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SOME COMMENTS ON THE ADMISSIBILITY OF POLYGRAPH EVIDENCE IN THE CRIMINAL TRIAL OF UKRAINE

Summary

The article attempts to answer the questions of whether it is possible to use technical means to monitor the reaction of a person's body for the purposes of criminal proceedings, and whether such an activity must be provided for in the Code of Criminal Procedure for its results to be considered admissible evidence in court. The study of this topic is aimed at learning about the problem of polygraph use and the use of polygraph opinion for evidentiary purposes. To better understand the possibilities offered by polygraph expertise, an attempt has been made to analyze the essence of the study and answer the question of how and to what extent it should be conducted, as well as the purpose of such studies. A thesis was presented in support of the use of the truth verification method for optimal case resolution without the need to isolate a separate provision that would allow the use of polygraph tests.

Keywords: evidence, expert opinion, proof, criminal trial, polygraph examination, expert opinion, polygraph

Introduction

At the outset, it would be appropriate to discuss one of the main and fundamental principles of the criminal process, namely the right to a defense, which is one of the most essential rights of any person in a modern trial. The guarantee of the right to defense is provided both at the level of acts of international law and acts of the statutory rank of individual countries and includes a number of rights that allow not only the personal struggle of the

accused against the charges (understood as material defense) but also the use of professional assistance of defense counsel (i.e., formal defense)¹.

In the literature, the concept of defense is understood as the totality of actions aimed at proving the innocence of the accused, at limiting or mitigating his responsibility², whose purpose is to protect the rights and interests of the accused in criminal proceedings³, as well as any deliberate conduct undertaken in the interests of the accused⁴. Rightly points out M. Lipczyńska that the defense as a procedural function is a totality of procedural activities aimed at refuting the accusation and mitigating criminal liability⁵.

As a procedural function, defense means activity directed at protecting the rights and interests of the accused, which includes not only substantive defense against the charge but also procedural defense, that is, the use of procedural instruments⁶. The norms governing the question of the guarantee of the right to defense are contained, among other things, in the rules of the criminal trial. M. Cieślak defines a procedural principle as a certain general directive most often expressing what is essential and typical in a process, and also emphasizing some general feature, some regularity in this process⁷.

It is necessary to add such an obvious, but no less important, statement that the procedural rules are closely related. The principle of the right to defense is the starting point for most procedural regulations relating to the protection of the defendant's interests. In addition, in light of the assumption that the purpose of the criminal trial – in addition to the pursuit of a state of procedural justice – is to achieve a state of substantive justice⁸ (it is incumbent on the trial body to establish the substantive truth), the boundary that marks the proceedings in cases in which the primary value is human

¹ J. Matan, *Zasada prawa do obrony w polskim procesie karnym*, "Rocznik Administracji i Prawa: teoria i praktyka" 2009, year 9, p. 91.

² A. Dąb, K. Cincio, *Prawo do obrony*, in: *Zagadnienia prawne Konstytucji PRL*, vol. 3, Scientific Publisher, Warsaw 1954, p. 244.

³ T. Grzegorzczak, *Obrońca w postępowaniu przygotowawczym*, University of Łódź Publishing House, Łódź 1988, p. 11.

⁴ W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*, LexisNexis Polska, Warsaw 2014, p. 26.

⁵ M. Lipczyńska, *Stanowisko oskarżonego w procesie karnym Polski Ludowej*, Juridical Publishing House, Warsaw 1956, p. 166.

⁶ Justification of the order of the Supreme Court of 17.12.2008, VKK448/07 OSN W SK 2008. Wr 1. item 119.

⁷ M. Cieślak, *Polska procedura karna. Podstawowe zagadnienia teoretyczne*, Scientific Publisher, Warsaw 1971, p. 202.

⁸ A. Malicka-Ochtera, *Ograniczenia działań obrońcy w procesie karnym*, C.H. Beck Publishing House, Warsaw 2021, p. 11.

freedom, according to Article 2 of the Code of Criminal Procedure is the obligation incumbent on the trial body to establish the material truth.

Substantive truth is knowledge whose content exists objectively, independent of a person's consciousness and will. Establishing substantive truth in a criminal case means recognizing that the conclusions of both the investigating authorities and the court on the issues to be decided on the merits of the case are consistent with the facts. Namely, it is a matter of answering the questions: whether the crime was committed, whether it was committed by the accused himself, what is the form of his guilt, whether there are mitigating or aggravating circumstances in the case, and thus whether the determination of facts was made in accordance with the facts⁹. In this way, we pursue truth as the main goal of any proceeding. This action not only includes the opportunity to clarify the facts but also imposes an obligation on the trial authority to make a true factual determination. Therefore, the need to establish material truth applies equally to the pre-trial and trial stages.

Investigators, the prosecutor, and the court are obliged, within the scope of their powers, to make decisions on the merits of the case, based on evidence and the conviction that their conclusions are accurate and fully consistent with reality. Such conclusions must be true¹⁰. However, the investigator's and prosecutor's conclusions in the case referred to the court are not final, and should be subject to the discretion of the court, which will decide them and rule on that basis. In this regard, it is argued that the correlation between truth and evidentiary reliability will be important in proving both theoretical and practical.

Also important is the very process of forming conclusions about the course of an event, which begins with cognitive processes. Man learns about his environment through the information he receives through the appropriate sensory organs (receptors). These organs allow us to perceive a variety of stimuli, especially visual, auditory, gustatory, and olfactory. Among the general characteristics of the senses is their property of allowing sensory experiences to arise, which can be in the form of impressions or perceptions. The objects we perceive are usually a source of multiple stimuli and are in an environment that provides additional information¹¹.

⁹ A. Boykova, *Kurs sovetskogo ugolownogo procesa. Obszczaja czast*, Moscow 1989, p. 533.

¹⁰ *Ibid.*, p. 533.

¹¹ Z. Czeczot, T. Tomaszewski, *Kryminalistyka ogólna*, Comer, Toruń 1996, pp. 78–79.

Man is constantly subjected to stimuli or signals sent to him by the world around him¹². Our representations about something may be true, i.e. they may correspond to reality, but (sometimes even at the same time) they may also be unsubstantiated. When a certain representation is proven (i.e., justified, argued), it takes on the character of a certainty that does not raise any doubts about the veracity of the knowledge. Such knowledge will be an adequate basis for making an accurate decision (especially when it comes to criminal cases). A proven, reliable claim is a verifiable claim. Investigators and judges, acting as subjects of cognition in a particular case, can practically operate their knowledge only if the veracity of their conclusions is justified, that is, proven.

Undoubtedly, the attribution of criminal liability, the subject of the trial, is made based on certain findings of fact, which are made based on evidence. As M. Cieslak notes, every significant fact leaves behind certain consequences both in the external world and in the human psyche, so it does not pass away without a trace. For this trace of the past to be reconstructed, it is necessary to reach for evidence¹³.

J. Bentham by proof, in the most general sense, meant a certain fact, presumptively true, which is to be used as a basis for believing in the existence or non-existence of another fact. In doing so, this author adds that every proof contains a minimum of two facts: the main fact, the existence or non-existence of which must be proven, and the so-called second, or probable, fact, which serves to prove the existence or non-existence of the main fact. Thus, any decision, based on evidence, emerges from the following reasoning: since a certain fact exists, it is inferred from there that a second, concrete fact exists¹⁴.

T. Grzegorzczak considers as evidence in criminal proceedings any means allowed by the criminal procedural law to make certain findings, i.e. to establish the circumstances relevant to the resolution of the case¹⁵.

M. Cieślak points out that a witness, defendant, or expert is not the basis of evidence, but a source of evidence providing evidence in the form of testimony, explanations, and opinions. In turn, according to S. Śliwiński, a means of evidence is a person or object that serves the judge to gain

¹² J. Widacki, *History of Polygraph Examination*, Polish Forensic Association, Warsaw 2021, p. 43.

¹³ M. Cieślak, *Polska procedura karna. Podstawowe zagadnienia teoretyczne*, Scientific Publisher, Warsaw 1984, p. 410.

¹⁴ J. Bentham, *Traktat o dowodach sądowych*, Association of Judges and Prosecutors of Republic of Poland, Gniezno 1939, pp. 21–22.

¹⁵ T. Grzegorzczak, *Dowody w procesie karnym*, Juridical Publishing House, Warsaw 1998, p. 3.

knowledge (e.g., a witness, a document, etc.), and the evidentiary basis in such a case would be, for example, the testimony of a witness¹⁶.

M. Cieślak stressed that the subject of proof is the circumstance whose existence or non-existence is to be demonstrated in the process of proof. It includes not only the known main fact but also every other fact and every circumstance subject to proof. As a main fact, this author referred to a circumstance that, within a certain process of proof, is the ultimate goal, while as an evidentiary fact – that which is the subject of proof, only partial and aimed at proving the main fact¹⁷.

Controversy over the use of polygraph opinion in command

Criminal procedural law and forensic science understand the process of evidence as a complex system that includes the activities of the investigative body, the prosecutor, and the court in collecting, recording, and evaluating evidence. It is a certain type of reasoning and the carrying out of evidence, in which the subject proves the truth or falsity of a certain thesis, or object of proof. In that case, it will be the thought process of inferring from evidence the existence or nonexistence of certain facts¹⁸.

Explaining the concept of the command process, Y. Orlov points out that such activity consists of three stages and involves the collection, verification, and evaluation of collected evidence. In turn, the collection of evidence itself can also be divided into stages¹⁹. As the first sub-stage, the author describes the evidence search phase, which occurs such as during the inspection of the scene or a search. Such an evidence-gathering step does not always have to involve a physical search, but “can be carried out in other ways, such as by interviewing witnesses to the incident in an operational manner, talking to neighbors to look for possible witnesses.”²⁰

The second stage is obtaining evidence; it involves securing and seizing items, taking testimony, and taking evidence at the request of the parties or ex officio. Unlike a search, obtaining evidence is only possible in the

¹⁶ S. Śliwiński, *Polski proces przed sądem powszechnym: zasady ogólne*, Gebethner and Wolff, Warsaw 1948, p. 577.

¹⁷ M. Cieślak, *Zagadnienia dowodowe w procesie karnym*, vol. I, Juridical Publishing House, Warsaw 1955, pp. 43–45.

¹⁸ Idem, *Polska procedura karna. Podstawowe zagadnienia teoretyczne*, Scientific Publisher, Warsaw 1984, p. 325.

¹⁹ Y. Orlov, *Problemy teorii dowodów w ugodownym procesie. Monograph*, Moscow 2009, p. 109.

²⁰ Ibid.

manner prescribed by the process. Evidence obtained contrary to the law is inadmissible²¹.

The third stage, which is a mandatory part of the evidentiary proceedings, will be the recording of evidence, which is carried out in the manner prescribed by law.

In addition, Y. Orlov notes that in the course of evidence collection, it is possible to use technical means, but this “raises the problem of admissibility of the evidence so obtained,” the solution of which the author sees in the fact that during search for evidence the use of any technical means should be allowed, except for those dangerous to the life and health of the person, after all, “the most important thing is the fact of finding evidence, and the method used will no longer be of particular importance. Provided that the evidence is properly recorded in the process, it remains evidence regardless of how it is disclosed.”²² On the other hand, actions taken by trial authorities to obtain evidence from an already known source of evidence (e.g., from a witness or suspect) must be specified in the code. Therefore, it is inadmissible, for example, to use a polygraph or, as the author points out, a “lie detector,” because such a technical tool is not provided for in the law, and therefore cannot be used to obtain evidence. Only what is explicitly stipulated by the procedural law is allowed²³.

Supporting opinion of Y. Orlov in the context of the inadmissibility of the use of the polygraph for evidentiary purposes, V. Vapniarczuk also adds that the information obtained with this device at the stage of formulating an expert opinion has no independent evidentiary value and the results of such an expert opinion cannot serve as evidence in the case. The status of such information is almost equated by this author with the selection of samples for expert examination, and he believes that the possibility of using the polygraph at the stage of transferring evidentiary information from its carrier (i.e., from the person who has some information about the event) to the judge (at the stage of its direct reception by the trial body) must be regulated by the code²⁴.

²¹ Ibid., pp. 110–111.

²² Ibid., p. 112.

²³ Ibid., p. 113.

²⁴ V. Vapniarczuk, *Teoria i praktyka kriminalnogo procesualnogo dokazywania*, Jurajt, Kharkiv 2017, p. 176.

The essence, possibilities, and limitations of using polygraph tests

It seems, however, that the view presented may raise some doubts, so here it would be appropriate to discuss the issue of the possibility of using a polygraph when conducting an expert examination in a little more detail, and in particular the status of the information flowing from the polygraph examination and how this information is treated.

In order not to be misled by the terminological ambiguity of the concept of evidence, it would be useful to answer the question of whether the information obtained by polygraph will be relevant to a particular case. In general, we can consider as evidence any factual data contained in any source of²⁵ information permitted by procedural law. Before a certain piece of information can be considered evidence, this factual data must serve as a means of establishing facts of interest to the investigator and the court, that is, be relevant to the outcome of the case. Information about facts that are not related to a specific case, do not confirm or deny anything in it, cannot be evidence. Factual data relevant to the case, to become court evidence, must be admitted and in a certain way introduced into the criminal process²⁶.

There is no doubt that the problem of the manner and quality of the presentation of expert evidence is one of the most serious issues that emerge against the backdrop of evidentiary proceedings in general, and expert evidence in particular. The proper handling of this evidence is one of the more difficult tasks facing law enforcement and the judiciary. In addition – as is the case with interrogation, physical evidence, or documents – the problem of expertise by polygraph cannot be ignored, and it should be conducted according to general principles and rules.

On the other hand, in the context of the intent and applicability of the polygraph for criminal proceedings, it seems necessary to discuss an issue that boils down to the question of what the essence of such an examination is and what conclusions can be reached by conducting a polygraph examination. This clarification will also be important to confirm the thesis that there does not necessarily need to be a separate provision of the Code of Criminal Procedure on polygraph examinations for the result of a polygraph examination to be considered admissible evidence in a case.

²⁵ One of the dictionary definitions of the word “source” (*PWN Internet Dictionary of the Polish Language*, <https://sjp.pwn.pl/slowniki/klasyfikacja.html>, accessed: 15.10.2022) is the beginning, or where something comes from. In this context, the word “source” should be understood as a general source of information, both personal and factual.

²⁶ R. Belkin, *Teoria dowodów w Sowietkim ugodownom procesie. Czast obszczaja*, Moscow 1966, pp. 246–247.

It is erroneously assumed that a polygraph examination with 100 percent reliability presents evidence of the fact that the person examined committed a specific crime. Thus, in the absence of an understanding of the nature of the polygraph examination, it is difficult to properly qualify the evidence of this examination²⁷. It is worth noting that polygraph tests are about verifying the truth, not detecting a lie. Currently existing tools, often described as designed to detect lying, do not directly measure it at all. In most cases, it is assumed that lying causes emotional, cognitive changes, etc., and that these changes are translated into observable characteristics (physiological change, behavioral change, etc.), and as a result, based on changes in observable characteristics, inferences can be made at most about the existence of insincerity in statements or whole testimonies²⁸.

The essence of a polygraph examination is to reveal and record the degree of emotional activation to the questions asked²⁹. The purpose of the study boils down to determining whether there are memory traces of a certain event in the subject's memory. Lie detection implemented in the form of polygraph examination, in its classical sense, is carried out at the psychophysiological level and is based on the detection and registration of physiological correlates of emotions that accompany lying, and their identification allows one to infer the cause, that is, lying³⁰. The phenomena that accompany lying (emotional tension, intellectual effort, etc.) are detected and analyzed, and manifested in various ways³¹.

Although some processionists also argue that in the case of polygraph examinations, we are dealing only with a special kind of "material" that is examined by an expert, and the result of the examination of this material is a kind of tool for limiting the circle of suspects and in the further course of the case does not serve as evidence³².

Nevertheless, it would be appropriate to draw attention to the normalization of the use of the polygraph (or, in other words, the "polygraph") in the provisions of the current Polish Code of Criminal Procedure, and in particular to § 1 of Article 192a, which provides that to limit the circle of suspects or

²⁷ J. Widacki (ed.), *Badania poligraficzne w Polsce*, AFM Publishing House, Krakow 2014, p. 134.

²⁸ J. Widacki (ed.), *Kierunki rozwoju instrumentalnej i nieinstrumentalnej detekcji kłamstwa: problemy kryminalistyczne, etyczne i prawne*, AFM Publishing House, Krakow 2018, p. 28.

²⁹ M. Kała, D. Wilk, J. Wójcikiewicz, *Ekspertyza sądowa. Zagadnienia wybrane*, Wolters Kluwer Polska, Warsaw 2007, p. 730.

³⁰ J. Widacki, *History of Polygraph Examination*, op. cit., p. 42.

³¹ J. Widacki (ed.), *Kierunki rozwoju...*, op. cit., p. 11.

³² J. Grajewski, L.K. Paprzycki, M. Płachta, *Kodeks postępowania karnego. Komentarz*, vol. 1, Zakamycze, Krakow 2003, p. 489.

to establish the evidentiary value of the traces revealed, fingerprints, cheek mucosal swabs, hair, saliva, writing samples, scent, taking a photograph of a person or making a voice recording may be taken. In addition, in light of § 2 of Article 192a of the Code of Criminal Procedure, with the consent of the person under examination, the expert may also use technical means to control the unconscious reactions of his body. Such material, if in the opinion of the investigator in the further course of the investigation, it is unnecessary, shall be removed from the case file and destroyed. Otherwise, such material remains on file but does not turn into evidence, even after the initiation of criminal proceedings against a specific person³³.

Legal framework and procedures governing the applicability of the polygraph in Ukraine

Explaining the prohibition of both obtaining information using a polygraph and then recognizing it as evidence in a case, V. Vapniarchuk relies on the current norm of the Ukrainian Criminal Procedure Code, the provisions of which at the moment do not contain any mention of polygraphs or technical means for recording the unconscious reactions of the subjects' bodies. The absence of a direct ban on the use of the polygraph in the Ukrainian criminal process by the legislature provides grounds for recognizing the possibility of its use. The fact that none of the existing laws in Ukraine prohibit polygraph tests³⁴ should be taken as confirmation of this position.

Thus, § 1 of Article 84 of the aforementioned Code of Criminal Procedure. Ukraine indicates that evidence in criminal proceedings is factual data, obtained in the manner provided by this Code, based on which the investigator, prosecutor, investigating judge and court determine the existence or absence of facts and circumstances relevant to the criminal proceedings and which are subject to proof in the case. On the other hand, §2 lists four types of trial evidence, namely: testimony (explanations in the case of suspects and defendants), physical evidence, documents, and expert opinions. This means that if the result of a polygraph expert report is presented in the form of an expert opinion, it will be treated as one type of trial evidence under the Code.

In addition to the code norms, the limits, possibilities, goals, and methods of such expertise are regulated by the guidelines of the Ministry of Justice of Ukraine on the appointment and conduct of forensic expertise, includ-

³³ Ibid.

³⁴ A. Volobujev, *Poligraf: techniko-kryminalistychnyj zasib vyjavlenia i fiksacii dokaziv czy instrument ekspertnogo doslidzenia?*, "Kriminalistikhni visnyk" 2018, no. 2 (30), p. 58.

ing, for example, forensic-psychological expertise using the polygraph³⁵. Therefore, it can be assumed that, for procedural reasons, neither the mere commissioning of such an expert report nor the question of the admissibility of evidence from an expert who used a polygraph in the course of the expert report raises any questions. In this case, if all the formalities of appointing an expert and conducting such an examination are observed and the consent of the person examined to the use of the polygraph is obtained, there is nothing to prevent this evidence from being considered admissible. Thus, it can be assumed that even if the word “polygraph” is not *strictly* mentioned in the Code of Criminal Procedure, the issue of the appointment of an expert and the subsequent attachment of his opinion to the case materials at this stage does not raise any questions.

On the other hand, it is worth adding that concerning the polygraph examination, it is not a matter of directly obtaining evidence in the form of verbal information flowing from the so-called source, which in this case would be the person subjected to the examination (who may or may not have knowledge of the pending proceedings), but only of providing, with the help of an expert, information proving that the person or so-called source knows the reality of the event in question. It goes without saying that in the course of conducting the relevant research, the expert cannot directly pronounce the guilt or innocence of a person, the truthfulness or falsity of his or her

³⁵ The commissioning and conducting of expert reports for litigation in Ukraine is carried out in accordance with the Guidelines of the Ministry of Justice of Ukraine on the appointment and conduct of expert reports, including forensic reports, dated 08/10/1998, No. 53/5. The guidelines distinguish several types of expertise: forensic, technical, economic, commodity, intellectual property expertise, psychological expertise, etc. Polygraph examinations are one of the types of psychological expertise and bear the official name “examinations using a special technical tool – a computer polygraph”. When ordering such an expert report, the trial authority must describe it as “[...] conducting a forensic psychological report using a polygraph”. Section 6.1 of the guidelines indicates that the subject of the psychological examination is mentally healthy persons; Section 6.3. – The psychological examination establishes those features of mental activity and their manifestations in the person’s behavior that have legal significance and can cause corresponding legal consequences.

On the other hand, apart from the seemingly obvious and seemingly logical connection between the name of the expertise and the requirement for the polygraph examiner to have psychological training, there is currently no such obligation. The regulations indicate that it does not have to be a psychologist. A polygraph expert may or may not have psychological qualifications.

The statutory requirements for experts are as follows: to speak the state language (Ukrainian) freely, to have a master’s degree and to have completed postgraduate courses within the framework of training programs for experts in polygraph examinations (additional requirements consisting in authorization of access to special knowledge constituting state secrets may apply to persons who are employees of a prosecutor’s office unit or the State Bureau of Investigation and employed as polygraph specialists).

testimony, nor will he or she use statements such as “the examined person lied” or “the examined person told the truth” and present a categorical opinion on the guilt or innocence of a person on this basis. This would be inappropriate since only the court has the authority to rule on the guilt or innocence of a person accused of committing a specific crime.

A polygraph expert’s opinion may prove, for example, that a person does not respond in any way to questions about a certain criminal event or, conversely, that a person has traces of that particular crime in his memory and may also know the details of it. Such conclusions are drawn based on a person’s response to specially formulated questions. Thus, in polygraph tests performed with the technique of control questions, we do not detect lying in the answers to the individual questions of the test, but by the sum of the responses to the individual critical questions, compared with the responses to the control questions, we make a holistic inference as to whether the examinee during the test is sincere or not, more precisely: whether he is trying to mislead the examiner or not³⁶. Therefore, equating a polygraph examination with lie detection is unacceptable.

Equally important is the question regarding the evaluation of such evidence. It cannot be said outright that it is inadmissible or will have no evidentiary value. When deciding whether to take polygraph evidence and then when evaluating this evidence, it will be necessary to take into account the nature of expert opinion evidence. This evidence can be useful in eliminating innocent people from the circle of suspects or verifying investigators’ versions. Thus, the result of the test cannot be directly used as evidence of guilt or innocence, which, however, does not prove its inadmissibility and inadvisability to use it as evidence in criminal proceedings³⁷.

The expert’s opinion is one of the numerous means of evidence that can be obtained in the criminal process, so the trial body must evaluate its usefulness in a particular case against the background of the totality of the circumstances revealed in the course of the proceedings³⁸. At the same time, when it comes to the free evaluation of evidence, as mentioned above, such an evaluation must be based on true findings of fact, and the polygraph examination opinion can play an auxiliary role in this sense, in that when making a final decision in the case, the court will be able to take

³⁶ J. Widacki, K. Dukała, *Detekcja kłamstwa – czyli czego?*, “Problems of Forensic Science” 2015, no. 287(1), p. 9, quoted in: J. Widacki (ed.), *Badania poligraficzne w Polsce...*, op. cit., p. 196.

³⁷ Order of the Supreme Court of 29.01.2015, I KZP 25/14, OSNKW 2015, no. 5, item 38.

³⁸ T. Tomaszewski, *Przesłuchanie biegłego w postępowaniu karnym*, Juridical Publishing House, Warsaw 1988, p. 154.

into account the results of the expertise, which can help confirm or refute the version regarding the level of credibility of the suspect's testimony. They will likely become an additional argument in support of the investigator's version or evidence, albeit indirect, but helping in the course of the case.

Therefore, it seems illogical and erroneous to take the position that an opinion based on information obtained in polygraph tests cannot be treated as evidence. Moreover, such mistreatment of opinion and then expert evidence clearly can lead to disregard for the basic principles of the criminal process and to a significant restriction of each person's right to a defense, with the consequence of improper adjudication.

The expert and the judge in the trial perform different functions. The judge has the duty to evaluate the evidence, and the expert accordingly must provide this evidence in the form of an opinion, prepared based on special knowledge, which in certain cases may be necessary to establish the truth. It would seem that excluding evidence of a polygraph opinion, the results of which sometimes help the court in assessing the credibility of an interviewee's explanations or testimony would lead to limiting procedural options. Now that the development of forensic science is so dynamic, providing such extensive technical opportunities to use additional methods and approaches to establish the truth, we must first and foremost advocate a comprehensive approach to problem-solving, rather than supporting procedures that limit the process.

Unfortunately, procedural authorities in Ukraine show little interest in commissioning polygraph expertise, as there are still controversial views and peculiar warnings from scientists regarding the effectiveness of polygraph tests and the admissibility of opinions based on such tests. All told, divergent opinions on the subject expressed by Ukrainian academics and practitioners persist. Some advocate the introduction and use of polygraph examinations into the trial and the use of the results of such examinations as evidence, while others, on the contrary, criticize them and deny the possibility of polygraph expertise, stressing the numerous disadvantages of this type of examination, the prevalence of erroneous conclusions and the difficulty of using their results in evidence.

In 2020 The Supreme Court of Ukraine issued several key rulings on forensic polygraph examination. Most of them only confirm the fact that the issue of recognizing the possibility of conducting polygraph examinations for criminal proceedings is topical and that doubts about the question of admitting the results of such expertise in the form of evidence of sufficient quality require clarification. The vast majority of refusals to appoint an expert

polygrapher were justified by the fact that the Ukrainian Criminal Procedure Code does not provide for this type of examination, and by the fact that the result of a polygraph examination cannot be considered evidence in court since “only the court can evaluate the evidence in the case.”³⁹

An analysis of reports from the Ukrainian Association of Polygraphers shows that polygraph examinations are popular with both individuals and law enforcement agencies. Along with this go the voices of experts who see several problems negatively affecting the spread of polygraph examinations in Ukraine. Specialists also point out the reasons that stand in the way of the widespread and practical use of the polygraph for litigation purposes. These reasons are both objective and subjective.

The subjective attitude towards polygraph examinations often leads to an outright refusal to use this type of examination, due to a lack of awareness in this regard among both ordinary citizens and representatives of the judiciary. One example is the ambiguous and often even negative attitude of the leadership of the internal affairs bodies towards the polygraph method of testing⁴⁰, justified, among other things, by the fact that the term “polygraph does not appear in any law currently in force in Ukraine, so this device cannot be used.”⁴¹. The opposite view is often held by litigants, whose positive attitudes toward polygraph examinations were formed mainly during their cooperation with experts in this specialty.

Among the objective reasons, first of all, methodological issues can be identified, such as the lack of a single certified test methodology and uniform standards for the education and continuing education of polygraphers. In practice, it has come to such a situation that the specialty of “polygraphologist” is included in the state list of specialties in which opinions are issued, but there are no specific requirements for the training of such specialists⁴².

Secondly, the main problem remains the lack of direct indication in the current legislation of the possibility of using a polygraph in criminal proceedings, from which some practitioners draw conclusions about the

³⁹ Judgment of the Cassation Criminal Court of Ukraine vid June 11, 2020 after case no. 621/1308/18, item 43.

⁴⁰ O. Motlach, *Psychofizyologicheskaja ekspertyza z vykorystaniem poligrafa ta problemni pytannia vprovadzenia*, “Naukowy visnyk międzynarodowego gumanitarnego instytutu”, Odessa 2014, p. 129.

⁴¹ O. Romciv, *Vykorystanie polografa v procesie podolannia protydii rozsliduvanniu zloczyniv u sferi sluzbovoi dijalnosti*, Visnyk nacjonalnego uniwersytetu „Lviv Polytechnic National University” 2015, p. 344.

⁴² Ibid.

illegality of conducting such an examination, and courts often do not consider polygraph opinions as potential evidence in criminal proceedings⁴³.

However, the negation of polygraph examinations, which stems from the lack of a separate legal standard for the use of polygraphs in Ukraine, has no legal basis. The way out of the current situation must be sought not so much in the laws regulating polygraph examinations but in the attitude of state officials toward this type of expert activity⁴⁴. It should be recognized that the use of the polygraph in criminal proceedings is permissible. This is because it meets the criteria of legality (no legal act prohibits its use, examination utilizing it does not violate human rights, the rules of criminal justice, or the procedural guarantees of the examinee), ethics (the polygraph does not detract from human dignity and is not immoral under conditions of proper use) and safety (it does not pose a threat to human life or health)⁴⁵. The fulfillment of certain requirements for the procedure for conducting a polygraph examination, in particular, the collection of the written consent of the person examined, as well as the proper training of the polygraph expert, “provides the court with a basis for considering the results obtained from the polygraph examination as one of the possible pieces of evidence in combination with other evidence collected during the pre-trial proceedings.”⁴⁶

On the other hand, an analysis of the jurisprudence⁴⁷ of district courts in Ukraine over the past few years has shown that there is a noticeable

⁴³ O. Motlach, *Normatywno- prawowe regulowanie wykorzystania poligrafa prawoochoronnymi organami zarubiznych krajin*, “Visnyk akademii pracy i socjalnych vidnosyn” 2011, no. 4, p. 170.

⁴⁴ O. Motlach, *Psychofiziologiczeskaja ekspertyza...*, op. cit., p. 129.

⁴⁵ V. Nananiivski, T. Leshkovich, *Perspektyva vykorzystania poligrafa u kryminalnemu sudoczynstvi*, “Visnyk nacjonalnej akademii prokuratury Ukrainy” 2014, no. 1(34), p. 35.

⁴⁶ O. Motlach, *Dopustymist vykorzystania u dokazuvani faktycznych danyh, jaki buly otrymani za dopomogou poligrafa*, “Jurydychnyi visnyk. Kriminalne pravo i kriminologia” 2014, no. 3(23), p. 142.

⁴⁷ The following Ukrainian court rulings were analyzed: Order of the SR in Bakhmut dated 12.01.2018, No. 219/8596/15-ii; Order of the Obukhov SR dated 21.05.2019, No. 372/1759/19; Order of the SR in Khmelnytsky dated 23.09.2019, No. 683/1929/19; Order of the SR in Kirovohrad dated 08.10.2019, No. 405/7363/19; Order of the SR in Lviv dated 27.11.2019, No. 463/4339/17; Judgment of the SR in Ivano-Frankivsk dated 13.07.2022, No. 344/17154/18; Judgment of the Kyiv SR dated 14.07.2022, No. 755/11764/19; Judgment of the SR in Boryspol dated 15.07.2022, No. 359/9667/20; Judgment of the SR in Sumy dated 15.07.2022, No. 581/76/21; Judgment of the SR in Lviv dated 18.07.2022, No. 127/891/21; Judgment of the SR in Vinnitsa dated 19.07.2022, No. 127/891/21; Judgment of the Kyiv SR 03.08.2022, No. 756/847/17; Judgment of the SR in Hlubyn dated dn. 09.08.2022, No. 527/212/22; Judgment of the SR in Dnipro dated 10.08.2022, No. 199/9556/21; Judgment of the SR in Luck dated 10.08.2022, No. 161/10041/22; Judgment of the SR in Głuchów dated 01.09.2022, No. 576/411/21; Judgment of the Odessa SR dated 07.10.2022, No. 522/17245/16k; Rozhysheche SR verdict of 23.09.2022,

positive dynamic and increase in the number of positive decisions in cases of recognition of polygraph examination expertise. Currently, however, most of the expertise is in civil cases. Although previous experience with polygraph examinations has shown a low level of acceptance of them by judicial authorities, it seems that the rate of growth in the use of polygraphs in civil cases indicates a positive direction of development and the gradual introduction of polygraph examinations into criminal trials as well.

Despite the clear and indisputable advantages of using the polygraph in criminal proceedings, some organizational problems inhibit the process of its legalization at the level of the Ukrainian Criminal Procedure Code and, consequently, its implementation into the practical activities of law enforcement agencies. Solving these problems as soon as possible would allow the effective and full use of all the possibilities of polygraph expertise for litigation purposes.

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