LIBERA UNIVERSITA' INTERNAZIONALE DEGLI STUDI SOCIALI LUISS "GUIDO CARLI"

PhD COURSE LAW AND BUSINESS

PhD THESIS

NATURE AND EVOLUTIVE PROSPECTIVE OF CONFISCATION IN ITALIAN CRIMINAL SYSTEM

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SUMMARY

The paper aims to analyze the legal institution of confiscation in the Italian criminal law and to verify its evolutionary perspectives, in the light of European legislation and the jurisprudence of the European Court of Human Rights.

The evolution within the Italian criminal law has determined that the *nomen iuris* of confiscation conceals the realities of a wide range of juridical institutions, with connotations and sometimes different nature. In turn, the European order has devoted many acts on confiscation since the entry into force of the Treaty of Maastricht, tracing the features of a legal body with characteristics - in part - different from those of the ablative measure in the legal system Italian.

The paper, divided into six chapters, aims tracing the analysis of the historical evolution of the legal institution of confiscation, starting from the Roman order, and then articulating a reflection on all the main forms of confiscation in Italian law

The need, however, to trace the possible evolutionary perspectives of confiscation, on which for some time the most careful doctrine hopes for a profound reform, have also imposed the study of the institution in other legal systems, the English and the French, in order to understand if a teaching could be drawn from the experiences of the two aforementioned systems.

Alongside this, the consequences deriving from the multilevel connotation of the Italian legal system and the principle of art. 117, paragraph 1 of the Constitution, determine the need to analyze also the European legal system as well as the jurisprudence of the Court of Strasbourg.

The diachronic study of confiscation allows us to understand how it, rather than other legal institutions, represents a constant within the criminal systems, since the Roman era.

The distress and repressiveness that characterize it, especially in the version of general confiscation of assets, in addition to its ability to generate general-preventive effects, have determined its full placement among the sanctioning measures from the monarchical age, in which, as an accessory sanction, was accompanied by the death penalty following the commission of offenses directed to the personality of the state.

Through the general confiscation of property the offender, already expelled and placed outside the *civitas*, was totally annihilated, as well as his next relatives, on which, through the ablation of the entire patrimony, fell a mark of infamy.

The possibility, through confiscation, to irreversibly punish the offender has allowed the aforementioned institution to stand as a privileged instrument against those who had found themselves in uncomfortable positions towards the holders of political power.

The liberal and revolutionary demands of the Enlightenment philosophy, therefore, reacted vehemently against the institution of the general confiscation of property, denying it citizenship within the juridical systems that would be outlined.

The peculiarities previously described, however, still allowed confiscation to survive and to return to express its usefulness within the

criminal law of the authoritarian state that was emerging in Italy since 1921.

In this context, for the first time confiscation assumed a markedly protean nature, being present both as a security measure, the ablation of assets directly connected to the commission of the offense, and in a markedly afflictive of penal sanctions against political opponents or Italian citizens of Jewish race

Currently the Italian legal system includes a hypothesis of confiscation governed by art. 240 of Italian Criminal Code, whose nature has been discussed since the entry into force of the Code - considering that many scholars questioned the genus of security measures - whose essential elements reveal numerous "obsolete" traits, not in line with the evolution of the institute in Europe.

Alongside this typology, so to speak classical, the Italian legal system has elaborated other special hypotheses, by virtue of the effectiveness conferred by the aforesaid measure on the fight against organized crime and profit crime.

Thus, forms of confiscation by equivalent, forms of enlarged confiscation or by disproportion and confiscation hypothesis as an asset prevention measure and, finally, specifically sanctioning hypotheses are present in Italian legal system.

For completeness, in the Italian order there are two cases of general confiscation of goods, whose nature is - it would seem - administrative.

The reasons of hypertrophic evolution must be found in the capacity of confiscation to add effectiveness to the fight against profit-driven crime and against the accumulation of illicit capital by criminal organizations

Such awareness has had the opportunity to develop simultaneously with the crisis of effectiveness of the actual criminal sanction and of the pecuniary one in particular, ending up by making confiscation even

more than an indispensable tool, not only for the Italian legislator, but for all the legislators. of European and Western states

The scope of the aforementioned forms, however, ends up - in many occasions - to overlap.

A comprehensive reform of the institute would therefore be necessary. In particular, it is possible to outline a general discipline of the confiscation, by changing its nature into ancillary sanction, in line with what the French legislature foresees in Art. 131-21 of Code Pénal.

The new regulation could also generalize the confiscation hypotheses by equivalent and, in the light of the principle of proportionality, leave to the judge the possibility of not applying it in cases of slight violations of the legal system, as was foreseen in the draft reform of the code penalty drawn up by the Pisapia Commission.

Alongside the general discipline, special hypotheses, with markedly afflictive characteristics, could be foreseen in relation to organized crimes offences and offences characterized by terrorism purposes.

A need for reform, however, is also shown in relation to confiscation as a measure of asset prevention, whose scope should be strongly restricted, contrary to the choices made even very recently by the legislator.