The Many Faces of Confiscation in Italian Criminal Law

Maristella Amisano*

Abstract

The Italian criminal code knew to recover the proceeds of crime just the confiscation, but that wasn't the main goal. Over time, the Italian system has found tools to extend the recovery of sums involved in a crime. But we must be careful to remain linked to the crime, without preventing in a way contrary to the guarantee principles of the Italian criminal system.

Keywords: *confiscation, security measures, preventing measures, criminal principles*

I. Confiscation in the 1930 criminal Code

The recovery of sums involved in various capacities in a crime is an element of fundamental importance for modern legal systems. Today the idea of punishment is reduced for leaving more space to prevention and punishment is enriched with nuances that remove the centrality of prison sentence. But it has not always been this way, at least in the Italian criminal system. The current penal code dates back to 1930 and the philosophy that inspired it was – to say it as Hart would – that of punishment and responsibility. Faced with the commission of a crime, the imposition of a penalty was inexorably triggered. The recovery of sums related to a crime was only possible and accessory.

Although the recovery of sums involved in a crime was not the main objective of the legislator of the 1930 code, the Italian penal code since its inception had provided a remedy – still present today. although much changed in its extension – to ensure that the proceeds of a crime were insured to the State. That instrument is confiscation, whose declared nature is that of a security measure. Due to the fact that the nature of an institution characterizes its functioning, it is necessary to open a brief parenthesis to explain what security measures are. It is necessary to take a step back and return to the cultural climate in Italy in the early 1900s, or shortly before the code, that lives even today, was issued. In that period, two different criminological schools clashed in the Italian cultural climate: the Classical School and the Positive School, which had two visions, not opposed and irreconcilable, but undoubtedly different of criminal law and especially of the punitive system. The Classical School is based on rationalistic and natural law principles of Enlightenment origin. For the Classical School, the crime is a legal entity to be analyzed as an empirical-social phenomenon that arises from the free will of a subject. Man has free will, therefore he chooses to commit crime following a rational evaluation of disadvantages and benefits and the sanction must therefore be

* Professor, PhD., Università della Calabria, Italia. Contact: maristella.amisano@unical.it.

proportionate to the evil he has committed, in an essentially retributive perspective. An exponent of the classical school is Carrara, author of the Program of Criminal Law, a fundamental work for Italian criminal lawyers.

On the other hand, the Positive school has its roots in methodological Positivism and believed that the act of committing a crime was the result of various reasons: anthropological, family and especially social. A sort of determinism that focused more on the offender than on the crime. Exponents of this school were Enrico Ferri and the famous Cesare Lombroso. It is clear that this diversity of approach has major implications on the legitimacy of punishment because for the classical school, punishment was the consequence of the evil committed; for the positive school, punishment had to remove the causes that had led to the crime and had to be based on social dangerousness. Social dangerousness, a flexible concept and not easily identifiable, was defined in the penal code as the previous commission of a crime combined with the probability that the subject would commit other crimes.

Well, faced with this dichotomy, the penal code has attempted a conciliation, which has materialized in the double sanctioning track, composed of penalties that respond to the need for retribution, and security measures, which respond to therapeutic or social security needs. Confiscation is a security measure and this makes us understand that it responds to a partially sanctioning need but above all to social defense: it wants to eliminate those elements that present an intrinsic dangerousness, such as the things that were used to commit the crime or that what are the product of it. In fact, confiscation is the only patrimonial security measure (the others are personal or real) and is governed by article 240 of the penal code. It is worth clarifying where this rule is placed within the code. This article is the rule that closes the first book of the Italian penal code, which is the one that deals with crimes in general: describes all the elements that make up the crime and its forms of manifestation. And this means that the scope of Article 240 is a general scope, it means that it applies to all types of crimes that are identified in the second book of the Italian penal code, which is the one that deals with crimes in particular. Article 240 therefore ends the general part of the code and is placed at the end of the security measures which, being an element of the so-called double track, are located immediately after the penalties.

II. The elements of confiscation

Confiscation consists in the expropriation in favor of the State of the things that were used or intended to commit the crime or that represent the product, profit or price of the crime or even of the things whose manufacture, use, possession or alienation constitutes a crime. The things that were used or intended to commit the crime are, for example, the tools that were used for breaking in during a burglary. The product or price of the crime are the profits that the criminal has derived from the crime itself. And the things whose manufacture, use or possession or alienation constitutes a crime are, for instance, weapons or counterfeit coins[1]. It is clear that this rule was not directly aimed at recovering the sums related to a crime but to ensure that what was, in a broad sense, connected to the crime could no longer harm society. However, the idea of recovering the proceeds of the crime itself was present in the part relating to the

[1] For a complete analysis of the elements of the confiscation, see A. Alessandri, *Confisca nel diritto penale*, in Digesto delle discipline penalistiche, III, Torino, 1989.

product of the crime. In fact, confiscation consists in a forced transfer to the State of an asset, or a set of assets, in some way related to the commission of a crime and the transfer effect occurs regardless of the will of the interested parts. Confiscation is an irrevocable and instantaneous measure and it's permanent: it cannot be revoked, it cannot be modified, even in the case of repeal or declaration of unconstitutionality of a criminal law.

So the idea of recovering the profits of crime in the 1930 code was only outlined and was just a background to the aspect related to social dangerousness, as logical for a security measure. Of course, confiscation is a particular security measure because it is independent of the requirement of the perpetrator's social dangerousness. Dangerousness for confiscation is objective and not subjective: it is not so much a matter of limiting the possibility that a subject who has already committed crimes would commit other crimes again, but of limiting the intrinsic dangerousness of certain objects connected to the commission of the crime. Furthermore, while other security measures are revocable when the conditions of social dangerousness of the perpetrator cease to exist, as I said earlier, confiscation is an irrevocable provision and, in fact, is based on objective dangerousness. For this reason, confiscation is a *sui generis* sanction and not a security measure.

Confiscation can be optional or mandatory[2]: this can be deduced from the wording of the law which alternates "confiscation can be ordered" and "confiscation is always ordered". The confiscation of things that were intended or served to commit the crime, for instance: the means of execution of the crime and the confiscation of the things that are the product or profit thereof, is optional. The confiscation of things that constitute the price of the crime or the things whose manufacture, use, carrying, possession or alienation constitutes a crime is mandatory.

At this point, in order to establish the scope of operation of one or the other type of confiscation, it is important to identify the exact scope of the concepts of 'product', 'price' and 'profit' of the crime. "Product" are all the material things that originate from the crime itself; "price" are the sums of money or other benefits given or promised as compensation for carrying out the crime. More controversial is the notion of "profit", which we can summarise as the indirect economic profit, that is what can be obtained from the crime after transforming the product. Narrowing the field to the actual recovery, this involves the product or the profit of the crime and the price of the crime, but only for the price of the crime is confiscation mandatory, while in other cases it is only optional and therefore depends on the free conviction of the judge. It will be the judge, on the basis of the regulatory wording "may order confiscation", to decide how to act: whether to confiscate the product or the profit of the crime or leave them at the disposal of the offender. It is immediately clear that in this way the recovery by the State is only residual: after all, this was not the main objective of the legislator of 1930.

III. New forms of confiscation

However, over time, social and legal sensitivity has changed. Not only has the punitive prison sanction gone from being considered the solution to all evils to constituting a problem itself and therefore requiring other alternative sanctions. But what is more

[2] About mandatory confiscation, see O. Forlenza, *Confisca obbligatoria in caso di condanna definitiva*, in Guida al diritto, no. 42, 2000, p. 53 and the following.

significant is that the European Community[3], initially only in the field of environmental criminal law, but then with a general extension, has begun to introduce other sanctioning systems. Among these, depriving the offender of the gain he obtained from the crime has primary importance[4], for this reason the European Community has proposed, among other instruments, that "whoever commits a crime pays". The idea was born with "whoever pollutes pays" but has now taken on a general value. The logical basis is that the perpetrator is deprived of everything he has obtained through the crime, otherwise no restorative sanction would make sense. If the offender can keep what he has obtained from the crime, any restorative sanction would be nullified.

The idea of the need to recover the proceeds of crime has thus become established and therefore the legislator has posed the intent of extending confiscation not only to the things linked to the crime by a direct etiological link but also to the same amount in the absence of any proof of a relationship of pertinence between the assets seized and the illegal act to which the conviction refers. This is how confiscation by equivalent was born[5], whose logical and legal basis is constituted by the failure to identify and seize the assets that physically constitute the price or profit of the crime. This is a confiscation that has an undisputed capacity to deter the repetition of the crime and that has not been introduced in general but only for individual types of crimes, including, first of all, usury. If confiscation is already a hybrid institution aimed at pursuing various objectives, confiscation by equivalent has particularities that make it difficult to place it in a dogmatic category free from contamination. The various types of confiscation by equivalent all have a common purpose, that is to neutralize the economic benefits deriving from the criminal activity even when, for various reasons, there is no concrete possibility of materially finding, in the assets of the offender, the specific economic entity that he has directly obtained from the commission of the crime. The fact that the legislator has not modified art. 240 of the Criminal Code but has inserted the possibility of confiscation by equivalent only with reference to certain crimes makes the regulatory technique completely peculiar and casts doubt on the nature of the security measure.

The nature seems to become predominantly punitive[6], because confiscation by equivalent is resolved in a form of public removal to compensate for unlawful acts. But this repression has particular aspects: it is not a punishment tout court but a punishment that eliminates the advantages of the crime, with notable social, preventive and even educational implications for the offender and, through him, for the entire community. Which, all in all, includes confiscation by equivalent among the security measures, albeit with different accents. Moreover, the proliferation of figures has gone, in our system, hand in hand with a more or less explicit diversification of the sanctioning models. So, confiscation by equivalent is an institution with a hybrid and multifunctional nature.

Even the latest reform that has affected the criminal process in Italy, namely the reform of law 134 of 2021[7], has greatly extended the execution of confiscation by

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[3] See G. Di Chiara, *Modelli e standard probatori in tema di confisca dei proventi del reato nello "spazio giudiziario europeo": problemi e prospettive*, in Foro it., 2002, p. 263 and the following.

[4] G. Melillo, *Il congelamento dei beni a fine di confisca o di prova nel sistema della cooperazione giudiziaria europea*, in Questione Giustizia, 2002, p. 99 and the following.

[5] See D. Fondaroli, *Le ipotesi speciali di confisca nel sistema penale. Ablazione patrimoniale, criminalità economica, responsabilità delle persone fisiche e giuridiche*, Bologna, 2007, p. 120.

[6] See L. Baron, *La confisca con "condanna sostanziale": verso un nuovo "principio generale" in materia ablatoria?*, in Cass. Penale, 2020, p. 4799.

[7] For some example, see V. Mongillo, *Confisca proteiforme e nuove frontiere della ragionevolezza costituzionale. Il banco di prova degli abusi di mercato*, in Giurisprudenza costituzionale, 2019, p. 3343.

equivalent. Equivalent confiscation is fully part of the development of a modern criminal law capable of overcoming the primacy of the prison sentence and, at the same time, effectively countering the collective and economic dimension of criminal phenomena[8]. With confiscation by equivalent there is always a link with the crime, because the seized assets must be the equivalent of those that constituted the profit or the product or the price of crime. This means that the crime is ascertained and so is the guilt of its perpetrator. Traditional confiscation and confiscation by equivalent respect the ascertainment of the crime and its perpetrator. What becomes essential is the meaning of "equivalence": civil law doctrine refers to the restoration of a pre-existing balance disturbed by the illicit conduct of a subject. That way, the equivalent is nothing more than a mechanism to re-establish the balance that the crime has broken: just as compensation tends to balance the disvalue caused to the damaged assets, as well as the consequences that such disvalue has produced, confiscation tends to coincide with the value of the illicitly acquired assets. There remains the problem of determining the value, which is not a natural fact but rather the stipulated result of the application of certain criteria conceived for the achievement of social purposes.

IV. A doubtful confiscation

But the maximum dissuasive effectiveness is that of the confiscation of assets suspected of illicit origin[9]. Which is even independent of the crime, so far from the crime that it is a measure of so-called prevention. Preventive measures, as well as all preventive criminal justice, are very welcome to politicians because criminal prevention has, by definition, the ability to generate consensus, even when statistical data testify to their poor success[10]. The problem is that preventive limitations of any freedom, even that of property, are very far from liberal principles and create para-incriminating norms that replace criminal ones, producing the same punitive effect, without ascertain either the fact of the crime or the responsibility of its perpetrator[11]. It is therefore necessary to be very careful to implement a prevention that must respect the principles that govern criminal law, where the foundation is the ascertainment of the fact of crime and, therefore, the compression of the individual's freedoms cannot be allowed only for indicators of social dangerousness not ascertained. The European Community, which in a proposed directive of 2022 sets the objective of identifying, freezing and managing assets by expanding the possibilities of confiscation and requires the introduction of a traditional non-conviction based confiscation[12], has an ambiguous position because the Cavallotti appeal is still pending at the ECHR, where the ECHR would seem to consider the

[8] In the same sense, M. Donini, *Le due anime della riparazione come alternativa alla pena-castigo: riparazione prestazionale vs. riparazione interpersonale*, in Cass. Penale, 2022, p. 2027.

[9] On the extent of preventive confiscation, see V. Manes, *L'ultimo imperativo della politica criminale: nullum crimen sine confiscatione*, in Rivista italiana di diritto e procedura penale, 2015, p. 1259.

[10] See A.M. Maugeri, *L'irrefrenabile tendenza espansiva della confisca quale strumento di lotta contro la criminalità organizzata*, in *Criminalità organizzata e sfruttamento delle risorse territoriali, in osservatorio permanente sulla criminalità organizzata* a cura di Barillaro, Milano, 2004, p. 97.

[11] See K. Gavrysh, *Il principio di proporzionalità e la confisca di prevenzione nella prassi della Corte europea dei Diritti dell'uomo*, in Cass. Pen., 2022, p. 3720.

[12] E. Zuffada, *La Corte europea giudica compatibile con la convenzione la confisca del profitto del reato anche in assenza di condanna*, in Riv.it. Dir e proc pen, 2020, p. 380.

application of confiscation in the absence of a formal finding of guilt a violation of the presumption of innocence. And so we are faced with contradictory pressures: on the one hand, the Union Europe is pushing for a greater diffusion of preventive confiscation tools such as preventive measures, in which Italy has played a pioneering role. On the other hand, the Europe of the ECHR could narrow its scrutiny and put a stop to the use of non-conviction confiscation. This road is still under construction. But the doubt concerns confiscation as a preventive measure[13], which is independent of the crime. The path is already marked for the confiscation that follows a crime, that it is very important for the purposes of preventing further crimes but also for sanctioning purposes, that the illicit act is not lucrative and that the illicitly received goes into the coffers of the State. As an effect of justice but also as a new way of understanding punishment, far and different from that which inspired the Italian penal code of 1930.

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