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Use of Polygraph in Ukraine

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History

In the Soviet Union, scholarly disputes over polygraph were substituted by political ones. The main opponent of polygraph detection in criminal justice was the then prosecutor general of USSR, A. Vyshynskiy who considered them an “unscientific underhandedness of bourgeois proceedings”, a return to the Inquisition, etc.[2] Due to such dominant ideological position in the state, polygraph research was suspended for decades.

When Ukraine gained independent, the polygraph became used increasingly both in law enforcement and in private sector.

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In 1997 Argo-A (an official representative of American Lafayette Instrument Company Inc.) started providing polygraph services, and Alfa-shchyt was set up in 1998.

On 15th October 1998, taking the floor before the representatives of mass media, head of main headquarters of the Ministry of Internal Affairs of Ukraine, general V. Zubchuk disclosed information known to a limited number of journalists. In particular, that the Ministry of Internal Affairs of Ukraine had at its disposal a polygraph detector: "According to my data it [the lie detector] appeared in the Ministry of Internal Affairs in the previous year [i.e. 1997], but they decided not to disclose this information. Apart from the Ministry of Internal Affairs such polygraphs were actively used in Security Service of Ukraine and in some commercial firms having special licenses." [4]

In 1998, a group of employees of the Ministry of Internal Affairs completed a training at the Chief Administration of Internal Affairs of Krasnodar Territory in Russian Federation [18, p. 14]. In 1999, five English-speaking officers (V. Barko, O. Betsa, D. Davydiv, O. Oleksiyiv, and V. Shyshko) from the National Academy of Internal Affairs of Ukraine and Lviv Law Institute of Ministry of Internal Affairs of Ukraine completed education at the Academy of Judicial Psychophysiology in Largo, Florida. The initiator of this step to modernise Ukrainian law-enforcement bodies was colonel I. Rakovskyi, head of Police Association of the Ukrainian Americans (Chicago, US). In 2000, one more Ukrainian (D. Savochkin) completed the training and became the first Ukrainian to become a member of the American Polygraph Association. [23, pp. 5–6].

Since then polygraph has been used increasingly. Employees of Chief Administration of the Ministry of Internal Affairs of Ukraine in the Crimean Autonomous Republic were among the first who started using polygraph detector in practice. Some of them underwent training in the US, and others in Russia. [18, p.14].

In 2001, the minister of internal affairs of Ukraine Y. Smirnov issued the Order No. 743 "On conducting an experiment in using computer polygraph detectors in the course of activity of bodies of Internal Affairs of Ukraine". The polygraph was used in the activity of law-protection bodies in the Crimean Autonomous Republic, Dnepropetrovsk, Donetsk, Kyiv, Luhansk, Lviv and Cherkassy Regions (there were altogether 16 polygraphers in Ministry of Internal Affairs).

In February 2003, the prosecutor of Ternopil Region announced using polygraph in the course of investigating crimes in the further activity of his office. In August 2004, the representative of Obolon District Department of Internal Affairs in Kyiv demonstrated in public the possibility of using polygraph for protection of law . [23, pp. 7–10].

A contribution to the development of polygraphy in Ukraine was also made by L. Chernovetskyi, owner of Praveks Bank who actively introduced polygraphs into the work of his private companies. For instance, in 2005 Praveks Strakhuvannia accomplished what at the time was a record-breaking insurance compensation of 257,000 in a case involving the owner of stolen car after examining him with the polygraph. The polygraph was also actively used in the activity of Praveks Bank, which had its group of nearly 30 polygraphers. [23, pp. 15–16].

An affiliated branch of the Chicago Polygraph Institute (headed by A. Volyk) has worked in Kyiv with Argo-A, training Ukrainian and foreign polygraphers since 2006. In the same year, the International League of Polygraph Examiners and International Polygraph Examiner Association, also presided over by A. Volyk, started its operation. With Ukraine's approx. 300 polygraphers, the unions are Europe's largest by the number of members. [7]

Legal regulations

Certain attempts to regulate the use of polygraph in law-enforcement bodies were made. In 2001, the Ministry of Internal Affairs issued the Order No.743 "On conducting an experiment in using computer polygraph in activity of internal affairs bodies of Ukraine" which was cancelled by the Order of MIA No.1460 of 24.11.2003 that adopted "The regulation on psychological provision of operating and employment activity of internal affairs bodies of Ukraine". It broadened the scope of psychological research in personnel administration and at the same time postponed the application of polygraph testing in crime detection and investigation till this issue is regulated at the legislative level, statutory and regulatory measures are adopted, and a medical database of using polygraph devices is made. The Order No. 1460 was in turn revoked by the Order of the Ministry of Internal Affairs No. 842 of 28.07.2004 "On further development of psychological provision of operating and employment activity of internal affairs bodies of Ukraine". [20] This order also adopted an

instruction manual regarding the use of computer polygraphs in the course of work with personnel of internal affairs bodies of Ukraine. [6]

Since 2010, the profession of “expert-polygrapher” was introduced into the classification of occupations (code 2144.2), and approved by the order State Committee of Ukraine for Technical Regulation and Consumer Policy. [19]

Legal regulations should be justified first of all by analysing the Ukrainian Constitution. Its Art. 28 states that nobody shall be subject to torture, cruel or inhuman or dishonouring treatment or punishment. No person shall be subject to medical, scientific or other experiments without his/her own wilful consent. [14] The article does not prohibit using polygraph or other scientific and technological means, it only creates certain guarantees of human rights and freedoms, which will be further analysed in greater detail.

Art. 9 of Law of Ukraine “On operative and investigative activity” states that using technical devices that suppress the will or are harmful to the health of people or environment is prohibited.[5] It appears that using a polygraph may be allowed a priori, as it neither suppresses the will nor is harmful to the health of people or environment.

However, such a regulation is not sufficient. It is worth to consider the opinion of D. Movchan who believes that to eliminate controversies regarding legitimacy of using polygraph in the course of investigating crimes it is necessary to provide such a possibility at the level of a legislative act [17, p. 261] (Criminal Procedural Code, Laws “On operative and investigative activity”, “On forensic examination”, etc.). Elaboration and adoption of subordinate legislative act regulating in details procedure of using polygraph in criminal proceedings of Ukraine would be a logical continuation.

Doctrinal views

Majority of modern scholars are in favour of using polygraphs in criminal proceedings in Ukraine [3; 8; 9; 10; 17]. However, uncompromising opponents of any possibility of such usage still remain, in particular V. Konovalova, [11; 12; 13], O. Larin [16], and others.

All statements about inadmissibility of using polygraph in criminal proceeding may be presented in several groups and subsequently defeated:

1. Absence of scientific foundations, inaccuracy and unreliability of results received with polygraph

This argument does not correspond to the facts, as psychologists developed theories of how the polygraph works. Moreover, it was determined in the course of research that accuracy of polygraph examination exceeds 90%, depending on the type of approach used, and in the case of applying different approaches throughout the process of investigation of one person so as to minimise error, accuracy increases up to 95% (which is a rather high result).

2. Violation of human rights in the course of polygraph examination, humiliation of examinee honour and dignity, physical and psychological abuse of the examinee, immorality and reactionary essence of the method etc.

Human rights are not absolute in fact, and with certain grounds present they may be violated. In this case, it is necessary to follow certain procedural guarantees which would prevent from unreasonable violations. Such grounds may include crimes committed and the need for “a fast, absolute and impartial investigation and judicial examination for everyone who committed a criminal offence to be brought to responsibility to the extent of his/her guilt and for each innocent not to be accused or sentenced” (Art. 2 of Criminal Procedural Code of Ukraine) [15]. For performing different actions, various procedural guarantees are provisioned (court order regarding possibility of performing action, sanction of the prosecutor, etc.). In the use a polygraph, the examinee receives the almost most extensive guarantees of protection their rights. First, a polygraph test may be carried out only in the case of wilful consent of the person to be tested. Secondly, the whole process of inspection is video recorded. Thirdly, before the test, the polygrapher discusses every question to be asked with the person. Fourthly, the examinee has the right to refuse further examination at any stage.

But are human rights really violated to some extent through polygraph examination? We may, particularly, speak about violation of freedom from self-accusation (Art. 63 of the Constitution of Ukraine). But in such case this right is violated also during questioning of the accused who did not use his right not to give evidence. Since in both cases a person chooses voluntarily the line of their behaviour, namely, whether to provide or not to provide evidence, and whether to agree or refuse polygraph test. We may consider violation only when a person is forced to examination against their will. However, the voluntary nature of the procedure is the cornerstone of psychophysiological diagnosis in polygraph testing, which makes no sense without it.

The Art. 28 of the Constitution of Ukraine states that no one shall be subject to medical, scientific or other research without their wilful consent. Since in its essence polygraph examination is a psychophysiological test, this article too admits the possibility of using polygraph only with the consent of the examinee.

P. 2.1. of the Instruction manual regarding usage of computer polygraphs in the course of work with personnel of internal affairs bodies of Ukraine states that according to the principle of wilful consent, a polygraph specialist starts the polygraph examination only having received written consent, and having ensured that such a consent is indeed wilful and is not the result of force or psychological pressure of any third parties.[6]

This principle is also enshrined in p. 3.8.2 of the Practice Standards of the International League of Polygraph Examiners where it is stated that “a polygrapher shall receive written consent of the person under test before polygraph examination”.[22]

The instruction manual regarding usage of computer polygraphs in the course of work with personnel of internal affairs bodies of Ukraine also stresses the importance of adherence to the rights of the examinee, and states in p. 2.3 “Principle of overall support of human rights is of utmost importance for the polygrapher. A person has the right to refuse examination at any stage, to know why the examination is held, to be familiar with the subject of the testing, and to explain or not to explain what they believe to be the potential reasons for reactions. Securing human rights is achieved through steadfast compliance, with the duration of examination lasting from 9 to 16 hours, taking into consideration the condition of the person.”[6]

3. In the course of polygraph investigation a person becomes an object of research. However, a person is also an object of research in cases of conducting medical evidence, psychological expertise and forensic psychiatric examination, the taking of biological samples, etc. While in the process of taking biological samples and conducting medical evidence in court, it is the physical body of a person that is the object, in the process of forensic psychological expert examination or forensic psychiatric expert examination, the object is their psychological activity; their inner world, as to quote I. Kohutysh, in the process of polygraph examination “humiliating, and therefore immoral and illegal may be the artificially created atmosphere in which the examination is conducted,

the behaviour of the person who conducts the examination, if based on illegal or psychical acts of force.” [10, p. 314].

A problem is also perceived in the possibility of “receiving information which does not concern the case under investigation but rather the personal sphere, coercive or covert intrusion which contradicts human rights and freedoms guaranteed by the Constitution of Ukraine. Prevention of such possible distortions is one of the conditions for elaborating rules for using the polygraph and establishing guarantees of legitimacy of using its results.” [10, pp. 314–315]. To prevent this problem in the course of polygraph examination two guarantees are provided: 1) all questions are previously discussed with a person; 2) the examinee has the right to refuse further continuation of procedure at any moment of the examination.

Therefore, the examinee may protect themselves from frivolous penetration into their inner world.

4. Giving consent to polygraph investigating, the accused takes over the burden of proof of their innocence, excusing the prosecution from duty to prove their guilt.

A statement that also seems to be an exaggeration. Since in such case we may say the same about taking over the burden of proof of their innocence in each case of evidential activity on the part of the accused. If a person gives denunciative evidence regarding themselves, they take over the burden of proof and release the prosecution from the duty to prove their guilt, provide proofs and release the prosecution from the duty to prove their guilt, etc.

Giving consent to a polygraph examination, a person may be guided by different motives: a will to prove their innocence, a hope for error in the course of examination (in case a guilty person) etc. Yet such a consent cannot be interpreted as taking over the burden of evidence.

5. Polygraph suppresses the will of the person.

Associating polygraph with applying hypnosis or psychotropic drugs (“truth serum”) that suppress the will of a person is rather widespread. Using such methods is prohibited in Ukraine. Section 16 of Art. 9 of Law of Ukraine “On operative and investigative activity” guarantees that “for obtaining information it is prohibited to use technical equipment, psychotropic, chemical or other substances suppressing the will or being harmful to the health of a person or environment”; [5] as mentioned above.

Associating polygraph with methods listed above is deeply erroneous; it neither suppresses the will of a person under examination in any way nor does it affect their mind or mentality. As it was already mentioned, polygraph only registers the flow of physiological processes in an organism. In other words, it is virtually a combination of several medical instruments. A person preserves the ability to think in clear mind and take decision freely throughout the course of the procedure.

Judicial practice

The results of enquiry in polygraph are rarely used in court. In most cases they provide only general bearings, and head investigation into the right direction. The polygraph is used in particular for reducing the number of people suspected of committing a crime, or establishing evidential value of the assembled evidences, finding locations of persons or things, identifying unrecognised bodies, detecting missing people, identifying place of residence of people, investigating undetected crimes of past years, etc.

However, individual cases of recognising polygraph results as evidence in court still exist. In particular, according to the sentence of Luhansk Court of Appeal in a criminal case on intentional homicide (No. 1-13/2010) the conclusion of a psychophysiological expert examination, which proved the truth of confessing guilt by the accused, acquired evidential significance. [1] The trial considered expert findings to be veracious, properly justified, and corroborated by other evidence investigated by the court. A similar position is reflected in a number of other judicial decisions.

Instruments

Mostly used in Ukraine are polygraphs of American (Lafayette, Axciton, Stoelting) and Russian (Diana, Epos, Polarg, Krys, Ryf, Barrier) make. However, Ukraine has also developed its own inventions in the field. Currently, an Ukrainian scientist, Dr Petro Slynko, claims that upon request from the KGB he developed a lie detector in the 1980s. His polygraph was based on the Galvanic Skin Response (GSR). According to Dr Slynko, due to the collapse of the Soviet Union, his project was abandoned. [23, p. 3].

Moreover, scientists of the Kharkiv Aviation Institute of the National Aerospace University developed ReoCom Stress, a computer polygraph designed for recording of changes in physiological parameters of a person under the influence of external stimulating factors aiming to diagnose stress conditions of the person under examination. [21, p.105] ReoCom Stress enables simultaneous registration of indicators of 18 physiological parameters of the examinee.

Conclusions

Polygraphs are actively used by private companies (banks, insurance companies etc.) in Ukraine for testing employees before hiring them and for regular testing in internal investigations.

Polygraphs are also used by law enforcement bodies (however, basically in areas related to employment), and rarely used for investigation of crime. The reasons being the absence of adequate legal regulation, insufficient development of scientific capacity for using instrumental methods of psychophysiological diagnostics in Ukrainian legal doctrine, distrust towards the polygraph on the part of employees of law-protection bodies and some scholars, etc.

Even more rarely the results of polygraph examination are used as evidence in court. However, the number of such cases is increasing with the increased interest of scholars and practitioners in polygraph.

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