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LINGUISTIC BASIS OF PRODUCING A COGNITIVE BIAS IN COURTROOM DISCOURSE: ILLUSORY CORRELATION-AFFIRMATIVE ACTION-REVERSE DISCRIMINATION

Abstract. Cognitive biases, cognitive errors, and thinking traps are persistent, repetitive patterns of behaviour, perception, and thinking that prevent a person from adequately perceiving reality and processing information. Thus, people draw conclusions based not on facts but on their perceptions of them. The topic of cognitive biases has become popular in both the media and science over the past 20 years. The results obtained have gained scientific recognition and have gone beyond purely psychological research. However, this issue remains open in judicial discourse, as researchers are only beginning to study judicial discourse from the perspective of cognitive biases, which has led to the relevance of this paper.

At the stage of terminological substantiation, the main method was the method of comparison. At the second and third stages, the following methods were used: classification (to distinguish linguistic means), generalisation (to summarise information), and argumentation (to justify one's position). The choice of approaches to the analysis was determined by modern scientific paradigms: cognitive linguistics, pragmatic linguistics, communicative science, and methods of lexical and semantic analysis.

Elements of cognitive analysis helped to reveal the dependence of judicial discourse on social conditions.

The author establishes that the role of cognitive biases in judicial discourse is to influence the principal participants in the course of litigation and to create public opinion which is significantly reflected in the adoption of a particular court decision. It is noted that trials reflect the change in cognitive distortions caused by the development of public views: from illusory correlation through positive discrimination to reverse discrimination. The linguistic means expressing these cognitive biases vary from neutral to
emotive, which is due to the nature of the trial, the severity of the case, and the strategy of the defence and prosecution.

**Keywords:** cognitive biases, judicial discourse, linguistic means, illusory correlation, affirmative action, reverse discrimination.

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ЛІНГВАЛЬНІ ЗАСОБИ СТВОРЕННЯ КОГНІТИВНОГО ВИКРИВЛЕННЯ В СУДОВОМУ ДИСКУРСІ: ІЛЮЗОРНА КОРЕЛЯЦІЯ-ПОЗИТИВНА ДИСКРИМІНАЦІЯ-РЕВЕРСИВНА ДИСКРИМІНАЦІЯ

Анотація. Когнітивні викривлення, когнітивні помилки, пастки мислення – це сталі схеми поведінки, що повторюються, сприйняття й мислення, що заважають людині адекватно сприймати реальність і обробляти інформацію. Таким чином люди роблять висновки, виходячи не з фактів, а зі своїх уявлень про них. Тема когнітивних викривлень стала популярною як у медіа, так і у науці за останні 20 років. Отримані результати здобули наукове значення й вийшли за межі чисто психологічних досліджень. Проте в судовому дискурсі це питання залишається відкритим, тому що на даний момент дослідники лише починають вивчати судовий дискурс з погляду когнітивних викривлень, що зумовило актуальність цього дослідження.

На етапі термінологічного обґрунтування основним методом став метод порівняння. На другому і третьому етапах використовувалися наступні методи: класифікація (виокремлення лінгвістичних засобів), узагальнення (узагальнення інформації), аргументація (для обґрунтування своєї позиції). Вибір підходів до аналізу був обумовлений сучасними науковими парадигмами: когнітивною лінгвістикою, прагматичною лінгвістикою, комунікативістикою, методами лексико-семантичного аналізу.

Елементи когнітивного аналізу допомогли виявити залежність судового дискурсу від соціальних умов.

Встановлено, що роль когнітивних викривлень у судовому дискурсі полягає у їхньому впливі на принципових учасників судового процесу та на створення громадської думки, яка істотно відбивається у
прийнятті того чи іншого судового рішення. Зазначено, що судові процеси відображають зміну когнітивних викривлень, що зумовлене розвитком суспільних поглядів: від ілюзорної кореляції через позитивну дискримінацію до реверсивної дискримінації. Лінгвістичні засоби, що виражають зазначені когнітивні викривлення, варіюються від нейтральних до емотивних, що обумовлено характером судового процесу, тяжкістю справи, стратегією сторін захисту та звинувачення.

Ключові слова: когнітивні викривлення, судовий дискурс, лінгвальні засоби, ілюзорна кореляція, позитивна дискримінація, реверсивна дискримінація.

Problem Statement. Cognitive biases, cognitive errors, thinking traps are persistent, repetitive patterns of behaviour, perception and thinking that prevent people from adequately perceiving reality and processing information. In this way, people draw conclusions based not on facts but on their perceptions of them. Many treat the fight against cognitive biases as a way to become more rational and objective. These qualities have become particularly valued in modern society.

In other words, cognitive biases are human delusions, wrong thoughts and actions that grow out of prejudices, stereotypes and even the very principles by which the mind works. With their help, our brains can convince us of something that is not really true.

We may sincerely believe that we have made a balanced, rational, logical decision, without noticing at what point our thought veered off in the wrong direction. As a result, a subjective perception evaluation becomes an immutable truth. Whereas in everyday life cognitive biases can be tolerated, in the political sphere or courtroom such biases can lead to irreparable mistakes on which a person's fate or even life may depend.

Analysis of recent research and publications. It should be noted that the topic of cognitive biases has become popular in the media as well as in science. Over the last 20 years, two economists – Daniel Kahneman and Richard Thaler in 2002 and 2017 respectively – won Nobel prizes on this topic.

The term “cognitive biases” itself was coined in 1972 by the psychologist Daniel Kahneman, one of the founders of behavioural economics. During his experiments, together with his colleague Amos Tversky, they discovered that people make the same systematic mistakes. To date, most of the biases have been proven in psychological experiments.

However, the results obtained have gained scientific recognition and have gone beyond purely psychological research, for example, “Cognitive
errors in prescribing antibiotics” (A. Semyankiv); “Cognitive biases and their impact on the behavioural patterns of labour market participants” (N. Yakymova); “Cognitive biases as an internal factor in the effectiveness of disinformation in the media” (S. Yaremenko) and many others. Thus, the list of such works is quite impressive. The interest in this topic is due, as already mentioned, to many factors, including the shift towards an anthropocentric paradigm in scientific research and the desire for rationality and objective perception of information.

It is worth emphasizing that in judicial discourse this issue remains unsettled, as at the moment researchers are only beginning to study judicial discourse in terms of cognitive biases (Zaitseva M., Kozitska I., Kovalko N.), which makes our article relevant. Hence, the aim of the paper is to find the linguistic means, which express such cognitive biases in a court discourse. The purpose of the research caused the following tasks as: (a) characterize the role of cognitive bias in judicial discourse and (c) determine the linguistic means expressing cognitive bias in judicial discourse.

**Research methods.** At the stage of terminological grounding, the main method was the method of comparison, i.e. a review of the research of scholars dealing with this problem; trends in the analysis of the problem, etc. At the second and third stages, the following methods were used: classification (to distinguish linguistic means), generalisation (to summarise information), and argumentation (to justify one's position). The choice of approaches to the analysis was determined by modern scientific paradigms: cognitive linguistics, pragmatic linguistics, communicative science, and methods of lexical and semantic analysis.

Elements of cognitive analysis helped to identify the dependence of judicial discourse on social conditions.

Certain authentic language corpus was selected for the research. **Overview of the main research findings.**

1. **Causes of cognitive biases**

According to many psychologists, everyone is subject to cognitive biases at some point in their lives. Some commit them occasionally, others systematically. Many factors influence how often we become hostages of the traps of the mind.

Cognitive biases emerge from our previous experiences as they are a consequence of the upbringing we receive in childhood and the beliefs and attitudes we pick up from our parents. And, of course, they are shaped by a certain culture of the society in which we live.

According to Buster Benson, business negotiator and author of books on productive communication, the main cause of cognitive biases is the
brain's tendency to conserve its resources. It's much easier to label things, build a simplified model of the world and live as if it fits reality, rather than trying to figure out what's going on [2].

Cognitive biases can be thought of as a defense mechanism for the thinking process, because they make it easier for our brains to cope with problems such as:

Information overload. Throughout the day, we have to process huge amounts of data. What's more, data from different sources often contradict each other. Our brain has a tendency to simplify information when there is too much or it is difficult to analyse.

The need to act quickly. We don't always have enough time to make every decision. Much more often, there are situations where a decision needs to be made quickly. And it is in these situations that cognitive biases often manifest themselves.

Difficulty in understanding the world. In this case, gaps in knowledge are compensated for by stereotypes and past experiences instead of seeking information and analysing new input.

The need to select information to remember. To save memory space, the brain remembers generalisations and salient features, ignoring details.

2. The impact of cognitive distortions on ideation and behaviour

Our brain often uses cognitive biases to reinforce some negative emotion or negative chain of reasoning. This causes us to see reality in a pessimistic way, distorting our perception of ourselves and those around us.

Some thought traps seriously damage our mental health, undermine our self-esteem and prevent us from building healthy relationships with others. The result is often stress, depression, anxiety and problems with social integration.

According to cognitive-behavioural psychologists, cognitive errors and the behaviour patterns built on them often lead to:

- conflicts with others (at home, at work);
- distortions in the perception of oneself and one's capabilities (low self-esteem, perfectionism, procrastination);
- excessive negative emotions: anger, resentment, anxiety, shame, guilt and depression.

So, on the one hand, cognitive biases simplify decision-making, but on the other hand, they often lead to erroneous solutions and cause unnecessary anxiety and almost always have a negative impact on people's thinking.

Let us consider how cognitive biases affect litigants and what linguistic means are used to express cognitive biases in judicial discourse.
In 1979, the Dan White Trial (1979) attracted public attention and entered the annals of famous court cases. One of the defence arguments was the juxtaposition of the defendant and the plaintiff:

He was a native of San Francisco. He went to school here, went through high school here. He was a noted athlete in high school. He was an army veteran who served in Vietnam, and was honorably discharged from the army. He became a policeman thereafter, and after a brief hiatus developed, again returned to the police force in San Francisco, and later transferred to the fire department. He was married in December of 1976, and he fathered the child in July 1978. Dan White was a good policeman and Dan White was a good fireman.

In filet, he was decorated for having saved a woman and her child in a very dangerous fire, but the complete picture of Dan White perhaps was not known until sometime after these tragedies on November 27th occurred [6].

The conclusion the lawyer draws is that the defendant is a typical male who is not used to complaining:

Dan White, as I think will be developed here, was the type of man that was not a complainer. He didn't complain about physical injuries, didn't complain about a disease he didn't know he had. He had an attitude that he developed through his life, perhaps because of his father, a man that he had admired the most in his life…[6].

As I mentioned, he volunteered for the army, was a policeman, a fireman, and he was a good fireman and a good policeman, and basically his concern for people helped him to run for the Board of Supervisors. You have to understand at this point, and the evidence will show, that normally in a city-wide election, it is very difficult for a man of Dan White's background to be elected to any position, and when we have the change and went to the district supervisorial elections, that allowed a man of Dan White's background, a working class man, with no political prowess, with no connections, to be elected to the Board of Supervisors, and he worked very hard to be elected to the Board of Supervisors…[6].

The lawyer highlights the defendant's commitment to the traditional values of American society at the time. And then he cites the characteristics of the deceased as an example. Although the lawyer does not explicitly express his attitude, the very fact of such a comparison is indicative of this:

Harvey Milk was a homosexual leader and politician…[6].

It was evident from various public statements coming from the Mayor's office that there were political pressures brought to bear, and somewhere in part of that pressure was Harvey Milk [6].

The lawyer creates a clear image of the defendant as a real man, a
family man, a loving father and son, a brave policeman and fireman who is always ready to come to the aid of the weak, whom everyone in this county knows and respects.

The victims of crime are faceless. Harvey Milk is described as the absolute opposite of the defendant – he is gay, an outsider, a wimp, a politician, which is also a negative characteristic according to the defence counsel:

He represented the underdog of being gay. He was something of the odd man out…[6].

The play up of one of the victims, whose murder was utterly meaningless (if there can be any meaning in murder at all) and could lead to a significantly increased imprisonment, as a non-traditional person, creates illusory correlation, that is, a cognitive bias exaggerated by a close relationship between variables that in reality either does not exist or is much smaller than it is supposed to be. A typical example would be ascribing negative qualities to a minority group and positive qualities to a majority group. Incidentally, journalists have noticed this. For example, one article explicitly points to this opposition of one at the expense of the other:

As added insurance, just in case this line of reasoning failed to sway the jury, Schmidt rounded out his opening with some very pointed comparisons between Milk's overtly homosexual lifestyle and White's all-American background [4].

But most effective of all were Schmidt's repeated portrayals of White as an upstanding young man, an ex-fireman and ex-police officer, someone who had been defeated by a corrupt system he was powerless to change. Schmidt cunningly marshaled public resentment against both politicians and homosexuals into one neat package [4].

The use of this misrepresentation allowed the lawyer to win the court case, switching it from first-degree manslaughter (a) to manslaughter (b) because the defendant received seven years and eight months (c) instead of a “gas chamber” (d), getting out after five years in prison (e):

(a) Members of the jury, that briefly is what I expect the evidence in this case will show, which I expect, at the conclusion of this case, will support the charges of murder in the first degree and the special circumstances which have been alleged here:

(b) entitled to a verdict of manslaughter;
(c) a crime deserving of death in the gas chamber;
(d) seven years, and eight months imprisonment;
(e) With time off for good behavior, Dan White was looking at freedom in five years. White was paroled in 1984 [4].
Neutral lexical means outside the given context become evaluative and emotive in the advocate's speech, creating an illusory correlation. Changes in society gradually lead to a shift in worldviews, which also causes a shift in cognitive biases.

In 1999, a high-profile case such as The Laramie (Matthew Shepard Murder) Trials was heard in the US. The defence lawyer tried to construct his defence based on traditional views of the problem of sexual minorities. Thus, he chose the tactic of the "gay panic" defence:

Mr. She pard was portrayed as a sexual predator who had sought a ride from the two men and had “reached over and grabbed Aaron's genitals and licked his ear”[8].

He justified the defendant's behaviour by his negative experiences as a child:

memories of a sexual encounter forced upon him by an older boy when he was 7. Mr. Tangeman said the older boy threatened to spread the word that Mr. McKinney was a homosexual. Also, Mr. Tangeman said, Mr. McKinney at 15 had a consensual sexual encounter with a male cousin [8].

The speech by the father of the murdered young man shocked the jury and society at large. It reflected a fundamental shift in the development of American society:

Matthew’s gift was people. He loved being with people, helping people, and making others feel good. The hope of a better world free of harassment and discrimination because a person was different kept him motivated. All his life he felt the stabs of discrimination. Because of that he was sensitive to other people’s feelings. He was naive to the extent that, regardless of the wrongs people did to him, he still had faith that they would change and become nice. Matt trusted people, perhaps too much. Violence was not a part of his life until his senior year in high school… He was the perfect negotiator [5].

The defence lawyer's attempts to proceed on the basis of traditional views failed. The fact that Matthew Shepard was of non-traditional orientation was an aggravating factor, but for the defendants.

It is worth explaining why we have classified this cognitive distortion as positive discrimination. We define it as being based on privileging one person or group of people because of their particular characteristics or beliefs, religions, membership of a previously oppressed race and so on. Why is it considered a cognitive bias? A recent paper by Stephen Jimenez, who has spent 13 years interviewing more than 100 people with a connection to the case, substantiates our point of view. His conclusion, outlined in The
Book of Matt: Hidden Truths about the Murder of Matthew Shepard is that “the grotesque murder was not a hate crime, but could instead be blamed on crystal meth, a drug that was flooding Denver and the surrounding area at the time of Matthew’s death. This new theory has, understandably, caused a lot of anger” [1].

The scales of Justice tipped in the other direction, so arguments that did not meet the zeitgeist went unheeded, although without such misrepresentation they probably would have been taken into account:

“Aaron and Matthew had a friendship. They’d been involved sexually, they bought and sold drugs from each other. That complicates the original story of two strangers walking into a bar and targeting Matthew – someone they did not know – because he was gay.” [1].

That the defendants were not gay haters is confirmed by one of the defendants serving a life sentence for the crime:

Still, he insisted, neither he nor Aaron McKinney was motivated by anti-gay hatred when they offered Shepard a ride home from a bar. Instead, he said, they were out to rob him of money and possibly drugs when they drove him to the edge of town on the night of Oct. 6, 1998. [7].

Notably, the lexical means used are emotive and evaluative, where emotion predominates. This is obviously to influence the jury and public opinion.

Finally, the third trial is that of 2017 – Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission. Charlie Craig and David Mullins got married in Massachusetts and wanted to celebrate their wedding where they lived in Colorado. In July 2012, they went to a local bakery, Masterpiece Cakeshop, a limited liability company in Colorado, and sought to purchase a wedding cake. The owner, Jack Phillips, refused to design and bake the cake, saying that gay marriage violated his religious beliefs. He said that he would be implicitly complicit in violation of his religion if he were to design and bake the cake. He was willing for his bakery to sell an already prepared cake for the couple, but not to make one for them.

Jack Phillips appealed to the Supreme Court, insisting that the state's anti-discrimination laws infringed on his freedom of religion and freedom of speech as guaranteed by the First Amendment to the Constitution. The Supreme Court found him right, although it did not go on to rule more widely on whether businessmen could refuse to serve homosexual couples on the basis of their beliefs. The line of defence built by the lawyers in this trial is intriguing. Thus, they rely on the concept of “compelled speech” or “protected speech” as a related legal concept which protects an individual from being required to utter or otherwise express a thought with which that
individual disagrees [3]. The Supreme Court Justices and the plaintiff's lawyers are engaged in a semiotic dispute over what is speech, whether a hairstyle, make-up, bouquet and so on is a definite message:

JUSTICE KAGAN: How do you decide, oh, of course, the chef and the baker are on one side, and you said, I think, the florist is on that side, the chef, the baker, the florist, versus the hairstylist or the makeup artist? I mean, where would you put a tailor, a tailor who makes a wonderful suit of clothes? Where does that come in?

MS. WAGGONER: Your Honor, the tailor is not engaged in speech, nor is the chef engaged in speech but, again, this Court –

JUSTICE KAGAN: Well, why -- well - woah. The baker is engaged in speech, but the chef is not engaged in speech?

MS. WAGGONER: Certainly not all cakes would be considered speech, but in the wedding context, Mr. Phillips is painting on a blank canvas. He is creating a painting on that canvas that expresses messages, and including words and symbols in those messages [10].

Semiotics acts as a special modus operandi of thinking, as a game of signs, and the judicial process consists in deciphering them.

JUSTICE SOTOMAYOR: There is creation in serving food, in creating any type of edible product. People -- there are sandwich artists now. There are people who create beauty in what they make, but we still don't call it expressive and entitled to First Amendment protection.

MS. WAGGONER: No, but when we have someone that is sketching and sculpting and hand designing something, that is creating a temporary sculpture that serves as the centerpiece of what they believe to be a religious wedding celebration, that cake expresses a message.

JUSTICE ALITO: What would you say about an architectural design; is that entitled to -- not entitled to First Amendment protection because one might say that the primary purpose of the design of a building is to create a place where people can live or work? [10].

Justices wonder what is to be protected and what is not. Where do we draw the dividing line between different human creations?

JUSTICE BREYER: So in other words, Mies or Michelangelo or someone is not protected when he creates the Laurentian steps, but this cake baker is protected when he creates the cake without any message on it for a wedding? Now, that -- that really does baffle me, I have to say.

JUSTICE SOTOMAYOR: Well, your client was saying that providing a cake to a same-sex couple was against his free-expression rights because -- and his free-exercise rights, because he cannot celebrate that kind of marriage [10].
The defence lawyer expertly sidesteps the topic and shifts the emphasis with her next statement:

MS. WAGGONER: Mr. Phillips is looking at not the "who" but the "what" in these instances, what the message is [10].

The second defence lawyer goes on the attack, citing the example of the Ku Klux Klan:

GENERAL FRANCISCO: Well, Your Honor… Is the thing that's being regulated something we call protected speech? I think the problem for my friends on the other side is that they think the question doesn't even matter. So they would compel an African American sculptor to sculpt a cross for a Klan service - For example, I don't think you could force the African American sculptor to sculpt a cross for the Klan service just because he'd do it for other religious – [10].

The justice exploits emotion by mentioning cases where people were discriminated against because of their sexual orientation:

JUSTICE SOTOMAYOR: …the gay couple who was left on the side of the highway on a rainy night, people who have been denied medical treatment or whose children have been denied medical treatment because the doctor didn't believe in same-sex parenthood, et cetera.

JUSTICE SOTOMAYOR: …you can't engage in. And that includes not selling products that you sell to everyone else to people simply because of their either race, religion, national origin, gender, and in this case sexual orientation [10].

However, it is through reverse discrimination that a turning point in the process has already occurred: the term ‘reverse discrimination’ originated to describe these kinds of cases where members of a majority group are claiming they were discriminated against on the basis of their age, race, gender, or other protected characteristic [11].

GENERAL FRANCISCO: And here, Your Honor, we don't think you can force a speaker to join the parade. Because when you force a speaker to both engage in speech and contribute that speech to an expressive event that they disagree with, you fundamentally transform the nature of their message from one that they want to say to one that they don't want to say [10].

Although the court's decision was not a one-sided one and drew protests from both sides, the strategy of reverse discrimination has nevertheless succeeded.

Conclusions. The role of cognitive biases in judicial discourse is to influence the principled participants in a trial and to create public opinion, which has a significant impact on a court decision, because judges and juries
are also human beings and nothing human is alien to them. The judicial processes discussed in this paper reflect, in our view, a shift in cognitive biases that is driven by the development of public attitudes: from illusory correlation as a cognitive bias exaggerating the close connection between variables, which in reality either does not exist or is much less than assumed; through affirmative action as compensation and equalisation of the rights of previously disadvantaged members of society; to reverse discrimination as restoration of the rights of the majority. The linguistic means expressing these cognitive biases range from neutral to emotive, depending on the nature of the trial, the gravity of the case and the strategy of the defence and prosecution.

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