is not necessary that the submission and silence of other people be imposed with material acts of intimidation»²⁸.

«With respect to the offence of mafia-type association, violence and threats are ways of exerting the power of intimidation, but they can also be used as a potential and hidden tool. The power of intimidation can actually originate from the mere existence and reputation of the association. [...] The condition of silence and intimidation imposed on other people by the participants does not depend on the perpetration of material acts of coercion; it mainly depends on the criminal prestige of the association that, by virtue of its negative reputation

²⁵ See Court of Cassation 30.5.2001 n. 35914, *Hsiang Khe Zhi*, in *CEDCass*, m. 221245; Court of Cassation 13.3.2007 n. 15595, *I. E. I.*; Court of Cassation 29.1.2008 n. 12954; more recently Court of Cassation 1.10.2014 n. 16353, *Efoghere*, in *CEDCass*, m. 263310, concerning the establishment of Nigerian criminal groups known as “Eiye” and “Black Axe” in Piemonte; Court of Cassation 18.10.2012 n. 3519, *Pavliv*, concerning the “Ukrainian Mafia” now rooted in Emilia Romagna.

²⁶ In this regard, however, the Court of Cassation has stated that «the offence of mafia-type association is also applicable to foreign criminal associations set up before the entry into force of Law. n. 125/2008, which introduced the words “even foreigners” in the last paragraph of Art. 416 bis: this amendment has not added any new element to the existing legislation, it has only ratified the extensive interpretation that the case law had already adopted» (5.5.2010 n. 24803, *Claire*, in *CEDCass*, m. 247809). In the literature see generally G. Amato, *Mafie etniche, elaborazione e applicazione delle massime di esperienza: le criticità derivanti dall'interazione tra “diritto penale giurisprudenziale” e legalità*, in *Diritto Penale Contemporaneo* 2015 (1), 266 ff.; C. Visconti, *Mafie straniere e 'ndrangheta al nord. Una sfida alla tenuta dell'art. 416 bis*, *ivi*, 353 ff.; L. Fornari, *op. cit.*, 11 ff.

²⁷ See especially V. Spagnolo, *op. cit.*, 26 ff.

²⁸ Court of Cassation 25.6.2003 n. 38412, *P.M.*, in *CEDCass*, m. 227361.

and its capacity to threaten, also in a symbolic and indirect way, is perceived as a frightening, effective and authoritative powerful entity²⁹».

Therefore, the affiliates of a mafia-type organization are liable under Article 416-*bis* Cc even if they have never personally committed a violent crime like assault and battery, personal injury or threats: when the latter crimes are committed, as often happens, they will serve as evidence of a reinforcement of the power of intimidation previously enjoyed by the same organization; furthermore, the perpetrators of such crimes will be held responsible for concurrence of offences (ie, assault, battery... *and* mafia-type association)³⁰.

The applicability of Article 416-*bis* Cc even when no violent conduct is engaged in was upheld by the Court of Cassation in its very recent decisions concerning the unlawful activities affecting the public administration of the municipality of Rome, referred to as “Mafia capitale”. According to preliminary investigation results, a powerful criminal organization had gained control over the administrative procedures for the awarding of public procurements, grants and permits, related to a variety of profitable economic activities (waste collection, reception of refugees, public parks maintenance), by means of systematic bribery of public officials.

While the defence lawyers contended the criminal group had not taken advantage of the characteristic mafia-type intimidation, but only of the complicity of corrupted civil servants, the Court of Cassation has held that:

«The effect of the intimidating power stemming from the bonds of association has been aimed not so much at determining the activities of the corrupted public servants who act as members of the criminal group, which ensures and increases their illicit profit; but rather as a means of establishing and preserving a *conventio ad excludendum*, in order to preclude the free participation in public procurements by undertakings that do not accept the system of rules imposed by the criminal group itself»³¹.

In other words, systematic corruption had enabled the criminal group to influence the decisions of a number of public offices in Rome, with no need to make use of violence or threats; as a consequence, potential competitors and, more in general, all the individuals involved in public procurement³² had experienced a «condition of subjugation which was so widespread and deep-rooted that nobody dared to voice opposition, either at a political or judicial level, before criminal courts or before administrative ones»³³.

²⁹ Court of Cassation 16.3.2000, *Frasca*, in *CEDCass*, m. 3215965.

³⁰ G. Turone, *op. cit.*, 124.

³¹ Court of Cassation 10.4.2015 nn. 24535 and 24536, both available at www.penalecontemporaneo.it, 15.6.2015, with commentary by C. Visconti, *A Roma una mafia c'è. E si vede...*; see also L. Fornari, *op. cit.*, 21 ff.; G. Turone, *op. cit.*, 167 ff.

³² Although the potential competitors were the main victims of the intimidation, the corrupted civil servants were also forced to silence, being confronted with the risk of criminal prosecution for bribery.

³³ Court of Cassation 10.4.2015 n. 24535.

In conclusion, the «power of intimidation stemming from the bonds of association” is not a constituent element of the illicit conduct (*actus reus*) of the offence in question, but is rather a characteristic feature of the association itself and at the same time an instrument exploited by the criminal group in order to attain its purposes³⁴. This element is deemed to exist when the association has gained a reputation of violence and an “autonomous power of instilling widespread fear»³⁵ in a certain geographical or social context, where such power is a fundamental aspect of its organizational structure, regardless of whether or not further material acts of intimidation are perpetrated.

As some authors point out, the precise moment when a criminal association gains an autonomous power of intimidation, which makes the use of further violence unnecessary, is not easy to establish with reference to the “new mafia”, i.e., the new criminal groups that start to exploit the mafia-style method; on the other hand, such a moment is lost in the mists of time in the case of the “old mafia”, which regenerates itself with the new generations of affiliates³⁶.

4.1. Article 416-*bis* links the power of intimidation stemming from the bonds of association with “conditions of submission and silence”. While the power of intimidation is an “active” feature of mafia-type organizations, submission and silence, connected with the fear typically engendered by such organizations, are “passive” aspects of the offence at issue, as they describe the psychological status of the individuals against whom the criminal activity is directed.

The legal provision explicitly requires a causal connection between intimidation and the conditions of submission and silence. Accordingly, when the latter depend on factors other than the organization’s power of coercion, only the generic offence of criminal association under Article 416 Cc will apply³⁷.

For instance, the applicability of Art. 416-*bis* was excluded in a case where the conditions of submission of a group of people belonging to an Islamic community were deemed to depend not on the power of intimidation of the leading authorities of the community itself, but on the enforcement of strict religious rules. In that case, the Court of Cassation established that:

«the bonds of a religious association (Islamic Cultural Institute) and the threat of the enforcement of sanctions for the violation of religious rules voluntarily established and accepted by the members of the community are essentially incompatible with the power of intimidation under Art. 416 *bis*, the latter being interpreted as an illegitimate, coercive and violent instrument which should be generally prohibited³⁸».

³⁴ Court of Cassation 25.2.1991 n. 6203, *Grassonelli*, in *CEDCass*, m. 188023.

³⁵ This wording is used by A. Ingroia, *L’associazione*, *op. cit.*, 69 f.

³⁶ See G. Turone, *op. cit.*, 136 f.

³⁷ In case law, see Court of Cassation 14.1.1987 n. 5771, *Fiandaca*, in *CEDCass*, m. 175927.

³⁸ Court of Cassation 13.12.1995 n. 4864, *Abo El Nga*, in *Cassazione penale* 1996, 3628 with commentary by R. Blaiotta, *La suprema Corte torna ad occuparsi dei rapporti tra istituzioni religiose ed associazioni criminali*.

As for “condition of submission”, this is understood as meaning a situation of subjugation, passive compliance and coercion, inflicted above all on individuals who are not affiliated to the criminal group and who comply with the requests, expectations and objectives of the mafia-type association out of fear³⁹. In case law, the concept is well illustrated in a decision of the Court of cassation, which describes it as “a condition of subjugation, originating from the belief of being exposed to an effective and inevitable danger connected to the power of the association”⁴⁰.

The interpretation given in the literature and case law of the concept of “silence” (*omertà*, the code or conspiracy of silence) is more complex: Italian legislators have viewed the phenomenon from a sociological perspective, describing a typical social situation strictly connected with the presence of the “traditional Mafia”. One of the many definitions proposed conceives *omertà* as a form of passive resistance to state authorities, which spreads throughout the community due to the supremacy of the mafia and which the latter promotes by using fear and intimidation and nurturing widespread mistrust of the public authorities⁴¹. According to another definition, *omertà* is an unconditional and almost absolute refusal of people to cooperate with law enforcement authorities, not only because they fear of retaliation and wish to protect the group they belong to, but also because they deny the government’s right to interfere with individual lives and the group’s affairs⁴².

Although the aforesaid definitions are indeed helpful for understanding the essence of the code of silence, they are too generic and vague to meet the principle of legal certainty and the rules of evidence. Therefore, when applying Article 416-bis Cc, the courts have interpreted the concept of *omertà* more strictly.

In explaining the reasoning underlying one of the most relevant decisions for the interpretation and delimitation of the concept of *omertà*, the Court of Cassation pointed out that, in order to demonstrate the existence of the code of silence, it is necessary to provide evidence of certain fundamental elements.

First, a refusal to cooperate with the public authorities (police and public prosecutor) during a criminal investigation must be tangible and widespread in the social context, even if it is not generalized and absolute. In this respect, case law has addressed the question of whether the code of silence is compatible with the phenomenon of “*pentitismo*”, i.e., the practice of some members of criminal groups who start cooperating (and become “*pentiti*”, or “repentant affiliates”) with the authorities, providing information in return for a reduced sentence, or for sincere reasons of repentance: the majority of decisions have established that *omertà* may be deemed to exist notwithstanding some scattered episodes of reaction against the intimidation, such as the presence of *pentiti* or a victim filing a civil action in a criminal proceeding⁴³.

³⁹ G. Turone, *op. cit.*, 120 f.

⁴⁰ Court of Cassation 25.2.1991 n. 6203, *Grassonelli*, in *CEDCass*, m. 188023; more recently, Court of Cassation 18.4.2012 n. 35627, *P. G.*, in *CEDCass*, m. 253457.

⁴¹ N. Dalla Chiesa, *Il potere mafioso*, Milano 1976, 67.

⁴² H. Hess, *Mafia*, Roma-Bari 1974, 147.

⁴³ See, for example, Court of Cassation 9.6.1994, n. 9439, *Pulito*, in *CEDCass*, m. 199843.

Second, the refusal to cooperate with the public authorities must be motivated by the fear of retaliation.

Third, the feared retaliation need not necessarily involve physical harm; it is sufficient that any other relevant interest of the victim be threatened. For example, a business owner may fear the negative consequences resulting from the exclusion from tendering for public procurement contracts that the mafia-type association has the power to control⁴⁴.

Furthermore, there must be a common belief that cooperating with the judicial authorities and reporting the threats will not prevent the retaliation, given the efficiency and infiltration of the association and its power to strike anyone who dares to react.

Lastly, it is not necessary for the threats to be put into practice: they need only cause sufficient fear to impose silence⁴⁵. Typical clues to the existence of a code of silence are, for instance, behaviours like refusal to testify, false testimony, aiding and abetting and the withdrawal of accusations.

A further question concerning the conditions of silence and submission stemming from the bonds of association is whether their typical effect must be tangible outside the association, or if they can also be limited to the relationship among the affiliates. According to the majority of the literature and case law, in order for Article 416-bis Cc to be applicable, evidence must be provided that the condition of silence and submission exist outside the association, in the social community⁴⁶. In this regard, the Court of Cassation has repeatedly stated that:

«the intimidation within the boundaries of the association, though certainly typical of the mafia method, needs to be accompanied by external intimidation: in fact, the impact on the territory and infiltration therein are typical elements of the criminal associations at issue. Therefore, the conditions of submission and silence cannot be limited to the participants, as could happen in any common type of criminal group; on the contrary, such conditions must affect the victims of the criminal activity, who are subjected to the power of the affiliates, due to the widespread sensation they experience of being exposed to risk»⁴⁷.

That does not detract from the fact that participants are also often forced to observe the code of silence due to the fear of retaliation and that this element can confirm the strength of the bonds. However, the internal effect of the power of intimidation is not an alternative to the external effect, which is the indispensable element for application of the offence of mafia-type association.

⁴⁴ This peculiar feature has been addressed by the case law concerning the “Mafia capitale” scandal (see § 4 above).

⁴⁵ Court of Cassation 10.6.1989 n. 11204, *Teardo*, in *CEDCass*, m. 181948.

⁴⁶ See G. Fiandaca, *op. cit.*, 260; A. Ingroia, *L'associazione*, *cit.*, 75; M. Pelissero, *op. cit.*, 283; V. Spagnolo, *op. cit.*, 39; G. Turone, *op. cit.*, 174 f.

⁴⁷ Court of Cassation 19.12.1997 n. 4307, in *Rivista italiana di diritto e procedura penale* 1999, 1475, with commentary by D. Notaro, *Art. 416 bis c.p. e metodo mafioso, tra interpretazione e riformulazione del dettato normativo*; Court of Cassation 25.2.1991 n. 6203, *Grassonelli*, in *CEDCass*, m. 188023; Court of Cassation 11.1.2000 n. 1612, *Ferone*, in *CEDCass*, m. 211071.

4.2. For all the reasons stated above, the power of intimidation and the conditions of submission and silence are three cumulative elements necessary for the application of Article 416-*bis* Cc. More specifically, according to the legal provision in question the participants in the association must “take advantage of” the three aforesaid elements in order to attain their final purposes. The wording “take advantage of” has triggered a lively debate in the literature and in case law concerning the moment when the crime is considered to have taken place.

According to a first interpretation, the offence of mafia-type association takes place when the criminal group, following a long history of violence and threats, gains an autonomous power of intimidation⁴⁸. Consequently, the wording «take advantage of the power of intimidation» should be interpreted as «with the intent of taking advantage of the power of intimidation» in order to attain the final objectives of the association⁴⁹. Part of case law supports such an interpretation⁵⁰, which is deliberately aimed at expanding the scope of application of Article 416-*bis*, since the demonstration of actual material exploitation of the power of intimidation would no longer be necessary: this would be a significant advantage for the investigative authorities, especially when the criminal group is so influential within the territory that it does not need the perpetration of material acts of coercion in order to attain its objectives.

According to a second way of thinking, the former interpretation makes the mistake of lumping together the two offences under Articles 416 and 416-*bis*, which have different structures. In particular, the offence under Article 416-*bis* Cc, unlike the offence under Article 416, cannot be considered to have been committed when the mere existence of a criminal group endowed with certain features and objectives has been shown: it also requires some material activities to be carried out. In other words, the wording “take advantage of” means that the autonomous power of intimidation must be practically exploited by the affiliates with a view to achieving the aims of the association⁵¹. Following this line of thinking, some authors contend that the offence of mafia-type association is committed only when one or more additional crimes are committed, or at least some concrete action is undertaken by the organization to put its plans into practice⁵². The latter interpretation, in turn, has the effect of restricting the scope of application of Article 416-*bis*, so that there is a risk of it not being applied to the most dangerous mafia-type organizations, which are so powerful and feared that they are able to attain their objectives without committing tangible acts of violence or intimidation.

In order to overcome the shortcomings of both the aforesaid interpretations, a third one has been formulated⁵³. According to this intermediate solution, the mere

⁴⁸ See, *supra*, § 4.1.

⁴⁹ See G.A. De Francesco, *op. cit.*, 310 ff.; G. Fiandaca, *op. cit.*, 259

⁵⁰ See Court of Cassation 2.10.2003 n. 45711, *Peluso*, in *CEDCass*, m. 227994, in *Cassazione penale* 2005, 2966; Court of Cassation 25.6.2003 n. 38412.

⁵¹ In case law, see Court of Cassation 9.12.1994, *Imerti*, in *CEDCass*, m. 200903.

⁵² V. Spagnolo, *op. cit.*, 64 ff.; A. Cavaliere, *op. cit.*, 440 ff.

⁵³ In the literature see especially G. Turone, *op. cit.*, 139 ff.

existence of a criminal association having the purpose of exploiting its power of intimidation, to attain specific objectives, is not enough for the commission of the crime under Article 416-bis. However, nor it is indispensable that the criminal plan be put into practice through the commission of further offences: the latter belongs to the subjective element of the crime – i.e., the specific intent (*dolo specifico*) to commit felonies – rather than being part of its objective dimension⁵⁴. On the contrary, it is sufficient that an organization exploits its power of intimidation in practice, even without committing any further crimes: in other words, the existence of widespread fear which facilitates the attainment of economic benefits by keeping other people under subjection is already a form of exploitation of the power of intimidation. Despite some inconsistencies, this appears to be the majority position as reflected in case law. In a significant decision, the Court of Cassation has stated that:

«Article 416 bis of the Criminal Code outlines an offence of criminal association of a multi-faceted, mixed nature, in the sense that whereas the offence of simple criminal association entails only the establishment of a stable organization aimed at the commission of a number of crimes, in the case of mafia-type association, it must likewise be shown that the group has gained a concrete power of intimidation in the surrounding environment and that the participants have effectively taken advantage of that power in order to carry out their criminal plan. The act of “taking advantage” can imply either the mere exploitation of the existing power of intimidation, or the commission of further acts of violence and threats, provided that such acts do not produce the psychological effect in and of themselves, but they rather underpin the already existing coercive power of the association»⁵⁵.

5. One of the most significant innovations of the legislation under scrutiny concerns the objectives of the mafia-type association as set out in paragraph 3 of Article 416-bis Cc: as previously pointed out, objectives that are *per se* lawful, especially those of an economic nature, are regarded as illicit if pursued using the “mafia method”.

⁵⁴ See A. Ingroia, *L'associazione*, *op. cit.*, 67. The use of further violence or threats, though not indispensable for the commission of the crime, provides evidence that the already existing force of intimidation is being strengthened.

⁵⁵ Court of Cassation 3.6.1993 n. 1793, *De Tommasi*, in *CEDCass*, m. 198577; Court of Cassation, 11.1.2000, n. 1612, *Ferone*, in *CEDCass*, m. 211071. Furthermore, the Court of Cassation has repeatedly underlined that an “effective” (and not only “potential”) exploitation of the power of intimidation over the territory must be demonstrated: see, for example, Court of Cassation 9.12.1994, *Imerti*, in *CEDCass*, m. 200903; more recently, Court of Cassation 22.1.2015 n. 18459 and Court of Cassation 23.2.2015 n. 15412, *Agresta*, both in www.penalecontemporaneo.it, 5.10.2015, with commentary by C. Visconti, *I giudici di legittimità ancora alle prese con la “mafia silente” al nord*, *cit.* However, the latter Author points out that the issue is still controversial in case law, as is well illustrated by some decisions where the Court of Cassation has applied Art. 416-bis to clusters of mafia-type groups which are newly established in a territory other than that of origin, where, however, a widespread power of intimidation is not yet tangible: see Court of Cassation 3.3.2015 n. 31666, *Bandiera* and Court of Cassation 30.4.2015 n. 34147, *Agostino*.

In detail, the mafia-type association can take advantage of the mafia method in order to:

- a) Commit criminal offences;
- b) Manage or control economic activities, concessions, authorizations, public contracts or services;
- c) Obtain unlawful profits or advantages;
- d) Prevent or limit the freedom to vote, or procure votes on the occasion of an election.

According to the Court of Cassation, «in order for Article 416 *bis* to be applicable, it is not necessary that one or more of the described objectives be actually attained»⁵⁶, it being sufficient that they form part of the criminal plan. Moreover, the objectives are to be considered alternative, so that it is sufficient that the criminal organization aims at achieving only one of them⁵⁷. However, should the organization tend to accomplish multiple objectives, the relevant conduct amounts to one offence only, not to a plurality of concurring offences⁵⁸.

a) The objective of committing criminal offences (*delitti*)⁵⁹ is common to the crimes punished under Articles 416 and 416-*bis* CC; as previously underlined, under the former provision such an objective is necessary, while under the latter it is a mere possibility. Due to the principle of speciality, when an unlawful association aims to commit criminal offences making use of the mafia method, only Article 416-*bis* CC will apply.

Although the commission of offences is in theory only a possible objective, in practice the conspiracy almost inevitably includes resorting to criminal behaviour. Consequently, whenever the activity of the association implies the commission of crimes (especially threats, assault, damage to property, extortion), the problem arises as to whether each affiliate, for the sole reason of being a member of the association, can be held responsible for the crimes committed by other affiliates.

In this regard, as a general guideline, case law has provided that:

«[g]iven the independence of the offence of unlawful association (both of the common type and of the mafia type) from the accomplishment of the illicit plan, not all the members shall be held responsible for the offences committed in pursuance of the plan itself, but only those who give an effective, intentional, material or psychological contribution to the perpetration of the individual criminal conduct»⁶⁰.

⁵⁶ Court of Cassation 15.4.1994, n. 5386, *Matrone*, in *CEDCass*, m. 198649, in *Giustizia penale* 1995 (II), 163.

⁵⁷ G. Insolera, *Considerazioni sulla nuova legge antimafia*, cit., 689; M. Pelissero, *op. cit.*, 285; G. Turone, *op. cit.*, 199.

⁵⁸ R. Cantone, *op. cit.*, 41; V. Spagnolo, *op. cit.*, 68; see Court of Cassation 12.12.2003 n. 9604, *Marinero*, in *CEDCass*, m. 228479

⁵⁹ In Italian Criminal Law, criminal offences are divided into two categories, *delitti* (felonies) and *contravvenzioni* (misdemeanours), according to their gravity and the different sanctions provided for by law; Art. 416-*bis* only mentions the commission of *delitti* as a possible objective of the mafia-type association.

⁶⁰ Court of Cassation 14.1.1987 n. 5771, *Fiandaca*, in *CEDCass*, m. 175927; Court of Cassation 1.4.1992 n.

The issue of individual responsibility for the crimes committed by the unlawful association becomes more complicated when it comes to the members occupying leading positions in the internal structure, as well as those who promote, direct or organize the association: their role in guiding the activity of the association could lead to the conclusion of them being automatically liable for any illicit behaviour engaged in by *any* or *all* the affiliates.

This assumption has been addressed in case law with special reference to the responsibility of the heads of the Sicilian *Cosa Nostra*, i.e., the members of the so-called *Cupola* or *Commissione*⁶¹. In a quite uncertain scenario, during the 1990s case law tended to consider the members of the *Cupola* not responsible for all the offences committed by the affiliates, but only for the those strictly linked with the pursuit of a primary and strategical interest of the association: for example, the murders of members of public authorities (magistrates, police officers), or members of rival criminal groups, or former affiliates who later became *pentiti*.

This approach has subsequently been consolidated, as illustrated by a number of decisions that have taken into consideration the “silent and passive consent” given by the participants in a meeting of the *Cupola*, who implicitly – i.e., without explicitly dissenting – approved a proposal to undertake a given criminal activity: in other words, the tacit approval of the bosses, given with their simple physical presence, has been deemed capable of determining a causal effect on the decision to commit a crime, the responsibility for which should be therefore attributed to the entire *Cupola*. By way of example, the Court of Cassation has recently decided as follows:

«The member of the leading committee of a mafia-type association who implicitly consents to the performing of a crime of homicide, by keeping silence at the meeting of the committee or when duly informed by another member of the association, shall be held responsible for moral participation in the homicide, since the mere presence and unspoken approval of the boss are a precondition for the commission of the crime, or can in any case reinforce the purpose thereof»⁶².

b) The objective of managing or controlling economic activities, concessions, authorizations, public contracts or services.

6784, *Bruno*, in *CEDCass*, m. 190537; Court of Cassation 15.11.2007 n. 3194, *P.M.*, in *CEDCass*, m. 23840.

⁶¹ At the supranational level, the issue has been already addressed by the «European Common Project to Counter Organized Crime», where, in view of the drafting of a common definition of participation in a criminal organization, it was provided as follows: «In highly structured and hierarchically led organisations, the leaders shall be held liable for the crimes committed by the members of the organisation, unless the crime committed by the latter is an unforeseeable consequence with respect to the organisation’s criminal activity». On the issue see V. Militello, *Partecipazione all’organizzazione criminale e standard internazionali d’incriminazione*, in *Rivista italiana di diritto e procedura penale* 2003, 204 ff.; Id., *The contribution of scientific projects to a European criminal law: European common project to counter organized crime*, in C. Bassiouni, V. Militello, V., H. Satzger (eds), *European Cooperation in Penal Matters: Issues and Perspectives*, Milano 2008, 137 ff.

⁶² Court of Cassation 26.2.2015 n. 19778, *P.G.*, in *CEDCass*, m. 263568; accordingly, Court of Cassation 18.9.2008, *Montalto*, in *CEDCass*, m. 241820; Court of Cassation 20.4.2010, *Emmanuello*, in *CEDCass*, m. 248022. In the literature, see G. Turone, *op. cit.*, 224.

As highlighted above, the commission of offences is a typical objective and, at the same time, a peculiar way of acting of a mafia-type unlawful association; however, this is not the ultimate goal of the association itself, which aims rather to gain and expand its economic power. In other words, the mafia crimes without an immediate economic return, such as murders, are always aimed at the acquisition of control over economic activities, both illicit (e.g., drug trafficking) and licit (e.g., public procurements)⁶³. Sociological and criminological research illustrating the evolution of the Mafia towards entrepreneurship⁶⁴ was promptly taken into account by the Legislator, who included the management and control of both economic activities and concessions, authorizations and public contracts or services among the typical objectives of mafia-type association.

As for the economic activities, the word “management” means the action of running an enterprise, while the word “control” indicates the capacity of the unlawful association to influence an economic activity or sector, without holding a formal managing position. Article 416-bis Cc provides that the management and control can also be “indirect”, therefore covering the frequent practice of using fictitious legal persons or figureheads (so-called “men of straw”). The expression “economic activities” is to be interpreted in a broad sense, so as to embrace agricultural, industrial, commercial and construction companies, both public and private.

The conducting of economic activities through the use of the mafia method described under Article 416-bis gives birth to a “Mafia business model”. According to the literature, a Mafia business exploits the power of intimidation and the related condition of silence and submission as an unconventional start-up asset⁶⁵. In other words, a Mafia business enjoys a three-fold advantage over law-abiding competitors: first, it enjoys a protective effect, since the power of intimidation compels potential competitors to abstain from entering the market controlled by the unlawful association, and suppliers to apply better contractual conditions⁶⁶. Second, the labour force is habitually less expensive and more flexible, as a consequence of the systematic infringement of the rights of workers, who are reluctant to report to the authorities⁶⁷. Third, thanks to the availability of a large amount of cash coming from illicit activities, a mafia business does not need to rely on borrowing from banks, which implies interest rates⁶⁸.

⁶³ G. Turone, *op. cit.*, 237 ff.

⁶⁴ See P. Arlacchi, *La mafia imprenditrice*, Milano 2007.

⁶⁵ G. Turone, *op. cit.*, 242.

⁶⁶ In this regard, Law n. 646/1982 also introduced Art. 513-bis into the Criminal Code; the Article reads as follows: «Unlawful competition through violence or threats. Whoever, in conducting a commercial, industrial or any other productive activity, engages in acts of competition making use of violence or threats shall be liable to imprisonment of from 2 to 6 years».

⁶⁷ This phenomenon falls under the scope of application of the clause concerning the objective to obtain “unlawful profits or advantages”, which will be examined under *lett. c.*

⁶⁸ In this respect, Art. 416-bis (6) prescribes that «[i]f the economic activities of which the participants in the said association aim at achieving or maintaining the control are funded, totally or partially, by the price, the products or the proceeds of criminal offences, the punishments referred to in the above paragraphs shall be increased by one-third to one-half».

As for the control of concessions, authorizations, public contracts or services, Article 416-*bis* Cc refers to the capacity of mafia-type associations to use the power of intimidation to exert pressure on public officials, with a double aim: first, to influence the adoption and contents of the administrative measures necessary for exercising a variety of economic activities; second, to avoid the legal consequences of violating the rules governing administrative procedures (e.g., the invalidity of administrative acts). The investigation into the already mentioned scandal referred to as “Mafia capitale” (see § 4 above) gives a meaningful example of a mafia-type association with the capacity of controlling public contracts through the intimidation of potential competitors and the systematic corruption of the civil servants in charge of administrative procedures.

c) Obtainment of unlawful profits or advantages.

In order to ensure that Article 416-*bis* would have the widest possible scope of application, the Legislator formulated the comprehensive objective of obtaining “unlawful profits or advantages”, which applies to any illicit return obtained by means other than those illustrated above (commission of offences, violation of specific administrative rules).

One example would be the proceeds deriving from the commission of *contravvenzioni* (misdemeanours), i.e. a category of less serious offences, different from *delitti* and not explicitly mentioned under Article 416-*bis* Cc⁶⁹. For instance, the unauthorised exercise of gambling violates the *contravvenzione* under Article 718 Cc: it is not uncommon for a mafia-type association to run clandestine gambling houses and make use of the power of intimidation, and of the subsequent condition of silence and subjugation, to guarantee the secrecy of the illicit activity and the payment of gaming debts.

Further unlawful benefits can originate from the violation of administrative rules differing from those related to the four aforesaid types of measures explicitly mentioned under Article 416-*bis* (concessions, authorizations, public contracts and services): for example, the benefits deriving from the illegal granting of public aid or funds, or the irregular recruitment of persons protected by the criminal group into the public administration.

Another type of illicit return can originate from the violation of the different sets of rules in the field of labour law concerning the rights of the workers: e.g., the prohibition of illicit recruitment, health and safety at work regulations, the minimum wage, the right to time off, etc.

To conclude, case law also provides examples falling outside the previous classification. In a recent decision, the Court of Cassation deemed the concept of “unlawful advantages” to apply to the benefit obtained by a foreign criminal group operating in Turin, which had taken advantage of the mafia method in order to «become the leading group of a large ethnic community» established in the local territory⁷⁰.

⁶⁹ See n. 59 above.

⁷⁰ Court of Cassation 1.10.2014 n. 16353, *Efoghere*, in *CEDCass*, m. 263310.

d) Preventing or limiting the freedom to vote, or procuring votes on the occasion of an election

This specific objective was introduced by law n. 356/1992, which aimed to extend the scope of application of Article 416-*bis* Cc to the various ways the Mafia can influence democratic elections. The generic wording of the legal provision includes a number of different objectives, all of them pursued by taking advantage of the power of intimidation, while the direct use of violence or threats is unnecessary: e.g., to hinder the free exercise of the right to vote; to obtain votes for the members of the criminal group; and to obtain votes for candidates who are not members, but are nonetheless protected by the association.

As is obvious, the effort to influence electoral competitions is not merely directed at the election of a given candidate, but is rather aimed at obtaining illicit benefits from the latter, once they have been elected to a public office. Besides the simple giving of cash, such benefits can include, for example, the irregular attribution of concessions, authorizations or public contracts or the irregular recruitment of applicants into the public administration⁷¹.

According to one opinion that finds expression in part of the relevant case law and literature, the reform under examination has only had a symbolic effect, since all the behaviours aimed at influencing democratic elections by means of the power of intimidation were already punishable under the original text of Article 416-*bis* Cc, insofar as they were directed at obtaining “unlawful advantages” (as illustrated under let. c above)⁷².

6. While the concept of “mafia-type associations” is set forth in great detail under Article 416 *bis* Cc, the conduct of participation is not described at all: the *actus reus* is merely defined as “participating” in a mafia-type association. Art. 416-*bis* Cc also distinguishes between the conduct of simple participation and the conduct of

⁷¹ The illicit exchange between a mafia-type association and a political candidate of electoral support for future benefits falls in a grey area between Art. 416-*bis* CC (especially as regards “external participation”) and Art. 416-*ter*, headed «Bargaining of votes between politicians and members of Mafia», which punishes whoever promises, and whoever accepts the promise, to obtain votes through the mafia method in exchange for payment or the promise of payment of money or other benefits: on this legal provision see E. Cottu, *La nuova fisionomia dello scambio elettorale politico-mafioso, tra istanze repressive ed equilibrio sistematico*, in *Diritto penale e processo* 2014, 789 ff.; G. Turone, *op. cit.*, 288 ff.

⁷² See Court of Cassation 23.9.2003 n. 37788, *Tursi*, in *CEDCass*, m. 228402. *Contra*, Court of Cassation 30.5.2002 n. 21356, *Frasca*, in *CEDCass*, m. 222440; in the literature, G. Taormina, *Principio di legalità e condizionamento mafioso delle consultazioni elettorali*, in *Giustizia penale* 1992, II, 394 ff. According to a different opinion, the behaviours in question could be punished under the original version of Art. 416-*bis*, since they were engaged in with the intent to “commit offences” (therefore falling under the objective illustrated in let. a above): namely, the offences of “electoral coercion” provided for under Presidential Decree n. 361 of 30.3.1957 and Presidential Decree n. 570 of 16.5.1970, which punish anyone who, by means of violence, threats or any other unlawful mean, exerts pressure on voters in order to influence the elections; see G. Turone, *op. cit.*, 284 ff.

promoting, directing or organizing, which are punished more harshly, with imprisonment for 12 to 18 years (Art. 416-bis [2])⁷³.

In the absence of a precise legal definition of “participation”, different opinions have been put forward in the literature. These oscillate between two principal models⁷⁴. According to the “organizational model”, for a conduct to be considered participation, the new affiliate must have become a permanent member of the unlawful association, which often entails a formal ceremony of initiation and the attribution of a stable assignment⁷⁵. According to the “causal model”, a formal affiliation is not sufficient; rather, it is necessary that the new affiliate offer a practical contribution to the existence or strengthening of the association⁷⁶. Many different intermediate models have also been elaborated, according to which an effective causal contribution and a formal affiliation are both necessary⁷⁷.

Notwithstanding some swinging back and forth, most case law has followed the intermediate models; for instance, the Court of Cassation has stated that:

«The conduct of participation in a mafia-type unlawful association requires a stable and structural position in the internal organization. Besides a *status* of membership, it is necessary that there be a dynamic and functional role, in the performance of which the member is viewed as being at the disposal of the association for the purpose of pursuing its goals»⁷⁸.

However, it is a common opinion that the contribution to the existence of the association need not necessarily consist in a material behaviour. According to this opinion, in the case of the Sicilian Mafia, the initiation ritual and the attribution of the title of “man of honour” also satisfy the requisite of a causal contribution: in other words, the formal commitment to be at the full disposal of the group, undertaken before the other members during the initiation ritual, already implies a tangible advantage for the association, whose power of intimidation and operational capacity can benefit from the availability of a new active member. In this regard, the

⁷³ In brief, the conduct of promotion consists in actively seeking to recruit new members; the conduct of direction consists in leading the association and its members and taking decisions concerning the general management of the group’s activities; the conduct of organization consists in coordinating, rather than leading, the activities of other members, or enforcing the group’s strategy at a general level for gathering or exploiting resources or securing the association and its members with impunity. See A. Cavaliere, *op. cit.*, 433; G. Turone, *op. cit.*, 407 ff.

⁷⁴ The issue is strictly connected with that of liability for “external participation”: on the issue see the literature quoted at n. 85.

⁷⁵ See A. Ingroia, *Associazione di tipo mafioso*, *op. cit.*, 142.

⁷⁶ See, especially, A. Cavaliere, *op. cit.*, 428 f.

⁷⁷ See G. Turone, *op. cit.*, 387 ff.; V. Spagnolo, *op. cit.*, 86 and 164, fn. 2. According to some Authors, formal affiliation already provides a practical contribution, since the fact that other members can count on the support of a new affiliate, with specific functions and tasks, strengthens the association itself.; see A. Ingroia, *Associazione per delinquere e criminalità organizzata. L’esperienza italiana*, in V. Militello, L. Paoli and J. Arnold (eds.), *Il crimine organizzato come fenomeno transnazionale*, Milano 2000, 242.

⁷⁸ Court of Cassation, United Division, 12.12.2005 n. 33748, *Mannino*, in *CEDCass*, m. 231670, in *Foro italiano* 2006 (II), 80, with commentary by G. Fiandaca and C. Visconti, *Il patto di scambio politico mafioso al vaglio delle sezioni unite*.

landmark decision of first instance in the *maxi processo* (“maxi trial”) of Palermo reads as follows:

«The minimum threshold of relevant participation shall also consist of the wilful oath of adhesion to the group and its criminal program: there is no doubt that this announced availability is a contribution to the existence and to the strengthening of the capacities of the unlawful association»⁷⁹.

This interpretation has been consolidated and developed in the case law of the Court of Cassation, an example of which is worth extensive quoting:

«The acquisition of the title of “man of honour” not only implies the membership – almost permanent and hardly impossible to dismiss – in the Mafia, in other words personal integration in a collective body and subjection to its rules and duties; but it also provides evidence of the causal contribution, which is inherent to the obligation of being at the service of the criminal group, with the effect of reinforcing its operational power and capacity of penetration in the community, thanks to the increased number of active members».

Most of the time a new affiliate, after the ritual initiation, will actively take part in the organization’s activities through material behaviour, but the fact of his having sworn an oath of loyalty makes it easier to prove that the affiliate’s conduct is classifiable as “participation”. It is worth underlining that although the act of formal adhesion to the Sicilian Mafia (and to the ‘Ndrangheta as well) is often considered sufficient to prove an individual’s participation, it is never perceived as indispensable for this purpose: in other words, the lack of a formal ceremony (ritual initiation, oath of loyalty) does not exempt a person who has contributed to the existence or the strengthening of the association, or to the attainment of its goals, by means of material behaviour, from liability for the offence of participation⁸⁰.

The notion of what type of conduct constitutes participation can be extremely variable, as the abundant case law demonstrates. In general terms, though the commission of crimes (murders of magistrates or police officers, or members of rival criminal groups, blackmail, drug trafficking, etc.) is the most common form of participation, many different forms are also possible. For instance, case law has deemed Article 416-*bis* Cc to be applicable to the following conduct⁸¹: transmitting communications between leading members or between the association and a fugitive member⁸²; working as driver for a boss; managing the affairs by means of which the unlawful association launders the money from its illicit activities; providing the

⁷⁹ Court of Assizes of Palermo 16.12.1987, *Abbate*, in *Foro italiano* 1989 (II), c. 54.

⁸⁰ The case law on this subject has been clear for decades: see Court of Cassation 22.12.1987 n. 13070, *Aruta*, in *CEDCass*, m. 177303; in the literature, see G. Turone, *op. cit.*, 401 f.

⁸¹ As a general rule, case-law requires that the conduct providing a practical contribution be repeated and not merely occasional: see Court of Cassation 29.11.1990, n. 4323, *Avitabile*, in *CEDCass*, m. 187524; Court of Cassation 16.1.2014 n. 12735, *K.D.*

⁸² Court of Cassation 28.9.1998 n. 13008, *Bruno*, in *CEDCass*, m. 211900. The Court of Cassation very recently applied Art. 416-*bis* in a case where the defendant had the role of delivering messages and orders from a boss under detention to other members outside prison (Court of Cassation 17.12.2015 n. 15664, *Forte*, in *CEDCass*, m. 263080).

association with facilities to store weapons⁸³; and extending legal assistance beyond the lawful limits of professional defence, with the illicit objective of helping affiliates to violate or elude the law⁸⁴.

As these few examples suggest, the existing case law is extremely multifaceted and not always consistent, especially when the illicit conduct falls in the grey area between participation in a mafia-type unlawful association as strictly defined, the more vague concept of external participation⁸⁵, and the offence of “aiding and abetting” (Article 378 Cc).

7. The absence of a precise legislative definition of the conduct of participation in a mafia-type unlawful association most likely reflects the needs and practical objectives of the legislator in 1982. In consideration of the highlighted deficiencies in pre-existing legislation⁸⁶, it was a matter of striking a blow against a phenomenon that had demonstrated an ability to avoid convictions in courts with extreme ease through a category of offence that was not excessively restrictive.

Although Article 416-*bis* provided an analytical outline of the elements of the so-called mafia method for the first time⁸⁷, the notion of the offence in question appears in fact to have demonstrated considerable elasticity in its application, enabling mafia-type organized crime to be targeted also in its subsequent transformations: conceived according to the model of the classic Sicilian Mafia, Article 416-*bis*, as we have seen, is today applied to any gangster-like criminal business association, even outside the context of Southern Italy⁸⁸.

⁸³ Court of Cassation 8.10.2008 n. 40966, Pillari, in *CEDCass*, m. 249701.

⁸⁴ Court of Cassation 8.4.2014 n. 17894, Alvaro, in *CEDCass*, m. 259257.

⁸⁵ The very same *actus reus* is often considered to be “participation” or “external participation” based on the different content of the subjective element. On the very controversial issue of the notion, criminal relevance and boundaries of «external participation in mafia-type organizations», among an extensive literature, see V. A. Cavaliere, *Il concorso eventuale nel reato associativo*, Napoli 2003; Id., *Il concorso eventuale nelle associazioni per delinquere di tipo mafioso: dal diritto penale “vivente” a quello conforme alla legalità costituzionale*, in L. Picotti, G. Fornasari, F. Viganò, A. Melchionda (eds.), *I reati associativi: paradigmi concettuali e materiale probatorio. Un contributo all’analisi e alla critica del diritto vivente*, Padova 2005, 117 ff.; G.A. De Francesco, *I poliedrici risvolti di un istituto senza pace*, in *La Legislazione Penale* 2003, 704 ff.; G. Fiandaca - C. Visconti, *Il concorso esterno come persistente istituto “polemogeno”*, in *Archivio Penale* 2012, 487 ff.; C.F. Grosso, *Il concorso esterno nel reato associativo: un’evoluzione nel segno della continuità*, in *La Legislazione Penale* 2003, 685 ff.; V. Maiello, *Il concorso esterno tra indeterminatezza legislativa e tipizzazione giurisprudenziale. Raccolta di scritti*, Torino 2014; V.B. Muscatiello, *Il concorso esterno nelle fattispecie associative*, Padova 1995; M. Papa, “Un baco del sistema”? *Il concorso esterno nell’associazione mafiosa di nuovo al vaglio delle Sezioni Unite tra prospettive di quarantena e terapie palliative*, in *La Legislazione Penale* 2003, 697 ff.; G. Turone, *op. cit.*, 428 ff.; C. Visconti, *Contiguità alla mafia e responsabilità penale*, Torino 2003.

⁸⁶ See § 1, above

⁸⁷As a matter of fact, Art. 416-*bis* Cc was the first example, in the legal systems of EU Member States, of a model of criminalization of organized crime based on the description of specific structural and operational features of the unlawful association

⁸⁸G. Turone, *op. cit.*, 113 f.

This elasticity is well represented in and at the same time a result of highly dynamic case-law. Eloquent examples have been given of the essential importance and practical effects of this hermeneutic endeavour.

One is the interpretative expansion of the concept of “territory” subject to mafia control, which goes well beyond a strictly geographical notion in favour of a broader notion of “social aggregation”⁸⁹. A further extension of the concept of “territory” has also emerged in the decisions related to the “Mafia capitale” investigation: as pointed out, Article 416-*bis* was judged to be applicable to the criminal control exerted not over a geographical context, but rather over a political-administrative subsystem, a “territory-building”.

The expansion of the scope of application of the crime in question irrespective of whether there is any proof of violent intimidation on the part of members of the organization has revealed to be equally significant. Let us consider the series of decisions which, in a partial break with the past, were recently handed down against the so-called “silent Mafia”, i.e., the new criminal colonies in northern Italy, on the basis of their notorious link to mafia organizations of undisputed fame⁹⁰. And to this we may add the just mentioned proceeding regarding the “Mafia capital”, where the present or past use of violence was not deemed essential to demonstrate the existence of a power of intimidation; what was judged decisive for this purpose was the organization's ability to influence the activity of public officials through corruption, also to the detriment of those who did not want to take part in the system of illegal allocation of public contracts⁹¹.

Finally, it is worth noting the by now substantial and firmly established case law that has confirmed the shift away from a “regionalist” approach in combating the mafia, so that Article 416-*bis* Cc has also been applied to foreign criminal organizations to the extent that their activity is characterized by the mafia method⁹².

Precisely this last example highlights how case-law has repeatedly had an effect of driving legislation: just as the notion of mafia-type unlawful association owed its original formulation to previous judicial elaboration⁹³, the addition of an explicit legislative reference to foreign organizations served to ratify an already established interpretative choice⁹⁴; the same may be said with regard to the inclusion, among the possible objectives of the association, of the aim of influencing the outcomes of electoral contests⁹⁵.

The tendency to broaden the scope of application of Article 416-*bis* by way of interpretation is no doubt in response to the need for more effective repression of constantly evolving mafia-type criminal phenomena; however, it could raise some concerns about whether the need to ensure legal certainty and legality in criminal proceedings is duly fulfilled. Precisely for this reason the introduction of innovations

⁸⁹ See § 4 above.

⁹⁰ See § 4 above.

⁹¹ See § 4 above.

⁹² See § 4 above.

⁹³ In terms both of measures of prevention and the application of Art 416 Cc (see § 1-2 above).

⁹⁴ See § 4, above.

⁹⁵ See § 5, above.

into the text of the provision, aimed at incorporating developments in case-law, should ultimately be greeted favourably, since they serve to delimit once and for all the perimeter of application of the provision where it had been rendered uncertain by oscillating interpretations. As confirmation of this observation, we need only consider the number and importance of the doubts triggered by the absence of a clear legislative choice on the subject of external participation⁹⁶.

It is in any case a matter of limited and precise updates, which need not call into question the original conceptual core of the offence of mafia-type association pursuant to Article 416-bis: notwithstanding the critical aspects and the persistent discrepancies with sociological and criminological definitions, the noteworthy results of the experience of its application seem on the whole to confirm the fruitful outcome of the effort of clarification undertaken in 1982⁹⁷.



⁹⁶ See V. Maiello, *Concorso esterno in associazione mafiosa: la parola passi alla legge*, in *Cassazione penale* 2009, 1352 ff.

⁹⁷ A “decidedly successful” effort according to G. Turone, *op. cit.*, 1.