

MESSAGES OF PERSONAL IDENTITY ATTEMPT IN FOREIGN CRIMINAL RULES

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Abstract

Researches in the world and in our country (Hungary) have revealed that the false personal identities play prominent role in the „justizmord” cases.

That is why it is worthwhile to look at identity rules and methodologies in other countries as well. In this study, the author examines the Slovenian, Austrian, Swiss, Serbian, Croatian, and distant (but, as it turns out, much the same) Turkish norms with a continental legal system similar to ours. Based on the legal details and implementation recommendations there, the researchers formulates at the end of his study the lessons learned from the models, the legal and forensic development opportunities available to us, the conclusions for efficiency and fairness, and the current and future messages to legislators and practitioners.

Keywords: *errors, false identification, identity parade, investigation, justizmord, line-up, miscarriage of justice, prevention.*

1. Introduction

The criminal justice system of all rules of law seeks to avoid the worst outcome, a miscarriage of justice. Unfortunately, this does not always work. I will present Hungarian examples in this study to support this statement.

In 1957, the court sentenced János K. to death for a sexually motivated homicide in Martfű (city), whose sentence was to be committed to life imprisonment. He had already served 11 years in prison, when it turned out that the crime had been committed by Peter K., who was prosecuted in the proceedings, sentenced to death, and executed in 1968.

In Hungary, in 1984, the prosecutor's office charged János M., a resident of Szolnok County, with the murder of a little girl. He was not legally sentenced to

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death, but then, in the lengthy criminal proceedings, it went through several forums and he was finally acquitted in 1986.

In 1995, P. Dénes was sentenced by a court in Heves County to 6 years in prison for attempted personal injury and robbery. Along with his arrest, the accused had already spent 26 months in prison when it turned out that the perpetrator of the crime against the elderly woman was someone else and who was then held accountable for the crime.

On May 9, 2002, the court sentenced Ede K. to life imprisonment as the perpetrator of a robbery at the Erste Bank branch in Mór (city), which claimed 8 lives. A few years later, exactly in 2007, it turned out that the crime had been committed by two other persons.

I present all this in order to make it clear in my introduction: miscarriage of justice also exists in our days as a phenomena, and its danger persists in our country as well. Therefore, it is in our elementary interest to develop prevention methods and to explore what it is that often causes fatal mistakes.

Researches in the world and in our country (and the real cases above) have revealed that the presentation behind recognition plays a prominent role in the „justizmord” case².

That is why it is worthwhile to look at identity rules and methodologies in other countries as well. In this paper, I examine the Slovenian, Austrian, Swiss, Serbian, Croatian, and distant (but, as it turns out, much the same) Turkish norms with a continental legal system similar to ours. Based on the legal details and implementation recommendations there, I formulate at the end of my study the lessons learned from the models, the legal and forensic development opportunities available to us, the conclusions for efficiency and fairness, and the current and future messages to legislators and law enforcements.

2. Personal identification procedure in Slovenia

The Criminal Procedure Code of our neighbouring country also names and specifies the main rules of identification (identity parade). Concretely³:

242 Art

1. Where it is possible for a witness to identify a person or object, they shall first be asked to describe them and to identify them. Only then can the witness be shown the person, together with persons unknown to others, or the object, preferably with other objects of the same kind. The same procedure should be followed for identification with other senses (hearing, touch, smell etc.).

² See more about these in: Csaba Fenyvesi: A kriminalisztika tendenciái. (Tendencies of Criminalistics) Dialóg Campus Publishing House, Budapest-Pécs, 2017. VII. Chapter.

³ Criminal Procedure Act 2007 (7 September) Official Journal of the JMSZ 4/77, 14/85, 74/87, 57/89 and 3/90. (In translation from English).

(2) Prior to identification, the witness shall be warned in accordance with Section 240 (2).

(3) The judge conducting the investigation, who ensures the identification process, must make sure that the witness does not see the person or object he / she will identify.

(4) A record of the identification shall be made and a group photograph of all persons examined shall be attached.

242 / a. If the life or physical integrity of the person carrying out the identification or a close family member (Article 236 § 1 (1) to (3)) is seriously endangered or it is possible that the identified person may influence the identification process, the identification shall be carried out in such a way that the person carrying out the identification must not be seen by the person to be identified.

80. Art

(3) In case of searching for an inspection, place or person, or identifying a person or object (Article 242), the document shall contain the relevant data of the act. In case of identification of separate objects, the description of the objects, the size of the traces. If sketches, drawings, drafts, audio or video recordings have been made, they must be included and attached to the file.

178 Art

(4) The prosecutor, the accused and his or her counsel may participate in the examination of witnesses. The judge conducting the identification may order that the accused be removed from the interrogation if the witness refuses to testify in his presence or if the circumstances show that the witness would not be able to tell the truth in his presence. Or in cases where an appearance will be required after the witness has been questioned. The accused may not be present at the examination of witnesses if they are under the age of 15 and have been the victims of any of the offenses under Article 65 § 3. The injured party may be present at the hearing of witnesses if he or she does not attend the main hearing.

230. Art

The accused must first describe the objects that can be linked to the crime or use it as evidence, and only then can it be presented to him as identification. If the objects cannot be delivered to the defendant, the defendant must be transported to the place where the objects are. We can read the following point in the regulations on the tasks and powers of the police⁴.

Article 46

(Identifying person from a photo)

(1) Police officers may act to identify a person on the basis of a photograph in order to locate the perpetrator in a criminal or offence case in order to establish the identity of an unknown person.

⁴ Police Tasks and Powers Act: Official Gazette of the RS, No. 15/2013.

(2) Before carrying out the identification procedure, the police shall warn the person about the rules for the protection of personal data. That person shall protect the confidentiality of the data which come to his knowledge during the identification procedure.

(3) Police officers shall first request the person who carries out the identification to record and present the physical characteristics that distinguish the person from other persons during the identification procedure.

Only then can they show images along with other similar images to the ID of people who are unknown to the person performing the identification.

The police officer who conducts the identification must make sure that the identifier does not see a picture of the person in question or does not see that person before identification.

(4) The police officer shall make an official record of the identification procedure, which shall include which images the identifier saw.

(5) Police officers may use photographs taken from other files of the persons photographed or in other lawful ways. Photos of individuals that are shown during identification must be selected based on the previously provided description of the person.

(6) When several persons participate in the identification procedure, it shall be conducted separately for each person.

3. Personal identification procedure in Austria

The Austrian Code of Criminal Procedure also recognizes the recognition procedure, and its provisions can be found in § 163⁵.

§ 163. (1) A witness may compare several persons - openly or secretly - with each other, from which he or she may select the suspect. Prior to this, the witness should be asked to describe the distinguishing features of the suspect: this description should be as close as possible to the person being compared. The witness should then be asked to make a statement as to whether he or she recognizes the person and what he or she recognizes. This process should be recorded and assisted by appropriate imaging techniques.

(2) The same shall apply to the examination of photographs and the hearing of sound samples. Even if a witness recognizes an important object that serves as evidence, he or she should first be asked to describe that object and, if necessary, its distinctive features.

3. In addition, the accused or witness may be confronted with other witnesses or tribunals if the relevant allegations differ in material circumstances and it is presumed that the contradictions can be clarified. People who stand side by side

⁵ Österreichische Strafprozessordnung (StPO) Criminal Procedure Act 1975. StF: BGBl. No 631/1975 (WV).

and have certain circumstances that are different or have conflicting statements or that are different should record the response from both sides.

(4) If the accused is summoned for comparison, his or her counsel shall be given the opportunity to participate.

4. Personal identification procedure in Switzerland

According to the Swiss Code of Criminal Procedure⁶:

Rule 146: Interrogation and comparison of several persons

(1) Interviewers shall be interviewed separately.

(2) Criminal authorities can compare individuals, including those who have the right to refuse to testify. The special rights of the victim are reserved.

(3) The authority may summon the interrogated persons who, after the completion of the interrogation, are likely to face other persons, to remain in the place of the proceedings until the confrontation.

(4) A person may be temporarily excluded from the proceedings if:

(a) there is a conflict of interest, or

(b) that person shall be heard during the proceedings as a witness, information officer or expert.

Article 152: General measures to protect victims

(4) A comparison may be ordered if

(a) the interests of the injured party so require

(b) mandatory due to a significant law enforcement interest.

Article 154: Special provisions for the protection of children as victims:

1. A child within the meaning of this Article who is under the age of 18 at the time of the questioning or comparison shall be the victim.

(2) The first hearing of the child shall take place as soon as possible.

(3) The authority may exclude a confidential participant from the proceedings if it may exercise decisive influence over the child.

4. If it is apparent that the interrogation or comparison is likely to cause severe psychological distress to the child, the following rules shall apply:

a) A report involving the suspect may only be ordered if the child expressly requests it.

(b) As a general rule, a child may not be questioned more than twice throughout the proceedings.

(c) The second hearing shall take place only if the parties have not been able to exercise their rights at the first hearing or if this is unavoidable in the interests of the investigation or the child. Where possible, recognition will be done by the same person who conducted the first interview.

⁶ Schweizerische Strafprozessordnung: SR 312. (Effective from 5 October 2007).

(d) Interrogations shall be carried out in the presence of a specialist: a detective trained for that purpose. If no comparison is made (recognition), the interrogation is recorded with images and sound.

e) The parties shall exercise their rights through the interrogator.

f) The interviewer (interviewer) and the trained professional record their own observations in a report.

5. Personal identification procedure in Serbia

The Serbian Criminal Procedure Code provides the following guidelines⁷.

VII. Chapter 1 (Basic Guidelines. Evidence Procedure 2. Presentation for Recognition. Face or Object Recognition)

§ 90. If it is necessary to determine whether the interrogated person recognizes the given object or person, or the properties thereof, which he or she has previously described, the object or person in question shall be shown together with other objects and persons whose properties are unknown to him or her. These are similar to those described above. The interrogated must then state whether he or she is certain to recognize the object or person, or if he or she has a certain degree of probability that he or she will recognize it. If the answer is positive, they should point to the subject or person.

If the person or object is not available in Method 1, the suspect must be shown an image of the object or person, along with several similar objects or persons unknown to him, whose main characteristics are similar to those described by the interrogator.

Nos. 1 and 3 recognitions may also be made by sound in accordance with the provisions.

6. Personal identification procedure in Croatia

Article XVI of the Croatian Code of Criminal Procedure Chapter deals with acts of recognition⁸.

XVI. Chapter Investigation Phase (Interrogation of Suspect 3 and Presentation for Recognition 5)

Article 301

1. Recognition is the recognition by a suspect or witness of a person, object, place, sound, mode of movement or other characteristic based on a comparison

⁷ Serbian Criminal Procedure Code: „Official Gazette of the Republic of Serbia”, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014 (based on a raw translation by Andrea Dernik).

⁸ Consolidated text of the Croatian Code of Criminal Procedure, published in the Official Gazette 152/08, 76/09, 80/11, 91/12) and Decisions of the Croatian Constitutional Court 143/12, 56/13, 145/13, 152/14, 70/17 and 126/19) (based on a raw translation by Andrea Dernik).

with another person, object, place, sound or mode of movement. The objects that help to clarify the case are presented to the suspect and, if necessary, to witnesses and experts.

2. Before being presented for recognition, the person shall be asked whether the person or object in question has been shown live or in images, on a computer, in the form of data collected or otherwise, or is aware of circumstances which may affect him or her in the course of the recognition. The answers must be recorded.

(3) The recognizing person shall describe the object and person in question in as much detail as possible, as well as the features that distinguish it from other objects and persons. At the same time, he or she should describe the circumstances in which he or she has perceived it and give a rich description of what he or she would recognize.

(4) The recognizer shall then be shown the person or object, the objects presented for recognition, together with any person or object unknown to him or her. Location recognition is done by the person first describing the location in detail and then pointing out or showing it on a recording and live.

(5) With the written consent of the person, the presentation for recognition may be performed by appropriate technical means. With programs that allow him or her to present simultaneous photo or audio-video recordings, see (3) in accordance with the paragraph. This type of recognition presentation can also be recorded with an audio-video device.

(6) If the suspect is the confessor, Articles 273 and 275 of the Act rule, but if the suspect is presented for identification, he or she will be warned of the right to be assigned a defense lawyer. A defense attorney may be present at the presentation for recognition. In that case, the provisions of Article 273, including paragraphs 2, 3 and 5, shall apply *mutatis mutandis*.

If the recognizer is a witness, the description of the recognition is given in No. 288 and it shall be governed by the provisions of Article 2 thereof. (3) and (4) pursuant to paragraph.

(7) A report shall be prepared on the presentation for recognition and an appropriate record shall be made of all persons, objects and places presented. The recordings are made by an expert assistant.

7. Personal identification procedure in Turkey

There are two law enforcement forces in the country bordering Europe and Asia: the police and the gendarmerie. Their jurisdiction is divided on the basis of geographical separation. The police have jurisdiction in all provinces and districts, and outside the provincial and district municipal boundaries, it is the gendarmerie that has jurisdiction. In other words, places that are outside the purview of the

police are within the purview of the gendarmerie. The investigative (evidence) actions of both organizations are based on the same legislation.

Article 6 of the Code (Law No. 2559), adopted on 4 July 1934 on law enforcement duties and competencies, provides guidance on identification⁹.

According to the content of this and related interpretations:

a) A 6/11. „Before initiating the identification procedure, the statement of the person who will identify the offender shall be recorded as a notification.”

b) The victim or witness is asked about the offender's gender, age, color, height, weight, physical disability, eye color, hair, beard. In doing so, the law enforcement officer should not ask directed questions.

(c) It must also be ensured that the characteristics of the description are objective, for example, descriptions that „the perpetrator was handsome” should be avoided.

(d) If there is more than one suspect, the identification procedure must be carried out separately for each suspect.

(e) The identification shall be repeated at least twice. Although not required by law, the persons subject to identification must be the same as in the first identification procedure. Because if the people exposed to identification change, it can negatively affect the person identifying them. There is also no statutory minimum time frame between the two identification procedures, but at least the first identification procedure must be completed and the second formula established. By doubling, the identifying person is given the opportunity to think twice and remember the event he or she witnessed.

f) In general, a suspect has the right to a lawyer (authorized or seconded) before, during and after the identification procedure. (Rule 150 (1)) However, the absence of a defense counsel does not render proof of identification inadmissible.

g) In the most common „live line-up” identification in practice, not only the suspect but also other people are introduced to the witness (victim) and asked to choose from them. (The photo identification method is exceptional.)

h) A 6/12. An additional point states that: There must be more than one participant in the identification procedure, they must be of the same sex and similar in appearance. For example, their age, height, weight, dress. If necessary, changes can be made to the identification procedure regarding the appearance of the suspect. During the identification process, each person holds a number in their hand.

i) The „line-up” method can be performed in two ways: simultaneously or sequentially. Simultaneous setup is the traditional (and almost exclusively used) method of identification. In this method, the people who are identified (or the photos taken of them) are presented side by side. In the sequential (allowed but not really applied) setup method, the persons (or photographs) are presented one

⁹ The original Police Duties and Competences Codex was supplemented on 16 June 1985 by Regulation 3233/7. with article number. On 02/06/2007, the 5681/5. amended by Article. (Translated from Turkish to English: Ahmet Murat).

after the other to the active subject, who, if he identifies the person or photograph presented to him, the other people (or additional photographs) do not appear.

j) There is also a so-called „show-up” method, where the authorities present only the suspect as a witness to the incident or a victim of the crime. Here you cannot choose from more than one person, but only to decide whether to identify the person presented to him or her as the perpetrator or to state that he or she is not the perpetrator.

k) If the suspect is personally unable to participate in the identification procedure for any reason, the photographic identification method may be used (Article 6/16). The victim or witness is shown a photograph of the suspect along with photographs of similar people and asked if: the perpetrator is among the people in the photographs? (Consecutive photo shows are not excluded either, but the former is used in Turkish practice.)

l) There is also video identification, in which case the victim or witness is shown the videos of the persons being identified and asked: is the actual perpetrator of the incident in the video? In this identification method, the suspect under identification is asked to look at the camera so that the face and shoulders are visible first. They are then asked to slowly turn from left to right and show their side profile to the camera, and finally they are asked to turn and show their backs to the camera. The video recording of the suspect's face, side and back profile is recorded in this way and combined with videos of other people whose appearance, gender, age etc. are similar and made by the same method. Video identification is performed as a „sequential identification” method because each video can only be displayed one after the other¹⁰.

m) Acoustic (voice) identification may occur if the witness or victim of the incident did not (could not) see the face or characteristic external features of the perpetrator but heard his voice. (For example, the perpetrator covered his own face with a mask or covered the victim's eyes. It is also possible that the crime was committed over the phone or that the victim / witness is visually impaired. In voice-based identification, and decides whether to recognize any of them as the voice of the perpetrator.

n) The most common form in life is listed as „Covered Identification”. (Article 6/13)¹¹.

In this case, those to be identified will not see the victim or witness. It is solved with a mirror that provides one-way vision. Persons subject to identification are in one room, while victims and witnesses are in another one. Between the two rooms there is a built-in (so-called Venetian) mirror that allows the victim and

¹⁰ Article 81/1 of the Code. If the offense is punishable by two years' imprisonment or more, the prosecutor shall, on the order of the public prosecutor, take a picture of the suspect and measure his/her height, take his/her fingerprints, palmprints and or the recognition of the accused; as well as a sound sample and video film must be prepared and inserted into the file.

¹¹ 6/13. „The identification person and the persons subject to identification shall not see each other”.

witness to see the persons exposed for identification while preventing them from seeing him / her in turn. (In contrast, open identification exists, but hardly used, in which the people subject to identification see the victim, the witnesses. There is no one-sided mirror or similar device here, and both sides can see each other.)

(o) „Natural identification” means the method by which a suspect is identified in his / her natural habitat. For example, walking down the street, shopping, or sitting in a coffee shop. Natural identification should be considered as covert identification, as the suspect subject to identification does not know who identifies him / her. Legally, however, this method should not be used because the Code of Police Duties and Powers (indicated above) states that a suspect who has been identified must always be aware of the identification procedure.

p) A „non-blind line-up” is a method in which the identified victim or witness and the law enforcement officer involved in the proceedings know only who the suspect is being identified.

q) The „single blind line-up” refers to a method in which the victim or witness does not know who the suspect who is being identified is aware of only by the law enforcement officer involved in the proceedings.

r) The „double blind line-up” refers to a method in which the victim or witness and the law enforcement officer involved in the proceedings do not know which of the suspects is being identified. The advantage of the double-blind method is that it is aimed at finding the truth, because when the law enforcement officer involved in the identification procedure does not know the suspect, there is no danger of manipulating the victim emotionally or unconsciously with his / her words, behavior and gestures, or the witness.

s) „Blank identification” is used to check the reliability of the victim or witness. In it, they are introduced to people who are not among the suspects, and this information is not shared with them, they are only warned that „the actual perpetrator may not be in the group.”

t) In the case of a method of identification by testimony (or testimony), the victim or witness may be asked to tell what he or she knows about the incident during the identification procedure. In this case, there is both an „identification” and a „statement” on the side of the victim or witness. These two separate actions are combined to produce a single report called „identification with testimony”.

u) Article 6/15 of the Law on Law Enforcement and 17: a report on the identification procedure shall be drawn up. Also, a visual note should be written and photos and videos of identified individuals attached.

v) The most important thing that should be clearly stated in the identification report is whether the identifying person has identified someone as the perpetrator. For example, „Person 4 was identified as the perpetrator by the victim or witness.” If the identifying person did not identify anyone or was unsure, this should also be clearly mentioned in the identification report.

w) Those who choose not to testify as a victim or witness shall not be compelled to identify.

x) The identifying person should be warned that „the perpetrator is not necessarily among the people being identified.”

y) For photographic identification, several photographs must always be presented together or separately. Multiple (different) photos of the same person can't be shown. Photos of different people should be the same size and have the same characteristics.

8. Conclusions, suggestions, messages

Before noting the conclusions and development suggestions arising from the above, I will only cite the XC. of 2017 on Criminal Procedure as a reminder and as a basis for comparison. (hereinafter referred to as Cp.). These are in particular:

§ 210. (1) A court, prosecutor's office or investigative authority shall order and hold a presentation for recognition if it is necessary for the purpose of recognizing the person or object. At least three persons or objects shall be presented to the accused or witness for identification. The person or object may be presented to the accused person or witness by image, sound or video and audio recording, unless otherwise available.

(2) Before being presented for recognition, the person from whom recognition is expected shall be heard in detail about the circumstances in which he or she perceived the person or object in question, his or her relationship with him or her, and his or her characteristics.

(3) In the case of the presentation of persons, persons who are independent of the case and who are unknown to the recognizer and who have the same characteristics as the person in question in the main characteristics, in particular of the same sex, body shape, skin color, care and clothing put in a group with the person in question. In the case of objects, the object in question must be placed among similar objects. The location of the person or object in question within the group must not differ significantly from any other and must not be conspicuous.

(4) The presentation shall be carried out separately in the absence of each other in the case of several recognizable persons.

(5) If the protection of a witness so requires, the presentation for recognition shall be made in such a way that the witness presented for recognition cannot recognize or perceive him or her. If the personal data of a witness has been ordered to be kept private, this must also be ensured at the time of presentation.

§ 213. (1) The rules of the inspection shall apply *mutatis mutandis* to the demonstration experiment and the presentation.

(2) The court and the prosecutor's office may also use the investigating authority to conduct an inspection, an attempt to prove evidence and a presentation for recognition.

(3) The accused, witness, victim and other persons, in particular those who have or possess the object of the inspection, shall submit to the inspection, the