From the overcoming of the judicial psychiatric hospitals (Ospedali Psichiatrici Giudiziari – OPG) to the overcoming of the 'double track system' – Laura Fierro

ABSTRACT

The research deals with the problems related to the basic condition of the criminal liability and the relationship between mental disorders, crime and social dangerousness as prerequisite of custodial measures. Offenders with a verdict of insanity cannot be punished and they have to be declared "not guilty by reason of insanity"; if these offenders are also declared socially dangerous, the judge has to apply custodial measures. The main issue is how to manage the contrast between social control demand and individual rights protection.
The questions arising within the criminal trial process concern basically the difficulties in the evaluation of the capacity and social dangerousness of defendant (mental illness is not easy to define and all mentally disordered offenders always hold a more or less wide 'portion of answerability' - Corte Cass. Sez. Unite n. 9163/2005); this led also to the questionable use of neuroscience in the judgment of capacity and social dangerousness.

Recently, the Italian criminal law system underwent a progressive change of the legislation concerning 'psychiatric hospitals for mentally disordered offenders' (*Ospedali Psichiatrici Giudiziari* – OPG): mentally disordered offenders have been dislocated into REMS (Residence for the Execution of custodial measures for mental disordered offenders). Act n. 81/2014 leads indeed to the overcoming of the psychiatric hospitals and changes the judgement of social dangerousness: this evaluation is now only based on subjective and personal qualities, without taking into account personal, family and social living conditions of the offender, as provided before in accordance to Art. 133 co.2 n.4 of the Italian Criminal Code.

The dissertation takes into account current law in force, recently change of legislation from Act n. 230/1999 to Act n.103/2017 (Riforma Orlando, from the name of the proponent), jurisprudence and doctrine on the subject, and all the most important law reform drafts on the matter. One of the change expected from Act n.103/2017 is the deinstitutionalization of mentally disordered offenders through the enhancement of healthcare in order to increase individual rehabilitative treatments (social dangerousness and 'need of care'). This important reform is not implemented so far.

The research is also the result of the participation in conferences and seminars on the overcoming of the partition between mentally disordered offenders and ordered offenders: not only some part of doctrine, but also a Parliamentary Commission (Commissione Parlamentare di inchiesta sulla efficacia e l'efficienza del Servizio Sanitario Nazionale, 2011), stated that the abolition of the legal institute of non-imputability is "*an essential landing place*".

Last chapter deals with a comparative research in which the attention has been focused on the system of custodial measures for mentally disordered offenders in Germany, a research study carried out at LMU – Ludwig Maximilian University of Munich, in France, in the United Kingdom and in Sweden. This analysis shows how Italian criminal law system is still inadequate, thus it does not provide a wide range of judicial reactions with re-educational and re-socialization purposes (Art. 27 Cost.).

Lastly, the study comes back to the problem concerning how to manage 'treatment' and 'punishment', i.e. the relationship between psychiatry and criminal law system. 'Treatment' should be the task of the psychiatry that should leave the social control sphere and regain its merely therapeutic status. 'Punishment' should be the task of the criminal law system. Within a perspective of real prevention and to accomplish Art. 3 Costitution the system should enhance healthcare and social services and provide access to individual therapeutic treatments for all mentally disordered offenders.