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Abstract tesi di Dottorato in

La frode alla legge nel diritto interno e nel diritto internazionale privato

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Criminal deception intended to result in financial or personal gain through the use of laws has been an issue. Since early Roman culture, this area of legal fraud has attracted the attention of lawyers. There has always been a tendency for some to reshape the law in their favor. Currently many people have specialized their search for new stratagems in order to evade imperative rules. This has become more cogent not only because these attempts of law evasion are layered into processes connected with simulation, indirect contracts, along with fiduciary mechanisms; but also because the fraud of the law is blended into connotations of "internationality", finding application not only in domestic law, but also in Private International Law. In addition, this legislative criminal deception is typically perpetrated solely by not a single contract, but by means of a plurality of connected contracts. On the one hand, the more honerous the task of the Court, called to perform a superficial non-formal analysis, whose substantial findings seem to look, at the overall economic operation put in place by the parties rather than a individual fragment contained by the result; on the other hand, it makes the figure strongly evanescent and difficult to frame in its many and colorful facets.

The fraud of the law is governed, in the Italian system, by art. 1344 of the Civil Code, which provides that «Si reputa altresì illecita la causa quando il contratto costituisce lo strumento per eludere l'applicazione di norme imperative»: reading of the text, it is a clear example of 'weasle words', evasive words that do not easily set a standard, in which to interpret the rule.

The term "fraud of the law" means a mediated and indirect violation, a circumvention of the law. In this it differs from other institutions that, though resulting violation of command or prohibition, act in a direct manner. In the words of the Supreme Court, «il contratto in frode alla legge è caratterizzato dalla consapevole divergenza tra la causa tipica del

contratto prescelto e la determinazione causale delle parti indirizzate all'elusione di una norma imperativa» (Cass. civ., 9 dicembre 1971, n. 3568; Cass. civ., Sez. Un., 7 luglio 1981, n. 4414; Cass. civ., Sez. Un., 25 ottobre 1993, n. 10603). The fraudulent purpose, therefore, is made through one or more typical contracts, but bent to the achievement of the aims prohibited by imperative rules (and divergent from those for which the figures were established).

This problematic is therefore also the fraud recognition. In this situation exists a fine line between circumvention and direct infringement (and other legal figures): difficulty exacerbated further by the refined techniques used by those who use the law for purposes of conflicting the ratio underlying the institutions used.

It seems a type of legal strategy is followed, whereby a part, in which related institutions are treated (or assumed these, such as the simulation, those that can be used to circumvent imperative rules) think of the indirect contract and the fiduciary one. Here the work, as well as the instrument most frequently used for fraudulent purposes (the negotiation connection), is focused on the origins of the institution. A thesis is developed on the topic, the definitions of fraud, and thus the problem of its identification.

The second chapter focuses attention on: practical cases of fraud within the law regarding domestic law (as pre-emption agrarian, sale and lease back, transfer of company and business unit, contract of administration of work); as well as on two assumptions: the "problem" of fraud to third parties and to tax authorities.

Finally, thanks also to the consultation of a large jurisprudence (national and international) on this subject, many cases have been rebuilt upon which fraud can occur within the Private International Law. It is thus treated the issue of trusts, that of the choice of applicable law (that inevitably brings with it the phenomenon of forum shopping), as well as

the case, perhaps feel more immanent and thorny, of the "marriages of convenience", illegal immigration, the "surrogate motherhood", ending with the question, very current and full of contrasts, of same-sex marriages.

Beginning from the origin of the phenomenon and in current application to the present day, this thesis describes the evolution in a construct of the fraud of the law, in its structural and functional aspects. Through the analysis of legal cases, providing cognizance of the breath and scope of this phenomenon, it will be revealed that, far from being extinct, openings for fraudulent criminal reception will remain present.

The complexity, and at the same time, the charm of this field is so varied and changeable that attempts to justify or clarify the essence of fraud within the law yields a unified definition, with a questionable validity as it is the job of legal counsel to strategize the bending of regulations to their benefit. Countering this is: the addition; changing the pose of avoidance; the ceaseless becoming regulatory; and the continuing subterfuges devised in order to evade application of the law. There is a race against time to positivization of institutions often born from operational practice, that do not allow to uniquely identify the tools of circumvention legislation.

The magnetic ability of greed has generated an atmosphere to generate fraud within the legal realm, this magmatic field has captured most major institutions and reveals a centripetal force that goes beyond the mere violation of the law for direct illegality, but that goes well beyond the confines of the Nation, welcoming in its womb also institutions with foreign elements, because they have strong ties with other legal orders.

When we speak about fraud of the law, then, we are surfing the vast sea of a phenomenon so easy to understand how difficult to be identified, in its many facets and multiple instruments from time to time devised by

those who intend to circumvent the provisions of the law. It is a rich chiaroscuro of light and shadow, a hazy picture, that the skilled brush of the judge has to make clear and intelligible.