VIOLENCE RISK APPRAISAL AND LEGAL PRINCIPLES – FROM LEGAL PERSPECTIVE TO PRACTICAL APPLICATION

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Abstract

The study of the mind and behavior gives us the opportunity to predict and to change behavior. In forensic psychology, examinations either try to give an answer, if the person was aware that the crime broke a social norm and was able to control his behavior, or tries to give an answer, if an offender will become a reoffender. The Austrian jurisprudence also focuses on aspects of behavioral prognosis: the verdict should not serve retaliative purposes, but aims at preventing the offender from reoffending. Building on this subordinate principle, that defines justice systems focused on prevention rather than punishment as means of retaliation, judges have to follow legal provisions that put an emphasis on factors related to the individual offender and their current risks and needs. This presupposed individuality and topicality of penal decision making requires the interplay of different scientific perspectives and a strong interdisciplinary practice. Therefore, psychological risk appraisal guides are used to provide valid indicators for recidivism risks leading to a beneficial development towards an interdisciplinary sentencing practice. Nevertheless, in light of the absence of substantive discussions of the expert's opinion in court and yet the high rates with which the court follows the expert opinions often by simply incorporating the opinion verbatim into the verdict (94.7% in sex offenses-cases, 95.1% in homicide-cases, 88.6% in arson-cases) this supposedly interdisciplinary, rather multidisciplinary legal practice bears risks (Fegert, 2006). By looking closer at the German versions of the VRAG-R (Rettenberger et al., 2017) and the LSI-R (Dahle et al., 2012), it becomes visible that some aspects of the tools have to be critically reflected from a legal perspective when incorporated into Austrian criminal proceedings. If adapted unquestioned, the application of this tools leads to fundamental legal questions and potential infringements. The underlying research focuses on revealing these contradictions between the two sciences, while implementing the tools into criminal proceedings and thus aims at paving the way towards an integrative rather than merely additive type of interdisciplinarity. Practical implications for the psychological assessment need to be considered.

Keywords: *Violent risk assessment, risk instruments, legal principle, interdisciplinarity.*

1. Introduction

In the Austrian justice system, especially in Austrian criminal law, there is a focus on behavioral predictions, driven by a preventive justice approach. Sentences aim to deter individual offenders from reoffending (specific deterrence) and to prevent the general population from committing crimes while strengthening the public's awareness of the legal consequences of criminal behavior and the enforcement of these consequences (general deterrence). According to prevailing opinions, criminal judgments should primarily serve specific deterrent purposes (cf. Jerabek & Ropper, 2020). This leads to a focus on offender-related factors and ultimately to the need of an individual-centered prognoses, that the law alone cannot provide. Thus, judicial officials need to consult and integrate non-legal disciplines (Kastner, 2019). This is generally done by appointing expert witnesses who provide their professional opinions on the grounds of their findings through thorough exploration and application of the proper tests (see: Kastner, 2019). However, the integration of "foreign" disciplines in legal proceedings with the aim of seeking empirically grounded facts, brings both opportunities and new challenges (Glatz & Aicher, 2019). Every science has its own perception of entities, which leads to divergent paradigms, attitudes and premises (cf. Bock, 2017; Gerhardt, 2014; Kuhn, 1969; Watzlawick, 2018; Weber, 1968). Hence as the cornerstone of the legitimacy of interdisciplinary work every integration of a "foreign" discipline, such as

psychological-statistical prognostic instruments in legal proceedings, must be evaluated in a discipline-specific way.

In law, there is little corresponding discourse on the content and foundation of applied prognostic tools. Nevertheless, in criminal proceedings it is the judge's responsibility to evaluate expert opinions provided, like any other evidence. However, in practice, such an evaluation is scarcely evident during proceedings (Kastner, 2019). Fegert et al.'s (2006) examination of expert opinions in sexual offense cases in Germany (N=38) revealed that 31.6% showed blanked approval without hesitation. 10.5% judges did not even rephrase the expert's opinion and 21.1% rephrased the text from the report, both groups did not discuss the content. 10.5% rephrased the assessment report and did discuss the content. 7.9% considered the content without mentioning it. 13.2% followed the verbal report of the expert witness. Approximately, 95% did follow the expert witness. This is not merely a habit in dealing with predictions for sexual offenders. This study also shows a lack of evaluation in culpability assessments, which conclude an overall adoption rate of culpability assessments for sexual offenders of 95.1%, and for homicide and arson offenses, of 88.6%. This suggests that critical reflections of witness reports are rather rare. Due to the broad similarities in the legal systems, we can assume a similar situation in Austria. Judges are trained in legal matters but have not built up an expertise in psychological assessments and psychiatrists as well as psychologists are experts in their field but are not trained in law. This bears the risk that incongruencies in the scientific approaches are overlooked. Both parties might perform their own discipline flawless without noticing the missing link of mutual reflection in the realm of an effective integrative interdisciplinary work that actually guarantees compatibility and validity. The danger associated with ignoring the necessary moderation of interdisciplinary cooperation will be illustrated below by examining four problem areas (individuality, timeliness, presumption of innocence and adopted values of foreign law) arising with the application of the VRAG-R (Rettenberger et al., 2017) and the LSI-R (Dahle et al., 2012), two of the most common actuarial risk assessment instruments in Austrian correctional facilities.

2. Individuality and timeliness

By ensuring that the punishment is primarily intended for specific deterrence, the legislator expresses its focus on the individual case and the individual offender in criminal proceedings. This brings to the fore those behavioral and personal sentencing criteria that can address and capture the offender in his social and behavioral context. This seems to be correct insofar as the results of criminological studies indicate that individual offenders do not differ in those risk factors such as "broken home" or social class. Instead, differences become apparent upon closer examination of *social conditions* (Bock, 2018; c.f. Walton, 2022). Thus, it seems perplexing that the challenge of necessary individualization in criminal proceedings is addressed most of the time with merely a nomothetic research logic, which requires establishing regularities and thus generalization, although also modern psychological diagnostics recommends a combination of nomothetic and explanative approaches for the assessment (Schmidt-Atzert, Krumm, & Amelang, 2021). Such generalization can indeed serve as additional evidence in proceedings, but it would need to be appropriately weighed by the judge, which, as the above-mentioned study shows, is hardly happening. The current practice thus might violate the principles of Austrian criminal law, when allocating individuals merely to a risk group (cf. Bock, 2017; Brettel, 2022; Höpfel/Ratz, 2023). Additionally, deciding on the necessary criminal law interventions for an individual by mere statistical membership of a risk group seems to neglect the fatality of alpha (false positive) errors in statistical procedures when used in legal proceedings. Can sentences be legitimized if they knowingly and deliberately accept wrong decisions in individual cases in favor of a rule-based overall view? It seems not to be in the interest of a modern, individual, prevention-oriented sentencing practice. When looking closer at specific types of assessment tools these concerns regarding the lack of individuality become more concrete. One of the most used second-generation tools is the Violance Risk Appraisal Guide (VRAG-R; English: Quinsey et al., 2006; German: Rettenberger et al., 2017). Studies have shown, that the VRAG-R shows good predictive validity for violent offenders (e.g. Rice, Harris & Lang, 2013) and the criteria of objectivity is given (cf. Fletcher et al., 2022). But regarding the need of a person-centred prognoses, it seems concerning that neither the motive nor the psychological functioning of the offenders are taken into account (for further reading: Rossegger et al., 2011). On the other hand, there are various items which could be criticized regarding content validity (Rossegger et al., 2013). For example, Item 1 deals with the "separation from either parent (except death) under the age of 16", which does make sense considering the test construction process, where the authors searched for variables which highly correlate with recidivism (Rossegger et al., 2013). Nevertheless, we would have to take a look on the specific case, because it could still be preferable to be separated from a violent parent or a toxic environment. Using such indicators without taking a closer look to the particular case may present a problem with the criteria fairness and objectivity.

Another fundamental principle of a preventive justice approach focused on specific deterrence is that the sentence and its imposed interventions are based on present circumstances. It is essential to ensure a prognosis that is sensitive to changes, responding appropriately to potential alterations in criminologically relevant factors, remaining dynamic, and not solely focusing on aspects related to the past. Looking again at the VRAG-R one major problem is that there are mainly static variables included and changes in the life of the offender do not affect the score and therefore the predicted level of risk (cf. Rosegger, Gerth, & Endrass, 2013). If the level of change is not measured the offender has no possibility to get a lower estimated risk and thus the assessment tool does not meet the requirements of the procedural law. On the contrary, the so called third generation risk assessments (e.g., Level of Service Inventory–Revised English: LSI-R; Andrews & Bonta, 2001; German: Dahle, Harwardt, & Schneider-Njepel, 2012) include dynamic items and allow the documentation of needs and changes (Rossegger et al., 2011). The LSI-R considers changes in several areas (e.g., education/employment, companions, emotional/personal). In this way the offender has the possibility to get a lower estimation of their risk level. Although, this assessment tool seems to fit better for the purpose at hand, it includes 10 items regarding to the criminal history and being an offender with multiple convictions even if the records of violence cannot be changed. So it can be hard for individuals with a criminal record to get a low probability (< 15%) no matter what changed in their individual lifes. It should be noted, that the LSI-R score alone cannot be used to predict the recidivism (c.f. Dahle et al., 2012; Harwardt & Schneider-Njepel, 2013), nor should others. In fact, it should be used for the assessment of needs and changes. The mentioning of concrete estimated recidivism rate, on the base of the LSI-R raw score, gives a deceptive sense of security in the decision-making process of the court.

3. Presumption of innocence and adopted values of foreign law

In addition to the purpose of punishment, fundamental procedural rights suffer from an uncritical incorporation of statistical figures into the judgment. Item 5 and Item 8 of the VRAG-R addresses the assessment of the criminal history, drawing on the Canadian system by Cormier and Lang, based on the earlier version by Akman and Normandeau (1967) for classifying violent and non-violent offenses. Offenses in the subjects' past are evaluated with a predetermined score, which is then added up. The descriptions in the Items of the VRAG-R manual add that in cases where there is a discrepancy between the charge and the conviction, the more serious of the two should be used, which will often be the indictment (Rettenberger, Hertz, & Eher, 2017). Therefore, the VRAG-R explicitly allows scoring not the actual offense the individual was convicted for in accordance with the rule of law but the suspicion and thus an initial assumption that has not (legally and/or factually) proven to be true. Undoubtedly, the result of a statistical analysis may indicate a certain correlation between the content of charges and subsequent recidivism. However, the principles of the presumption of innocence, as well as the dominant principles *nullum crimen, nulla poena sine lege ("no crime, no penalty without law")* are particularly crucial for the rule of law in penal practice, which is why undermining these principles through the use of psychological tools that do not follow these premises should be carefully reconsidered with respect to potential infringements.

It is also worth reflecting on the fact that the Cormier-Lang system is based on Canadian criminal law, the Criminal Code of Canada, which, in turn, is rooted in British Common Law. In this way, the Cormier-Lang system assesses behavior that, in individual cases, might not be punishable by Austrian law. For example, "possession of items for burglary" or "wearing a mask with the intention of committing a crime" might not reach the threshold of a criminally punishable attempt stage under Austrian law. In addition, there is also the risk of scoring behavior that is under no circumstance punishable by Austrian criminal law (e.g., "exhibitionism" and "disturbance") and yet has an influence on a prognosis that can aggravate the sentence. This indirect influence of the system and values of foreign law is problematic one should be aware of when applying and evaluating the results.

4. Conclusion

Risk assessment puts the legal system and all involved to test. One has to take a closer look which parts of the decision-making process already work and in which one's there still has some work to be done to bridge disciplinary divides and meet both legal and assessment criteria. In doing so, we have the opportunity to increase the fairness for the individual (decrease false positives) and meet the requirements of Austrian law. After all, interdisciplinarity does not simply mean drawing on the insights of other sciences (instrumentalizing interdisciplinarity) or explaining one science through the methods of another (additive interdisciplinarity). Instead, integrative interdisciplinarity demands examinations from

different methodological perspectives with the aim to critically reflect our own methods (defamiliarizing interdisciplinarity) (Wallner, 1991).

Only through this approach can we collaborate effectively. Instead of merely collecting blocks of knowledge, we can build a solid foundation through meaningful integration, capable of addressing future challenges. It requires this integrative interdisciplinarity to prevent potential blind spots, such as the one discussed here. A redefinition of exchanges in the field of criminal science is necessary.

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