The Rule of Law Messages of the Anglo-Saxon Identification Procedures in Criminal Cases

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Abstract. The study shows the most frequent causes of justizmord (miscarriage of justice) cases in Hungary and in the USA. The reader can see mistakes of identity parade (line-up, recognition) method, which can result in a tragic outcome. The author analyses the sources of criminal tactical and criminal technical major errors through a few real Hungarian criminal cases. He has researched legal and tactical rules of American, Canadian and British identity process. Lastly, the writer suggests modification of legal rules (‘de lege ferenda’) for lawmakers and a few preventive methods, tactics for law enforcers (police officers, custom officers, detectives), and criminalists as well.

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Introduction

Each country’s (continental and common law) criminal justice system strives to avoid the worst possible outcome — wrongful convictions, in other words injustice (justizmord). Regrettably, criminal justice systems do not always succeed in this regard. To support this statement, examples from Hungary can be mentioned.

In 1957, in a Hungarian town called Martfű, a sexually motivated homicide was committed, for which the man called János K. was sentenced to death, which as an act of grace was later converted to a life sentence. After serving 11 years of his punishment, it was proven that the crime had in fact been committed by Péter K., brought to justice in new proceedings, who was subsequently sentenced to death and executed in 1968.

Also in Hungary, in 1984, János M., a resident of Szolnok County, was charged by the prosecution with murdering a young girl. In the legally non-binding decision he was sentenced to death, however, in 1986, he was acquitted of all the charges in a long-lasting criminal procedure, which took place in front of several courts.

In common-law legal system countries there is jury, the continental (civic) legal system (e.g., Hungary) does not provide for (any) jury.
Dénes P., a resident of Heves County, Hungary, was sentenced to 6 years in prison in 1995 for violence causing death and attempted robbery. He had spent 26 months in custody and confinement when it turned out that the crime against the victim — an old lady was committed by another person, who was subsequently held accountable.

Ede K. was non-appealably sentenced to life imprisonment for a robbery of a bank in the city of Mórs, Hungary on the 9th of May 2002, in which 8 people were murdered. Several years later, in 2007, it turned out that the crime had been committed by two other people.

What are the reasons (causes) for such misconceptions (in Hungary)?

I am not keeping it secret and therefore in this study I present the (error) answer line so that I can then suggest some kind of ‘antidote’, ‘counter-ammunition’ (prevention tactics) for police officers, prosecutors, defence counsels, and judges.

1) There is a lack of careful study of the case data, deciding whether recognition is needed and which type of procedure should be used (e.g., situational or non-situational, using original objects or media data storage);

2) Failure to examine the witness (victim) or, less frequently, the suspect in advance and, in particular, to examine the circumstances of the perception (time, season, distance, duration, other movements and activities, emotional effects, etc.);

3) There is a lack of clarification as to what characteristics the target person or target object has and based on what the identification by the recognizing person would be made;

4) It is not clear whether the interviewee is willing to cooperate or whether there is an obstacle to the recognition, whether there is an exclusionary circumstance that would fundamentally call into question its use as evidence (there should be no excluded evidence);

5) Failure to check the witness’s perceptivity (sensory or other disabilities), e.g., examination experiment. (In the case of János M., cited above, one of the recognizing witnesses who made different testimonies had only been subjected to an ex post facto examination to prove that he cannot have seen the accused’s face in the circumstances and visibility at the time when the crime was committed, showing that not even his gender could be recognised with certainty);

6) The personal and material conditions of the recognition are not planned in advance (carefully) (e.g., the presence of possible official witnesses, witness’s lawyer, defence counsel, interested parties, the location, technical recording possibilities);

7) Identity parade for situational recognition is not performed under the same perceptual conditions;

8) Those present are allowed (not stopped) to disturb the execution of the identification process;

9) Putting aside the witness’s (victim’s) safety/interests (protection, freedom from conflict) so that the person to be recognised will not see the recogniser (e.g. through a one-way mirror, so-called one-way viewing);

10) Too many persons to be recognised, objects, documents, sounds, media, animals, plants, flavours, odours, (e.g., more than five);
11) A corpse or part of a corpse is shown in plural, against the recommendation to use singular elements;
12) The recognising witness has already been presented in advance with a single photograph (later one of them in the line-up) of the person to be ‘recognised’;
13) The potential suspect (or already the accused) stands out, differs significantly from the other members of the line-up in clothing, hairstyle, hair colour, height, coat (facial hair, etc.), age, physique;
14) Demonstration for situational recognition is not performed under the same perceptual conditions (in the case of János M. there were not enough distance and light conditions);
15) In the case of several recognising witnesses, they were not separated before and during the line-up;
16) There are not enough people (or objects, animals, plants, photos) to be selected from;
17) If a photo is presented for recognition, only a picture of the person to be identified is presented (no more are shown); or it is too large, substantially different from the other photos;
or the photograph of the person adjusted to the investigative (investigators) version is shown more slowly, for a longer time;
18) The members of the group selected for recognition differ significantly in their characteristics, (too mixed according to the ‘picture’, height, physique, age, etc.);
19) The member of the authority uses suggestion, influence, incorrect instruction towards the recognizing witness, suggests the person to be selected (in a firmer way: makes a confirmatory, praiseworthy remark);
20) There is a recognizable acquaintance among the people in the line-up, which is not checked in advance;
21) Identity parades are performed with undue delay (witnesses’ memories fade);
22) A so-called blind trial is not performed, in which only persons above all suspicion stand in a line-up. This can be used to filter out a pompous person, who wants to make a choice at all costs, and because of that becomes incredible;
23) Recognition is performed in the context of confrontation;
24) Incorrect, incomplete, faulty record or video recording of the conduct and statements of the recognisers;
25) Uncertain selection is assessed as effective, definite recognition (consistency) in the records;
26) Percentage similarity is determined in the report (e.g. the perpetrator was recognised by the witness with ‘the certainty of 80%’). From my standpoint, there is either identification or there is not, it is meaningless, at the same time dangerous, to talk about similarity or similarity percentages.
27) I would like to emphasize in particular that in the last thirty years I have not even accidentally seen an official warning (‘instruction’) of a recognizing witness in a criminal file: you do not necessarily have to choose between the persons in question (objects, sounds, images, recordings) and the perpetrator (the object to be recognised) may not be present, and it is not a duty of choice.
These examples and causes were highlighted in the introduction to make it clear that the previously mentioned phenomenon still exists these days and is a real threat in Hungary as well. For this reason, it is of immense importance to work out preventive measures and to bring to light the cause of these, frequently fatal, irregularities.

Research (and actual cases) in the world and in Hungary as well have brought to light the accentuated importance of lineup procedures with regards to justizmord. This is the reason why I believe it is important to examine the recognition methodology introduced by the Anglo-Saxon countries in their toolset of modern criminalistics, in light of the recommendations on its implementation. Based on these, at the end of this article, I show the potential opportunities for improvement from a legal and criminalistic perspective, the lessons learned from the models and the conclusions, which contribute to an efficient and fair procedure.

The United States of America (USA)

The USA was not placed at the beginning of the essay by accident: the study on wrongful convictions and the results of the innocent project show that the lineup method is at the top of the list of causes leading to justizmord.

I will highlight three studies of the many, which all reach similar conclusions. As a result of the first research, the following were mentioned as direct causes:

2 a) false line-ups, as the most frequent cases,
   b) mistake made by police during investigation, (for example: identity checking, inspection errors, influencing, contamination of material residue/cross- or carry-over-contamination,
   c) infringement of the law by the police and investigators,
   d) errors of the prosecution (for example: failure to exclude evidence),
   e) expert opinion errors (unfounded, professionally mistaken),
   f) erroneous testimonies and reports of other offenders, prison agents, informants,
   g) mistaken, weak defence counsel activity,
   h) false confession,
   i) false circumstantial evidence.

The second study processed 205 specific cases, with the following causes of error:

3 a) misidentification by a witness 52,3%
   b) false testimony 11%
   c) negligence of officials 9,9%
   d) forced confession 8,4%
   e) framing 4,2%
   f) false testimony by an official-police officer 2,6%


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Lastly, the third study reviewed 86 cases and named the following causative factors of miscarriages of justice:4

- a) misidentification by a witness 71%
- b) errors in forensic science tests 63%
- c) police errors 44%
- d) prosecution errors 28%
- e) false/errorneous expert opinions 27%
- f) dishonest informers 19%
- g) incompetent defense counsels 19%
- h) false witness testimony 17%
- i) false confession 17%

In light of the above mentioned three studies and the research behind them, it is clear that my choice of topic is not a coincidence. I have been consciously researching the rules and methodology of identification for a decade, because it is obvious that there is often an insidiously hidden misidentification behind the most serious legal errors and wrongful convictions. This has been noticed by the Innocence Project staff and some theoretical researchers, thus legal, criminological and psychological recommendations have been (and are being) formulated at the federal level, which have been adopted by most of the states, or are in the process of being adopted (as rules, regulations). I will highlight a few noteworthy recommendations here:

- a) use of blank tests;
- b) allowing members of the lineup to introduce themselves;
- c) use of video and audio recording techniques in both pre-trial interrogations and identification activities;
- d) forensic training of investigators, prosecutors, judges;
- e) the selection of line-up should be done with great care in a ‘fair’ way, meaning that there should not be fundamental difference between the (potential) suspect and the members (gender, race, hair, clothing, physique, facial hair);
- f) the legal representative (counsel) of the (potential) suspect preferably should also be present at the lineup;
- g) not only simultaneous (in which people and objects are present at the same time), but also sequential, in other words, a one-by-one presentation is also allowed;
- h) a ‘blank’ wall of people (culprit-absent line-up), who are above all suspicion, can be applied to test the credibility of the witness;
- i) a blind line-up is used to prevent official bias, in which the person who conducts the lineup is unfamiliar with the case, of which fact the recogniser must also be informed;
- j) a recommendation issued by a working group of the Department of Justice (DJTWG) recommends a line-up of minimum five people when the people are actually present at the line-up;5

k) authorities shall follow the ‘one line — one suspect’ principle, i.e., only one potential suspect can be in the line;
l) it must be communicated to the recogniser that the perpetrator may not even be present in the line and will not be given feedback on whether their choice was ‘correct’ — if they make a choice at all;
m) it must also be communicated to the recogniser that the investigation will continue even if they do not choose anyone, thus they do not have to choose someone;
n) in case of photographic identification, the recogniser should also be told that the perpetrator’s appearance (hair color, length, shape, facial hair, skin) may have changed over time and may look slightly different in the photographs;
o) the size of the presented photographs should be the same and the order in which they are presented should be random (and preferably the suspect’s photograph should not be the first one presented to the recogniser);
p) especially in the case of child witnesses, the show-up method is allowed, in which case they are shown the quickly brought in potential suspect at the scene of the crime or at the police station — without involving other people like in a lineup;
q) in court proceedings it is practical to apply a two-step test to check the reliability of the identification: firstly, to check whether the identification carried out can be taken into account as evidence and, secondly, whether the method used could have led to a misidentification.

United Kingdom (UK)

The UK is the second Anglo-Saxon country to be presented, as according to my research the Scotland Yard’s inspectors were the first to use the procedure of identification as a modern forensic method. At the end of the 19th century, it was considered that putting a (potential) suspect in a line-up among eight people of similar appearance, age and size to each other, but who were innocent according to the best knowledge of the authorities, and then asking the witness to choose the perpetrator, was much more probative in the eyes of the judge than just putting the suspect in front of the witness and asking him/her whether or not he/she recognised the suspect. The method was also adequate for assessing the credibility of the witness, because, if the recogniser chose a person who was above suspicion, he/she would lose credibility and question the rest of his/her testimony, since his/her memory was not reliable.

The Police and Criminal Evidence Act of 1984 (PACE) and within it the Code of Practice for the Identification of Persons by Police Officers (Code D) set out requirements to guarantee a due process. I will present a series of the ones that could be instructive:

a) One witness can take part in a photo identification during which the authorities are obliged to show 12 photos.
b) The victim or witness should be made aware that the perpetrator may not be in any of the pictures.
c) If the witness clearly selects a person from the pictures, claims that that person is the perpetrator and there are no other circumstances to suggest that
the selected person can be excluded as a suspect, there is no need to call more witnesses at this stage of the procedure.

d) This can be followed by video or face-to-face identification but only if the identity of the offender is not fully established.

e) After the presentation, all further activities must be carried out in the presence of the suspect and his/her legal representative or guardian.

f) When all the witnesses have left, the suspect must be asked: ‘Do you have anything to add to what happened?’

g) In general, a video recording of the identification procedure should be made and made available to the suspect or his/her legal representative at any time upon request.

Canada

From Canada, which also has a common-law legal system based on precedents, I also explore line-up recommendations that are worth thinking about:6

a) The detective who is present with the identifier does not need to know anything about the case and should not know whether the suspect is among the people in the line.

b) The investigator must also tell the witness that he/she does not know whether the suspect is in the line, and must not say if the suspect is in fact in the line, or which of the individuals shown is the suspect.

c) Everything that happens in the witness room should be audio-recorded, or even better — video-recorded. The identifier should not be influenced in any way.

d) All information declared by the recogniser during the identification must be recorded and then signed by him/her.

e) Before and after the identification, the witness should be escorted into and escorted out of the police station so that he/she cannot be influenced by anyone, especially by the investigators involved in the case.

f) The appearance (external physique, clothing, facial hair) of the people gathered for the line-up should correspond as closely as possible (at least should be strongly similar) to the description given by the witness/witnesses at the time of the incident.

g) At the end of the line-up process, once a person has been identified, the witness should be asked if he/she is sure that the correct person has been identified. Both the question and the answer should be recorded word-for-word and then signed by the witness.

h) At least 10 people must be assembled for the presentation. The larger the number of people collected, the lower the risk of misidentification.

i) At least the portraits of 10 people must be included for photographic identification.

j) The appearance of the people photographed should match the description provided by the witnesses as closely as possible. If this is not possible, they should resemble the suspect as closely as possible.

k) Everything should be video- or audio-recorded from the moment the executive investigator meets the witness until the end of the process.

l) The identification must be done by a detective who does not know who the suspect is and is not involved in the investigation.

m) In case of a photographic identification, the identification officer must tell the identifier that he/she does not know who the suspect is, and whether or not the suspect’s photograph is included in the series of photographs provided.

n) Before showing the images to the recogniser, the investigator should inform him/her that it is as important to exonerate an innocent person as to identify the suspect.

o) The photos must be shown to each witness separately (one after another and not at the same time).

p) In addition to the audio and video recordings, a form should be filled in about the event, findings, statements, observations, and signed by the witness and the person conducting the procedure.

q) Police officers should not talk to witnesses about their identification after the presentation — in order to avoid any possible doubt or fear. Under no circumstances should the identification officer (or any other investigator) tell the witness that he/she was mistaken.

r) Because of the importance of the evidence provided by eyewitnesses and the risk of the evidence being tampered with, there is also a proposal that witnesses should be interviewed and the identification procedure should be conducted by police officers other than those investigating the crime.

**Conclusions, suggestions, recommendations**

Before I state the conclusions and my suggestions for improvement arising from the above, I would like to remind the reader of the essential rules of identification of the Act of Criminal Procedure (2017. XC.) (hereinafter referred to as the Act). These are specifically:

§ 210(1) The court, the prosecution or the investigating authority shall order and hold a presentation for identification if it is necessary for the purpose of identifying a person or an object. The accused or a witness shall be presented with at least three persons or objects for identification. The accused person or witness may, if no other means are available, be presented with a visual, audio or visual and audio recording of the person or object for identification.

(2) Before the presentation for identification, the person from whom the identification is expected shall be questioned in detail about the circumstances in which he or she observed the person or object in question, his or her relationship to it, and any characteristics he or she knows about.

(3) When people are presented, people who are independent of the case and not known to the person conducting the identification and who share the same Internal Security, January–June
characteristics as the person in question in the main features indicated by the person making the identification, in particular the same sex, age, body type, color, grooming and clothing, shall be grouped together with the person in question. Where objects are presented, the object in question shall be placed among similar objects. The position of the person or object in question within the group must not be significantly different from the others and must not be conspicuous.

(4) The presentation shall be made separately, in the absence of each other, in cases where several people are identifying.

(5) If the protection of the witness so requires, the presentation for identification shall be carried out in such a way that the witness cannot be recognised or perceived by the person presented for identification. If the personal data of the witness are ordered to be kept confidential, this shall also be ensured.

§ 213(1) The rules of inspection shall be applied mutatis mutandis to the attempt to take evidence and to the presentation for identification.

(2) The court and the public prosecutor's office may also have recourse to the investigating authority for the conduct of the inspection, the attempt to take evidence or the presentation for identification.

(3) The accused, the witness, the victim and any other person, in particular any person in possession or possession of the object of the search, shall submit to the search, the attempt to produce evidence and the presentation for identification, and shall make the object in his/her possession available for the purpose of the search, the attempt to produce evidence or the presentation for identification. The accused may be compelled to comply with these obligations, the victim, the witness and other persons may be compelled to comply with them, or may be fined.

(4) A video and audio recording shall be made of the inspection, the attempt to take evidence and the presentation for identification, if possible.

A) Despite the fact that we read the most detailed (Act of Criminal Procedure) statutory regulation so far on the specifically named identification, it does not say that it is necessary to keep the identification in the original perceptual circumstances.

B) Also as a 'de lege ferenda' suggestion, I would suggest that it would also be useful to stipulate in the law that the person who makes the identification must advise (inform) the recognizer that:

a) it is not certain that the perpetrator is among the people to be recognised;
b) he/she is not obliged to choose (to choose at all costs);
c) the investigation will proceed even if no one is selected;
d) he/she will not get feedback on whether he/she made the 'right' choice — if one is made at all;
e) the warnings in point (a) to (e) should also apply to the identification of objects or photographs, and that the offender's appearance (the color, length, shape of his/her hair, facial hair, skin) may change over time or look slightly different in the photographs.

C) It is my understanding that both the words ‘to identify’ and ‘presentation’ (individually and together) encourage the recogniser, most often the crime victim witness, who is often willing to comply with the authorities, to choose from among the people (objects, sounds, etc.) presented, to make sure he/she chooses, to make sure he/she recognises someone. And the compulsion to comply with can have the erroneous consequence that the recogniser chooses when he/she is not sure, when

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he/she only perceives a similarity, or simply concludes from external signs that he/she thinks that he/she recognises the real perpetrator. However, his/her mistake can lead to justizmord, since it is difficult to disprove this selection in theory and almost impossible in practice if the identified person has no alibi. It would therefore be more appropriate to speak of an ‘attempt at identification’, that is, an attempt to identify rather than a presentation.

D) In the field of criminal tactics, it would be worth considering the so-called ecological detection method, which is a novelty. In essence, it differs from the traditional procedure in that the witness is led — more or less randomly — alongside the suspect, who is in a natural environment. In this case, the potential target is asked to be in a place where several other people are also present, e.g., in a shop, on a busy street. The witness is accompanied with the intention to try to identify the suspect and pick out the perpetrator he/she saw earlier. The fact that the people to be compared are not purposively selected is usually compensated for by the large number and diversity of people present. However, it is also possible that passers-by are ‘enriched’ by the authority with people fitted for comparison. The advantage of this method is that it is more relaxed than the classical presentation for identification, minimizing the risk of the target person standing out from the group because of his/her inner tension or the unwitting attention of the persons assigned to the comparison.7

E) The identification officer should aim to minimize communication during the presentation. Instructions should be brief, clear and precise.

F) It is advisable to provide the (potential) suspect’s legal representative (defense counsel) with a description of the witness or victim before the hearing. This gives him/her the opportunity to comment on the blatantly different, suggestive attitude and, if necessary, to complain.

G) It may be of tactical importance to accurately mention and correctly record how the recognising witness expresses who among the several persons he/she recognised as the person he/she perceived in connection with the crime. Whether he points out, states it openly definitely, even repeatedly or, on the contrary, is vague and indefinite.

H) In case of uncertain or doubtful identification of a person, repetition based on a different grouping of the same person is not appropriate, and the Anglo-Saxon ‘blank’ figure is preferable. In this case, the (potential) suspect is not even included in the group (only individuals above suspicion), and the witness is then asked to identify him/her.8

I) An important criterion to be checked beforehand is that none of the people in the line should be an acquaintance of the person who is identifying (most often the victim).

J) Immediately after the presentation, the person making the identification (often the witness) should be given the opportunity to explain the identification in their own words.


K) There is no place for any percentage identification, especially when evaluating an attempt at identification. There can be no identification even if a percentage of similarity is indicated by the recogniser himself/herself.

L) Especially if the selection is based (in part) on functional characteristics (e.g., walking, running, speech, voice), it is advisable to use more modern technical tools than photography (e.g., video, digital camera).

Summary

It is to be hoped that, under the rule of law, the proposals for improvement put forward by legal theory will have a meaningful influence and impact on legislation and the application of the law. Even if not immediately, but years later, we can achieve that the attempt to identify as an Achilles heel will be in place, both in law and in law enforcement, and will not give rise to erroneous court rulings (‘legal death’) of misled judgments, as the Anglo-Saxons put it: miscarriages of justice.

References

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Streszczenie. W artykule przedstawiono najczęstsze przyczyny pomyłek sądowych na Węgrzech i w USA. Autor prezentuje błędy w metodzie identyfikacji (ustawienie, rozpoznanie), które mogą prowadzić do tragicznych skutków. Autor analizuje przyczyny kryminalnych błędów taktycznych i technicznych na podstawie kilku rzeczywistych węgierskich spraw karnych. Analizie poddano prawne i taktyczne zasady amerykańskiego, kanadyjskiego i brytyjskiego procesu identyfikacji. Ostatecznie autor sugeruje modyfikację zasad prawnych (‘de lege ferenda’) dla legislatorów oraz proponuje wprowadzenie kilku metod taktycznych i prewencyjnych dla funkcjonariuszy organów ścigania (policjantów, celników, detektywów) oraz ekspertów kryminalistyki.

Resumen. El estudio revela las causas más comunes de los errores judiciales en Hungría y Estados Unidos. El lector puede ver que los errores en el método de la rueda de reconocimiento (composición, reconocimiento) son los principales factores de resultados indeseables. El autor analiza las causas de los errores penales tácticos y técnicos utilizando el ejemplo de varios casos penales húngaros. En este sentido, examina los principios jurídicos y tácticos del proceso de identificación estadounidense, canadiense y británica. Por último, el autor sugiere la modificación de los principios jurídicos (‘de lege ferenda’) para los legisladores y varios métodos preventivos, tácticos para las fuerzas de seguridad (policías, aduaneros, detectives), así como para los científicos forenses.

Zusammenfassung. Die vorliegende Studie stellt die häufigsten Ursachen von Justizirrtümern in Ungarn und in den USA dar. Der Leser kann sich mit den Fehlern in der Methode der Identifizierung (Einstellung, Erkennung) bekannt machen, die zu einem tragischen Ergebnis führen können. Der Autor analysiert die Ursachen für kriminelle und technische Taktikfehler anhand einiger tatsächlicher ungarischer Kriminalfälle. Er untersucht die rechtlichen und taktischen Grundsätze des amerikanischen, kanadischen und britischen Identifizierungsverfahrens. Schließlich schlägt der Autor die Modifikation der Rechtsgrundsätze (‘de lege ferenda’) für Gesetzgeber und einige präventive Methoden und Taktiken für Strafverfolgungsbeamte (Polizei-, Zoll- und Detektivbeamte) sowie forensische Wissenschaftler vor.

Резюме. В статье представлены наиболее распространенные причины судебных ошибок в Венгрии и США. Автор рассматривает ошибки по методике идентификации (способ предъявления, опознание), которые могут привести к заведомо негативным последствиям. На примере нескольких венгерских уголовных дел автор анализирует причины тактико-технических ошибок криминалистов. Анализируются правовые и тактические принципы американского, канадского и британского процесса опознания. В заключение автор предлагает изменить правовые принципы (‘de lege ferenda’) для законодателей и hтритулет ввести ряд тактических и профилактических методов для сотрудников правоохранительных органов (пolicейских, таможенников, детективов) и экспертов-криминалистов.