

The role of stereotypes in the process of verification

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Introduction

What would we do without prejudices? What would happen if we put aside all stereotypes, schemas, prejudices, models connected to age, gender, hair colour and profession? What if the relationships between two people or two social groups would not be laden with, in the strict sense of the world, *prejudice*? Should we meet anyone, there were no pre-experience expectations, stances distorting experience, conclusions discriminative (direct or implicated), based solely on the affiliation, the categorisation of the related group.¹

Are judges free from stereotypical or prejudiced thinking which is a basic human characteristic? If not, how can it affect him or her during the process of verification? Or are judges infallible?

No one with a common sense would believe that judges are unerring, and although we presume the judgement to be always fair, this presumption can sometimes prove false.²

In fact, the righteousness of the judgement is not an obvious requirement, in spite of the function of the court being to deliver justice.³

No subjective rights are assured (can not be assured) neither for the assertion of substantive justice by the Constitution, nor for all the judicial verdicts to be legal. The constitutional requisite of substantive justice can be realised within the institutes and warranties serving legal certainty.⁴ Jurisprudence is concerned with the possible processes making penal procedure faster.⁵ But this can inevitably hurt some principles, as these processes can reduce the possibility to determine the state of affairs that is most approximate to reality, while securing timeliness.

But what does the truthfulness of judgement mean, what are the reasons for the finding of facts not being faithful enough to real events? Among many factors, stereotypes have a major role in this.

I must begin by saying that this study is not trying to present a detailed and well-documented empirical research. Rather, my paper is raising a problem; it is an experiment to

¹ Hunyady György: *Mi lenne velünk sztereotípiák nélkül?* Magyar Pszichológia Szemle, 2001/2., pp. 213-238

² Király Tibor: *Büntetőítélet a jog határán. Közgazdasági és Jogi Könyvkiadó*, Budapest, 1972, pp. 301-312

³ Criminal Procedure Act of Hungary 12. §

⁴ 9/1992 (I. 30.) AB határozat

⁵ Nagy Anita: *Büntetőeljárást gyorsító rendelkezések az Emberi Jogok Európai Egyezményében, az Európa Tanács Miniszteri Bizottságának ajánlásaiban, az Európai Unióban és a hazai jogalkotásban.* Miskolc, Bíbor Kiadó, 2008, pp. 302.

share my impressions and worries concerning penal procedures that surfaced while getting familiar with the vast field of stereotype research.

Definition of stereotype

The idea of “stereotype” has been introduced by Walter Lippmann, who already pointed out in the 1920s those general, emotion-fuelled presumptions that precede, control and filter information. He emphasized the role of stereotypes in relation to both the individual and the society. Later this idea has been modified many times. In the 1960s and 70s, the definition of stereotype and its ways of research seemed stable. In those times, stereotype meant almost the same as prejudice.

According to traditional belief, stereotype means describing a particular group with personal characteristics. Parents, for example, can make up such a group, as figures of authority in a personal sphere.⁶

Allport described stereotype as an exaggerated point of view teamed up with categorisation. He meant a linguistically marked classification, adopted by our everyday thinking to label events, things and people, and based on which we shape or explain our relation and attitude to them.⁷ Stereotypes in this approach are rigid images built on categories, with an additional dimension. Categorisation refers to the realm of the visual, which is conquered with the help of labels.

Categorisation solves the problem of classifying groups empirically, just like when someone states that in front of him or her there are people to the left and people to the right in the room. Stereotypes enter into it when beyond “left” and “right” an invisible dimension is attributed to them and he or she states that there is a significant distinction between being to the left or right, as a mentality or a character, that is irreconcilable with the other.⁸

By another definition, “the stereotype is a categorising point of view based on exaggeration, regardless of its content being favourable or unfavourable. Its function is to verify (or rationalise) the behaviour related to the given category.”⁹ Also, there is a definition according to which the stereotypes are oversimplified generalisations of people’s categories. Recently these generalisations are called “schemas” or “expectations.”

We must emphasize that no definition of stereotype is accepted universally, although many researchers agree on that stereotypes include characteristics attributed to certain social groups or classes. These characteristics can be personal traits, physical features, social roles, or even specific behavioural patterns as well.

It is possible to demonstrate empirically that stereotypes can affect the interpretation and evaluation of a person’s behaviour, and the same is true for other information related to

⁶ Sallay Hedvig: *Sztereotípiák formálódása egy átalakuló társadalomban – Gondolatok Hunyady György könyvéről és könyvéből.* (Hunyady György: *Sztereotípiák a változó közgondolkodásban*), Magyar Pszichológia Szemle, 1999/ 4., pp. 643-652

⁷ Hunyady György: *Sztereotípiák a változó közgondolkodásban.* Akadémia Kiadó, Budapest, 1996, pp.3

⁸ Csepeli György: *A kisebbségek diszkrimináció mentes észlelésének esélyei.* Főiskolai Figyelő, 1996 január, pp. 9-15

⁹ Gordon W. Allport: *Az előítélet.* Osiris Kiadó, 1999, pp. 245

that person. Even the process, during which we draw conclusions and judging someone, can fall under the influence of stereotypical opinions. The way we pass judgement while having specific information about somebody, but at the same time having stereotypical expectations based on that person's belonging to a certain group as well, can also be examined. Stereotypes can influence not only our instantaneous judgement, but also the expectations of a percipient regarding another person's future performance. (This is, no doubt, of great importance, as judges may found a different measure of penalty appropriate for penitence in the case of the same or a similar crime, under the influence of stereotypes.)

Other researches have shown that stereotypes can activate automatically, even without us being aware of it, and so they can affect not only our judgements but our behaviour as well – so their influence can prevail unconsciously. Already developed stereotypes can have a peculiar effect on the consciousness – they make people see new, empirically acquired knowledge in the light of categories that were formulated previously.¹⁰

Function of stereotypes

There are many theories, but the information-processing theory offers maybe a possible explanatory frame to understand the function of stereotypes. According to that, stereotypes are efficient adaptation mechanisms in that complex and often frightening mass of stimuli which is the world around us. Cognitive efficiency can thus be a reason for us to create and use stereotypes.

A stereotype can also influence the type of information the observers gather from the subjects in the first place. It can channel the behaviour of the observers in a way that justifies the stereotype in a self-fulfilling way.

A stereotype is stored and recalled for the sake of future goals. The stereotypes of well-known groups are stored in our memory and can be called forth to help recognition.

Stereotypes are everywhere. They can be observed in thinking, communication, in connections between people and groups, and actions as well. This is a natural phenomenon. We must also emphasize that although stereotypes are the required components of social recognition, but we still need to guard against their distorting effects, which can soon lead to prejudices. They can cause a “social blindness”, preventing us from seeing in any other way. We do not and will not have the capacity to know each and every person, so we cannot avoid the use of stereotypes, which, on the other hand, can sometimes complement directly available information for the better.¹¹

The use of stereotype is also a tool, with which people fill their memory.¹² It is a general characteristic of the social mind to summarize, group and sort the accumulating social knowledge. This makes the life of the individual easier, as he or she is safe from calculating each and every case and question. Society, tradition and common knowledge helps the individual by informing him or her about the possible outcome of things. This is undoubtedly a great help. The knowledge and prejudice containing sketchy and simplified averages and possibilities provided by others are far more than ignorance. On the other hand, the

¹⁰ Gordon W. Allport pp. 244

¹¹ Hunyady György – *Nguyen Luu Lan Anh* (szerkesztő) pp. 151

¹² Csepeli György: *Szociálpszichológia*. Osiris Kiadó, Budapest, 1997, pp. 475

knowledge and approach taken from society are based on pigeonhole principles by definition, therefore it is not at all easy to make a distinction between the notions of anticipation, general opinion and prejudice.

In practice, the distinction is made based on whether they consider the information the start or the end point, as final, perfect, all cases to be satisfactory. The problem is not with having precognitions and organizing principles, but with not considering particulars and circumstances. For want of better, we need to figure out everything based on the few and uncertain morsels of information available. We cannot go without anticipation, social stereotypes and over-generalisation. These are the most important tools of social orientation.¹³ Life is too short, and meeting the requirements of practical conformity is too hard for anybody to let their everyday actions be hampered by ignorance. We can only decide whether the things confronted are good or bad by creating groups. It is impossible to know everything in the world in itself, thoroughly. Albeit these tools are ready-made, rough, and too wide pigeonholes, to some extent everyone must rely on them sometimes.

During our life, we often standardise certain events, which we pigeonhole and act accordingly. When we go to the doctor while being ill, we expect the doctor to behave in a particular way. This is not always the case, as the doctor may be not measuring up to his task, but our behaviour was rational, as it was based on large probability.

Our life experiences tend to flock around certain viewpoints (notions, categories) of grouping. Although we may choose the appropriate viewpoint in the wrong time, or rely on the wrong viewpoint in the good time, the process in action fully controls our psychic actions. Thousands and thousands of events happen around us every day - we would be lost between them. If we think about them at all, we only standardise them. The process of standardisation makes as much events clear as it can. Our thinking has a certain incapacity and this process eases problem-solving. We can ensure this by immediately labelling the problems in a satisfying category which we use as a tool to help judge the situation.¹⁴ There is an anecdote about the navy medic who had only two categories for his patients – for what was visible, he prescribed iodine, for what was unseen, he prescribed laxative. Life to him was so simple. With only two categories, he was fine during his entire career.

The point of overgeneralization is to have less effort, which is usually preferable. With the help of a category, the object related can be identified faster. A car wobbling dangerously can make us think of a crazy driver, but burglary becomes a category as well, when we see someone climbing over a fence, fetching a bicycle and pushing it away.

These categories can be more or less reasonable. We can say that many of them have a spark of justice. We can meet such categories in every area of our life. The penal code itself is basically a collection of categories.

Sorting stereotypes

Stereotypes add to the empirical experience a new, empirically not verifiable dimension, and imply characteristics that are not visible, but deducible. But how? With the help of imagination. How can we be sure about redheads being untrustworthy? Nobody ever

¹³ Tomka Miklós: *Vélemények (elő-) ítéletek, társadalom*. Belügyi Szemle, 1999/7-8. szám, pp. 3-14

¹⁴ Gordon W. Allport pp. 50

conducted an empirical test about the reliability of people with red hair. However, we know this because Judas had red hair as well. But how can we know that Judas was a redhead, with having no television, camcorder or camera at the time of Jesus Christ? We know this because in the Middle Ages the illiterate believers were always shown paintings of Judas with red hair, and this stereotypical depiction has been kept up to this day. The empirically verifiable characteristic and the one related to the betrayal got connected, thus creating a powerful stereotype.¹⁵

Today the stereotype of the „blonde woman” is even more enduring. According to a common belief based on the vernacular and the media, young blonde women are highly attractive and pretty but usually these things go hand in hand with stupidity. In a penal case, criminal procedure was initiated against the accused, who was an immigration officer, thus, a functionary, because at the border crossing point, as the security cameras also certify, after a few minutes’ talk with a pretty young blonde woman the officer let through the lady and another person’s car out of turn. The statement of facts established by the court also suggested that the young officer was under the influence of the young blonde woman when he let them through out of turn. All the personal data of this lady was known, still, the statement of facts included only „a blonde woman.” So during secondary prosecution, the court recorded the name of the Russian lady from the files, and omitted the reference to the hair colour with the justification that „it is not the stereotypical reference to the blonde woman that has significance in the statement of facts.”

There are stereotypes that can be related to different professions.¹⁶ Such stereotypes surround entrepreneurs, homeless people, the unemployed, woodsmen, teachers, psychologists. We often hear the unquestionable utterance, „I know all about” teachers, students or even criminals...

Representatives of the legal professions, such as judges, lawyers, prosecutors and civil servants are also subject to the stereotypical thinking of common people. Judges were described in the first place as just, sober-minded, learned, dignified, but also reserved by those asked. Lawyers are thought to be pushy, greedy, eloquent, cunning, obtrusive, unscrupulous, but clever and quick-witted. The stereotype of the prosecutor is austere, determined, confident, smart, one who strives for justice and is tough on crime.

Certain professions bear categorisation due to the financial circumstances they provide.

In certain cases the court determines the sum of the fine or the accessory fine based on the profession or qualifications of the accused, without revealing the concrete financial circumstances; sometimes a given profession (e. g. lawyer) is connected to a stereotype of having a large income.¹⁷ Namely, an obvious way of dividing social groups is differentiation based on the financial circumstances, riches and income.¹⁸

In a penal case, the court of first instance deemed it necessary to highlight from the testimonies that the person accused with drug-abuse „seemed a ’cool’ man with his A-class

¹⁵ Csepeli György (1996) pp. 9-15

¹⁶ Nagy Pál Mónika: *Sztereotípiák a szervezet pszichológusokról. Magyar Pszichológiai Szemle*, 2005/1-2., pp. 267-283

¹⁷ Arató Kinga: *Sztereotípiák a jogászokról. Belügyi Szemle*, 2000/9., pp. 57-78

¹⁸ Hunyady György (1996) pp. 178

car and trophy women accompanying him at the clubs he went.” The court has a duty to find out about the personal circumstances and conduct of the accused. This might be important in the process of verification and meting out punishment. The mention of the trophy women is an obvious hint on them being as expensive as A-class automobiles.

Categorisation, stereotypes and an approach based on prejudice can be the means of recognising minorities, nationalities or ethnic groups. “These are the mechanisms that result in creating the definitive image of the minorities in everyday life. When noticing a person belonging to a minority, our first reaction is not that it is a man or a woman, neighbour or not, coming from the same nationality or not, being a Christian, a liberal, or conservative, but our sole consideration, which cannot be overlooked by many, is that he or she is a member of a minority”.¹⁹

Until December 1989, the category “gipsy perpetrator” had existed in the unified statistics of the police and prosecution.²⁰ This is obviously related to the usual prejudices and stereotypes related to Gypsies, namely, that their characteristics of life style – criminal behaviour, joblessness, sponging, and incest – are controlled by their genetics.²¹

Sometimes even that can affect a judgemental sentence. An example of this is the penal case when the city court sentenced the accused – who was a subsequent offender – to ten months in prison and the exercise of public affairs was additionally forbidden for him for one year for continuous seduction. The accused had sexual intercourse with his niece several times, until he was arrested. The accused had been aware of the fact that the offended was not yet 14 years old. The fact that the moral judgement of such an action was different among the gipsy and non-gipsy part of the population had been considered as a mitigating circumstance by the court when declaring the sentence.

The county court did not include this when considering the circumstances of guiltiness to decide over the sentence, since the laws of penal code include general norms that are obligatory for every citizen; these laws cannot fall under different adjudications, and so the ethnicities of a country cannot interpret these general laws or be judged in a different way.

Thus, the different judgement of the norms cannot be considered as a mitigating circumstance.²²

Prejudice

The definition of the prejudice is seemingly obvious, understandable, and manageable. Its original meaning is a “judgement passed in advance,” which can be either positive or negative. Usually negative, disadvantageous or derogatory opinions and attitudes regarding a group or its members are called prejudices. These are schematic, stereotypical and rigid beliefs transmitted by the society, and they are in no way questioned by the logic or experience of their representatives. Prejudice can even get entirely independent of empirical reality. But it is a more usual scenario that prejudice is the result of the illegitimate overgeneralization of real, particular experiences. Prejudicial thinking does not consider the

¹⁹ Csepeli György (1996) pp. 9-15

²⁰ Tauber István: *Cigányság, társadalmi beilleszkedés, társadalmi problémák*. Főiskolai Figyelő plusz, 1993. 2., pp. 192-194

²¹ Máté Mihály: *Cigány ellenesség a rendőrök között*. Rendészeti Szemle, 2006/11., pp. 86-93

²² BH 1998.218, Bács-Kiskun Megyei Bíróság 2. Bf. 45/1988. sz

variety and differences existing in reality and thus can be deeply unjust with individual people.

It can target people belonging to different ethnic, racial or religious groups, in other cases the basis of discrimination is age, gender, or sexual orientation.

One of the basic traits of people with prejudice is that they never admit to making judgements without enough information. Allport defines prejudice as “an attitude of aversion or hostility towards a person, which is solely based on the fact that this person is the member of a certain group, and the allegedly negative characteristics of the group are attributed to him or her as well.”²³ The phrase “assuming wrong about others” is too general, but it can somewhat be connected to the expression “presumption of guilt” that appeared recently in the literature of Hungarian law of penal procedure. Presumption of guilt is a prejudice as well, and it is very difficult to change it.²⁴

It has many types, as there are preliminary judgements based on simple misapprehensions, and there is the so called actual prejudice. When a person, considering the newly discovered evidences, is able to correct his or her misjudgements, then he or she does not have prejudices against the particular topic. Preliminary judgements turn into prejudices when the new information cannot change them. As opposed to simple notions based on misapprehension, prejudice is immune to any evidence that would prove it wrong. Thus, the difference between prejudice and preliminary judgement is that we are able to debate over the latter objectively, and correct them, when necessary.²⁵

The bad character of the defendant as a prejudice

The bad character of the accused is a type of evidence the use of which is restricted in certain legal systems. This is the fact that he has committed criminal offences in the past, or the fact that he has the habit of misbehaving himself. According to psychiatric expert the fact also part of the bad character that his personality lends itself to the commission of the kind of offence of which he is accused.

The bad character is relevant when the judge decide of the punishment, but the relevance of the character to guilt is more problematical.

“In general, English law takes account of the character of the accused in connection with the penalty, but excludes it on the question of guilt. In English law, furthermore, it is fairly easy to limit the purpose for which this information is used, because where the accused pleads not guilty the trial is divided into two phases: a first phase for establishing whether he is guilty or not, and if he is convicted, a second phase in order to decide the penalty. In the second phase previous convictions and the opinions of experts on the personality of the accused are freely admissible. During the first phase, however, the court almost never hears the opinions of experts on his criminal tendencies, and hears evidence of his previous offences only if they are in some way more directly relevant than simply showing that he has a tendency to break the criminal law in general, or to commit criminal offences vaguely similar

²³ Gordon W. Allport pp. 34-37

²⁴ Farkas Ákos – Róth Erika: *Előadások a büntetőeljárási jog köréből*. Miskolc, Bíbor Kiadó, 2000, pp. 39

²⁵ Gordon W. Allport pp. 34-37

to the one of which he stands accused. (...) at trial, not only expert opinions about his personality are excluded, but even evidence of his previous convictions.”²⁶

In France, Germany, Belgium, or in Hungary there is no general restriction on the use of expert assessments of the personality of the accused. Evidence related to the guilt of the accused is heard at trial mixed up with evidence that is relevant only to the sentence, because there is no distinct phases in proceedings. Some author is of the opinion that this creates a risk of an innocent person being convicted on account of an expert assessment which, being based on the hypothesis that he is guilty, brands him dangerous because of his tendency to re-offend.²⁷

The truth behind stereotypes

Stereotypes can have no solid basis, but they may contain a grain of the truth. In spite of this, we must emphasize its wrongness on the whole.

Many argue that stereotypes have some truth to them, as it would be ridiculous to say that groups with certain national and cultural roots do not have general characteristics that distinguish them from groups of a different origin.²⁸

Do the stereotypes related to different ethnic groups – temperament, vitality, pace, injustice – really not have any basis? Why is the “carnival of Rio” not held in Stockholm? In the light of this, cannot we connect particular types of crime to particular nationalities and ethnic groups? What do we mean by Italian, Chinese, Ukrainian or Gipsy criminals? Nevertheless, raising the issue of group differences is very difficult, even dangerous in today’s social atmosphere. This kind of straightforwardness can inevitably lead to the suspicion of indifference or even racism.

The following statement, that “in heaven, the houses are American, the food is Chinese, the police are British, the cars are German and art is French – in hell, the houses are Japanese, the food is British, the police are Chinese, art is German and the cars are French” is a stereotype. These judgements may reflect overgeneralization, false perception, rigidity, simplification or misapprehension, but they can also contain the element of accuracy.

In certain cases, stereotypical opinions about a social group can be compared to the objective statistics about the same group’s characteristics. When these are in accordance with each other, it is very difficult to disagree with the accuracy of stereotypes. Evidences of this kind can be found in different fields, when it comes, for example, to stereotypes connected to jobs, gender and appearance (physical attraction).

Stereotypes are not necessary sources of error. Our general knowledge about others often turns out to be helpful. Being aware of the universal or group norms is a good starting point, especially when the other person is a typical representative of his or her culture or class, in other words, the structure of his or her traits is very similar to the basic personality of the group he or she belongs to.²⁹

²⁶ Delmas-Marty and Spencer, eds, *European Criminal Procedures*, Cambridge University Press, October 2002, ISBN 0-521-59110-4 Chapter eleven- Evidence 1.4.3 The bad character of the defendant, 23-25 p.

²⁷ Delmas-Marty and Spencer, 24-25. p.

²⁸ Hunyady György – Nguyen Luu Lan Anh (szerkesztő) pp. 43-54

²⁹ Hunyady György – Nguyen Luu Lan Anh (szerkesztő) pp. 58-68

Stereotypes and the danger of stereotypical thinking

The pilot model of stereotypes is the attribution of a category with a human feature. “Germans are conceited, Gypsies steal, and women are unpredictable.” The first objection to this is of course that these are generalizations. The second is that it is uncertain who belongs to this group, what kind of behaviour reflects this feature exactly. Third is whether we have any personal experiences related to this or not. People of our culture often automatically feel bad when they are dissolved in a category while being forgotten about as an individual. It is not flattering, even when this is a positive evaluation: “you people from Budapest are so funny; you psychologists are like this; you people in your sixties are so wise.”³⁰

Stereotype turns an image presented by a single group member into an absolute. People without questioning naively assume that the alien group is as he or she perceives it, or as his or her own group describes it for him or her.

Stereotype can be the source of inaccuracy. It can influence our ability to make a difference between the members of the generalised group. Recalling the appearance or the facial features as individual differences of the member of a different group can be difficult depending on the influence of group stereotype. Eyewitnesses often remember a person’s race or ethnic group, but not their individual characteristics.³¹

When the witness has any ideas about the characteristics of Germans, Italians, Gypsies, or female drivers, he or she can fill out the gaps of memory based on this, and this can even lead the judge astray.

Leiber and Fox investigated how ethnicity and arrest influenced decision-making, by examining the effect of ethnic background on arrests in the state of Iowa. With the help of court statistics (from 1980 to 2000), they conducted an analysis of many viewpoints, which showed that the ethnic background is indeed an influential factor. The direct and indirect effects of ethnicity are proven, and these often discriminate young black people as opposed to young white people. Leiber and Fox think that the symbolic threat is strengthened further by the negative image connected to Afro-Americans, and the ethnic stereotypes created by the authorities, and this subjective attitude often changes the outcome of court cases.³²

Other studies concluded that the effect of ethnicity is indirect, rather than direct; according to this, the result is affected by seemingly neutral factors like social class or family status, which largely correlate with ethnicity itself.³³

The invisible realm of stereotypes can so be very dangerous. Knowledge about it is very important for those who meet with real, actual people during their everyday life. They must know that if they jump to conclusions, then these conclusions – based solely on the visual, empirically witnessed attributes – are mostly fictitious, imaginary, and are leastways to be verified in all instances. There are many, many unconscious elements in this invisible

³⁰ Hunyady György – Nguyen Luu Lan Anh (szerkesztő) pp. 484

³¹ Forgács J.: *A társas érintkezés pszichológiája*. Kairosz Kiadó, 1996, pp. 45-46

³² Leiber, M. J. - Fox, K. C. (2005): *Race and the Impact of Detention on Juvenile Decision Making*. *Crime & Delinquency*, Vol.51 No. 4, October 2005, pp. 470-497

³³ Guevara, L. - Herz, D. - Spohn, C. (2006): *Gender and Juvenile Justice Decision Making. What Role Does Race Play? Feminist Criminology*, Vol.1, No.4. October 2006, pp. 258-282

realm of stereotypes based on unverifiable motifs.³⁴ If the stereotype does not fit the particular person, the recollection shall be inaccurate and schematic.

The prejudice of the masses is often strengthened and channelled even by the media. We can list many examples for this. One such thing is the general opinion about hunters. The rampage of one psychotic hunter is enough for us to pigeonhole all the hunters as mass-murderers, under the influence of the media.

Stereotypical thinking during penal procedure and the judicial conviction

Already during the investigation, it is necessary to have an alternative planning, which means the setting up, checking and verification of versions. Version means an alternative for the interpretation or presentation of a certain event, happening or fact. We need to set up versions when there are many ways to explain the available facts, and we do not know which one is the closest to reality.³⁵ Versions thus fill in the empty frame drawn up by the usual state of affairs when planning the investigation, so defining the direction of the investigation itself. It makes much easier to set up versions when the detective has, either in practice or in theory, already met a similar case, because a successful method or a solution used in that particular case can be made use of in the present one as well. This is called an analogy – when based on the well-known circumstances of two incidents we may conclude that some of their other characteristics, about which we only know as related to one incident, also correspond. A detective uses analogy when for example he deduces the perpetrator's identity from many crimes committed in the same way, and this can help narrowing down the circle of perpetrators or later at the process of proving something.

During the investigation, until the detective has absolute certainty regarding the case, he must comply with the requirement of excluding all but one version while checking them all. Nevertheless, it can happen that the course of investigation is determined in one way with the use of analogies and routine, without setting up any versions at all.³⁶

No one could deny that in the penal procedure there might be “effects beyond evidence” when making a certain decision. Until now, research focused on the decisions of the jury in this regard. The social scientists examining the jury have been investigating the negotiating process of the jurors to find out about the effects – that are beyond the strictly taken evidences – influencing the final decision. Such effects beyond evidence obviously exist in the European continental system as well.

There are factors, nevertheless, whose effects on the verdict is convincingly proven. The most examined factor of these is the physical appearance of the accused. In the portrayals of people from childhood tales the connection between the aesthetic appearance and the inner features is obvious, but this is more complex in reality. At the same time, many studies prove that the appearance of people creates prejudices. There was a study which showed that the more attractive the accused, the less strict the verdict had been. Studies prove that in doubtful cases, when facts are not clear enough, prejudice has a decisive role. The Supreme Court of

³⁴ Csepeli György (1996) pp. 9-15

³⁵ Bócz Endre: *Kriminalisztika a tárgyalóteremben*. Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2008, pp. 162

³⁶ Máramarosi Zoltán – Törökné dr. Remete Márta: *Verziók szerepe a felderítésben*. Főiskolai Figyelő plusz II. évfolyam 1991. 4., pp. 322-339

the United States accepted, for example, that prison clothes have such a prejudice-inducing effect, that it infringes the basic principle of the presumption of innocence (1976. *Estelle v. Williams*).³⁷

If stereotypical thinking is a characteristic of every person's mind and convictions, is it a trait of judges as well? If this stereotypical thinking is part of the judges' conviction, is it reflected in the verdict too?

While reading the related literature, some say that judging after one's convictions is the right and duty of the judge, and because religious belief and worldview can be a part of this conviction, just as anti-Semitism, this entitles, and what is more, obligates the judge to follow his or her own convictions.³⁸

The whole judgemental process is however imbued with the subjection to laws. Judges swear an oath not on judging by their own convictions, but by the laws themselves. A judge cannot be led by racist or anti-Semitic convictions while making a decision and stay lawful. Such a judgement would clearly violate the constitutional provision about everyone being equal in front of the court. A certain role of the judge's personality is unquestionable, but it would be a mistake and disproportionate to overemphasize it and to set it against judicial law.³⁹

The theory of verification evolves with the following tendency: the inner conviction of the court should not only be a conviction based on intuition, but one that clearly recognises the factors shaping a confession, the relations of causality between the effects of these factors, and excludes every doubt with rationality. Today we want to see that when the court makes a decision based on its convictions, these convictions are not unconfined, emotional, irrational and intimate, but based on rational thinking.⁴⁰

The law about penal procedure demands from the court to make a well-established statement of facts and verdict.⁴¹ The judgement is unfounded when the court's evidence-evaluating actions do not fulfil the requirements of procedural law. According to court practice, when the evaluation necessary to create a judicial conviction breaks the rules of rationality and logic, or when the court did not consider all evidences, then it must be taken as unfounded.⁴² The court is bound to obtain and examine all evidences, from which one can make deductions about the credibility of these evidences for or against somebody, according to the laws of logic.⁴³ The conviction of the judge about the objective truth of the statement of facts should be developed by conclusions that are verifiable by facts, and conclusions that are drawn from facts by the laws of logic.⁴⁴

Formal logic is indispensable while creating case decision and while arguing for these decisions, but it is not sufficient in the process of knowing objective reality by the rules of

³⁷ Badó Attila: Pszichológiai vizsgálatok az esküdtszékekkel kapcsolatban. „Hogyan dönt 12 dühös ember?” Magyar Jog, 1998/ 8., pp. 479-481

³⁸ Ádám György: *Hibák és műhibák*. De Jure, 2007. 6-7.

³⁹ Katona Sándor: A bírói meggyőződés védelmében. *Bírák Lapja*, 2008. 1. pp. 35-41

⁴⁰ Király Tibor: *Bizonyítás a készülő büntető eljárás kódexben*. Osiris Kiadó, Budapest, 2000, pp. 90-102

⁴¹ CP 351.§

⁴² Bírósági Határozatok (BH) 2000. 47

⁴³ BH 2004. 447., BH 2004. 266., BH 2002. 87., BH 2000. 82

⁴⁴ Búzás H. - Nagy S. (1996): *A büntetőeljárás új kodifikációja bizonyítás elméleti nézőpontból*. Magyar Jog, 1996/7., pp. 397-407

procedure – during the constat.⁴⁵ Similarly, Cséka warns us that dialectic logic by itself is not enough to ensure the correctness, the merits and lawfulness of the substantial legal act, it must also be complemented with other psychological evaluating elements of the mind.⁴⁶ When the court pronounces the accused guilty, it is without doubt, and this is equal to the inner convictions. This includes both the credibility of proving tools and facts, and the truthfulness of the statement of facts.

The enlargement of the role of the judge's conviction in shaping the certainty of the judgement, and the occasional judicial mistakes nurture the opinions that deny the truth in the penal decision, and allow certainty and probability at best. There are some philosophical trends that challenge the notion that the objective reality can be truly explored.

The role of preliminary knowledge and anticipation in the judicial conviction

When having a penal case, which can be theft, burglary, a pro forma invoice, or a robbery, a judge already has a more or less detailed idea about what could happen even before looking into it more thoroughly. Based on experience, the judge knows how does the fictitious selling of a company for homeless people with the help of lawyers, lush rolling or the bribing of a customs officer take place. Judges anticipate and have preliminary knowledge, which is widened by knowing the facts of investigation, the charge, the police report. He or she is familiar with these categories, and his or her task is to verify whether what happened is really what he or she thinks. All the facts and findings of the case must be or should be proved, or be found out by correct logical inference. Imagination, or in other words, the judicial experience is a great help in this.

A tapped telephone conversation may contain evidences. They talk in euphemisms, it is evident that a crime is going on, somebody is selling something to someone else for money, and they make an effort not to be understood by anybody. Because of this, there are a lot of texts and tapped conversations which can prove the smuggling of cigarettes, a sale without an invoice, or selling drugs, if we embed the unnamed “document,” or “stuff” etc. according to the meaning into the context of the proper category. In a similar penal case, the defence called the unnamed thing a pornographic movie, which has even been confirmed with much embarrassment by the wife of one of the accused people. Albeit seemingly the pornographic movie fitted into the context, the court did not accept this as an answer to the charge.⁴⁷

The “screenplay theory” of witness confessions

In psychology, the so called “screenplay theory” (or schema theory) can explain how the witnesses can provide coherent confessions about events that they did not perceive in their entirety. According to this, part of our knowledge is organized around hundreds of situations in which we act according to routines. Examples like this are travelling on the bus, starting a car (we have to sit behind the wheel, insert the ignition key, turn it, step on the gas etc.), visiting the doctor's office, or asking for directions, but even a shoplift, or a bank-robbery,

⁴⁵ Nagy L. (1974) pp. 175

⁴⁶ Cséka E. (1968): *A büntető tényállásmegállapítás elméleti alapjai*. Közgazdasági és Jogi Könyvkiadó, Budapest, pp. 209

⁴⁷ Szabolcs-Szatmár-Bereg Megyei Bíróság 2.B 124/2006/20, Debreceni Ítéletábla Bf. II 14/2007/13

from where the perpetrators get away with a car. In a screenplay there are regular roles, regular props and things, one event leads up to the next.⁴⁸ Only the most distinguishable features are decoded, the others are set in a schema. In exchange for this so called cognitive efficiency, we must suffer the distorted recalling of certain things or events that could not be set in the applied schema. The screenplay theory does not think that people remember everything they see or hear, but claims that forgetting can be explained with the importance of a piece of information, or it can depend on which information is easier to recall or rediscover. Human understanding is a process by which we process new information based on old information already existing in the memory. Thus, understanding is related to the personal experiences a witness has about the world around him or her.

When we hear a glass break in a bar fight, probably we decide that it was a glass of beer or wine, and not of milk or coke. The deduction is added to the memory imprint of the sentence by the witnesses as well. In this case memory goes beyond the originally received information. The witnesses in these cases complement the memories of the original events, they fill them up using common knowledge, namely, what goes hand in hand, the bar, for example, with glasses of beer. This creates a so called constructive memory.⁴⁹ We do all this to explain ourselves all the events we heard about.

If human understanding is a process by which we process new information based on old information, then does this not include judges as well? The understanding of judges connects to their personal experiences about the world as well.

In a certain penal case the only thing we know is that it is a case of lush rolling where a young girl is the possible wrongdoer. The only evidence we have is that the plaintiff had several drinks with the girl who cuddled up to him many times. This was seen by the witnesses as well. After some time the plaintiff fell asleep because of the alcohol and later could not find his money. Maybe there is no direct evidence that the accused really took the money, but we have a common knowledge about the process of lush rolling. We fill out the gaps between evidences with the help of this knowledge, which does not necessarily lead to the correct result.

The parties often try to bring up stereotypes during penal procedure as well. One can only balance the bad influence of such attempts on manipulation with a stable human, professional and sexual identity. The art of responsible thinking means knowing, when it is possible and sufficient, when it is necessary and when it is a great mistake to depend on stereotypes and stereotypical judgement.⁵⁰

Final reflections

Does human perception and judgement perfectly represent reality? Obviously not. Even so, the fact that human perception and judgement is correct to a certain extent cannot be overlooked, or underestimated. As per a simile of a psychologist: “what makes a dancing bear

⁴⁸ Bower, G. H. - Black, J. B. - Turner, T. J. (1991): *Forgatókönyvek szövegre való emlékezésben*. In: László J. (szerk): *Válogatás a szociális megismerés szakirodalmából*. Kézirat. Tankönyvkiadó, Eötvös Lóránd Tudományegyetem Bölcsészettudományi Kar, Budapest, pp. 148-203

⁴⁹ Atkinson, R. L. - Atkinson, R. C. - Smith, E. E. - Bem, D. J. : *Pszichológia*. Osiris-Századvég Kiadó, Budapest, 1995, pp. 249

⁵⁰ Hunyady György – Nguyen Luu Lan Anh pp. 462-466

impressive is not the beauty of its dance but the fact that it is dancing.” Human perception and judgement is not perfect, but ”it is impressive that in the midst of vast difficulties we can even be a little exact.”⁵¹

As a conclusion, we can tell the same about the truth in verdicts – because what makes the judgements of courts proceeding in penal cases impressive is not the amount of truth, but that it comes into existence amongst regulated procedures, and it is truly remarkable, that in the midst of vast difficulties we can even be a little exactly.

⁵¹ Hunyady György – Nguyen Luu Lan Anh (szerkesztő) pp. 67