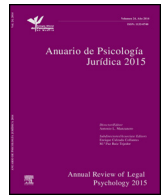




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Psychopathy: Legal and neuroscientific aspects

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ABSTRACT

Psychopathy is characterised by emotional disturbances that affect interpersonal behaviour and decision-making. The objective of this paper is to review the most recent contributions to the field of neuroscience of psychopathy and the implications that this disorder has on the criminal legal field. In regards to this last aspect, we evaluate the issue of psychopaths' accountability and the incidence of psychopathy in many other penal institutions. In terms of the contributions of neuroscience, we will focus on the orbitofrontal (ofPFC) and ventromedial (vmPFC) regions of the frontal lobes and on the amygdala. Data spanning from the nineteenth century to the present indicate that damage to the ofPFC and vmPFC is the basis of behaviours that have been referred to as pseudopsychopathic. The earlier during brain development the damage occurs, the more likely these behaviours will resemble those of psychopaths. The damage to the amygdala is rather related to impairments in the ability to distinguish facial expressions of fear and the capacity to feel emotions. Damage to ofPFC, vmPFC, and amygdala are highly relevant to the expression of pseudopsychopathic behaviours.

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La psicopatía: aspectos legales y neurocientíficos

RESUMEN

La psicopatía se caracteriza por alteraciones emocionales que afectan a la conducta interpersonal y la toma de decisiones. El objetivo de este artículo es revisar las contribuciones más recientes al campo de la neurociencia de la psicopatía y las implicaciones que tiene este desorden en el ámbito legal criminal. En relación a este último aspecto, analizamos la cuestión de la responsabilidad de los psicópatas y la incidencia de la psicopatía en muchas otras instituciones penales. En relación a las contribuciones de la neurociencia, nos centraremos en las contribuciones de las regiones orbitofrontal (CPFof) y ventromedial (CPFvm) de los lóbulos frontales y en la amígdala. Los datos que cubren desde el siglo XIX a la actualidad indican que el daño a la CPFof y la CPFvm se encuentra en la base de las conductas que han sido denominadas pseudopsicopáticas. Cuanto más temprano ocurra el daño en el cerebro más probable es que estas conductas se parezcan a las de los psicópatas. El daño a la amígdala está más bien relacionado con alteraciones en la capacidad de distinguir las expresiones faciales de miedo y con la capacidad de sentir emociones. El daño a la CPFof, la CPFvm y la amígdala es muy relevante para la expresión de las conductas pseudopsicopáticas.

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Psychopathy is a construct characterised by personality facets such as selfishness and emotional poverty (lack of guilt or remorse and empathy) along with behavioural aspects, such as poor behavioural control, impulsiveness, and lack of responsibility (Cleckley, 1976; Glenn & Raine, 2014). Among the features that

distinguish psychopaths are their superficial charm, lack of remorse or shame, untrustworthiness, self-centeredness, inability to love, failure to learn from experience, emotional poverty, lack of empathy, poor planning abilities, and antisocial behaviour. Using the Psychopathy Checklist-Revised (PCL-R), developed by Robert Hare, the 20 psychopathic characteristics proposed in the PCL-R have been grouped into two factors: factor 1, interpersonal-affective, and factor 2, antisocial lifestyle (Hare, Newmann, & Widiger, 2012).

The relevance of this construct is revealed when incidence data are presented. Accordingly, there is consensus that up to 1% of the general population meets criteria for psychopathy, and this percentage rises to estimates ranging from 15% to 25% within the prison population (Muñoz Vicente, 2011; Reidy et al., 2015; Torrubia & Cuquerella, 2008). The studies carried out with psychopathic subjects have also shown interest in decision-making, given their poor behavioural control, impulsivity, and antisocial behaviour. Such altered decision-making has been studied in laboratory conditions using the “passive avoidance learning paradigm”, in which subjects must avoid response options that lead to punishment (Koenigs & Newman, 2013). This stimulus-punishment learning is the basis of a proper socialization that helps children and youth prevent harm to others (Blair, 2013a).

In the same vein, there are the results of a recent 10-year longitudinal study that included 102 participants with an average age of 7.8 years at baseline and 17.4 years when the study concluded. Children with high levels of psychopathy showed worse emotional regulation skills in adolescence (Romero, Kapralos, & Gomez-Fraguela, 2016).

Thus, the goal of this paper is to review different neuroscientific and legal aspects to improve the response to the challenges that the people who have high scores in psychopathy produce in our formal control system. We consider that this challenge cannot be solved from a purely scientific or legal approach. On the contrary, in such a response science and law must be combined in a dialogue that this work aims to help establish.

Legal Aspects of Psychopathy

Psychopathy has been object of intense debate within the legal field, both in terms of the legal consequences for individuals with this condition and the implementation of adequate legal regulations. The challenges this personality disorder poses to criminal law begin with the question of whether individuals with psychopathy can be held criminally responsible. However, this is not the only issue to be considered. The strong links between psychopathy and criminal dangerousness (at least, but not only, in the popular perception) strengthen the impact, as we shall see, this disorder has in many legal-criminal institutions.

Legal Consequences of Criminal Dangerousness

There are many instances in which the Spanish criminal law, more or less explicitly, allows or requires that the offender's personality and willingness to engage in new criminal behaviour is taken into account. Without being exhaustive, this is the case in the current Spanish Criminal Code of the aggravating circumstance of recidivism (art. 22.8a) and its qualified form (art. 66.5a), with “the danger posed by the offender” to complement the principal punishment in certain crimes with certain accessory penalties (arts. 48 and 57), with the possibility of attending to the “personal circumstances of the offender” in the final determination of the sentence (art. 66.7a), with reference to the “individualised prognosis and favourable social reintegration” and “the personality of the convicted offender” to make certain decisions concerning the access to the third prison grade (art. 36) or probation (art. 90 and 92); and

also the obligation for the judge or court to attend to the need for the execution of the sentence “to avoid the future commission of new crimes by the convicted person” as limit of the suspension of the execution of imprisonment (art. 80).

The increasing importance attached to the prediction of future behaviour in relation to the duration and specific circumstances of the execution of the sentence can lead to well-founded fears about the possible consequences of labelling the offender as a psychopath, because, after all, psychopathy is probably one of the offender's characteristics most negatively appraised by the legal system, constituting in practice an “aggravating circumstance” of criminal responsibility (Fox, Kvaran, & Fontaine, 2013). Such severity in the criminal treatment of those who once labelled psychopaths supposedly represent a greater danger to society is often reflected in tougher penalties, not necessarily only in terms of their duration, but also in the intensity of their execution.

Psychopathy and Security Measures

Paradoxically, the strict criminal treatment of individuals with psychopathy or other severe personality disorders does not recede when they are declared totally or partially not responsible. In these cases, the concurrence of a prognosis of recidivism (criminal dangerousness) does not simply result in the exemption or reduction of a sentence, which would be expected in other circumstances, but in the imposition of security measures that can also lead to the deprivation of freedom for a period of time that could reach the same duration of imprisonment had the subject been fully responsible; individuals may be confined to hospital settings, rather than to prison (interment in a psychiatric institution, arts. 6, 95 et seq. and 101 et seq. Penal Code, hereinafter: PC).

In theory, the imposition of security measures does not pose problems concerning criminally responsible or partially-responsible subjects, because the system recognises the absence of any cognitive or volitional impairments that should be taken into account. It is however controversial to impose security measures (in addition to sentences) on subjects declared fully responsible. In the case in particular of subjects affected by psychopathy, if we acknowledge that there is no effective treatment available – as it is usually said, the imposition of a security measure in addition to a sentence is questionable, because it would have no other objective than the prevention of injury interests of third parties or society as a whole. It is significant that even in the Anglo-American legal system, generally very willing to justify incapacitation (subtype of “desert-based detention”, through the extension of the length of the sentence and the aggravation of recidivism), serious doubts are raised in terms of establishing a “disease-based detention”, because it would considered incompatible with the precepts of the traditional “involuntary civil commitments” and “insanity acquittals followed by commitments”, and only imaginable as an extension of “commitment for mentally abnormal sexually violent predators” established in the legislation of several American States (Morse, 2013).

The expansion of security measures to imputable subjects constitutes an incontestable fact in Spanish law, and its most obvious example is the security measure of supervised release, introduced in 2010 (its scope was expanded in the reform of the criminal code in 2015). However, a sound resistance to such recent political-criminal tendency is observed in a broad range of specialists who have dealt with it. Among others, Maraver Gómez (2015) and Rodríguez Horcajo (2014) have expressed their opposition from different perspectives. The reason for this criticism is not only found in the unreliability of prognosis of dangerousness, but also in the contradiction that may involve qualifying the same subject as responsible and dangerous, given the normative definition of a

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