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Editorial

The Psychiatrist in the forensic setting: old and new problems

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Editorial

A psychopathologist – either as a psychiatrist or psychologist – basically aims at treating mentally disordered people; though, within a specific domain their objective is evaluative and pertaining to social defense. The domain implied is the forensic field, with particular reference to the evaluation of people guilty of a crime in that, when acting the crime, they were fully liable for it or under the influence of an unexpected mental state affecting mental capacity.

The principle that the mentally ill can be excluded from criminal responsibility for their actions dates back to the Roman Law and is still accepted in almost every modern jurisdictional system, either based on civil or common law.

Discrepancies even significant are to be found among different countries. For instance, the offender can be considered either totally responsible or non responsible, and some countries even consider diminished responsibility. In some countries, laws or jurisprudence can specify and discriminate between illnesses possibly affecting the absence of responsibility and others showing no influence. For instance, alcohol- or drug-related disorders are not legally considered as illnesses everywhere.

When the Roman law was applied, psychopathologists did not certainly decide over the issue. It was in the 19th century that these professionals were involved in the jurisdictional field with full rights and they were rightly proud of their knowledge, scientific knowledge as they claimed it. Professional ethics and methodological problems were underestimated, though.

As stated above, the first deontological implication for psychopathologists deals with their care to patients. Unlike other medical branches where consensus is a precondition, under specific circumstances psychopathology consents to coercive measures, but generally speaking who takes care of patients is commonly by their side in a relation of therapeutic alliance. On the contrary, in the forensic field, as clearly exemplified by the evaluation of social dangerousness, some decisions are to be taken even when they imply distress for the subject under evaluation. Again differences among countries are possible, but broadly speaking such evaluation is required to psychopathologists. When evaluating an individual as "dangerous" we decide whether their behavior is dangerous to society, which is rather different from a clinical diagnosis or prognosis as commonly known. Moreover, an inpatient treatment frequently follows an evaluation of dangerousness, which implies a decision that may be inconsistent with a professional mission of help. An even more tragic consequence for the juveniles; nonetheless, it is tragic for all patients given that the presence of one more protagonist, i.e. social defense, is persistently perceived between them and the psychopathologist.

As already underlined, systems vary according to different countries and comparing them can help with improving and even solving at least some of the possible problems. Italy represents an interesting example in that in the 1980s it was the first country where mental hospitals were abandoned and patients have been admitted to a hospital department since then; in 2015, even the six "Ospedali Psichiatrici Giudiziari" (Hospitals for the Criminally Insane) for criminal non responsible and dangerous patients were changed into smaller centers named REMS (Residence per l'Esecuzione delle Misure di Sicurezza, i.e. Institutions for Safety Measure Fulfillment) totally managed by healthcare professionals supported by penitentiary police only for external control. Assessing this change is premature; however, no crimes have been committed by these subjects so far. Even though national data are not available yet, a potential paradox is perceived: now, more than ever before, experts tend to assess an offender as dangerous knowing that they will no longer be sent to a Hospital for the Criminally Insane.

The ethical code of an expert and of a therapist is, then, somehow different. However, I would add that it should not be too much different. Given that in some countries the assessment of dangerousness by a psychiatrist can lead to death penalty, it is reasonable to ponder on whether a therapist should give their consent to this task or not as it openly contrasts with the non malfeasance principle, i.e. premium non nocere. Operating in a domain other than the therapeutic field and where the legal framework must be considered also involves methodological peculiarities; notwithstanding, methodological and ethical problems can sometimes overlap.

How we use our scientific knowledge and how much aware of its related limits we are can exemplify a problem both ethical and methodological.

The "Daubert Standard" or "Khumo Standard" of the American legal system – also adopted in other countries – calls for the scientific validity of what asserted by an expert witness and for its approval by the scientific community. Appalling errors related to scientific evidence at Courts are very common, even errors connected to a branch of knowledge such as DNA testing or fingerprinting that we think can express high reliability. It is important to ponder that whenever we express any assessment affecting a person and their destiny, our view is based on soft rather than hard science. Of course, this means that not only must we comply our knowledge, that is a well-established knowledge, but also consider that in our domain it implies even higher caution than in others.

For a few years, disciplines such as neuroscience and genetics have been entitled to lead the assessment on the offender responsibility toward hard science. In Italy, for example, some judgments were based on evaluations claiming that the subject's fMRI showed anomalies proving their inability to control impulses. Though, while some argue that research performed using fMRI cannot meet the standard imposed by courts concerning error percentage, others consider neuroscience research and results anecdotal and based on few samples and on even fewer control samples (how many subjects do not commit a crime, though showing such anomalies?. Therefore, neuroscience lures judges and juries with promising certainty it cannot honor.

And this is valid for results from genetics, too. A case also known to the general public occurred in the Italian city of Trieste some years ago; a murderer was judged as non responsible because according to examined polymorphisms he showed at least one among the alleles carrying a significantly increased risk of developing an aggressive behavior. The European Journal of Human Genetics criticized this judgment as scientifically weak in its causal association between genetic variants and aggressive behavior: "It is crucial to avoid simplistic casual relations between genetic variants associated with violence or aggression and actual violent or aggressive behaviour. Whereas some people showing more aggressive or violent behavior might have these particular gene variants, others will have the same variants despite being perfectly law-abiding citizens. […] There is no scientific support to declare that gene variants, claimed to predispose to aggression, would make the carriers incapable of repressing an aggressive behavior".

Genetic testing used in legal proceedings was also criticized from another point of view: "Little is known about the interactions with other possible, still unknown genetic variants and with the environmental factors that undoubtedly have a role in any behavior. We believe that the specific context in which those analyses have been applied in makes these complex genetic evaluations especially prone to misinterpretations. The most questionable issue is the decision to request a susceptibility testing in the context of the legal proceedings. The vast majorities of these tests, if not all, are still purely research-based and have not received any formal evaluation in terms of clinical validity and utility. In our opinion, no susceptibility test should as yet be used in forensic or other judicial settings. […] the use of genetic susceptibility tests could be incompatible with the basic principle of the criminal justice system"[ ].

What stated above interestingly sums up both ethical and methodological issues arising when scientific acquisitions are transferred to and used in judicial settings.

In the Diagnostic and Statistical Manual of Mental Disorders (DSM), in its different editions, one can read an even more general Cautionary Statement for Forensic Use:

"When used appropriately, diagnoses and diagnostic information can assist legal decision makers in their determinations. […] However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. […] Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the etiology or causes of the individual's mental disorder or the individual's degree of control over behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time"[2].

The DSM's statement is correct because, and I would say mainly because, the assessment concerning the offender responsibility should not be confined to the diagnosis of anomalies or disorders but should establish whether a causal connection between the signs of the disorder and the crime committed is given.

In a judgment of 2005, the Italian Court similar to the Supreme Court, laid down that an etiological connection between a mental disorder and a crime must be assessed in order to consider the crime causally related to the disorder. Whether or not there is a mental disorder, why did the offender choose that victim rather than anyone else? Why was the crime committed at that moment and in that very peculiar way? Which is the meaning of that crime in the offender view?

Similar questions can arise in relation to the interaction be-

tween the offender and the victim. Which was the meaning perceived by the offender due to an action of the victim; to a possible provocation; to a catastrophic experience such as being abandoned or rejected; to words causing harm to self-esteem or to a sense of threat derived from the victim's behavior? Neither fMRI nor genetic analysis and even diagnosis can be exhaustive; deep investigation is needed on the genesis and dynamics of this criminal action.

Long ago I was asked to assess the criminal responsibility of an individual injuring another person with a knife in the course of a quarrel. As the offender suffered from an organic disorder that prevented him from controlling his aggressiveness (he was alcohol- and cocaine- addicted), his responsibility for that crime was assessed as diminished. Ten years later he committed some frauds; the judge – in consideration of the previous expertise- asked for another one related to the new crime. Eventually, the offender was declared fully responsible for it as it was a kind of crime with no connection to his disorder preventing him from impulse control.

Continuing with ethical and methodological issues, it is necessary to underline that the person whose expertise is required does not voluntarily asks for our help; as a consequence, to what extent can we investigate on their inner and private matter? Shall we respect their privacy and take the risk to miss some necessary elements or do the interests of justice rank higher? Moreover, a patient who asks for help has no interest in telling lies and when it occurs their lies become part of the stuff we can use for clinical interpretation. On the contrary, a subject under expertise can understandably be interested in telling lies or malingering, which means we must be able to recognize their lying.

Shall we go even further, maybe using, for instance, lie detectors? In Italy, Article 188 in the Code of Criminal Procedure reads as follows: " Not even with the consent of the person concerned can methods or techniques suitable for influencing freedom of self-determination or affecting the ability to remember and assess the facts be used." A statement not spread worldwide even though it implies the ethical question concerning what ranks higher between freedom of any individual and the interests of justice.

Two further ethical dilemmas are to be considered here. The first deals with what diseases are to be recognized to the purposes of insanity defense, with particular reference to all personality disorders and to psychopathy. Psychopaths and people suffering from antisocial personality disorders are aware of and decide on their actions but they cannot understand the ethical consequences of them and are incapable of empathy for their victims. Thus, is their disease a possible excuse to their actions? After all, they did not choose themselves to be born with such a condition.

In Italy, the joined Chambers of the Court similar to the Supreme Court stated that also personality disorders and psychopathy when substantial, intense, relevant and severe can be recognized to the purposes of insanity defense. Little has changed, though, because the experts usually add to their diagnosis of personality disorder the fact that the subject is mentally fit.

The judicial assessment of a psychopathic as well as the discrimination between a mad or a bad person are but philosophical problems that have been troubled forensic psychopathology for a long time, basically because balancing clinical opinions and social defense requirements is not an easy issue.

Let us consider another problem of the kind, i.e. the assessment of terrorists and foreign fighters: are they mad or bad subjects? Criminological literature does not agree on the presence of diseases – might be personality disorders – in terrorists, nevertheless it is not possible to rule out that some of them can be mentally ill. n particular, this could be true for those Western people who join the cause of Islamic terrorism that shows a large gap from their culture and for which they have no historical or political reasons.

In Italy, a Somali citizen was charged with kidnapping, possession and charge of several military weapons in international waters to the purpose of terrorism. An expertise was required because the subject told his mind was split into two parts, each of them bearing a human being, a man and a woman, respectively. The subject was assessed as criminally liable even according to a cultural fact. As asserted by the expert, in his native country the dominant tribal culture is the Minghis, characterized by a belief indicating the presence of contrasting forces in the same body, usually a devil and an exorcist forever fighting. Thus, the subject was not suffering from a delusional disorder that –in my opinion- might not have affected his responsibility for the specific crime he committed in any case.

In short and generally speaking, committing severe and brutal crimes can mean being insane? Are killers affiliated to Mafia to commit plenty of murders just insane? During the Nuremberg Trial about six psychiatrists assessed Eichmann and others as 'normal' and one of them added: " Even more normal than I am after having examined him.

The issues I have expressed are but a few from forensic psychopathology practice; they may be worth discussing or simply they are what I consider as the most important and tragic problems. To conclude and lighten the load with a little humor, let me quote Groucho Marx: "Those are my principles, and if you don't like them... well, I have others".

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