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ON THE BENEFITS TO POLISH LAW OF A COMPARATIVE ANALYSIS OF IDENTIFICATION PARADES

Abstract

The author presents a comparative analysis of the status of the identification parade, an act belonging both to criminalistics and the law, vis-à-vis some deliberations on the interdependence of criminalistics and law. The identity parade is at the core of criminalistics as one of the forms of the individualisation of people and things on the basis of memory traces; on the other hand, it is (sometimes) regulated precisely in the Codes of Criminal Procedure as a procedural act. Therefore, the comparative analysis is fully justifiable. The identification parades in six different countries, representing the main legal systems (civil law v. common law) are analysed, namely in Poland, Russia, Portugal, the United States, New Zealand, and England and Wales. The benefits of the internalisation of some foreign achievements to the indigenous law are also explicated.

Keywords

criminalistics – criminal procedure – interdependence – identification parade – comparative analysis

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Forensic science, frequently called “criminalistics” in civil law countries, is regarded as a bridging discipline, and supporting the law. P. L. Kirk, a professor of criminalistics at the University of California, Berkeley, defined criminalistics briefly as “the science of individualisation”¹. In 1963 the California Association of Criminalists adopted the following definition: “Criminalistics is that profession and scientific discipline directed to the recognition, identification, individualization, and evaluation of physical evidence by application of the natural sciences to law–science matters”².

K. Inman and N. Rudin, while placing criminalistics within the confines of physical evidence examination, describe it as follows “Divisible matter and transfer are the two fundamental principles upon which the forensic analysis of physical evidence is based. Identification, classification or individualization, association, and reconstruction form the infrastructure for the practice of forensic science”³.

T. Hanausek, a professor of criminalistics at the Jagiellonian University in Kraków, viewed criminalistics in much broader terms as “a science of tactical principles and ways as well as technical methods and means of recognising and detecting negative social phenomena – specified by the law – and in particular criminal events and their perpetrators. Criminalistics aims at proving the existence thereof or the absence of correlation between the perpetrators and the events; it also refers to preventing crime and other legally relevant phenomena that are adverse to social development. Thus science should also deal with strategic methods of predicting, identifying and combating those events, especially through precluding their emergence and growth”⁴.

¹ P. L. Kirk, *The Ontogeny of Criminalistics*, *Journal of Criminal Law, Criminology & Police Science* 1963, vol. 54, p. 236; idem, *Criminalistics*, *Science* 1963, vol. 140, pp. 367–370.

² H. Tuthill, *Individualization: Principles and Procedures in Criminalistics*, Salem: Lightning Powder Company 1994, p. 6.

³ K. Inman, N. Rudin, *The Origin of Evidence*, *Forensic Science International* 2002, issue 1, p. 16.

⁴ T. Hanausek, *Współczesna koncepcja kryminalistyki [Contemporary Concept of Criminalistics]*, *Krakowskie Studia Prawnicze [Krakow’s Legal Studies]* 1993–1994, issue XXVI–XXVII, p. 78.

J. Konieczny⁵ concludes his deliberations on the nature of criminalistics in the following way: “Criminalistics describes, explains, and foresees the coming into existence of human behavior traces, important for law application, for the purpose of the human identification”.

Forensic science as a universal science, comprising, among others, natural sciences such as physics, forensic biology or forensic chemistry, would seemingly not profit from comparative legal studies at all. However, as S. Waltoś expressed it: “In contrary to other penal sciences, contemporary criminalistics in Poland has been increasingly strongly related to the theory of criminal procedure”⁶. S. Breyer, an Associate Justice of the Supreme Court of the United States, formulated a statement that “scientific issues permeate the law”⁷.

In spite of the above mentioned views it is rather difficult to find the rationale for seeking criminalistic inspirations in a foreign law. The methodology of expert witness opinion lies in the province of an expert, not the law, the court, or a public prosecutor⁸. For instance, crime scene investigation – the root of evidence – is regulated in a similar manner in various countries, even though there are more detailed rules governing this action, especially in the codes of the Iberian and former communist countries⁹.

However, there is one very interesting and relatively frequent act having, on the one hand, a typically criminalistic nature as a form of human individualization on the basis of (memory) traces, and on the other hand, being a forensic procedural activity regulated in law. This is

⁵ J. Konieczny, *Metodologiczna charakterystyka kryminalistyki* [Methodological Characteristics of Criminalistics], Katowice: Wydawnictwo Uniwersytetu Śląskiego 1984, p. 43.

⁶ S. Waltoś, *O związku prawa karnego procesowego z kryminalistyką* [On the Relation Between Criminal Procedure and Criminalistics], [in:] J. Blachut, M. Szewczyk, J. Wójcikiewicz (eds), *Nauka wobec przestępczości. Księga ku czci Profesora Tadeusza Hanauska* [Science vis-a-vis Criminality. Professor's Tadeusz Hanausek Liber Amicorum], Kraków: Wydawnictwo Instytutu Ekspertyz Sądowych 2001, p. 177.

⁷ S. Breyer, *The Interdependence of Science and Law*, Science 1998, vol. 280, pp. 537-538. See also: J. Wójcikiewicz, “Is Crayfish a Fish”? *The Interdependence of Criminalistics and Law*, *Archiwum Iuridicum Cracoviense* [Krakow's Law Review] 2013 (in press).

⁸ See for example: J. Wójcikiewicz, *Glosa do postanowienia Sądu Apelacyjnego w Katowicach z 21.06.2012, II AKz 386/12* [Comment to the Judgment of the Court of Appeal in Katowice of 21.06.2012, II AKz 386/12], *Państwo i Prawo* [State and Law] 2013 (in press).

⁹ V. Kwiatkowska-Wójcikiewicz, *Ogłędziny miejsca. Teoria i praktyka* [Crime Scene Investigation. Theory and Practice], Toruń: TNOiK Dom Organizatora 2011, pp. 237-251.

an identification parade (lineup)¹⁰. It seems that in some foreign codes the identification parade is regulated better than in the Polish law.

Before we start our comparative analysis which could prove useful for the Polish criminal law and police practice, let us look into the Polish rules concerning the identification parade (*okazanie*)¹¹. It is governed by Article 173 of the Polish Code of Criminal Procedure (C.C.P.) of 1997. It is worth mentioning that the previous Code of 1969 practically did not regulate the identity parade, only enumerating it as one of the duties of the suspect (the accused). The current Code treats lineups much better, somewhat even in a casuistic way. Article 173 § 3 C.C.P. determines a minimum number of persons participating in a parade – four, i.e. a suspect and at least three fillers. However, this too minimal minimum turned out to be in police practice a maximum since a police record form includes only three spaces for the fillers! A prosecutorial form is more flexible but public prosecutors hardly ever conduct identity parades in Polish criminal proceedings.

The other important rule (Article 173 § 1 *in fine*) orders the avoidance of any suggestion. Article 173 § 2 C.C.P. allows such a mode of a lineup that an interrogated person does not have direct contact with a person being recognized in order to protect the former. Article 173 § 4 C.C.P. refers to the Minister of Justice ordinance of June 2, 2003¹² on the technical aspects of identity parade, which specifies in sixteen short sections that:

- one should carry out as many parades as there are interrogated persons (§ 4.1),
- the fillers should be of similar age and be similar to the recognized person (§ 5.1),

¹⁰ The author, after 30 years, returns with the current article to the comparative analysis of the identification parade issues; cf. J. Wójcikiewicz, *Okazanie. Studium porównawcze z pogranicza kryminalistyki i procesu karnego* [Identification Parade. A Comparative Study from the Borderline Between Criminalistics and Criminal Procedure], *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* [Jagiellonian University Scientific Review] 1985, no. 117.

¹¹ Cf. J. Wójcikiewicz, *Temida nad mikroskopem: judykatura wobec dowodu naukowego 1993-2008* [Forensics and Justice. Judicature on Scientific Evidence 1993-2008], Toruń: TNOiK Dom Organizatora 2009, pp. 201-239.

¹² Dz. U. [Polish Journal of Laws] 2003, No. 104, item 981.

- police officers and people familiar to the interrogated person cannot be fillers (§ 5.1.),
- one should carry out as many parades as there are recognized persons (§ 7),
- a recognized person can choose a position in a parade (§ 8),
- if video clips are presented, they also should be in a group, if possible (§ 12.4).

There are also the Guidelines No. 3 by the Commander of the Polish Police of 15 February 2012¹³ on carrying investigative actions by police officers, where sections 84–86 regulate the protocol of identity parades.

Our comparative analysis will be based on five other countries, representing two main systems of law: civil law – Russia and Portugal as well as common law – New Zealand, the United States (North Carolina), and England and Wales. It seems that the analysis of the prospective differences within each system of law could also prove fruitful and make it possible to draw interesting conclusions.

In the Russian Code of Criminal Procedure¹⁴ the identification parade (*предъявление для опознания*) is regulated by Article 193. In nine sections it also deals with the presentation of things, and a corpse. Similarly to the Polish Code a minimum number of parade participants is also determined – only three, i.e. two fillers (sec. 4). According to some authors the maximum number ought not to exceed nine¹⁵. The fillers should have an appearance similar to the suspect who is allowed to take a chosen position in the parade. Article 193 sec. 8 is the legal basis for a parade in which both persons – the recognized and the recognizing – are separated for security reasons. Sec. 3 contains a very important rule, namely, the ban

¹³ Dz. Urz. Komendy Głównej Policji [Official Journal of the Polish Main Police Headquarters] 2012, item 7.

¹⁴ Уголовно-процессуальный кодекс Российской Федерации (УПК РФ) [Code of Criminal Procedure of the Russian Federation] from 2001, see note 15.

¹⁵ О. Я. Баев, Д. А. Солодов, *Производство следственных действий. Криминалистический анализ УПК России* [The Execution of Investigative Acts. A Criminalistic Commentary on the Russian Code of Criminal Procedure], Москва: Издательство Зксмо 2009, p. 121.

on the repetition of an identity parade presenting the same person (thing) to the same recognizing person, concerning the same features¹⁶.

This is a delicate question. The identification is a one-off kind of procedure (in a forensic and legal sense) and in order to be valid and reliable it will be conducted only once. It does not imply, however, that an absolute proscription of repeated identification should be introduced, as it would be an erroneous decision in cases in which the second procedure was more advanced. Nevertheless, arguing that repeated identifications ought to be allowed because each identification procedure constitutes a separate action in evidence-related proceedings (picture v. live presentation) does not appear to be reasonable¹⁷. It is true that no provision exists to prohibit this¹⁸, but the diagnostic value of the second procedure is always lower. It is not the first time that a badly constructed provision (Article 173 of the C.C.P.) calls for an interpretative creativity instead of its modification¹⁹.

Article 289 authorizes identity parades before the court, not in the form of dock identification, but it is, rightly, strongly criticized in the literature²⁰.

There is a Russian speciality concerning identification parades and some other unrepeatable acts: the participation of at least two witnesses to an act, to keep an eye on police officers and public prosecutors (Article 170). This rule has some exceptions, first of all logistic difficulties and the risk to life and health of participants. Anyway, it seems rather unrealistic for many reasons, and no wonder that sometimes the names and addresses of the non-existent witnesses are written down into the records²¹.

The Portuguese Code of Criminal Procedure²² regulates an identity parade (*reconhecimento*) in Article 147 (recognition of persons), Article 148

¹⁶ Ibid., pp. 118-119.

¹⁷ D. Karczmarska, *Przyczynek do prawnoprocesowej systematyki okazań* [Contribution to the Legal Classification of the Identity Parades], *Prokuratura i Prawo* [Public Prosecution and Law] 1999, issue 7-8, pp. 65-72.

¹⁸ The Polish judiciary concerning the question is ambivalent. See Wójcikiewicz, *supra* note 11, p. 218.

¹⁹ Ibid., p. 233.

²⁰ Баев, Солодов, *supra* note 15, p. 129.

²¹ Ibid., p. 38.

²² Código de Processo Penal [Code of Criminal Procedure] from 2007. See also: A. Gama, *Reforma do Código de Processo Penal: Prova testemunhal, declarações para memória futura*

(recognition of things), and Article 149 (multiple recognitions). It sets a very low threshold of the fillers' number – at least two (Article 147 sec. 2). Sec. 3 gives a possibility for separating a suspect from the recognizing witness to protect the latter. It is also possible to take photographs of the fillers with their consent and include them into the records (sec. 4). The Code allows also putting photographs, films, and recordings into the records, with the consent of the persons involved.

Article 149 deals with parades when there are more witnesses or more recognized people or things, urging separate identifications in both situations.

However, the most important rule is stipulated in Article 147 sec. 7, which says that an identity parade that does not fulfill the requirements enumerated in Article 147 cannot be regarded as evidence!

Let us move now to the *common law* world. In 2006 the Evidence Act was passed in New Zealand²³. Its subpart 6 entitled "Identification evidence" deals with visual identification evidence (sec. 45) and voice identification evidence (sec. 46). As the former takes two pages, the latter is rather disappointing stating only that voice identification evidence offered by the prosecution is inadmissible unless the prosecution proves on the balance of probabilities that the circumstances in which the identification was made have produced a reliable identification.

As concerns visual identification, in sec. 45(3)(b) we can find seven practical rules governing the so-called formal procedure. Among them there is a rule that the person to be identified is compared to no fewer than seven other persons who are similar in appearance to the person to be identified. The person making the identification is informed that the person to be identified may or may not be among the persons in the lineup. A very important directive on the documentation of the procedure is included in sec. 45(3)(f): that it is the subject of a pictorial record of what the witness

e reconhecimento [A Reform of the Code of Criminal Procedure: Evidence by Testimony, Statements of Future Memory, and Identity Parades], *Revista Portuguesa de Ciência Criminal* [Portuguese Review of Criminal Science] 2009, issue 3, pp. 415–420.

²³ Available at: www.legislation.govt.nz/act/.../2006/.../DLM3936 [last accessed: 9.04.2013]. See also: P. Williams, *Evidence in Criminal Law: Codification and Reform in the Evidence Act 2006*, *Auckland University Law Review* 2007, vol. 13, pp. 236–237; K. Li, *Who Did You See? An Evaluation of the Criminal Justice System's Response to the Danger of Eyewitness Misidentification*, *Auckland University Law Review* 2010, vol. 16, pp. 217–242.

looked at and which is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the judge and the defendant (but not the jury) at the hearing.

In April 2013 the Law Commission issued “The 2013 Review of the Evidence Act 2006, Report 127”²⁴. Despite some suggestions that the formal procedure outlined in sec. 45(3) may be better placed in regulation rather than primary legislation due to its technical nature, the Commission does not recommend such a move²⁵. Among other (few and marginal) recommendations the Commission suggests the replacement of the term “person to be identified” with “suspect”²⁶.

Sec. 126 of the Evidence Act 2006 urges the judge to warn the jury of the special need for caution before finding the defendant guilty if the case depends wholly or substantially on the correctness of visual or voice identifications of the defendant or any other person.

In the United States there are no common legal rules concerning identity parades. Each state and sometimes each police force creates the rules by itself. According to Article 14A § 15A of the North Carolina Code²⁷, the *lineup* is organized by a person who is not participating in the investigation of the criminal offence and is unaware of the fact of which person in the lineup is the suspect. Individuals or photos shall be presented sequentially²⁸ (in a group but one by one) with each individual or photo presented to the witness separately. The lineup shall be composed of at least five fillers who generally resemble the eyewitness’s description of the perpetrator.

Before the lineup, the eyewitness shall be instructed that the perpetrator might or might not be presented in the lineup, its administrator does not know the suspect’s identity, the eyewitness should not feel compelled to make an identification, and it is as important to exclude

²⁴ Available at: www.lawcom.govt.nz/...evidence-act-2006/report [last accessed: 9.04.2013].

²⁵ *Ibid.*, p. 143.

²⁶ *Ibid.*, p. 144.

²⁷ Available at <http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML> [last accessed: 25.07.2011].

²⁸ Cf. for instance G. L. Wells, N. K. Steblay, J. E. Dysart, *A Test of the Simultaneous vs. Sequential Lineup Methods. An Initial Report of the AJS National Eyewitness Identification Field Studies*, Des Moines: American Judicature Society 2011, available at www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf [last accessed: 10.04.2013].

innocent persons as it is to identify the perpetrator. Only one suspect shall be included in the lineup.

As regards the documentation of the identity parade the Code requires that a video record of live identification procedures shall be made unless it is not practical. If a video record is not practical an audio record shall be made instead (in a photo lineup, the photographs should be included into the record).

Failure to comply with any of the requirements of § 15A shall be considered by the court in adjudicating motions as suppressing eyewitness identification. It is symptomatic that the Code imposes on the enumerated bodies the obligation to create educational materials and conduct training programs on how to conduct lineups in compliance with this Article.

It seems that the most sophisticated rules concerning *identity parades* have been elaborated in England and Wales. As for the second half of the twentieth century there was the Home Office Circular on Identification Parades of January 1969²⁹ which comprised only twenty four short sections. Even then it demanded at least eight or more fillers (“if practicable”) and a maximum of two potential suspects in the parade.

The police practice was, however, rather poor, resulting in some miscarriages of justice. In this situation the Home Secretary appointed Lord Devlin to chair a small team to inquire into identification evidence. Their Report³⁰ (April 1976) can be regarded as the starting point of the fundamental reforms on identification parades in England and Wales. The Police and Criminal Evidence Act was issued in 1984. Its sec. 66(b) imposed on the Secretary of State the obligation of issuing, among others, a code of practice in connection with the identification of persons by police officers. Its current version, Code D³¹, has been in force since 7th March, 2011. Rules given on twenty seven pages (sic!) concern various forms

²⁹ R. Brandon, C. Davies, *Wrongful Imprisonment*, London: George Allen & Unwin Ltd. 1973, pp. 268–270.

³⁰ See *inter alia*: G. Williams, *Evidence of Identification: The Devlin Report*, Criminal Law Review 1976, issue 6, pp. 407–422.

³¹ *Police and Criminal Evidence Act. Code D, Code of Practice for the Identification of Persons by Police Officers*, available at <https://www.gov.uk/government/publications/pace-code-d-2011> [last accessed: 2.04.2013].

of eyewitness identification (Part 3 and Annexes A–E), and outperform widely the Polish regulations in the field³².

There are three main modes of eyewitness identification (3.4–3.9):

- video identification, when the witness is shown moving images of a known suspect, together with similar images of others who resemble the suspect;
- identification parade, when the witness sees the suspect in a line of others who resemble the suspect; and
- group identification, when the witness sees the suspect in an informal group of people.

Video identification is preferred by the English legislator (3.14). Moreover, in England, Wales, and Scotland photo line-ups and live identification parades have now been replaced by video line-ups. There are two systems available for the police: Video Identification Parades by Electronic Recording (VIPER) and Profile Matching Identification (PROMAT ID)³³. Video parades, as by definition sequential ones, outperform classical, simultaneous parades by their uniformity, non-suggestiveness and reduction in mistaken identifications with little or no reduction in accurate identifications³⁴. VIPER contains clips of over 14,000 people. A conventional line-up would cost at least £ 800 and could take up to ten weeks to set up, a VIPER parade costs about £ 150 and can be constructed in a few minutes³⁵.

The core rules concerning the video and live parades are the same. An officer, not below the rank of inspector, who is not involved with the investigation (“the investigation officer”) is responsible for the identification procedure. The set of clips as well as a live parade must include the suspect and at least eight other people, who, so far as possible, resemble the suspect in age, general appearance and position in life. Only one suspect shall appear in any set unless there are two suspects of roughly

³² Cf. supra notes 12, 13 and the accompanying text.

³³ C. Havard, A. Memon, *The Mystery Man Can Help Reduce False Identification for Child Witnesses: Evidence from Video Line-ups*, *Applied Cognitive Psychology* 2013, issue 1, p. 52; R. Wilcock, W. Kneller, *A Comparison of Presentation Methods of Video Identification Parades*, *Applied Cognitive Psychology* 2011, issue 6, p. 836.

³⁴ See, for example, supra note 28.

³⁵ Available at http://en.wikipedia.org/wiki/Video_Identification_Parade_Electronic_Recording [last accessed: 2.02.2013].

similar appearance, in which case they may be shown together with at least twelve other people.

Similarly, only one witness may see the set of images or people at a time. In case of clips they should be asked not to make any decision until they have seen the whole set at least twice.

A very important issue from the court's assessment of the line-up point of view is the rule concerning documentation: a video recording (apart from the record) must normally be taken of the identification parade. If that is impracticable, a colour photograph must be taken.

Annex E deals with showing photographs, namely, another accessorial mode of personal identification. The witness shall be shown no fewer than twelve photographs at a time, as far as possible, all of a similar type.

The English Code, contrary to the Russian one, does not include the ban on repetition of identifications of the same suspect to the same witness. However, when a witness attending a video identification, an identification parade, or group identification has previously been shown photographs or computerised or artist's composite or similar likenesses, the suspect and their solicitor must be informed of this fact before the identification procedure takes place.

Unexpectedly, there are strong similarities between Polish and English regulations as far as voice identity parades are concerned. Annex B contains a rule according to which if the witness wishes to hear any identification parade member speak, he/she shall be reminded that the participants in the parade have been chosen on the basis of physical appearance only, nevertheless they may be asked to comply with the witness's request to hear them speak.

Similarly voice recognition circumstances authorize in § 16 the ordinance of the Polish Minister of Justice of 23 February 2005³⁶. Such practices have been, however, strongly condemned by the judicature³⁷ due to their inherent suggestiveness.

³⁶ Dz. U. [Polish Journal of Laws] 2005, No. 33, item 299.

³⁷ Lublin's Court of Appeal, judgment of 12.03.2002, II AKa 39/02, Prokuratura i Prawo – Orzecznictwo [Public Prosecution and Law – Judgments] 2002, issue 3, item 32.

On the other hand, as an example of good practice, in England and Wales, since 2003 the Home Office Circular 057³⁸ has been in operation, suggesting the proper protocol of voice identification parades. Nevertheless, as we can see, voice identification as opposed to visual identification is treated rather contemptuously by all analysed codes and regulations.

Forensic science activities must have some legal frameworks. They are more or less similar in various legal systems as to expert witness opinions (cf. for example Article 193 C.C.P. and Rule 702 of the Federal Rules of Evidence³⁹) or crime scene investigation⁴⁰. It seems, however, that the major differences can be perceived in actions dealing more with humans than things such as an interview, interrogation, a polygraph examination, DNA analysis, forensic hypnosis, and just the identification parade. These differences are derivatives of the law of evidence, the system's sensitivity to human rights, and last but not least, the level of forensic science development. No doubt, the Polish legislator, to the advantage of the Polish criminal proceedings, could learn much from the foreign regulations, and not only in the field of the identification parade.

After World War I it was English police officers who taught their Polish colleagues how to cope with police work. It seems that after a century we could benefit again, but this time from the English rules concerning identification parades.

³⁸ Home Office Circular 057–*Advice on the use of voice identification parades*, available at <https://www.gov.uk/.../advice-on-the-use-of-voice-identification-parades> [last accessed: 3.04.2013]. See also Wójcikiewicz, *supra* note 11, pp. 241–258.

³⁹ Available at <http://www.law.cornell.edu/rules/fre/rules.htm> [last accessed: 3.04.2013].

⁴⁰ Cf. Kwiatkowska–Wójcikiewicz, *supra* note 9, *passim*.

