

CHARACTERISTICS OF UNIMPUTABLE INDIVIDUALS MONITORED DURING THE COMPLETION OF THEIR SENTENCE: THE CASE OF A PENAL TEAM IN PORTUGAL

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ABSTRACT

The present article arises from a study developed in the context of a Social Service curricular internship in a penal team of great Lisbon. Within the scope of the Directorate-General of Reintegration and Prison Services (DGRSP), penal teams' main responsibility is to monitor the whole process of social reintegration of individuals serving community-based sentences, but also to assist the competent bodies in the criminal-legal scope. Among the various responsibilities, we find the monitoring of the measures for those who cannot be held criminally responsible, the unimputables.

In this regard, it was intended to deepen the knowledge on the problem of unimputability through the characterisation of the unimputable population monitored in 2019/2020 by the referred team. The universe of the population in question was of 55 cases, and it was possible to analyse 42 of these cases. The present study, of a descriptive nature, was carried out through document analysis (data collection from the individual's files) and subsequent analysis, using SPSS. It was possible to find that there exist some common characteristics that allow us to present a description of the unimputable persons monitored in 2019 and 2020: individual of the male gender, single, aged between 40 and 59 years, of Portuguese nationality, without a defined profession, diagnosed with schizophrenia – alone or in combination with other pathologies – primary and serving a non-prisonal internment measure.

Keywords: *Unimputability Characterisation of the unimputable Unimputables, Social reintegration*

INTRODUCTION

Article 20º nº 1 of the Portuguese Penal Code (PC) explains the concept of unimputability, referring to someone who, "as a result of a mental abnormality, is incapable, at the time the act was committed, of assessing the illegality of the act or of making a judgment in accordance with that assessment". In such wise, the concept is associated with the idea of general prevention delimited by the principle of guilt. In penal and criminal law, the concept of guilt or culpability is a principle of justice, which presupposes, on the one hand, that no one should be punished for something they are not guilty of and, on the other hand, that the guilty party of an unlawful action should be sanctioned.

In order to better understand this matter and the population it encompasses, it was carried out a characterisation of the unimputables monitored in 2019 and 2020 in a penal team of great Lisbon. It was intended to understand if some common attributes may characterise this population. Having the knowledge of these characteristics may be an important clue to outline possible interventions in the monitoring of the measures to which the unimputable are obliged to comply with.

UNIMPUTABILITY: A BRIEF EXPLANATION

According to Damasio (2013)[1], in order to understand unimputability, it is first necessary to address guilt. A crime presupposes that the action it corresponds to is culpable, i.e., a judgment of blame is directed to the specific agent who committed the crime. At present, several authors try to explain the "theory" of guilt, and it is not our intention to present them exhaustively here. Thus, we have chosen to make an explanation that relates it to questions of unimputability, that is, that associates it with questions of freedom (free will) and the power to act differently.

Speaking of free will is speaking of responsibility. In the words of Jorge de Figueiredo Dias (2009)[2] human beings' freedom "constitutes the intimate common assumption to all material consideration of guilt" (p.178). Thus, it is about the freedom of decision about what one does, a decision made by a free person who determines their own action, even if it occurs in a context imbued with a set of endogenous or exogenous determinants. Responsibility corresponds to the requirement that one must answer for their behaviour. Hence, it can be said that being free, and therefore responsible, makes someone capable of guilt – this being one of the unquestionable assumptions on the concept of guilt.

In such matter, it is fundamental to understand if one "could have acted differently". For Jorge Figueiredo Dias (1995)[3], this could only be proved if it was experimentally possible "to put the same individuality in the same situation again, and to observe then whether an action different from the one which gave rise to the experience would be produced; such an experience is, however,

impossible, since neither the individuality nor the situation could be the same again" (p.35). This impossibility of proving whether a person could have acted differently does not hinder, according to the author, the validation of guilt, and, for this purpose, it is possible to use two types of criteria: a subjective criterion of the individual power of that person, i.e., the power of a "normal" person with the agent of the act's abilities; and an objective criterion, where it is taken as a standard the action that an average person would have in that situation (Dias, 2009)[2].

Nevertheless, when it comes to analysing this "possibility of acting differently" concerning someone unimputable, these criteria are more difficult to use, since, in reason of psychic anomaly, it is unfeasible to analyse their behaviour in comparison with the behaviour of the "common" or standard person. It cannot be forgotten that the behaviour of the unimputable is frequently devoid of meaning. From the above, it is possible to understand that guilt, as an element of a criminal offence, implies the awareness of illicitness and a capacity for guilt, that is, an intellectual capacity that allows the subject to be held responsible for their acts.

When alluding to unimputability, the first question that arises is the capacity (freedom) of decision of the unimputable for the crime, due to psychic anomaly; that is, if they are free in their will. Despite being considered that the psychic anomaly does not destroy the principle of freedom, it is known that, in more serious situations, the subject possesses an altered reality of themselves and of the world, destitute of any connection with reality, so that their acts, even if explained, cannot be understood by standard "reasoning". Therefore, it can be affirmed, roughly speaking, that the person who decides freely is imputable, but that this freedom of decision is limited (and distorted) by their psychic anomaly. For the definition of unimputability, it is not enough to create a category with the weighting of the circumstance of the physical, mental and psychological development of the individual, because, although this assessment plays an important role, only the normative understanding of the implications of certain endogenous characteristics can lead us to find what is to be understood by unimputability.

The Portuguese Penal Code provides two reasons for the exclusion of imputability, specifically: (i) based on age; and (ii) based on psychic anomaly. Regarding age, according to article 19, the Penal Code provides that minors under 16 years of age are unimputable. As regards unimputability due to psychic anomaly, article 20 of the Penal Code has foreseen that: 1) The person who, as a result of a psychic anomaly, is incapable, at the moment of committing the act, of assessing its illicit nature or of determining their own actions in accordance with that assessment, shall be considered unimputable; 2) The person who, as a result of a serious psychic anomaly, which is not accidental and whose effects are beyond their control, and for which they cannot be blamed, may be declared to be unimputable if there was, at the moment of the commission of the act, a

significantly reduced capacity to assess the illicit nature of the act or to determine their own actions in accordance with that appreciably diminished assessment; 3) The proven incapacity of the agent to be influenced by penalties may constitute an index to the situation provided for in the preceding number; 4) Imputability shall not be excluded when the psychic anomaly has been provoked by the agent with the intention of committing the fact.

Unimputability is linked to the moment when the offence was committed and to the type of offence; for example, a pyromaniac will not be unimputable for the crime of homicide. Regarding consequences, it is important to clarify the difference between penalties and security measures. In penal law, there cannot be a penalty without guilt; therefore, as the unimputable is incapable of guilt, no penalty can be attributed to them. Therefore, in these situations, the legal-penal system applies security measures. These measures aim to protect society, taking into account the special dangerousness of the perpetrator. Thus, the unimputable does not commit a crime, but only an illicit act, being subject to safety measures and not penalties, since the latter are aimed at those who are capable of acting with guilt.

Imputability has two associated measures: i) prevention, which includes society's protection and treatment and ii) security measures, which are divided into internment and suspension of the internment's execution. In situations in which an individual is considered to be unimputable due to a psychic anomaly and is assessed to have a condition that justifies a high probability of the occurrence of the same kind of offence, a security measure will be applied, particularly a measure of internment in a treatment establishment (article 91 n° 1 of the Portuguese Penal Code). This measure has a minimum duration of three years when the fact committed "corresponds to a crime against people or a crime of common danger, punishable by a prison sentence of more than five years" (article 91, n° 2 of the Portuguese Penal Code), except in situations in which the previous release is compatible with the defence of social peace. In cases where the fact committed "corresponds to a crime punishable with a prison sentence of over 8 years, and the danger of new facts of the same kind is so serious that it makes release inadvisable, internment may be extended for successive periods of 2 years" until it is verified that the state of criminal dangerousness has ceased (article 92 n° 3 of the Portuguese Penal Code). Thus, the basis of internment has two assumptions, the typical illicit fact, the seriousness of the fact and the dangerousness.

The purpose of internment is the rehabilitation and reinsertion of the individual into the family and social environment; the prevention of further criminal acts; and the defence of society and, particularly, of the victim (article 126 n° 1 of Law n° 115/2009). To this end, it is mandatory to draw up a therapeutic and rehabilitation plan "structured according to the individual needs, abilities and risk assessment" (article 128, n° 1 of Law n° 115/2009) and to respect individuality and dignity, in order to promote the involvement of the victim and their families

through occupational activities, individualised and group therapies, integration in rehabilitation programmes, and, if appropriate, in community structures, ensuring that the necessary conditions for the continuity of treatment exist after the release. This plan has to be drawn up alongside mental health specialists and technicians from the DGRSP, must have the internee's agreement, and must be ratified by the Sentence Execution Court. Furthermore, an individual file must be organised, in which there must be placed "the communications received from the court" and "the elements provided to it, as well as the periodic assessment reports on the effects of the treatment on the internee's dangerousness" (article 129 n° 1 of Law n° 115/2009) and for the possibility of probation, which, based on the assumption that the internee will maintain a conduct in accordance with the rules in force, defines a period for the probation's execution with obligations and rules of conduct, and with the compulsory monitoring by the DGRSP.

Security measures also include the suspension of the internment's execution, "if it is reasonably expected that the purpose of the measure is achieved with the suspension" (article 98, n° 1 Portuguese Penal Code). This measure imposes rules of conduct on the individual, appropriate to the "prevention of dangerousness, as well as the duty to undergo treatment and proper out-patient treatment regimes, and to undergo examinations and observations at the places to be indicated"(article 98 n° 3 Portuguese Penal Code). In such cases, the "agent whose detention is suspended shall be placed under the guardianship of the social rehabilitation services" (Article 98, n° 3 Portuguese Penal Code).

METHODOLOGY

The main aim of the present study is to characterise the unimputable monitored in a Lisbon Penal Team in the years 2019/2020. Descriptive research was used, carried out through document analysis of the files for data collection and, later, statistical analysis with the help of SPSS. The total universe of unimputable people under monitoring in the Penal Team in which the study was conducted in 2019/2020 was of 55 cases. Of this universe, it was possible to access a total number of 42 cases (76.7% of the universe), as the remaining 13 files were inaccessible. Based on the information that we knew was part of the individual file, a set of specific objectives were created: i) sociodemographic characterisation of the unimputable accompanied by the Penal Team in 2019/2020; ii) Identify the reasons for the individual's unimputability; iii) Analyse the situation regarding the crime; iv) Analyse the individual's informal social support network.

RESULTS

The first objective is aimed at the sociodemographic characterisation of the individuals. Therefore, concerning the sample (42 cases) it was possible to verify that, in the years 2019/2020, in the team under analysis, the cases of unimputability belonged mostly – 40 cases (95.2%) – to male individuals and the remaining 2 (4.8%) to female individuals. Regarding age, it was possible to see

that the ages range between 28 (minimum age) and 88 (maximum age), with the mode represented by 33 years and the average at 47 years. The age group with more individuals, with 11 each, are those in their forties and fifties. This is followed by the thirty-year-olds with 9 cases, the twenty-year-olds with 5 individuals, the sixties with 3 cases, the eighties with 2 cases and the seventies with 1 individual. Considering the cases analysed, four nationalities are represented, namely Portuguese, which represents 38 of the cases (90.5%), followed by Angolan, which corresponds to 2 cases (4.8%) and, finally, French and North American, with 1 case each (2.4%). Regarding the place of birth, Lisbon is the most relevant, representing 17 of the cases (40.5%). We stress that the fact that the team in which we analysed the cases belonged to Lisbon influenced the data about the subjects' birthplace and may explain the high number of individuals who were born in Lisbon. In what concerns marital status, it was possible to verify that 29 (69%) of the individuals are single, 4 (9.5%) are divorced, 3 (7.1%) are married and 1 (2.4%) is widowed. It was not possible to obtain information on marital status in 5 (11.9%) of the cases. Thus, through this analysis, we found that being single is the predominant marital status in the sample of the unimputables being monitored in this Penal Team. The majority of cases, more specifically 27 (64.3%) did not contain any information on their educational qualifications. In the cases with this information, it was possible to ascertain that 4 (9.5%) had 2nd cycle education, 4 (9.5%) had 3rd cycle of education, followed by 3 (7.1%) with the 1st cycle of education. With 1 case in each, there is "did not attend", "secondary education", "bachelor's degree" and "master's degree". Regarding profession, of the 42 cases analysed, 4 (9.5%) are retired; 3 (7.1%) have professions related to bakery, pastry and cookery; 2 (4.8%) have professions related to the construction industry; with 1 subject in each (2.4%), we have professions such as account manager, electromechanical and driver. In the information contained in the court documents, 20 (47.6%) were depicted as "unknown" or "without information" and 10 (23.8%) had no information regarding their profession.

We intended to understand the diagnosis of the individuals in our sample. We stress that the data was taken from the information recorded in each of their files. Of our sample, 12 individuals were diagnosed with schizophrenia; 1 with schizophrenia and mental weakness; 1 with schizophrenia and alcohol use; 4 with schizophrenia and drug addiction; 1 with schizophrenia and drug addiction, and also with infectious, contagious, parasitic and/or neurological diseases; 1 with schizophrenia and alcohol and drug addiction; 1 with schizophrenia and alcohol and drug addiction and personality disorder; 4 with mental weakness; 1 with mental weakness and personality disorder; 2 with mental weakness and alcohol addiction; 1 with mental weakness and drug addiction and personality disorder; 2 with infectious, contagious, parasitic and/or neurological disease; 2 with infectious, contagious, parasitic and/or neurological disease and personality disorder; 1 with infectious, contagious, parasitic and/or neurological disease and schizophrenia; 1 with personality disorder; 1 with personality disorder and schizophrenia; 1 with personality disorder and drug addiction; 1 with personality

disorder and drug addiction and infectious, parasitic and neurological diseases; 1 with personality disorder and alcohol and drug use; in 3 of the cases, it was not possible to obtain diagnosis information.

In the third objective, we tried, through the analysis of the files, to understand what was the measure applied by the court, the year of the crime and the existence of previous sentences/measures. We verified that in 25 cases (59.5%) a non-prison internment measure was applied, which is, more than half of the sample. This is followed by the suspension of the internment's execution with the imposition of rules of conduct with 7 cases (16.7%), the suspension of the internment's execution with probation with 5 cases (11.9%), the suspension of the sentence's execution with probation with 3 cases (7.1%) and, finally, the execution of probation with 2 cases (4.8%). In addition to the measures enforced by the court, impositions to be complied with by the individuals may be indicated. In the cases under analysis, there were 27 unimputables to whom the court ordered internment in a prison or non-prison unit (depending on the measure applied); 5 unimputables have supervision by the DGRSP and the obligation to undergo medical treatment, ordered by the court; 2 unimputables are under supervision by the DGRSP, and must undergo medical treatment and have to undergo periodic and random drug screening tests; 2 unimputables are required to be monitored by the DGRSP, to undergo medical treatment and to pay compensation and/or court costs; 1 unimputable is required to be monitored by the DGRSP, to undergo medical treatment and to be prohibited from approaching the victim; 1 unimputable is required to be monitored by the DGRSP, to undergo medical treatment and to abstain from alcohol consumption and drugs use. Regarding previous sentences, it was found that 31 individuals (73.8%) had no previous sentences/measures and 9 (21.4%) had previous sentences/measures. There was no information in 2 cases (4.8%). Thus, we verified that, in most of our sample, there is no recidivism, without the existence of any previous penalty or measure to the crime they committed and that led to the current monitoring by the team. With regard to the year in which they committed the crime, we can observe that they range from 1990 (minimum) to 2020 (maximum), with the mode being in 2018. Note that individuals who committed crimes more than one or two decades ago represent not only the situations of recidivism but also the fact that, there is an assessment of the individual's dangerousness, for which the sentence may be extended if it is found that the danger remains (with biannual verifications).

Finally, we tried to understand if there was family and/or friends support, a constant and present monitoring of their informal support network. We have verified that there is a balance between those who have and those who do not have this support: 19 unimputables (45.2%) have the support of family or friends, 18 unimputables (42.9%) have no support from family or friends and, in 5 cases (11.9%), it was not possible to obtain this information. Monitoring by DGRSP professionals is fundamental as it allows to make up a therapeutic and rehabilitation plan that supports the individual in their rehabilitation and reintegration into the family and social environment, in the prevention of further

criminal acts and in the defence of society and, particularly, of the victim. In cases where there is no informal support network, often individuals can only count on formal support, namely from the DGRSP.

CONCLUSION

The main conclusions of this study are presented next and, simultaneously we sought to verify possible differences from the four studies conducted in Portugal, namely two studies from the 1990s - Saraiva, C.B., Costa, F.S., Pereira, J.M. (1995)[4] and Von Doellinger, O., Ribeiro, L., Basto, C. (1999)[5] - and two studies from the second decade of this century - Pereira, C. (2012)[6] and Batista, P. (2016)[7].

Considering the sociodemographic characteristics, we found that most of the unimputables studied are male, which is in line with the results obtained in the abovementioned studies. As regards age, the average is 47 years old, with the forties and fifties age group being the most represented, with 22 cases (11 in each), followed by the thirties age group, with 9 subjects. This data presents some variability in relation to the studies mentioned since the studies by Saraiva et al (1995) and Von Doellinger et al (1999) presented the thirty-year-old age group as the most common among unimputables. However, the more recent studies by Pereira (2012) and Batista (2016) are in line with the data collected, the first with a majority of individuals aged between 40 and 49 years and the second with an average age of 43.9 years. These data may suppose an increase in the age at which unimputables commit the crime over the years, which we believe should be the object of further investigation.

As regards marital status, most of our sample was single, which is in line with the four aforementioned studies. This data would be predictable since the fact of having a psychiatric disorder may hinder the establishment of stable and conjugal relationships. The nationality of our sample was mainly Portuguese and born in Lisbon. We consider that the fact that the study was carried out in a Lisbon team conditioned, from the outset, these results. However, we point out that in previous studies, Portuguese nationality was the most expressive. In our sample, the majority of the cases did not have information in the files about their educational qualifications. Despite this, in the 15 cases in which information was available, it was found that the most common schooling was the 2nd and 3rd cycles, followed by the 1st cycle. It should be noted that in Baptista's 2016 study, almost half of the unimputable were illiterate and the maximum level of education achieved was the 9th grade, while in Pereira's 2012 study, the 1st and 3rd cycles were the most common qualifications among the unimputables. The undifferentiated profession and/or no defined profession were the most present in the sample, denoting labour instability among these individuals. These data are in line with all the previously mentioned studies, except for Pereira (2012). In the case of the latter study, most of the population had professions in industry, construction and craftsmen. In relation to the study sample, we highlight the low number of pensioners and

retired subjects, which means that the diagnosis of mental illness did not lead to a retirement/pension request process.

Schizophrenia was the most common pathology, either alone or in combination with other pathologies. These data are in line with those of Pereira (2012) who, in his study, found that 61.5% of the inmates were diagnosed with schizophrenia. In the study by Batista (2016), almost half of all offenders suffered from mental deficiency (oligofrenia) to varying degrees, and in the two studies conducted in the 1990s, oligofrenia was the most prevalent among offenders, followed by schizophrenia. Considering the existing literature, it is possible to affirm that schizophrenia is the disorder most frequently used as a reason to justify unimputability, which was verified in the study carried out.

With regard to the criminal situation, it was found that most of the individuals had no previous penalty or measure prior to the current measure that led to the monitoring by the DGRSP. The data found is in line with the 2012 study, in which most individuals were primary (not recidivists). The referred studies of 1995, 1999 and 2016 do not explain if there is a situation of criminal recidivism, although they have found that the vast majority of the population had no previous internment at the date of application of the last measure. The type of measure that was applied in most of our sample was the non-prison internment measure. Again, the study is in line with the data of Pereira (2012), where the internment measure was the most applied in the studied unimputable population.

Concerning informal support, it was not possible to find a regularity that would allow us to characterise this population, since the division between those with and without this informal support was almost identical.

We emphasize that this study presents a set of limitations, namely the reduced number of the sample and the variables studied (available in the individual file), as well as the lack of information present in some files. Despite this, we hope to contribute to the knowledge on this population, which presents some common characteristics that allow us to present (without any generalization intentions) a description of the unimputables monitored in 2019 and 2020: Single, male, aged between 40 and 59 years, Portuguese, without a defined profession, diagnosed with schizophrenia – alone or in combination with other pathologies – primary and serving a non-prison internment measure.

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