8.
BETWEEN NORMS AND PSYCHOLOGY
The well-being of the person and the social community

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This chapter deals with the ethics of action according to psychology & law and how the impulse towards innovation within this discipline and its professionals revolves around the promotion of individual and collective well-being. Focussing on some critical aspects of the current debate, the chapter identifies the need for a more focussed and consistent interaction between scientific research, legal contexts and institutional practices. The knowledge gained within each area should be part of collective awareness and not only a resource that a small number of professionals can draw upon (Quadrio & De Leo, 1995; Patrizi, 1996; De Leo & Patrizi, 2002).

8.1. The identity of psychology & law

Psychology & law is the branch of psychology that applies to the processes regulating social living, and more specifically, those processes that are formalised in law, including their declinations into the justice system. Indeed, psychology & law gravitates around two core bodies of knowledge: (a) the symbolic interactions and social dynamics in the relations between the individual, the law and the community; (b) the processes of interpretation and application of the laws, the organisation and administration of justice, the actions stemming from judicial decisions, the impact of laws and justice on individuals and social groups. With respect to these two core fields of knowledge, areas of interest may be classified according to the issues analysed or the research or professional activity (De Leo & Patrizi, 2002):

- the psychology of the law, or legal psychology, is concerned with the set of psychological notions that are involved in the application of the law, the psychological dimensions contained in the law, the contributions of psychology to the development of the law;
- the psychology of judicial activity, organisation, functions, dynamics and strategy;

- the psychology of provisions and interventions associated with judicial decisions (both civil and penal);
- the psychology of training for professionals and service providers in application of judicial decisions;
- the psychology of children at risk, with the protection of children as its main objective;
- the psychology of deviant and criminal behaviour.

The historical roots of psychology & law, its developments and its current physiognomy, all highlight its applicative nature, which is to say that its primary object of study are the domains of law and justice.

Its origins lie within social psychology, and this orientates the discipline to approach its object of study from a systemic perspective, aware of the processes linking the psychological with the social dimensions. On the other hand, considering the fields of study listed above, one can see that the toolset used by psychology & law also draws from other areas of psychology (Quadrio & Catellani, 1995; De Leo, 2003): clinical psychology (the study of crimes, of the analysis of legal categories requiring personality assessments, or the treatment models); community psychology (consider preventive and inclusive actions, or the involvement of the community in the enforcement of external penal measures); developmental psychology (juvenile deviance, problem behaviour such as bullying, children's custody when parents are separating, etc.); organizational psychology (let us remember how relevant this matter is for the organisation of justice, for operators' training); general psychology (the functions of perception and memory implicit in witness statements). However, in order to be usefully employed in the sector we are dealing with, this important knowledge needs a specialist filter. This is in fact one of the basic functions of psychology & law: the knowledge and skills deriving from other branches of psychology ought to be specialised and contextualised with reference to the characteristics, the issues and the requirements of the field of application.

When it comes to witnessing, for example, the knowledge of the mental processes that oversee the mnestic reconstruction of events must be squared not only with personal characteristics and conditions, with the methods of collection of the testimony, but also with a number of other elements linked with the acquisition of evidence, the reliability and credibility of the witness, his/her protection, especially if s/he is a child, the psychological consequences of the contribution given to justice. In order to evaluate the psychological components of the imputability of a young offender, one needs not only a clinical assessment with reference to the alleged offence, but also an analysis of how that assessment interacts with and how it complements the conventional dimensions of the legal category, the effects on the response of the law and the provisions applied by law. In any event, and at a level which is superior to those contents – an example of the complexity characterising every issue and problem that puts together justice and psychological knowledge – that knowledge needs to include not only the discipline's scientific debate, but also the juridical, legal and operative debate, as well as the inter-disciplinary debate (law, psychology, other non-legal disciplines) over the issues under study and their evolution over time.

Within this background, the discipline is moving towards a new and focussed reflection on its relationship with its scientific reference (psychology) and its contextual reference (laws and any situation of normative relevance) as well as on the matters related on the interactions between the person, the law and the society (De Leo & Patrizi, 2002). This kind of reflection can be based on psychological and social awareness, which is today a valuable asset for psychology & law not only from a knowledge standpoint, but also insofar as its ability to interact with law and social restitution. Here, the two main elements are:

(a) the context (the law and its application systems), in order to be defined as one of psychology's action domains, this has to be considered an essential reference. The laws (the Codes), its makers (the legislators), its interpreters (the court actors, the administration of justice), their beneficiaries (the whole society, including those subjects that are explicitly mentioned by the law for protection/safeguard of their rights, for regulation of behaviours that are problematic or in breach of the rights of others), they all define the meaning and the actual possibilities of psychology, its very presence in the domain of the law;
(b) psychology does not accept an auxiliary role with regard to the questions and issues of the law, to the formal and informal interactions activated within it, acquiring from its scientific reference the criteria needed for autonomous thinking, including the contribution to the application of the law and its ability to evolve with the social change and with the development of the knowledge used to interpret these.

Starting from this awareness and considering the role played by psychology & law as inter connector between social problems and their legal/regulatory relevance, it is possible to highlight some critical aspects that depend, on one hand, on the complex nature of the issues under study – especially regarding the relation between individual and community interest (or well-being) – and, on the other hand, on the ability of psychology to return its results to the social sphere and the application context. At the same time these critical aspects depend on how much law and justice allow psychology to put in place its observation/analysis of law and justice.

8.2. Psychology & law for people's well-being

Concerning the first of the two issues – the relationship between individual and community well-being – we can see that many of the issues analysed by psychology & law contain elements of conflict where the well-being of one side (be it and individual or a community) seems to contrast with the ill-being of another side (individual or community).

Let us think of some of the traditional domains of this discipline: the relationship between rehabilitation/inclusion of an offender, including the expectations of his systems (family, children), and the social representation of security through

incarceration, the dual purpose of protecting an adolescent and his/hers development needs, when s/he encounters the justice system and of sanctioning his/her deviant behaviour. And also the objectives of curing sex offenders, between the indignation of the community and the scarce or no investments made to train prison operators; the dual objective of guaranteeing continuity in parental relationships to the children who are victims of abuse within their family and that of prosecuting the abusing parent.

We only mentioned some of the domains to which psychology & law has paid attention for a long time. The results of the cooperation mentioned in the opening paragraph have impacted to some extent both lawmaking and social awareness, but cooperation requires today a more focussed commitment, to ensure that the critical issues can be re-examined in light of the most recent scientific developments and professional skills matured until now. We report here two examples of this: the protection of children involved in judicial proceeding is a case of positive development of such cooperation; the responses to criminal behaviour and treatment of offenders is a critical area that highlights the need for a continuous exchange between all interested parties: scientific, institutional and social community.

8.2.1. *Protection of the child involved in judicial proceedings*

For a long time, the judicial system considered children in its care as the object rather than the subject of legal rights. The difference between the right *for* and the right *of* the child (Lucidi, 2002) may be an especially useful development of the prior transition from the rights *over* the child to the rights *for* the child. A right *over* somebody refers to the object of that right (the child, over whom adults have rights as well as obligations), the right *for* refers to a beneficiary and an objective (his/her protection and safeguard, considering his/her specificity and the structural situation of indirect representation). The right *of* is centred around the subjectivity that needs to be guaranteed when exercising those rights – through the rights recognised by the law – in age specific and suitable ways. Subjectivity, specificity and suitability may be considered recent acquisitions of the debate around children, where the law has acknowledged the evolution of social sciences, not only psychology & law but also social and developmental psychology.

The traditional concept that considers infancy and adolescence as a sort of incomplete adulthood (in sense that they are the object of protection intended to direct their development) has been progressively re-examined in light of that evolution, which has contributed to the assertion of a new legal – social representation of both the individual in evolving age and the best possible forms of intervention regarding problematic or risky situations which the law is called to regulate. The first set of rules for the safeguard of a child were characterised by a *defensive model* with respect to the very same individual (if engaged in transgressive behaviour) or his/her family (if guilty of violence or denied education). For a long time, the main criteria has been that of segregation, in order to defend

society from dangerous children or to defend the latter from inadequate families. The administration of the law has proceeded with sanctioning and corrective objectives, pursued within a perspective of separation from the subjects' everyday life (children removed from their families, imprisonment for deviant adolescents). Even preventive measures tended to favour (and to some extent they still do) actions aimed at identifying the risk of maladjustment and harm, isolating its constituting elements, which were taken as predictors of a pathology, and attempting to remove them so as to prevent their acting as causes.

The results of psychological research have highlighted (Caprara & Fonzi, 2000; De Piccoli & Quaglino, 2004): (a) the reductionist nature of this model of linear causality; (b) the relevance of protective factors acting as modulators of risk factors; (c) the inclusion of both strategies and response modes (including those from the law) among the variables that can impact on the dynamics and processes that the law plans to regulate; (d) the greater effectiveness of treatments that are oriented towards the development of individual resources, of social contexts, of the community, that are aimed at the expected objectives rather than being directed by the conditions identified. Such conditions represent a critical starting objective of knowledge, but can only be the endpoint of actions in view of the changes that the same people and their systems are able to anticipate as necessary, opportune, useful in terms of well-being, for themselves in relation to the expectations/requirements of the community they belong to.

The present orientation of the law appears to have acknowledged the indications of scientific research. A key characteristic of the most recent laws is founded upon the considerations illustrated above: the promotional perspective. In Italy we encounter this perspective in the proceedings against adolescents, where together with the assessment of responsibilities (typical of penal court cases), the primary objective is the development of the adolescent. We find this perspective in the Law no. 285 dated 28 August 1997 *Disposizioni per la promozione di diritti e di opportunità per l'infanzia e l'adolescenza* [*Provisions for the promotion of rights and opportunities for children and adolescents*], which can be considered one of the first legal texts to be oriented towards the promotion of well-being and the development of positive actions towards its achievement.

8.2.2. *Modes of response to crime and treatment of offenders*

We will not venture into the details of the concept of punishment and its evolution, which go beyond the aim of the present paper. We shall simply recall its present meaning and purpose: responding to harm done with a corresponding retribution (which in our Penal Code is identified with the taking away of freedom) and, at the same time, activating processes for the care of the imprisoned person. Such processes must be able to contain the risk of second offences and to produce a significant change from the perspective of the established rules of social living (the re-educational purpose of punishment enshrined in our Constitution is reflected in the treatment/education model established by our prison

system: Law no. 354 dated 26th July 1975). Still today the meaning of punishment and the most effective sanctions to prevent second offences are the subject of a wide debate. It seems that prison cannot be a response capable of inducing individual (or social) change that may realistically impact on security (De Leo, 2000; De Leo & Patrizi, 2002). Despite the fact that the re-education model has marked a crucial historical step in the way crime is dealt with, it has also revealed a number of limitations in its application: due to the structural deficiencies of the prison regime (from logistical inadequacy to the scarcity of skilled professionals), due to the unlikelihood of starting any evolutive process within an artificial situation (prison), due to the similarly artificial separation of the person from his/her life system, due to the inability of this solution (imprisonment) to take the victim into consideration and restate the sense of security.

The current debate highlights the need for a new and different mode of managing/preventing crime, which should be motivated by aims of security, individual well-being (the victim, the inmate, the former inmate), of the professional system involved (operators, services) and of the community, through a more reasonable inclusion within the community of all the issues pertaining to crime and its prevention, to security and its promotion. Such vision entails a fundamental social awareness of the systemic complexity of all these issues, the recognition of the role played by all social stakeholders in the active construction of those problems as much as in the participative identification of the strategies to tackle them. The most recent trends in this respect consider the de-institutionalisation of the intervention, in order to maintain continuity between the system of penal responses and the mechanisms of social responses. They are aimed at identifying the criteria with which one can discriminate between situations that require incarceration and those that would be better tackled with interventions of a social nature (Palomba, 2007; Margara, 2007; Turco, 2007). This perspective, which is shared by this author, entails however some difficult challenges representing the domain in which penal justice (including the prison system) and scientific as well as operative contents are confronted with the requests emerging from society.

The difficult balance between social calls for security – which frequently drive the reintroduction of a restrictive climate, erroneously considered the only way to combat crime – and the need to implement effective solutions for active rehabilitation and further crime prevention, raise the issue of how to communicate a promotional and pro-social culture of responsibility. This would be in accordance with the most recent psychology & law literature and with the EU and international orientations in matters such as reparative justice, penal mediation, non-custodial treatment, which are viewed as especially important instruments for the prevention of crime and the promotion of social security (Patrizi & De Gregorio, 2009).

Within this background, the reduction of the use of jail has been advocated and calls have been made for the implementation of the principles of minimum criminalization (AA.VV., 1985; Ferrajoli, 1989), passing through a substantial reformation of the entire penalty system. Minimum criminalization is to be taken as paradigm and as a normative model aimed at three main objectives: preventing

offences breaching fundamental rights, protection of the subjects harmed by the offences, prevention of punitive excesses or arbitrariness. To quote Luigi Ferrajoli (2002, p. 10), minimum criminalization is «the law of the weakest against the law of the fittest that would apply in its absence: that which would safeguard the weakest subject, who during the crime is the offended party, during the court proceedings is the accused, at the time of penal enforcement is the prisoner. […] We can […] say that its effectiveness is equivalent to the extent to which a given penal system safeguards civil rights and liberties». This systemic vision of safeguards, protection and non-violence includes non-custodial sanctions and the use of social mediation of conflicts originated by the crime (Ponti, 1995; Palma, 1997; Tigano, 2006).

Within this view, the emerging model of reparative justice – supported by many international declarations and recommendations – drives one to revisit the penal systems with novel attention to the victim of crime and, at the same time, to the development of new forms of treatment that can reduce the conflict within social dynamics. If committing a crime creates a fracture between the offender and the society in which the offence took place, the action/penalty needs to also worry about that relation and repair the social fracture that took place (Wright, 1995; Bazemore, 2000; Ceretti, Di Ciò, & Mannozzi, 2001; Gius, 2004; Patrizi & Lepri, 2011).

8.3. Inter-disciplinary exchange and community based approaches

The two domains illustrated above – and their synthesis has been given priority over the discussion of their complexity – show the fertile (the first one) and problematic (the second one) nature of the practice of knowledge exchanges between scientific research and institutional legal contexts that can relate to the social realities they both address. To this end, practical communication channels must be activated (or developed) so that specialist knowledge (for example, the functionality and efficiency of the treatment implemented, especially if different from custodial sentences) may turn from sector-specific knowledge to community knowledge.

This brings us to the second profile highlighted above, that is, the ability of the psychology and the law (justice) to interact: the former yielding the results of its research and the latter making itself receptive to those results, and, before that, offering itself to observation.

We believe that further research in this sector should follow these general guidelines:

(a) Active involvement of the contexts/subjects addressed by the research, from the definition of its objectives, at the outset and in all phases of its research.
(b) Researchers with specific competence/knowledge of the context, so that the themes and objectives of the research may derive from the observation of

needs/wants and so that the results remain relevant for the operation and the context, thus generating new working assumptions.

(c) Sharing results with the participants and directly transferring the results as a way to develop/change the same contexts/subjects who participated: this is a fundamental phase of the research (especially qualitative) which strengthens its quality, credibility, usability (Seale, 1999).

(d) Transferring the results of research generates new demand for knowledge and is an essential part of constant and continuing cooperation between the research and the context of the study, so as to guarantee verifications over time and non improvised dialogue between the developments of scientific research and the evolution of knowledge, procedures, professional practices.

(e) Including the agreement on access to the sources of the research (questioning, court and prison files, expert examinations etc.) – which is the norm in other countries (e.g. the UK) but limited access to data in Italy causes serious gaps not only as far as studying/thinking is concerned, but also as far as improving operative practices and the administration of justice.

(f) Constant rather than improvised monitoring of the best practices that can enhance strengths and acquire new methodologies.

(g) Dissemination both in the domains of the completed research and in the social contexts, of the thinking/observations made during the research, so that new knowledge is no longer an exclusive benefit of those involved but becomes an asset for the promotion of new social knowledge and awareness.

(h) Within this framework, the national and international scientific debate becomes the focus of discussions among researchers, who use the debate as a starting point to commit towards promotion/participation in operative pluri- and inter-disciplinary discussions, bringing to the table theoretical knowledge and research methodologies to enable systematic monitoring and verification of issues and assessments coming from legal work.

One may consider it an ethical commitment of psychology & law to achieve this kind of discursive interaction not only in research, but at every level and context of work, in academic teaching, in the training of professionals and service providers, in the scientific as well as operative multi- and inter-disciplinary debate. It's also an ethical commitment: to promote the opportunities to meet, the circulation of one's own thinking, a new culture of contact with the community.

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