

Biases in the Criminal Justice System with Reference to the Practice of Compulsory Treatment of Mentally Ill Offenders*

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ABSTRACT One of the least researched areas of the economic analysis of law today is Criminal law and Criminal justice. A contemporary line of thinking and examination is the behavioural economic approach that reflects on various mental distortions (i.e. biases) affecting the decision-making and situation-assessment of individuals. The focus of my essay is the intersection of Criminal law and behavioural economics in the sphere of biases influencing the participants in criminal proceedings. The measure of compulsory treatment in the cases of mentally ill offenders serves as an illustration: the application of the sanction, as well as the review procedure aimed at deciding whether an already applied sanction could be ceased and the treated person should be released. Outlining this measure is justified by the fact that the potential considerations and evaluations of mentally ill offenders cannot be taken into account as those of sane perpetrators (who are in no state of impairment of the mind). This places an even greater responsibility on the rest of the procedural participants – especially judges and experts – to deliver well-reasoned decisions by eliminating the eventual negative consequences of their generally less reflected mental distortions that could pose further detriments to the mentally ill. As a closure, I am referring to certain ways and means that can potentially reduce the role of biases in the criminal proceedings and thus contribute to fairer jurisdiction for the mentally ill.

KEYWORDS *heuristics, similarity and availability bias, hindsight bias, omission bias, overconfidence bias, status quo bias*

1. Introduction

One of the most debated areas within the scope of the economic analysis of law even today is Criminal law and Criminal justice. It is worth mentioning though that one of the starting points of the field of science was exactly made by the works of Cesare Beccaria in the 18th century and its development in the 20th century was facilitated by the law enforcement related research of Gary Becker. Within the economic analysis of law, the original idea of neoclassical economy on complete rationality was challenged by the behavioural economic approach, which essentially reflected on the limitations of rationality, self-interest, and willpower in the situation-assessment and decision-making of the

offenders, victims, and the rest of the participants in the criminal justice system. The concept of bounded rationality was introduced by Herbert Simon in the 1950s, who emphasised that decision-makers cannot step over the boundaries of their calculation, logic, and remembrance. His related significant suggestion was that such discrepancies from the neoclassical economic model can be predicted and by exploring them it becomes possible to draw conclusions for the shaping of the (criminal) justice system.¹ Another cornerstone in the development of the field was the work of Daniel Kahneman, a Nobel Prize winning economist who described two basic levels and ways of the functioning of the human mind in *Thinking, Fast and Slow*. The first level is automatic, and it is where simplifying techniques or *heuristics* are functioning in terms of our everyday choices. They make our decision-making easier, however, they can just as easily result in mental distortions, also known as *biases*. Therefore, there is a need for a second, conscious level that exercises control over the first, and counterbalances the negative effects of biases.² As a simple illustration: on the automatic level a judge may have an initial conviction at the beginning of the procedure about whether the defendant is guilty or not, yet, this conviction can change substantially in the course of the evaluation of the pieces of evidence on the second level throughout the proceeding.

For the purposes of further analysis I consider it advisable to make a difference between the mental distortions affecting the offenders and those influencing the rest of the procedural participants – the ones in decision-making position – since the legal system can reflect on their empirically founded biases in different ways and to a different extent. While it is possible to deal with the first category by shaping the system of sanctions in general, and within the framework of sanctioning the perpetrator specifically, the latter category generally remains unrecognised in the legal practice, and there are absolutely no or only vastly limited chances for counterbalancing it through sanctioning. In the current examination, I will introduce the second, less researched group of biases, and I will demonstrate the threats and the negative effects it represents through the practice of the compulsory treatment of mentally ill offenders. On the one hand, this is justified by the fact that in the cases of the mentally ill, no such situation-evaluation and consideration can occur as in the cases of sane perpetrators, therefore, such potential attitudes can and shall be excluded from the scope of analysis. On the other hand, in order to facilitate procedural fairness and unbiased jurisdiction for vulnerable individuals, it is required to put even greater emphasis on reducing the mental distortions influencing the rest of procedural participants. These could otherwise have an additional negative

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¹ Bálint Esse, „Gondolkodásegyszerűsítő stratégiák hatékonysága,” *Vezetéstudomány* 42, special no. 1 (2011): 80.

² Daniel Kahneman, *Gyors és lassú gondolkodás* (Budapest: HVG Könyvek, 2013), 48–50.

effect on the outcome of the process and lead to the infringements of the rights and interests of the mentally ill. Further on, I will look through the most significant biases that may play a role in the decisions made by the experts and the judges, besides referring to some of the potential means for their reduction.

2. Experts' Biases

In terms of the biases affecting experts when examining mentally ill offenders, the analysis is structured according to the logic of the application of compulsory treatment and the review of the already applied treatment in the Forensic Psychiatric and Mental Institution (hereinafter: Institution), taking place every 6 months, aimed at deciding whether the given individual could be released.³ The conditions of the application which require the involvement of experts are that the offender cannot be prosecuted due to his mental condition and there is reason to believe that he will commit a similar act (risk of reoffending).⁴ As for the latter requisite, the Regional Court of Appeal of Pécs declared that it is not sufficient if the risk is merely abstract and theoretical, instead, it needs to be concrete and properly founded.⁵ It is worth mentioning at this point that these questions are ambiguous in nature as the judge has the opportunity to diverge from the expert opinion, it is even possible for the judicial decision to contradict the expert opinion, however, the actual competency and background knowledge that would be necessary for this are missing on most of the occasions. The lack of specific psychological and psychiatric knowledge on the side of the judges compels them to become excessively risk-averse in practice and to accept the expert opinions even in cases of reasonable doubt, which contributes to the spread of the phenomenon of *experts' jurisdiction*.

One of the most common mental distortions influencing both experts and judges is the availability bias, which I will henceforth refer to as *similarity and availability bias* for greater precision.⁶ On the one hand, it may occur through the exaggeration of the risk of reoffending due to the fact that an expert can recall this possibility fast or faster than the rest.⁷ On the other hand, related to the distortion caused by reconstruction processes, it happens regularly that the given expert relies solely on the pieces of experience gained and the opinions delivered in previous cases. Separate reference shall be made to the review

³ Act CCXL of 2013, Section 69/B, para. (1)

⁴ Act C of 2012, Section 78, para. (1)

⁵ *Nagykommentár a Büntető Törvénykönyvről szóló 2012. évi C. törvényhez*, ed. Krisztina Karsai (Budapest: Wolters Kluwer Hungary, 2019), 208. and judicial decision no. PIT-H-BJ-2013-33.

⁶ Daniel Read and Yael Grushka-Cockayne, "The Similarity Heuristic," *Journal of Behavioral Decision Making* 24, no. 1 (2007): 23–24.

⁷ Gábor Kovács, "Az ítéletalkotás csapdái," in *Sic itur ad astra Ünnepi kötet a 70 éves Blaskó Béla tiszteletére*, eds. Sándor Madai, Anikó Pallagi, and Péter Polt (Budapest: Ludovika Egyetemi Kiadó, 2020), 288.

procedure in which it is examined whether the treated person has recovered, the risk of reoffending naturally needs to be taken into account, as well as whether the further treatment can be deemed unnecessary from the perspective of the protection of society.⁸ Experts are under significant pressure throughout the review procedure not to let potentially still dangerous individuals get released back to the society. The eventual commission of another criminal offence by the released person – through the excessively negative reaction of the media and the public to such cases and the loss of citizens’ trust in the criminal justice system – ignites further risk-aversion on the side of the experts and apart from really rare exceptions, they stand for the exclusion of the possibility of release even when substantial arguments and factors are supporting it. When a released individual commits another offence, the *hindsight bias*⁹ can distort the evaluation of experts and judges as well. It refers to the tendency to overestimate the probability with which they could have predicted the outcome of an event, since the occurrence of the result reinforces their assumptions.¹⁰

Although the protection of society undoubtedly needs to be a prominent principle, the majority of expert opinions in the review procedures are prepared with minimal differences in content, occasionally lacking in a deeper analysis of the factors of the case, which hinders individualisation. The literature indicates the phenomenon when the general norm becomes *not* to act as *omission bias*. As a result, the individual generally chooses not to differ from the norm even when there are reasonable arguments and factors for acting otherwise. The line of thinking on personal and professional responsibility in these cases is that if the person acts in accordance with the norm and it does not lead to the awaited result, the negative perception caused by this would still be lesser than in the case when he/she chooses to differ from the norm and a negative outcome occurs as a result of the “disobedience”.¹¹ This is supplemented by the *overconfidence bias*, the extensive, often unjustified belief in the righteousness of one’s opinion, as well as by the *status quo bias*, the insistence on one’s reference point and on the current state of affairs, which – combined with the strikingly low number of releases – further decrease the chance for giving an opinion distinct from the general tendency and/or the previous opinions the expert gave in the actual case.

3. Judges’ Biases

Regarding the analysis of biases affecting the judges, similar logic is used as for the experts: first, the decision on the application of the sanction is examined, then I am referring to the periodic review procedure and the possible release of the offender. Judges are also widely influenced by the *similarity and*

⁸ Opinion of the Criminal Division of the Supreme Court no. 30/2007.

⁹ Zita Paprika Zoltayné, *Döntésmélet* (Budapest: Alinea Kiadó, 2005), 91.

¹⁰ Angéla Gábri, “Kognitív tudományok az ítélkezési tevékenység szolgálatában,” *Pro Futuro* 10, no. 1 (2020): 126.

¹¹ Kovács, “Az ítéletalkotás csapdái,” 289.

availability bias, which is indicated by the exclusive and tendentious insistence on the decisions made in previous, analogous cases. The obvious intent of the legislator to shorten the criminal procedures and its manifestation in the criminal justice system supplemented by the excessive caseload hinders the individualisation further. When it comes to the judges, the effect of the similarity and availability bias is added to that of the *expert bias* and the *anchoring effect*¹². The previous one can be described as the unconditional acceptance of authority, and in extreme cases both cognitive illusions may lead to the given judge disregarding his/her own professional conviction, the acceptance of questionable decisions and evaluations and thus the institutionalisation and internalisation of even inaccurate practices of higher judicial forums.

The application of the previously relatively determined duration of compulsory treatment in the cases of juvenile offenders serves as an example for such improperly acknowledged legal practices. While the duration of the sanction is currently undetermined¹³ – as the treatment and the related deprivation of liberty within the framework of the criminal justice system can last as long as it is deemed necessary, without foreseeability –, there was a temporary change in the regulation between 2010 and 2013, which – in my view – represented a progressive approach. According to this, the measure could not exceed the maximum term determined by the Criminal Code (then in force) for the offence and 20 years in case of a crime punishable with whole life imprisonment.¹⁴ Within this time limit that served as a legal guarantee the duration was still determined by the necessity criteria examined by experts in the review procedure. Besides, the civil psychiatric system was to take care of those few offenders whose treatment proved to be necessary after the maximum term as well, so there was no chance and risk of releasing potentially still dangerous individuals. Concerning juvenile offenders, the key question was whether the maximum term shall be determined with regards to the special, less severe rules of the Criminal Code (then in force) for their sanctioning, or the provision on the maximum term of the measure shall be applied and interpreted in the same way as in the cases of adult perpetrators, without the opportunity for taking into account the more favourable rules. The Supreme Court remarkably yet arguably stated that no difference can be made between adult and juvenile offenders¹⁵, and when coming to this conclusion it relied on a strictly textual analysis of the regulation. This represents the effect of *framing*¹⁶ in the decision-making process, which basically indicates that the way the options are presented substantially determines their evaluation, as well as that of the underlying case, and the level of risk-aversion of the participants. In this case,

¹² Kahneman, *Gyors és lassú gondolkodás*, 198–199. and Gábri, “Kognitív tudományok,” 122.

¹³ Act C of 2012, Section 78, para. (2).

¹⁴ Act LXXX of 2009, Section 25.

¹⁵ EBH2011. 2303. (BH2012. 2.)

¹⁶ Gábri, “Kognitív tudományok,” 124.

the judicial body did not consider the contextual and teleological perspective properly, not to mention the basic principles of Criminal law, including the fact that a mentally ill individual cannot suffer more severe consequences because of his act than a sane perpetrator who can be held responsible under Criminal law. When it comes to a punishable juvenile, the special, more favourable provisions would be applied, which means that these rules must pertain to a mentally ill offender as well. Also, when an issue arises in the legal practice that cannot be decided unequivocally, that solution must be chosen which results in a less disadvantageous outcome for the defendant.

Similarly to experts, judges are also regularly influenced by the *overconfidence bias*. There have been a number of research projects to empirically verify its effect, and one remarkable example is the work of Badeau and Radelet in the United States who examined 350 murder cases in which a judicial error occurred. They got to the conclusion that only in 5 cases did the judicial body realise the mistake before the final verdict while in 139 cases death penalty was imposed – from which 23 was actually executed –, in another 139 cases the defendant was sentenced to life imprisonment, and for 67 individuals imprisonment of 25 years was imposed.¹⁷ In the procedures targeting mentally ill offenders specifically, the distortion of overconfidence seems to be reduced by conducting the review procedure, still, its actual effectiveness in this regard is questioned by the more and more automatic nature of the process both on the side of judges and experts.

The other common mental distortion affecting judges and experts as well is the *hindsight bias*. Generally, it may play a role in the sphere of information that are or have become irrelevant and excluded pieces of evidence, for instance, a confession made under force, the result gained through an unauthorised search of a suspect's home or an unlawful gathering of secret intelligence.¹⁸ Although such evidence should not be taken into account in the procedure, there have been various researches to demonstrate that judges are in fact incapable of ignoring them completely throughout their decision-making, and they can have a substantial influence on the outcome of the proceeding. This bias is most commonly tested in practice in a way that the participants of the experiment are presented with different potential outcomes of an event, the leaders of the research priorly outline one which seems to have a greater probability, and the subjects then need to make their own suggestions for the outcome. An example of this was the analysis carried out by Guthrie, Rachlinski, and Wistrich in the Netherlands with the involvement of 167 judges.¹⁹ The subjects got divided into 3 groups, the same fictive case and 3 alternatives for the decision of the higher court were introduced to all of them. The options were repeal, ordering a new procedure to be conducted by the court of first instance, and approval. However, the researchers made a different

¹⁷ Zoltayné, *Döntésemélet*, 191.

¹⁸ Gábri, "Kognitív tudományok," 129–130.

¹⁹ Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich, "Inside the Judicial Mind," *Cornell Law Faculty Publications* 86, no. 4 (2001): 799., 801–803.

prediction in each group in terms of the potential decision of the higher court while also informing the participants that regardless of the prediction made by them, each result may occur with equal probability. The presumption of the researchers was that their implication shall not necessarily affect the decision of the participants. Now, let us see the conclusions they have come to.

- Among those who were informed of the approval of the case, 81.5% stated that they would have made the same decision.

- Among those who were told that the higher court repealed the verdict, only approximately 27.8% declared that they would still have approved it.

- Finally, among those who received information that the court of first instance had to conduct a new procedure 40.4% would have approved the verdict.²⁰

Thus, it was established that the judges attributed a lot greater probability to the outcome which was predicted or implied by the examiners. In short, their knowledge of the Higher Court's decision significantly influenced how they evaluated the underlying case and evidence. Hindsight bias in the review procedures targeting the mentally ill – as it could be seen in the case of experts as well – is connected to the release of the treated individual and becomes especially characteristic on those occasions when another offence is committed after the release. The pressure on judges and experts in this regard further decreases the chance for supporting the release and increases the automatic nature of the process.

4. Practical Considerations for the Review Procedure of Compulsory Treatment

In connection with the review procedure it is worth outlining certain issues and considerations to improve the legal practice. The Act on the Execution of Punishments, Measures, Certain Coercive Measures and Confinement for Petty Offences declares that the prosecutor, the attorney, and – if his/her state makes it possible and there is a capacity to exercise his/her rights – the treated person shall be heard. Nonetheless, the decision whether the treated individual is in a suitable state for appearing in front of the court depends entirely on the discretion of the director of the Institution.²¹ In this regard there is no system of criteria or control mechanism, therefore, the risk of arbitrariness occurs. It is undeniable that the bringing of the treated person to court and the criminal procedure itself represent an increased psychological pressure on the individual as the required security measures are differing excessively from the open departments and the comparatively free movement within the Institution. In addition, they create additional costs for law enforcement. To eliminate these unfavourable factors changing the procedures' venue to the Institution shall be considered, which would make it possible for the judge to hear the patients in

²⁰ Gábri, "Kognitív tudományok," 126–128.

²¹ Act CCXL of 2013, Section 69/B, para. (3).

their usual, less stressful environment. This element of gaining a more realistic picture of the offender's current state is also relevant because the judge may not have all the relevant information about the rest of the factors and circumstances of the case to deliver a well-founded decision about the question of release. One of the most common reasons for this is that the forensic medical expert who provided an opinion and the physician of the treated person are generally not present at the hearing, and in the lack of a related requirement the judge would have to adjourn the trial if he/she wanted to ask questions from them in the process. I note that according to the pertaining research of the Center for the Rights of the Mentally Ill in which approximately 60 cases were examined, there was no instance of adjournment.²² To avoid the merely formal nature of the procedure and to enable the judge to get informed about all the relevant factors of the case – even without specific psychological and psychiatric expertise –, it is advisable to integrate the requisite of the participation of the above mentioned professionals in the hearing into the legal regulation.

Another issue leading to a lack of balance and sufficient information among the procedural participants is that expert opinions are forwarded automatically only to the court but not to the treated person and his/her attorney, therefore, they may not get to know their content before the trial. However, receiving the opinions in advance would be of essential importance in order to be prepared for the procedure and acquire the potential (counter)evidences, since without this key legal guarantee and requirement, the equity of arms cannot prevail. This was outlined by the European Court of Human Rights as well in *Nikolova v. Bulgaria* along with the fact that the procedure targeting the lawfulness of the deprivation of liberty must always be contradictory in nature. The Court emphasised that the legal representative needs to be provided with access to the files of the investigation and all the other relevant data to be able to debate the lawfulness of the deprivation of liberty effectively.²³ In the cases of the mentally ill such information is mostly contained by the expert opinions, so it can be inferred that they shall be forwarded to the treated person and the attorney in due course. Besides, in terms of the right to *effective* defence the Court's approach is worth mentioning as it reflects on the difference between the official appointment of the attorney and effective legal counselling. In other words, the violation of the Convention may take place even in the case of an official appointment when the involvement of the attorney in the procedure remains purely formal, and it does not contribute substantially to the protection of the rights and the assertion of the interests of the treated person.²⁴

²² Központ a Mentális Sérültek Jogaiért Alapítvány (MDAC), *Megvont szabadság. Emberi jogi jogsértések a kényszergyógykezelés felülvizsgálata során Magyarországon* (Budapest, 2004), 28.

²³ *Nikolova v. Bulgaria*, 30 September 2004, Grand Chamber, case no. 40896/98. <https://kuria-birosag.hu/hu/ejeb/nikolova-bulgaria-elleni-ugye-3119596>.

²⁴ *Pereira v. Portugal*, 26 February 2002, Grand Chamber, case no. 44872/98. <https://kuria-birosag.hu/hu/ejeb/magalhaes-pereira-portugalia-elleni-ugye-4487298>

The adequate representation of the interests of the mentally ill is also hindered by the fact that the attorneys are rarely consulting with them before the trial.²⁵ Instead of an obviously stressful environment created by a court hearing, a prior meeting with the legal representative would be more favourable for the treated person. Although the Act on Legal Practice generally states that the appointed defender is obliged to contact the defendant or, if the nature of the case permits it, the represented individual – without any delay²⁶, and the attorney commits a disciplinary infraction if the obligations arising from pursuing the activity stipulated in legal regulations or ethical code are unfulfilled, related disciplinary proceedings are not taking place in the legal practice.²⁷ While the stipulation of this expectation in the form of obligatory provisions could be problematic, greater emphasis shall definitely be put on its realisation, for example, through the more thorough professional supervision of defenders and the creation of a system of complaint for the treated persons.²⁸

5. Remarks on the Potential Ways for the Reduction, Elimination of Biases

In the present part of my study I will reflect on the two main ways – based on my own categorisation – for reducing biases, and I refer to certain concrete means within these main categories. On the one hand, as it has already been indicated in the previous chapter, there is a regulatory way (in a broader sense) to compensate the occasional lack of sufficient information of procedural participants. For instance, the judge can deliver a more well-founded decision if the professionals having specific knowledge and expertise – the forensic medical expert and the physician of the mentally ill individual – are present at the review hearing to answer the occurring questions. The provision of sufficient time for evaluation and reasoning for judges and the properly considered assignment of cases in court to decrease institutional pressure could contribute to the reduction of the negative effects of simplifying techniques in the line of thinking. According to Thaler and Sunstein²⁹, decision-makers can and shall also be oriented by setting up guidelines based on the *nudge* theory.³⁰ These leave the discretion of the decision-makers intact and thus, there is no such risk of resistance on the side of the professionals that could occur in the case of introducing binding rules of acts and decrees, which limit their

²⁵ Központ a Mentális Sérültek Jogaiért Alapítvány (MDAC), *Megvont szabadság*, 24.

²⁶ Act LXXVIII of 2017, Section 36, para. (2).

²⁷ Id. Section 107.

²⁸ Központ a Mentális Sérültek Jogaiért Alapítvány (MDAC), *Megvont szabadság*, 38.

²⁹ Ian Marder and Jose Pina-Sánchez, “Nudge the judge? Theorizing the interaction between heuristics, sentencing guidelines and sentence clustering,” *Criminology & Criminal Justice* 20, no. 4 (2020): 400., 403., 410.

³⁰ Richárd Szántó and Levente Dudás, “A döntési helyzetek tudatos tervezésének háttere – A nudge fogalma, módszerei és kritikái,” *Vezetéstudomány* 48, no. 10 (2017): 399.

capacities.³¹ I make the remark here that this theory is applicable to the experts, for instance, in the form of methodological letters and guidelines issued regularly by the Hungarian Chamber of Forensic Experts.

On the other hand, the knowledge and information on biases could and should be integrated into the training of professionals. Without such training, there is a risk of committing the same mistakes in the decision-making all over again, for example, the failure to identify – or to memorise and recall – all the relevant information, the inconsistent evaluation of contradicting facts and pieces of evidence, the exclusion of a relevant information when reflecting on the factors of the case, and the selective examination of the potential options for the decision. Further on I am taking the judicial sphere as a reference point due to the unified structure, the transparent rules, and the outstanding responsibility of judges throughout the proceedings. The Charter of the European Judicial Training Network (hereinafter: EJTN) declared that the constant improvement and widening of the scope of judges' knowledge does not only serve the purpose of conducting the procedures faster, but it is also a key guarantee of judicial independence, since properly prepared judges will be a lot less prone to accepting the questionable or debatable decisions of higher forums and/or the prosecutor instead of establishing and maintaining their own conviction.³²

In the framework of planning and structuring the training, the constant assessment of demands is an essential prerequisite. The committee deciding on the training shall also be composed with the involvement of professionals with diverse expertise, including the sphere of psychology and economics, to be able to comply with a more and more interdisciplinary approach to (legal) decision-making. The Supreme Court's Legal Practice Analysis Group stated in its summarising opinion in 2017 that an educational material shall be prepared on the most relevant psychological background knowledge from the perspective of the judicial work specifically, in an easy to understand manner, after which courses and consultations shall take place to facilitate the internalisation by the participants.³³ I take the view that such a comprehensive training material shall be compiled which – beyond the overview of biases – indicates the appearance and the negative effects of mental distortions in the judicial practice through the results of empirical research, and demonstrates their functioning in the different areas of law respectively, as did the present analysis in the cases of mentally ill perpetrators.

In the EJTN Handbook, moving away from the merely *ex cathedra* presentations and favouring interactivity, as well as a combination of the different methods – especially presentations and groupwork – appear as crucial

³¹ Gábri, “Kognitív tudományok,” 131.

³² Amnesty International Magyarország, *Fortélyos félelem – Erősödő kontroll a magyar bíróságok felett* (Budapest, 2020), 34.

³³ Kúria Büntető-Közigazgatási-Munkaügyi és Polgári Kollégiumai Joggyakorlat-Elemző Csoport, *Összefoglaló vélemény – Az ítéleti bizonyosság elméleti és gyakorlati kérdései* (Budapest, 2017), 27–28.

objectives.³⁴ Among others, the research of Gaeth és Shanteau reflected on the significance of interactive training when they examined the effectiveness of two methods aimed at decreasing the negative influence of information that have become irrelevant in the procedures. One training only contained traditional frontal lecturing, while the other also entailed interaction and practical tasks. The researchers could verify that the first way was suitable for changing the anchored mental distortions, however, its effect was only for the short term and was solely attached to the specific field and issues which the training dealt with, so, it was vastly limited both in time and scope. By contrast, it proved to be a lot more efficient when the participants of the research project needed to reflect on what error could have occurred in their decision-making and had to bring up arguments both for and against their conviction and opinion.³⁵ The training methods involving active participation encourage individuals to question their presumptions by critically examining their pieces of experience in the judicial system. Through this progress, the unfavourable effect of the *groupthink* phenomenon can be reduced as well, which is specifically characteristic in hierarchic structures and refers to rather rigid, institutionalised approaches³⁶ with which there is generally an implicit – sometimes even explicit – expectation towards the members of the organisation to comply.

6. Summary

In my study – primarily with the intention of introducing an innovative, interdisciplinary field of research – I examined certain intersections of Criminal law and behavioural economics in the field of biases affecting the decision-makers in the criminal procedures targeting mentally ill offenders. Besides, I referred to a number of potential means for reducing the negative effects of mental distortions in the proceedings. At the beginning I discussed the basic concepts of behavioural economics regarding the bounded rationality, willpower, and self-interest of individuals in comparison to the former presumption of complete rationality within the neoclassical economic approach. The criminal justice system can reflect on the empirically founded assumptions of behavioural economics on biases in various ways and to a different extent when it comes to the offenders and the rest of the procedural participants, therefore, I made a differentiation between these two categories. The latter largely remain unnoticed in the legal practice, and the chance to counterbalance them through sanctioning is limited. I demonstrated their negative effects through the example of the compulsory treatment of mentally ill perpetrators as their mental state and related vulnerability places an even greater responsibility on the decision-makers, specifically judges and experts, in the procedures. The

³⁴ European Judicial Training Network, *Handbook on Judicial Training Methodology* (2016), 3., 15–16.

³⁵ Gábri, „Kognitív tudományok,” 131.

³⁶ Eric Ip, „Debiasing regulators: The behavioral economics of US administrative law,” *Common Law World Review* 46, no. 3 (2017): 176.

specific factor about this analysis was that I presented the functioning of biases – mainly the similarity and availability, the hindsight, the omission, the overconfidence, and the status quo bias – in the complete course of a measure: from its application through its review to the potential release of the treated person.

It was my conclusion that the mental distortions of (legal) professionals could be reduced by certain regulatory means, for instance, by integrating the knowledge on biases into the methodological letters and guidelines for experts, placing greater emphasis on the expectation regarding the (active) participation of experts and defenders in the review procedure, or ensuring sufficient time for evaluation and reasoning for judges in court proceedings. The other main path is to incorporate the information on biases into the training of the professionals. In this regard there is a demand for preparing a comprehensive training material and a more significant role shall be attributed to interactive educational means, such as the analysis of verdicts, groupwork, and trial simulations. These means have the potential to facilitate a prejudice-free approach to prejudiced human decisions and thus contribute to a fairer, more reasonable, and less biased system of sanctioning and jurisdiction. As a closing remark, I recall the renowned idea of Alvin Toffler: “The illiterate of the 21st century will not be those who cannot read and write, but those who cannot learn, unlearn and relearn”.³⁷

³⁷ Alvin Toffler, *Future Shock* (New York: Bantam Books, 1984), 272.