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PARTICULAR CASES OF PROBATION FOSTER CARE: COMPARISON BETWEEN “DRUG ADDICTION AND FREQUENT USE OF DRUGS”

A short comment on the sentence of the Italian Court of Cassation, Section I, 7th April 2016, n. 14008, which clarifies the notions of drug addiction and frequent use of drugs.

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The Italian Court of Cassation, Section I, with sentence of **7th April 2016, n. 14008**, by clarifying the notions of *drug addiction* and *frequent use of drugs*, focuses on the *ratio* and the premises of the institution of probation foster care in specific cases.

1. The case

The abovementioned sentence is about the appeal made against the injunction of the Surveillance Court of Rome, which declared the request for probation foster care in the case of therapy as unacceptable, ex art.94 of the presidential decree, 9th October 1990, n.309.

In particular, **the statement of unacceptability** was adopted because *the certification attached to the request, released by NIDA (National Institute for Drug Abuse) of Frosinone (Rome), declared a condition of “cocaine abuse”, with the consequence that the convicted could not think of himself as a drug addict, but as an habitual cocaine user, thus making such request unacceptable.*

Therefore, the claimant complained about violation of law and errors of judgement because he believed that the premises for introducing probation foster care in a case of therapy did not exist, since the reasons given by the Surveillance Court of Rome were inconsistent and illogical. In particular, he claimed that the SCR did not pay attention to the fact that NIDA, which had certified the claimant's cocaine abuse, considered him as affected by a chronic and recurring pathology, thus making this condition become one of drug addiction.

Finally, in this particular case, the Court of Cassation cancelled the injunction and postponed it for further examination by the SCR.

2. Probation foster care in the case of therapy

To begin with, it is worth pointing out the conditions of the institution in question, disciplined by art.94, presidential decree, n.309/90. It can be requested by the **drug addict** or the **alcoholic** who *is attending* a rehabilitation programme or declares that he is

willing to attend one.

The “**drug addict**” is a subject in a psychophysical state of drug interaction which determines various reactions, including the compulsion to take the drug. Subjective and objective measures are used to define the condition of drug addiction.

The **subjective profile** requires that:

- The convicted is a *drug addict or alcoholic*;
- The convicted is *attending or is willing to attend a rehabilitation programme*;
- The **programme in question, which has a therapeutic content, was accepted by the convicted in agreement with a national health service (NHS)**, i.e. public or private structures specified by the law (art.115 in relation to art.113, 114 and 116, presidential decree 309/1990);
- *A healthy local service certifies the state of addiction or alcoholism of the convicted and the suitability of the arranged therapeutic programme in order to help him recover.*

"The certification declaring the state of drug addiction and the suitability of the arranged programme, which the health local service has to release, is a necessary condition for the addict's benefit and equivalent certifications or substitutive examinations are not allowed, so that the drug or alcoholic addiction or the execution of the programme do not interfere with the achievement of the benefit" (Cass. Pen. Section I, 25.06.1998, n.210874). **The condition of drug addiction and the therapeutic programme must be current.** The addiction can also be psychic.

Consequently, the benefit cannot be allowed if the judge thinks that the effective suitability and usefulness of the therapeutic programme are missing.

In order to give probation foster care in particular cases, the subject needs to have such a behaviour that the measures taken can contribute to the offender's education and can prevent him from committing other crimes, as stated by ex art.47 penit. Ord. concerning probation foster care.

The objective requirement is the *quantum* of the prison sentence, which was originally

set on three years and later brought to *four years* as a consequence of art.7 l.d. 139/93 (con. L. 222/93), in order to let the convicted attend a rehabilitation programme and to limit the presence of drug addicts in the prisons.

However, the law 49/06 established that the sentence's duration depends on the type of crime: it was generally raised to 6 years, but the 4-years limit was kept in the case of a crime stated in art.4 bis penit. Ord.

The importance of prison sentence is highlighted, but it does not need to be accompanied by a pecuniary sentence.

To determine it, not only should we consider the causes and the redrafting factors of the punishment arisen with the sentence, but also the partial atonement.

Consequently, the question submitted to the Court focuses on the *possibility to consider drug addiction and the frequent use of drugs as equal concepts*.

3. Legal points of view

It is not possible to consider drug addiction and the frequent use of drugs as equal, as stated by the following principle: "*drug addiction and the frequent use of drugs are not equal conditions, but different categories recognised by the law, since drug addiction cannot be identified by a frequent use of drugs which – as a matter of DSM IV parameters that are recognised by the international scientific community – constitute an essential but not a sufficient condition for the diagnosis of drug addiction*" (Cass. Pen. Sess. 4, n.38040 of 06/27/2012, Capuzzi , Rv 254366).

In the recent version of this diagnostic manual, **the distinction between drug addiction and abuse of drugs is deleted**, on the scientific condition that *all the addictions and the related behavioural problems fall in the general field of “disorders from drugs” and they occupy a full chapter of DSM V, entitled “disorders from addiction and consequential use of drugs”*.

In this nosographic field, DSM V introduces **a new distinction** inside the general field

“*disorders from drugs*”, recreating the **conditions** for the diagnosis of these disorders, on a scale of degrees: *light, medium and serious*.

Consequently, the Surveillance Court of Rome refers to an old version of the abovementioned diagnostic manual, imposing a new examination that includes the evolution of the nosographic parameters applied to the hypothesis of the abovementioned abuse of drugs.

In conclusion, in the case of frequent use of drugs (now equivalent to the notion of drug addiction), probation foster care in specific cases ex art.94, presidential decree, 9th October 1990, n.309 can be requested with the obligation to attach the certification of the case of addiction as well as the suitability of the arranged rehabilitation programme instead of the documentation regarding the observation of personality required for probation foster care ex art.47 pen. Ord.
