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Chapter 1

Legal psychology or law and psychology by Peter J. van Koppen and Dick J. Hessing

Law and psychology has been a fast-growing field in the last two decades. Much has been accomplished. In some areas, the insights gained are remarkable, e.g. eyewitness testimony (Loftus, 1979; Yarmey, 1979), juries (Hans and Vidmar, 1987)[1] and procedural justice (Lind and Tyler, 1988).

In this chapter, rather than giving a detailed account of research done in law and psychology, we want to discuss the present state of the field as a whole. We will discuss what pretensions the field has and how the field falls short or surpasses expectations.

Usually pretensions are reflected in the names given. The field is given a more modest name in the United States than on the continent: usually it is referred to as law and psychology or psychology and law and sometimes — a little more pretentious — as psychology and *the* law (Tapp, 1976) or *the* psychology of law (Monahan and Loftus, 1982). On the continent, at least in The Netherlands and in Germany, it is invariably named *rechtspsychologie* (legal psychology).

The aspirations of an interdisciplinary field like law and psychology (to remain modest for the time being) can be aimed in one of two directions: either to make directly applicable contributions to practice, or to try to understand the field through theory building. These two directions, of course, are not independent: many successful applications will lead to understanding, in due course, and understanding will lead to applications. First of all, however, psychology as a scientific endeavour should aim at understanding the object of study and to that endeavour we restrict the discussion below.[2]

[1] See also the chapters by Sealy and by Bekerian and Dennett in this volume.

[2] In the chapter by Lloyd-Bostock in this volume, the application of psychology in law is discussed.

A legal type of discussion would involve judging what has been accomplished for what it is worth. We will use a more psychological method, and take the opposite approach: go through the field in a falsifying manner by pointing out what has not been done and what is missing. This method releases us from the obligation to give an extensive review of the literature. Such would in any event be impossible in the available space.[3]

Law

It is noticeable that, in most reviews of and general chapters in the field of law and psychology, a clear definition of the object of study is missing. Surely, most try to give a description of what *law* is. Of course, law itself is not the object of law and psychology. The study of law is the burden of lawyers. Nevertheless, a description of what law is can be a useful starting point for our discussion. Recently, for instance, Blackman, Müller and Chapman (1984) described law as a "social system created with a view to regulating the conduct of the members of a community" (p. 3). Since psychologists commonly leave the study of social systems to sociologists and political scientists,[4] the object of law and psychology is apparently twofold: "regulating" and the (regulated) behaviour of individuals. The former is the study of law as a behavioural technology (Crombag, 1982); the latter is concerned with behaviour under the influence of law and in the legal system. We will discuss each in turn.

[3]Extensive reviews were given by Tapp, 1976, 1977 and Monahan and Loftus, 1982. See also Bermant, Nemeth and Vidmar, 1976; Cohn and Udolf, 1979; Ellison and Buckout, 1981; Farrington, Hawkins and Lloyd-Bostock, 1979; Feldman, 1977; Greenberg and Ruback, 1982; Hans and Vidmar, 1986; Kerr and Bray, 1982; King, 1986; Kolasa, 1972; Konečni and Ebbesen, 1979, 1982; Lipsett and Sales, 1980; Loftus, 1979; Monahan, 1981; Monahan and Loftus, 1982; Müller, Blackman and Chapman, 1984; Nietzel, 1979; Reiser, 1982; Robinson, 1980; Saks and Hastie, 1978; Sales, 1977, 1981; Sprague, 1982; Tapp, 1980; Tapp and Levine, 1977; Toch, 1961; Wexler, 1981; Yarmey, 1979.

[4]That apparently is not obvious for everybody. King, in his seminal book *Psychology in and Out of Court* (1986) reproaches psychologists working in the field of law for not accounting for differences between countries in legal system and legal culture (see for instance his comments on Greenberg and Ruback, 1982, and Konečni and Ebbesen, 1982). That, however, is not the task of a psychologist. Psychology should study behaviour under the law and within the legal system, *given* the legal system. In doing so, typical characteristics of the legal system at hand should be made explicit as much as possible, to aid generalization. King's critique holds on the point that the latter is seldom done. Cross-cultural comparisons, however, become important in, for instance, the studies by Thibaut and Walker, 1975 on preference for an adversarial or an inquisitorial procedure. They not only claim that individuals universally prefer an adversarial system, but implicitly also claim that such a system would be better everywhere. The claims are enunciations on the level of social systems, and thus require cross-cultural testing.

Behavioural technology

Traditionally, the behavioural technology of the law is laid down in legislation in civil law countries and in precedents in common law countries. Nowadays, both systems have grown a little closer and thus, in both statutes and precedents comprise the set of legal rules.[5] Underlying these rules are assumptions of how individuals behave and how their behaviour can be regulated. Since these assumptions are about the behaviour of individuals, they are available for empirical research and testing. To some extent, both have been done in the field of law and psychology. Monahan and Loftus (1982) name only one (i.e. competence of children), but of course the extensive literature on, for instance, eyewitness testimony (Loftus, 1979) or instruction of the jury (Hans and Vidmar, 1987) implicitly forms a test of legal assumptions. All together, however, only scattered and isolated assumptions of the law are tested, usually aiming at direct application in the courtroom. The body of research in the law and psychology movement resembles, in this respect, more a bunch of *capita selecta*.[6]

The body of law contains many more and many more central and fundamental assumptions about behaviour than are touched upon in the field. A popular example of a central assumption in law, which applies to criminal as well as civil law, is the assumption of a free will (see, for instance, Blackman, Müller and Chapman, 1984: 11), i.e. that individuals can validly be held responsible and accountable for what they do. It is evident from attribution theory (Fincham and Jaspars, 1980; Semin and Manstead, 1983) and from research (Ten Kate and Van Koppen, 1984) that observers and judges follow psychological predictions in ascribing responsibility, but whether such is validly done remains untested and is not discussed. In criminal law, such a discussion could have far-reaching consequences for the insanity defence; in civil law the discussion could shed light on the continuing shift from liability based on fault to strict liability.

Of course, such assumptions are difficult to test: the assumptions that underlie law are hard to discover. The body of law is by no means unified, even in a single legal system, because it is the result of a political process by ever-changing legislators during a long period. That so few attempts have been made to test fundamental assumptions in the law, however, may be due to the predominance of the United States in the law and psychology field. Common law is judge-made law and develops from case to case. Therefore, there is hardly any need for jurisprudence in law. The few attempts to develop jurisprudence in the United States (Fuller, Pound, Llewellyn, Hart), then, are

[5]That is, statutes and precedents comprise the legal rules on a national level. As we shall see, the national rules are a very small portion of the legal rules that apply to each individual.

[6]See, for instance, the subfields as divided by Tapp (1976) or by Blackman, Müller and Chapman (1984) in which hardly any structure can be discovered.

cited over and over again by psychologists, as if no other legal scholars ever existed except, of course, Cardozo. To study assumptions in the body of law, a real *body* of law is needed. Such a body can only be provided by lawyers who attempt to bring together the inherently very diverse notions in legislation and precedents (for instance, the German Esser, 1956, 1965 or the Dutchman Scholten, 1974).[7]

Behaviour under the law

We identified the second (part of the) object of law and psychology as behaviour under influence of the law and in the legal system. That is a great deal of behaviour indeed. Legally binding rules are issued by many bodies: ranging from parliament, to the local school-board, to you and your contracting partner. These rules cover a wide range of behaviour: at what hours you can drink (England and Wales), what books you can borrow from your local library (United States), where you can work as a communist (West Germany), where you can buy your 'dope' (The Netherlands), whom you can or cannot murder (in any army), to name but a few. The field of law and psychology, however, has almost exclusively been concerned with courts and criminals, and even there, only some of the behaviour of some of the participants is well documented.[8] The choices made seem to be based mainly on the availability of subjects and the availability of adequate psychological theory. We will give some examples.

The most fully developed areas of study are those of eyewitness testimony and jury behaviour. Eyewitness testimony is a subject which is ideal for the laboratory. Eyewitnesses are, in many respects, poor in giving their testimony and any experiment can be tied to reality by the argument that, if they are poor in the laboratory, they will surely be poor in court, under stress and after a long period. The study of juries is also almost exclusively based on simulated jury experiments. There, much greater problems in generalizing to reality exist, among other things, because subjects lack real responsibility towards defendants (King, 1986).

For experiments for both eyewitness testimony and jury behaviour, the traditionally-used subjects are usable: under-graduate students and the general public. In studies on other participants in the courtroom, finding good subjects is much more difficult. That is evident from the studies undertaken and not undertaken: lawyers are rarely used as subjects, prosecutors hardly ever, and research on judges has vanished almost completely, except where court files can

[7]Hommers and Ruimschotel, in their respective chapters in this volume, discuss fundamental assumptions in the body of law from a psychological perspective in the manner described here. The two chapters by Carson in the present volume attempt the same thing from a legal point of view.

[8]In Oddie's chapter in this volume a much more dynamic picture is given of what happens in the courtroom, than that which usually emerges from research in psychology and law.

be used. Outside the courtroom, law and psychology is hardly active at all. Police officers and prison personnel can sometimes be studied, usually because higher officials deem these studies useful for policy reasons.[9] In civil and administrative law, we know of only a few studies done outside the courtroom.[10] The courtroom itself, however, is only a small, not to say tiny, part of law. Most criminal cases, and the vast majority of civil and administrative disputes, are handled elsewhere. We, therefore, know little of the behaviour of criminals who never end up in court. An atypical, but nevertheless important, example is tax behaviour. In The Netherlands only about 3 percent of the proven tax fraud cases reach the court (Hessing, Elffers and Weigel, 1988). This involves such a small proportion of tax frauds, that, for a study of tax behaviour, courts are very unimportant indeed.[11] Since law — at least at the ideological level — is also meant to prevent crimes and disputes, what happens outside the courtroom should also be considered as part of the field.

The emphasis on courts in the law and psychology movement gives a skewed image of behaviour under the law and in legal contexts. This is most obvious in studies of the parties in civil law disputes. The cases that come before a judge represent only the very tip of an iceberg. The vast majority of disputes are settled outside the courts, and there is every reason to believe that the disputes which do reach the courts form a biased sample (Priest and Klein, 1984), and that the parties who become litigants form a biased sample of all parties in dispute (Vidmar and Schuller, 1987).[12]

Psychology

Most of what we discussed above is not new. Lind remarked, in 1977, that the volume by Bermant, Nemeth and Vidmar under review, "like most of the literature on psychology and the law, contains more works that respond to the immediate concerns of the law rather than to a general understanding of legal behavior" (p. 647). It is possible that psychologists working in this field are so much concerned with acceptance by the legal community (e.g. King, 1986: 28-29; Melton, 1987; Melton, Monahan and Saks, 1987; Tremper, 1987; Monahan and Walker, 1988) that their efforts will lead to an understanding of defendants, witnesses, juries or courtroom interaction, but not to understanding law.

Lind (1977) continued his critique by adding that the existing literature in psychology was neglected. King (1986) widened and expanded that critique.

[9]An example of a study on prison personnel which goes beyond such policy recommendations is the chapter in this volume by Lösel, Bliesener and Molitor.

[10]Exceptions in civil law are, for instance, Ross, 1980; Williams, 1983. A fine example of a study relevant to administrative law is the chapter by Bierbrauer and Volkmann in this volume.

[11]See the chapters by Long and Swingen and by McGraw and Scholz in this volume.

[12]Groen, in this volume, eloquently sketches much of litigants' behaviour commonly left out of studies in psychology and law.

Although King's comments go far beyond a discussion of law and psychology proper,[13] both his and Lind's discussions show that research in law and psychology lacks theory. For a deeper understanding of law from a psychological perspective, research must be led by theory, while at present most research is based on practical courtroom questions.[14]

Conclusion

The previous discussion can be summarized as follows: the field of law and psychology needs both more psychology and more law. From the law side, research tackles too few general assumptions in the body of law and too few participants in the legal system. On the psychology side, research is guided too little by psychological theory and too much by practical questions. The present name for the field — law and psychology — therefore seems quite appropriate for the time being. What has been studied and accomplished in a short period of time, and the present growth rate of the field, however, justifies the expectation that in due course the field can be called *rechtspsychologie* or legal psychology.

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[13]King, after assuming that all psychological research tries to mimic natural science, rebuts psychology and law for using the experimental method because, unlike the natural sciences, reality is reduced to an inexcusable extent. King, however, ignores the possibility that his assumption may not hold. A mimic of natural science would mean that in an experiment reality is put to the test. In fact, in psychology a *theory* usually is tested in an experiment. The experiments are not meant to mimic reality, but are used as specimen of the application of the theory. That is one of the reasons why, in psychology, a theory is never verified, but only falsified or supported. Nevertheless, many of the comments by King on psychology and law are worthwhile remembering when doing research in this field.

[14]Exceptions do exist. See, for instance, the use of attribution theory and exchange theory by Greenberg and Ruback (1982), the use of behaviourism by Crombag (1983) or the social orientation model introduced by Hessing (1988).

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