PROBLEM OF THE INCOMPATIBILITY BETWEEN THE LAW AND PSYCHOLOGY AND THE USE OF PSYCHOLOGICAL KNOWLEDGE IN THE LAW

Viktoras Justickis
Mykolas Romeris University
Faculty of the Social policy
Professor at Department of Psychology
Ateities 20, LT-08303 Vilnius
Tel. +370 615 33289
E-mail: justickv@takas.lt

Gintautas Danišauskas
Mykolas Romeris University
Faculty of Law
Ass. professor at the Department of Criminal procedure
Ateities 20, LT-08303 Vilnius
Tel. (+370 5) 271 46 39
E-mail: danigint@mruni.eu

Straipsnyje nagrinėjamos priežastys, kurios trukdo plačiau panaudoti teisėje psichologijos žinias. Apibendrinami dabartiniai teisės priešinimosi plačiau taikyti psichologijos žinias aiškinimai. Parodoma, kad bendras visų šių aiškinimų pagrindas yra teisės ir psichologijos žinių nesuderinamumas, kylantis iš esminių šių dviejų mokslų skirtybių. Atliekama kritinė teisės ir psichologijos nesuderinamumo idėjos analizė. Siūlomas alternatyvus minėto fenomeno aiškinimas. Tuo pagrindu nagrinėjami teisės priešinimosi psichologijos žinioms įveikos būdai ir platesnio psichologijos taikymo teisėje perspektyvos.

The paper focuses on the reasons of resistance of law against the use of psychology. Current explanations are reviewed. It is demonstrated that all these explanations have one common ground – the idea on very different nature of the law and psychology. This different nature is seen as the reason of their mutual incompatibility and of the resistance of law to any broader application of psychological knowledge in solving legal problems. The paper provides a critical analysis of the idea of incompatibility of the law and psychology. An alternative explanation for the same phenomenon is proposed.

Introduction

Any law addresses a human, directs his actions, defends him, tries to change him, to provide him with legal opportunities to achieve his aims. This central position of a human in the legal regulation should have cause intensive lawyers' demand on the knowledge on a human. Without the most complete and valid knowledge on people, on their real needs and abilities, on their

ways, attitudes, thinking, decision making, reactions it is impossible to design and to execute a legal provision.

The knowledge of work material is decisive in any profession. Indeed, no carpenter is able to produce a piece of furniture without profound knowledge on wood. No mechanic can fix an engine without valid knowledge on its construction. The human is the "material" for law. He is supposed to be changed and guided by legal regulation. Psychology is the discipline investigating a human. During two hundred years of its history it gathered a great deal of scientifically verified knowledge on the human and different sides of his functioning.

Every piece of this knowledge could be useful improving both the law and its action, making it more efficient, providing both legislator and effector with ever new ideas how to make the law more able to achieve its goals. Thus, we could expect the intensive use of psychological knowledge in the law and in its enforcement. The psychological knowledge on people should be on everyday's working tool of a law and lawyer.

However, the reality is quite different from these expectations.

Despite long existence of psychology, the application of its knowledge in development and administration of the law still makes its first steps. Nowadays we could mention only few directions of legal practice, still rather discrete and uncoordinated, in which psychological knowledge is more or less used.

For example, the psychological study of witness started more than hundred years ago. However, the history of the practical use of this knowledge in the legal proceeding is much shorter and started only three decades ago [12, p. 27–32]. Still today this application of psychology is rather episodic. Another example is the application of abnormal psychology in law. Psychological studies of abnormal people started 150 years ago. However, only lately the psychologist joined the psychiatrist in examination of people showing abnormal or just unusual behaviour [5, p. 167–190]. Psychological investigation of the principle traits of human (also criminal) personality is one of the leading branches of psychology for more than two hundred years. However the use of this knowledge in crime detection is now in its primary stage [16]. The ability of the participants of the criminal or civil process adequately understand it is highly important for the justice. Forensic psychology gathered a great deal of knowledge on this topic. However, the use of all this knowledge is far behind. The first, rather undecided steps are done in examination of the ability of the participants of the legal proceeding to meet its demands [1].

So, we can see, on the one side, that psychological knowledge are extremely necessary for legal regulation. However, on the other hand, we can see the inability of the law to use even a small part of what the psychology has to offer.

Reasons of this inability will be the main problem of this paper.

The state of art. Originality of the study. The idea that the law has to use psychological knowledge and even calls to base the law on the psychologically verified ground is not new. There were several episodes in the long history of the law when these calls for decisive expansion of the use of psychology seemed to about to bring revolutionary changes in the law.

The first one was on the beginning of the twentieth century. It was the peak

of legal realism, represented by great names of Karl Llewellyn, Oliver Holmes, Franz Liszt, and others. They all focused upon the chain of psychological events, mediating the effect of a single legal provision upon one's behaviour. They flayed the current legislation that took proper functioning of this chain for granted. They asserted that every single link in this chain could be poor and potentially destroy the whole chain. They insisted that here we will find many reasons for the inefficiency of the law [7, p. 335–363].

There were also other episodes when the smell of great psychological revolution in law was strong. Thirty years ago, it was the excitement caused by ideas and studies of procedural justice [13]; 20 years ago, by legitimacy psychology [11]; 15 years ago, by therapeutic jurisprudence [6, p. 561–580].

In all these cases, the very foundations of law were criticized. It's oversimplified view of people and following from it the inefficiency of legal regulation were discovered. In all these cases, extensive use of psychology was shown to be the solution to the most fundamental problems of the law. However, each time it turned out to be a revolution only in psychology and not in law. The law proved to be highly resistant to any expansion of psychology. As a result, the gap has been growing between ever increasing potentialities of rapidly developing psychology and its restricted use in law.

This resistance of law against psychology is broadly recognized and discussed. Reviews of this discussion and the list of the reasons of resistance can be found in every handbook of forensic psychology [See 1; 4; 9; 14]. All these reasons are supposed to come from the same source- the highly different nature (in fact, incompatibility) of the law and psychology. This idea of incompatibility of law and psychology firstly proclaimed by Hans Kelsen and now seems to be commonly accepted and causes no discussions [15, p. 4].

In Lithuanian several single problems and obstacles of the use of psychological knowledge in the law have been discussed in the frames of the problems of forensic examination [21].

Our paper provides (to our knowledge, for the first time) a critical discussion of the idea of incompatibility of law and psychology and tries to find alternative explanation of problems that law meets using psychological knowledge.

The aims of this paper are 1. the critical review of the mentioned above ideas on incompatibility of the law and psychology and 2. to propose new explanations of barriers preventing the broader use of psychological knowledge in the law.

The object of the paper are the sources of resistance of law against the use of psychological knowledge.

The method of the study is analytical examination of the current views on incompatibility of law and psychology.

Scientific and practical salience of the problem. Analysis of obstacles preventing the use of psychological knowledge in the law is of great importance first of all for the law. Discovery and removal of these obstacles provides opportunity to bring the modern, extensive and well-validated knowledge on human to the law. This, next, opens the new prospects for further enhancement of the efficiency of the legal regulation.

The structure of the paper. In the next chapter the problem of the due extent of the use of psychology in law will be discussed and this due extent will be compared with

the real one. The following chapter includes the critical review of the current explanations of the gap between the due and real extent of application of psychology in the law. The final two chapters provide alternative explanation of this gap and discuss the opportunities to overcome it.

1. The due scope of the use of psychological knowledge in the law

The demand of law for psychology. We shall refer as "demand of law for psychology" *a situation when a legal problem can be solved more efficiently by using psychological knowledge than without it*. For example, the testimony of a witness, of course, can be examined without using the data of the modern witness psychology; however, it can be done much better with this knowledge. So, if a legal problem can be solved better with psychological knowledge than without it, we have to state, that here is the demand of law for psychology.

How widely psychology should be used in the law? Which areas of the law need psychology and which do not and must stay "free of psychology"?

Our answer to these questions is simple: every branch of law, every legal regulation within each branch, every single person making or administering the law solves legal problems better with than without psychology. So, no law is "free of psychology".

The demand of law in psychology is so universal for, at least, three reasons.

1. Any legal regulation can direct a human action only through a chain of psychological events.

For a legal regulation to affect one's actions, this person has, first of all, to learn on it (this involves his perception), next – to understand it (thinking), then to keep it in her / his memory until the situation to be regulated by this law will be met (memory). In this situation the person has to recall this law and the possible punishment (again, memory). The thread of this punishment should impress him – to arouse his fear (emotions). Next, this fear must motivate the proper action – for example, to deter from offending (motivation, decision taking). Perception, thinking, memory, emotions, motivation – all of them are psychological phenomena. If any link fails, the legal provision will not work and it is up to psychology to explain why. All this is true for every case in every branch of law.

2. The main objective of any legal provision is to regulate, directly or indirectly, one's behavior. However, in doing so, any regulation can also affect the rest of a his personality. The point is that situations in which one deals with justice usually are highly significant for him, stressful, and, therefore, endangering to one's psychic well-being. Numerous ways in which an encounter with justice can affect one's psychic health are documented by extensive "therapeutic jurisprudence" studies [See e.g. the extensive review 6, p. 561–580].

The main conclusion following from these studies is that every encounter with any justice may affect the person. This means that this probable effect must be considered when designing or administering every legal regulation, independently of which branch of law it belongs to.

3. Any legal regulation must ensure the legitimating effect of law.

Every legal regulation is supposed to evoke respect. This respect is one of the

important reasons why people obey the law. Any law must cause people to believe that this law is just, rightful, and legitimate. Studies on psychology of legitimacy demonstrated conditions in which such attitude arises. The content, shape of a law, and the way in which it is administrated should meet some psychological demands or the regulation will not be seen as legitimate [11].

Again, this is true for every branch and every legal regulation.

Thus, the law needs psychology *universally:* 1. to design the chain of psychological events between a legal provision and one's action, necessary for this provision to work; 2. to provide the proper (therapeutic) impact upon one's personality, and 3. to be seen as legitimate.

This universality is a special trait of psychology. Aside from psychology there are many other sciences that are applied in the law. Genetics, ballistics, chemistry, motor mechanics, etc – this is not the complete list. However, as opposed to psychology, all of them can be applied only to solve some specific tasks. Ballistics finds the trace of a bullet. This, of course, can only be important in "shooting" cases. In all other situations, the law does not need any knowledge of ballistics. Genetics establishes affiliation. This can be important in some family cases, but only in such cases. Motor mechanics can provide the piece of evidence on conditions of a vehicle, but only in cases where a vehicle is involved.

Conversely, the demand of law on psychology is universal, the law always needs psychology. It is required in every branch and every case. This means that cooperation between lawyers and psychologists ought to run on an every-day, side-by-side basis in every case, in every branch.

This ought to be, but what is it like in reality?

The reality is opposite to this view. In reality we see highly restricted use of the psychological knowledge.

What is seen in the real use of the psychological knowledge can be referred as "*triple – filtering"* of the psychological knowledge by law. Let us discuss every layer of this filtering.

The first filter. "Branch – filtering". Modern law is a huge empire consisting of many single branches of law: civil, criminal, church, labor, constitutional, international, European, environmental, etc., to mention only few. According to statements above, the psychological knowledge equally could and should be used in every this branch. However, in reality the main consumer of psychological knowledge in the law is Criminal law and procedure. Most handbooks titled "Forensic psychology" actually are handbooks on *criminal* forensic psychology. They talk only on psychology of a criminal, crime detection, witness psychology, psychological reasons of repeated offending [See 1; 4; 9; 14] and do not discuss any use of psychology in church, labor, constitutional, international, European, environmental, and etc. law.

This pioneering and exceptional role of the criminal law in using of psychology is not easy to explain. Criminal law is not any special branch of the law. It is neither the central, nor the most important or most used. So, there is no obvious reason for this "pioneering" role of criminal law in the application of psychology.

One possible explanation could be historical one: the pioneers of the forensic psychology (for example, Hans Gross) were specialists in criminal law and they

initiated this restricted concept of the forensic psychology as "forensic criminal psychology". This "narrow specialization" of forensic psychology was then reinforced by their follower, who whose continued to work in the same direction and who'w studies were focused mainly on application of psychology in detecting of offences, prosecuting and punishment of offenders.

Another probable explanations could be a cultural one. Psychologists, not lawyers, are the driving force for broader use of psychology in the law. However, psychologists are not experts in all branches of law. Just criminal and (to a lesser degree) civil law are the most familiar to them. The reason for it seems to be the way in which psychologists get their ideas on law. It seems that a psychologist gets the greatest part of his knowledge on law from TV and other mass-media. The latter are overwhelmed with criminal cases. Just this sources of information on law decide on which branches of law the psychologist gets more information. Indeed, through watching TV and reading detective stories one can get sound ideas on criminal, and, perhaps, civil law, however not on commercial, canonical, European and other branches. That why just criminal (and to some degree civil) psychology is the most familiar for psychologist. He has the most vivid view how it works. Therefore, only these, most familiar branches attract all the attention and efforts of psychologists. Here, they channel all their energy. All other branches are still perceived by psychologists as "alien", and, therefore, ,purely juridical", "unsuitable" for psychology.

Anyway, this restricted view causes the "branch – filtering", providing obstacles for the use of psychology in any others than criminal or civil law branches of law.

The second filter. "Legislation – administration" filtering. Traditionally, the psychological knowledge is rather used in administration of the law and not in legislation. Even in the criminal law that is pioneering in the use of psychology the latter is used only in the administration of this law and never in its drafting.

This seems to be strange.

Indeed, a criminal provision prohibits some actions and defines the sanction for its violation. For this law to work and to deter one from this offence, the preventing stimuli, caused by sanction, must surpass ones pushing to offence. Therefore the main task of legislator is to ensure that the fear caused by this sanction strong enough to stop the offender from committing his crime.

Stimuli, motivation, decision taking are topics of psychology. It is psychology that has sophisticated tools to assess both. It is also psychology that has validated, extensive and modern knowledge on them, on their causes, and intellectual and emotional events that follows these stimuli. All this is supported by extensive general psychological knowledge on motivation, stimulation, decision taking, emotional and perception processes.

In this situation the legislator aiming to improve a criminal law has two alternatives: either to use all this knowledge and design the law based on modern, well-validated idea on human and their psychic or ignore all this knowledge and rest his

decision on his own plain common – sense ideas on people.

Today legislator traditionally chooses the second alternative.

This creates the second filter – excluding the use of psychological knowledge drafting the law. Again, this restriction is not ease to explain. Most probable there are no serious reasons behind. The use of psychology for drafting of law is simply "not done so". Maybe legislation is seen as affair of a State(and not person) scale" and as such "non-psychological". What follows, psychology is seen as "not proper" for legislation.

The third filter. The filter of exceptionality. According the prevailing usage, the psychological knowledge is addressed by court exceptionally in situations when the regular (common – sense) knowledge seems to be insufficient. If offender's actions or words are very strange and unexplainable in usual ways, the judge can think on support of psychologist and to appoint a psychological examination. In regular, "usual" cases, when a judge is satisfied with his common sense explanation the court sees no need of psychological knowledge.

However, the result of scientific psychological assessment can be very different from one by the common sense in every, and not only in exceptional cases. Therefore, many cases, considered by judges as not demanding any use of psychological knowledge, in reality needed it.

This common conviction that in "usual" situation the scientific psychological knowledge is not necessary provides the third filter preventing psychological knowledge to be used by law.

All these filters create mighty defense system protecting the law from the modern psychological knowledge.

2. Current ideas on the barriers preventing the use of psychological knowledge in the law

Let us review the common explanations of the resistance of the law against psychological knowledge.As mentioned, the general idea of all explanations is that there exists a fundamental incompatibility between law and psychology, because they are absolutely different. Let us summaries several differences that are mentioned most often [See, for example, 4; 19].

1. *Probabilistic vs. "yes-no" knowledge.* Typically, psychological knowledge is probabilistic. Psychological information usually shows *probability* of a trait or event. On the contrary, the law is built upon "yes-no" information. One is either guilty or not, he offended or not, a contract is signed or not, etc. So, when trying to apply psychological data in law we meet the difficult problem, how to covert probable data into firmly stated "yes-no" ones. A lawyer asks "Is it true or wrong?". A psychologist answers "The probability of truth in this situation is this, the probability of wrongness is that". In this situation the lawyer has not idea what to do with this psychological information. It turns to be incompatible with its use in law.

2. "*Is" vs. "ought"*. Psychology shows what is, law shows what ought to be. Psychology studies how people act in reality. As opposed to this, the law commands what they ought to do. So both are incompatible because they address quite different aspect of reality.

3. *Objectivity vs. value.* The law is permeated with political and economic interests and the values of society and its groups. Psychology is (or, at least, tries to be) objective and impartial.

4. *Conservatism vs. innovation.* The law is rather conservative. It is termed "The power of dead generations over living ones". We still follow laws made hundreds years ago. On the contrary, psychology is innovative, searching to re-check old truths and to find new, more perfect ones.

All these differences are claimed to be liable for the incompatibility between law and psychology. These explanations are wide-spread and taken for granted. They have never has been criticized either by lawyers or by psychologists.

However, there seems to be a good base for criticism. Let us successively review all statements that are applied discussing the law resistance against psychology. We will review again all these differences and try to answer two questions:

1. Do the above – mentioned differences between the law and psychology really exist?

2. If they do, are these differences really the reasons for incompatibility between the law and psychology?

Our thesis is that all these differences and problems are usually met and successfully solved in relations between all theoretical and applied sciences.

1. *Probabilistic vs. "yes-no" knowledge.* We can agree that when applying psychology in law we meet the conversion problem: how to use probabilistic psychological information to take "yes-no" legal decision ("guilty-non-guilty", etc). However, the same problem is typically met in any practical applications of any theoretical knowledge. When a bridge is designed, its constructors dispose probabilistic knowledge on strength of its building material. However, they have to "convert" this information into "yes-no" decision: will this material do for this bridge or not. Biology provides probabilistic knowledge about a living body. The major part of our biologic characteristics (blood pressure, temperature, etc.) is probabilistic. Medicine converts it into "yes-no" information: whether a person is ill or not, is there definite disease or not, will a certain course of treatment do or not, etc. The botanist provides probabilistic knowledge on plants, their developments and demands. Agronomy converts this knowledge into practical "yes-no" rules and decisions about which plants to use and how they can be cultivated.

2. *"Is" vs. "ought"*. We can agree that the psychology shows what people do and the law provides rules about what they ought to. The first one produces knowledge and the second one uses this knowledge to produce rules and standards. However, not only law and psychology are so. Any scientific knowledge is usually applied to develop rules saying where, what and how things have to be done. Medicine (an applied science) uses biological knowledge (theoretical science) to develop rules indicating what ought to be done to cure a disease. Bridge engineering (applied science) uses knowledge provided by physics to establish rules and standards of bridge-building.

3. *Objectivity vs. value*. It is true that any law is permeated with social and economic, political, moral values derived from the considerations of people designing it. However, the same is true for every goal-seeking activity. Any bridge is also perme-

ated with interests and values of people who ordered and financed its building. Depending on their intentions, demands, interests, values and tastes, the bridge can be expensive or cheap, simple or sophisticated, modest or fancy, more or less durable, destined for different tasks.

4. *Conservatism vs. innovation*. It is true that the law (in contrast to the innovation-seeking psychology) is mistrustful of innovations. However, this is typical for any practical activity in which responsibility is involved. For example, designers of a bridge also are mistrustful of innovations. They resist innovations for the same reason as the law-maker. Both carry the heavy responsibility for the success of their activity. If they adopt innovation and this brings fatal consequences, they (and not the inventor) go to prison.

Thus, we can see that all these differences are not only met between law and psychology. They are usual also in many other areas of human activities. However, this does not cause any resistance similar to the one found between law and psychology.

3. Alternative explanation of the barriers to use psychological knowledge in the law

Our explanation does not agree with the idea that the law rejects all psychology because of its totally different nature. Our explanation is that the law does not reject every psychology. It rejects only one kind of psychology- scientific one.

The law rejects scientific psychology because it has its own "basic legal psychology", which is highly independent from scientific one. Law has its own psychological ideas about human nature and just these ideas (and not those provided by scientific psychology) underlie the law and its institutions. This specific for the law and independent on scientific psychology set of psychological principles and concepts permeate all law-making and administration.

Let us review several specific psychological ideas that are basic for the law and do not agree with the ideas of the modern scientific psychology.

As a first example of "psychology of the law" consider the basic psychological statements which underlie one of the most important aspects of the legal process – legal sanctions.

Legal sanctions (punishments provided by the law for violation of its regulations) are fundamental to law and used in all its branches. Generally speaking, the whole of law can be seen as the legitimate way to use sanctions. Sanctions are used to achieve its most important aims, especially, to deter people from forbidden actions and to rehabilitate offenders.

Why do legislators believe that sanctions work? We find the explanation in every law theory manual. This belief is based upon two fundamental statements on human nature.

I. Everybody has fear of sanctions.

II. This fear holds for violation of the law.

Now let us answer two questions:

1. Are these statements psychological ones? The answer is "Yes!"

The first one comments on human emotions (about the way in which fear arises). The second one deals with motivation.

2. Do these statements agree with ideas of the modern scientific psychology about

human emotions and motivation? No, they do not. The picture of emotions and motivation drawn by modern psychology is infinitely more complicated. Thus, both statements are oversimplifications. Therefore, the belief based upon them that sanctions of law deters and rehabilitates is an oversimplification too. In his meta-study J.Albrecht summarized results of studies on efficiency of criminal sanctions: "In the best case they have no effect, in the worst one they are harmful" [2; See also, 18; 20].

Is it possible to improve these basic statements- to bring them in line with modern-day scientific psychology? The answer is "No!" This would have to mean that sanctions, fundamental for law, do not work. From this follows that also the law using them does not work. Next, this means that the very necessity of the law is controversial. This puts in question the whole legal system: court, police, and prison. Thus, an attempt to improve basic statements and to conform them with modern knowledge could be destructive for the law.

Another fundamental statement of law is the presumption of knowing the law. It implies that even people who never read the law know it [3]. The psychological statement underlying this presumption is that all people are able to discover every demand of law intuitively. From the standpoint of psychological studies of intuition, this statement is, to put it mildly, oversimplified. However, to reject this statement means to allow a wrongdoer to excuse his misdeed by his supposed legal ignorance. This would be destructive of the legal system.

The most interesting site of the matter is that the legislator is certain that statements of basic legal psychology are valid. Therefore, hundreds of legal regulations are passed without any empirical verification of their psychological foundation and without validation, whether they really will work as they are supposed to. The legislator believes self-evident that they must work. So, they are passed even despite all evidences of their inefficiency. All these psychological scientific evidences of this inefficiency are seen as impertinent, having nothing to do with the law and are simply ignored.

All this means that the basic legal psychology is highly independent of science, scientific validation, conclusions and criticism.

This is surprising. We live in the world of omnipotent science. It plays a crucial role in all areas of life. We trust it, even if its conclusions and recommendations are in a sharp contrast with our everyday experience.

Only the basic legal psychological statements seem to be exempt from the power of science. They are seen as valid despite the lack of their scientific validation. How it is possible?

Our thesis is that it is possible only because the "basic law psychology" has its own validation methods, independent of scientific ones. These methods provide the possibility of supporting statements that are seen by scientific psychology as invalid; to "defend" the "basic legal psychology" against the destructive impact of the scientific one.

Many of these methods are those used by people in their everyday life to validate their common sense ideas. They are methods used by folk psychology (everyday, naïve, common-sense psychology) drawn on by lay persons [10].

The Mental Simulation is one of such methods of validation [10]. Its essence is simple. One puts oneself in the position of another person and tries to think and feel "for him". Instead of knowing how another person "ticks", "we just do the ticking for him" [8, p. 161–185].

Validation by Mental Stimulation "shows" (contrary to science) that legal sanctions do work and are even highly efficient. Indeed, try to put yourself into the position of an imprisoned offender. Think of the years he spends in prison. Every month, day, hour, and minute, he is deprived of everything: freedom, love, normal food, friends and relatives. Therefore, every minute and second teaches him the same lecture – "you suffer because you committed your crime". Trying to think and to feel "for him", we can "clearly see" a vivid and detailed image of his thoughts, feelings, decisions. This image "clearly shows" that in his place everybody would refuse the slightest idea of committing any new crime.

Yet science says that criminal sanctions do not work. However, common-sense's Mental Stimulation depicts how they do work. In the same way a regular person can "clearly see" (despite all psychological data on intuition) that everybody can intuitively discover the demands of the law, how a threat of criminal sanction deters from an offence, and how any new law evokes public respect, etc.

Thus, this 'clear view' replaces any scientific validation and defends basic psychological statements of law (and law itself) from scientific psychology.

This situation has some positive consequences.

1. This preserves the law, protecting it from ideas that, though scientifically valid, could be destructive for it.

2. Being defended from criticism of scientific psychology, the law is, therefore, more stable. It is protected against often and drastic changes peculiar to scientific psychology. The stability of law is highly important, ensuring its ability to make social relations predictable. "It is better to have a poor but stable law than good but unstable one", advises old legal wisdom.

3. Both ordinary, lay people and the basic legal psychology use the same, common sense, validation methods. Thus, both "see" the same reasons for which the law should work. Therefore, both believe the law. They believe that criminal punishment deters and helps to rehabilitate offenders. They "see" that everybody can intuitively discover the demands of the law and, therefore, "understand" why legal ignorance is no defense. This is highly important in integrating the law into everyday life and encouraging people to accept the law.

However, there are also many negative consequences.

1. Inefficiency. It is impossible to rely upon invalid, oversimplified ideas and to be efficient. Believing that 2 x 2 is 17, one cannot be efficient in one's calculations. In the same way a law based upon oversimplified ideas cannot be efficient.

2. Rigidity of law and obstruction to innovations, especially those suspected of endangering stability. The law wants "stability for stability". It does not distinguish "good stability" from "bad". This hinders it solving its inveterate problems. Instead of changing, the law insists. It resists innovations, increases zeal in implementing the existing state of affair. Thus, problems are intensified instead of being solved.

Collectively, this means that the law sacrifices its efficiency for its stability.

However, the price for stability is very high. Why do we agree to pay such a price?

We already have no illusions about efficiency of the sanctions. We know very well that prison is not the place where criminals can be improved. We are not so naïve as to believe that legal sanctions deter people from violating the law. However, we do not have any really strong alternative. We do not know when and how any different basis for law can be build. We cannot even picture the world without criminal punishment. Today we cannot even find any single country without prisons. They have existed as long as human society has.

This brings the conclusion: "Yes, current situation is bad but there is no way to change it". Therefore, the price for stability of the law is seen as a forced one.

4. Ways to overcome the resistance of the law against the use of psychological knowledge

Modern psychology is a dynamic, quickly developing and highly offensive science. It actively searches for new opportunities to apply its knowledge in new areas of human life also in the law. Modern psychology actively tries to overcome both the open and hidden resistance of the law against the use of psychological knowledge. Let us review several strategies in dealing with this resistance both already discovered by psychology and just possible.

1. *Submission. Psychologist can just admit that stability is the only efficiency criterion of the law.*

The he desists from any criticism on law and its specific psychological ideas. Adopting this strategy, a psychologist admits that a lawyer knows better what can be safe or unsafe for law. Therefore, he calmly waits until a lawyer asks him to do something.

Meanwhile, a psychologist does not try to widen the use of psychology. Instead, he only improves things that are permissive for law: improves methods for the examination of witness testimonies, capacities to stand trial, etc. The positive side of this strategy is an increased mutual confidence. As usually in life, if you want nothing of another person, his confidence in you may grow. This improves mutual understanding. This inoffensive position of psychology can be seen in many countries. Psychologists calmly work in traditional areas without much effort to widen them.

2. *Restricted expansion. Application of psychology is widened mainly in some selected areas with especially high demand for efficiency.*

Generally, the law sacrifices its efficiency for stability. However, in some areas it is not so easy. In these areas, the need for efficiency is especially strong and the lack of it is especially evident.

One of such areas is crime detection. If you act efficiently, the offence will be detected. If not, it remains undetected. In most countries the police are responsible for crime detection. No wonder that here the cooperation with psychologists is the most demanded and successful. Great uptake of psychological profiling is a good example.

3. *To modify innovations to avoid endangering of basic legal statements.* Psychological proposals which are supposed to endanger the stability of law are modified to make them not harmful for stability

of the law; their non-endangering shape is promoted.

A good example of such an approach is the diversion of juvenile offenders from the full force of the law. Empirical studies discovered so – called "spontaneous remission" of juvenile delinquents. It was demonstrated that the great majority of offenders commit offences in their adolescence or youth [17]. Paradoxically, the probability that they will continue their criminal activities proved to be much higher if their offences were detected and prosecuted.

The most direct and logical way to react to this finding is to abolish offences of adolescents and youth.

However, such a solution endangers the basic statements that everybody has a fear of criminal sanction and this fear deters him. It would be a direct admission that the criminal law does not work.

In this difficult situation, a skillful alternative route was found. Instead of abolishing the inefficient and harmful law, prosecutors were given discretion to cease prosecution of a juvenile at any moment. In this situation, Peter has been paid without robbing Paul. Both fundamental statements of law are left safe and the possibility of protecting juveniles from criminal prosecution, which harms them psychologically, was created. This procedural trick, first discovered in US became highly popular and spread widely around the world [22].

This is a good pattern for a potential and sophisticated way for expansion of psychology within the law.

4. *Moving ahead very slowly and imperceptibly*

Psychology has great experience using desensitization methods. Its main tool is slow but steady progress, weakening aversions or phobias. Following this approach the law's phobias and aversions against psychology can be cured, gradually increasing the dose of the latter, closely observing feed-back, moving ahead carefully step by step.

Actually, the whole history of expansion of psychology within the law is a good illustration of such a strategy.

Think of the examination of eyewitness fallibility. Reviewing the use of witness psychology in court from Hugo Münsterberg until modern days, we can see the very slow but steady progress. Of course, this progress is much too slow. However, it is now much easier than 100 years ago, to persuade the court that psychological examination of a witness statement is needed. The use of psychology has been expanding very gradually but steadily in examination of capacity to testify, etc.

5. The revolutionary strategy – drastic change in the law and its interrelations with psychology, placing responsibility of integration on the doorstep of both, refusing oversimplifications. As seen, this may demand drastic changes in the very foundations of the law. As we have seen this can bring threads to the stability of law. However, maybe, nevertheless, the time came to think how to do it?

Conclusions

1. Psychological knowledge is demanded in every legal decision affecting or involving people.
2. However, the real use of psychological knowledge in the current law is far behind this demand.
3. Common explanation of restrictive use of psychological knowledge based

upon idea of incompatibility of law and psychology is not valid. Phenomena described as discrepancies between both are not specific and can be see in the interrelations of all theoretical and applied sciences.

4. The true reason of resistance of the law against psychology is that law possesses it's own specific "legal psychology" providing its own and different from scientific psychology statements.
5. Independence of the statements of the "legal psychology" from scientific one is ensured by specific validation methods used by the "legal psychology".
6. There are several possible strategies for reforming the psychological foundations of the current law.

REFERENCES

1. ACKERMAN, M. *Essentials of Forensic Psychological Assessment*. New York: John Willey and Sons, 1999.
2. ALBRECHT, P.-A. *Kriminologie*. Muenchen: Beck, 2002.
3. *Black's Law Dictionary*. St. Paul, Minnesota: West Publishing, 1991.
4. CONSTANZO, M. *Psychology applied to law*. Australia: Thomson Wadsworth, 2004.
5. COOKE, D. Psychopathy as an Important Forensic Construct: Past, Present and Future. Psychology and Law. Bridging the Gap. Ashgate Publishing Limited, 2007.
6. DAICOFF, S.; WEXLER, D. Therapeutic Jurisprudence. In GOLDSTEIN, Alan M. (Ed.) *Forensic Psychology*. Hoboken, New Jersey: John Wiley and Sons, 2003.
7. ERLANGER, H. *et al*. Is It Time for a New Legal Realism? *Wisconsin Law Review* 2005(2): 335–363.
8. GOLDMAN, A. Interpretation Psychologized. *Mind and Language*, 1989, 4, 161–185.
9. GOLDSTEIN, A. M. (Ed.). Forensic Psychology. In WEINER, Irving B. (Ed.). *Handbook of Psychology*. Vol. 11. Hoboken, New Jersey: John Wiley and Sons, 2003.
10. GORDON, R. Folk Psychology as Simulation. *Mind and Language*, 1986 1, 158–171.
11. JOST, J. T.; MAJOR, B. *The Psychology of Legitimacy*. New York: Cambridge university press, 2001.
12. JUSTICKIS, V. *Bendroji ir teisės psichologija*. Antroji laida. Vilnius: MRU, 2004.
13. JUSTICKIS, V.; VALICKAS, G. *Procedūrinis teisingumas Lietuvos kriminalinėje justicijoje*. Vilnius: MRU, 2006.
14. KAPARDIS, A. *Psychology and Law*. A Critical Introduction. Cambridge. Publisher: Cambridge University Press, 1997.
15. KELSEN, H. *General Theory of Law and State*. New York: Clark, 2007.
16. KOCSIS, R. N. *Applied criminal psychology: a guide to forensic behavioral sciences*. Charles C Thomas Publisher, 2009.
17. LAUB, John H.; SAMPSON, Robert J. Understanding Desistance from Crime. In *Crime and Justice* (Volume 28: 1–69), edited by Michael Tonry. Chicago: University of Chicago Press, 2001.
18. MARTINSON, R. "What Works – Questions and Answers About Prison Reform". *The Public Interest*, Vol. 10 (Spring), pp. 22–54, 1974.
19. MELTON, G. B.; PETRILA, J.; POYTHRESS, N. G.; SLOBOGIN, C. *Psychological Evaluations for the Court: A handbook for mental health professionals and lawyers*. New York: Guilford Press, 1997.
20. SHERMAN, L. W.; MacKENZIE, D.; ECK, J.; P. REUTER, P.; BUSHWAY, S. 1997. *Preventing Crime: What Works, What Doesn't, What's Promising*. A Report To The United States Congress Prepared for the National Institute of Justine [interaktyvus. Žiūrėta 2012-09-29]. Prieiga per internetą: <http://www.ncjrs.gov/works/overview.htm>.
21. VALICKAS, Gintautas; JUSTICKIS, Viktoras; ČĖSNIENĖ, Ilona. Teismo psichologinė ekspertizė Lietuvoje: dabartinė padėtis, problemos ir galimi jų sprendimo būdai. *Psichologija*, 2006, t. 33, p. 89–100.
22. WALTER, M. *Jugendkriminalität*. Stuttgart: Richard Boorberg Verlag, 2001.

TEISĖS IR PSICHOLOGIJOS NESUDERINAMUMO PROBLEMA IR PSICHOLOGIJOS ŽINIŲ TAIKYMAS TEISĖJE

Viktoras Justickis, Gintautas Danišauskas

S a n t r a u k a

Kiekvienas teisinis reguliavimas tiesiogiai ar netiesiogiai skirtas žmogui: nukreipia jos veiksmus, gina jį, siekia pakeisti jo asmenybę, teikia asmeniui galimybių pasiekti savo tikslų. Šis reguliavimas, kad būtų veiksmingas, turi remtis patikimomis žiniomis apie žmogų ir jo asmenybę. Psichologija yra mokslas, turintis ir teikiantis tokių žinių. Dėl to psichologijos žinios turėtų būti labai plačiai naudojamos teisėje, sprendžiant bet kokias teisines problemas, liečiančias žmogų.

Tačiau iš tikrųjų psichologijos žinios teisėje naudojamos gana ribotai ir daro tik pirmus žingsnius. Jų panaudojimas toli atsilikęs nuo teisės psichologijos galimybių.

Straipsnyje nagrinėjamos priežastys, kurios trukdo plačiau naudoti psichologijos žinias teisėje. Apibendrinami dabartiniai teisės priešinimosi plačiau naudoti psichologijos žinias aiškinimai. Parodoma, kad bendras visų šių aiškinimų pagrindas yra teisės ir psichologijos žinių nesuderinamumas, kylantis iš esminių šių dviejų mokslų skirtybių.

Atliekama kritinė teisės ir psichologijos nesuderinamumo idėjos analizė. Siūlomas alternatyvus minėto fenomeno aiškinimas. Tuo pagrindu nagrinėjami teisės priešinimosi psichologijos žinioms įveikos būdai ir platesnio psichologijos naudojimo teisėje perspektyvos.

Įteikta 2012 m. rugsėjo 30 d.
Priimta publikuoti 2012 m. spalio 29 d.