

POLYGRAPH INVESTIGATION TECHNIQUE (LIE DETECTOR), A LEGAL FICTION FROM THE PROBATIVE FORCE POINT OF VIEW- POSSIBILITIES AND LIMITS

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Abstract

Although generally the results of the polygraph test are not admitted to the courts unless a convention is reached and the lawyer's consent is obtained, the test can be very useful for investigators during the investigation of the crime. In Romania, the first study on the opportunity and efficiency of polygraph insertion into police activity was made in 1976. This was done for a year, using the classic methods of police work with the polygraph method in parallel.

Keywords: *polygraph technique, polygraph diagrams, psychophysiological changes, informed consent.*

1. Introduction

With over 25 years of use in Romanian forensics and over 54 years of consecration in the world, USA¹, Japan², Israel, Serbia, Croatia, Canada, etc., the polygraph technique is reasonably disputed even today.

Permanently, as well as the specialists in the field, between appreciation and contestation, the sinuous road of simulated behaviours investigation was littered with both smashing failures and remarkable successes.

We will not insist on them, the last 25 years of professional practice in the field, done by psychologists and prosecutor authors, with good and bad, assimilated to the lessons we have learned from them and on which we still reflect.

Asked by courts, prosecutions, defences to speak out about the specialist opinions of some distinguished specialists in the field, we are facing challenges that we are called to detail hereinafter:

Arguments of the current vulnerability of the polygraph technique

- a) *The polygraph technique has been extensively / exponentially popularized in the sense of satisfying the freedom of information of the general public, exposing in details a series of intimacies - thus losing its "infallibility" and mystery / surprise aura, psychologically necessary to the pre- test phase of waiting, charging, emotional mounting on the issue "criticizes the memory of the criminal act" absent / present in the cognitive / emotional memorial matrix of the*

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¹ See John Reid, Fred Inban, Lye Detection and Criminal Investigation, 1942, Baltimore, USA.

² See Tanemoto Furuhashi, Le detector de mensonges (polygraph) au service de la police japonaise, Revue Internationale de police criminelle, mars, Paris, 1966, p. 62.

- persons included in the suspects pools (see TV talk shows - mass media, radio, advertising etc.) full of ironic / comic, pseudo-scientific - improvisations, arrangements, etc.).
- b) *The strengths of polygraph technique have been revealed* (see the role of the control question, the stimulation test, the tension peak, etc.) and the operative moments of the polygraph investigation are sometimes superficially prepared, the findings of the tests being not always supported by procedural activities capable of professional corroboration specific to qualified, classic evidence (search, confrontation, special means exploitation, person recognition, filing, investigations, interrogations) capable of probing facts (their recognition, exposing the accomplices, delivering corpus delicti, etc.).
- c) *Broad dissemination of elements of examination tactics and procedure* (consent, medical-psychological approval, rules to be respected during examination, etc.) increasingly inspire (especially recidivists) a series of measure to counter-attack the simulation detection (mental evasion, somato-physiological self-control attempts, induction of parasitic elements, movements / contractures, invocation of psycho-medical suffering, self-administration of neuroleptics or sedatives, refusal of examination etc.)
- d) *The technique has been eroded permanently* either between the absolutisations of some (capable at one time to encumber it with the force of evidence) or between the denials and the discredits of others (capable to fully repudiate it) both of them taking care that after exploitation of the orientative clues offered by the polygraph, the identification of the authors, and solving of complex causes, to temporarily marginalize it enough to hyperbolize their own contributions willing to be ephemerally and undeservedly congratulated.
- e) *Among “technical specialists”, there are not once all sorts of “university hybrids” or* (see in the practice of some US schools) simply high school graduates who “intensively” trained in less than a few weeks are declared experts in total disregard for the clinical sense specific to the forensic psychologist, leading to the danger and at the same time the excuse for the possible errors by completely transferring the responsibilities of the findings to the computer processing.
- f) *The polygraph technique is gaining more and more connotations than those that have consecrated it in justice filed*, partly abandoning the requirements of the formidable classical school in the field, being “heavily” used in management and human resources, selection of personnel, recruitment of the workforce, etc., subjects being declared “fit” on a roll (in part having personal experiences in some recruiting companies in Israel).

2. Vulnerability perspective due to erosion of the scientific support on which the method is based

In this respect, we should discuss the explanation for the absence of significant retroactivity and the synergistic support of the route changes, in that the objective psycho-behavioural footprint as a reminder of the deed committed and preserved in the stored memory of the individual in the form

of the criminal algorithm (a sort of objective psycho-dynamic criminal matrix) begins to be more and more solidly expressed and more inconsiderably stored by more and more suspects along with the moral, ethical and legal values, the morals versatility, the continuous disturbance of status criteria and the roles of success-assuring behaviours, the accentuation of lack of credibility in the state institutions and the roles of success-assuring behaviours, the accentuation of one-direction motivation exclusively to the sole target that is the money at any price, the individual (as an expression of the social environment in which he/she develops), he/she also changes, the criminal algorithm becoming in turn drained by his/her affective-mental energy support, a consequence of a barely spotted controversial conflict with the increasingly tolerant and anaemic moral algorithm (in the Durkheimian perspective).

For example, ask if they have stolen!? Embezzled!? Taken bribe! Raped!? Eluded taxes!? Scammed!? Etc. The perpetrators deny with serenity committing the deeds as long as in terms of moral algorithm (moral matrix) as a representation of guilt, inter-projections about sanction, guilt, shame of lying, moral sense of consciousness, etc. – interferes a more and more anaemic and pale criminal algorithm expressed in its affective composition, absolutely necessary for the appearance of emotional stress objectionable in the psychophysiological changes of pulse, BP, bioelectric (GSR) and respiratory routes.

The individual refers to the social models of the ethical, aesthetic, moral, legal conditions, etc. subject to socio-historical conditions at a given moment.³ In our opinion, the activity of the routes and the absence of identification of the synergic changes is the consequence of the acceptance in the offenders' conscience of

the equivalence of the moral and criminal algorithm, while the thieves, the rapists, the embezzlers, the components of the organized criminal groups etc. are running free, not ashamed of their deeds, but on the contrary they make fortunes, enjoy social success, show a contemptuous opulence, enjoy mass media, public blame or stigma delaying in showing, penitentiaries becoming every day real hotel prisons.

In the context of the penitentiary's reality as a holiday "and the elimination of the so-called "labelling" as a reflexion in socius of the "moral patrimony of the detainee, fear and shame as functional and mental references specific to the criminal matrix algorithm are absolutely eliminated"...". So we ask ourselves where is the cognitive – affective potential for the psycho-emotional reactivation against lie..."

Emile Durkheim gives the necessary explanations in the field, the revolutions, the transitions offering the natural experiment of the moral drifting which unfortunately also reaches the efficiency of this rewarding anti - crime replica, because anyway ... "the technique cannot be saved by insinuating fetishes meant to throw on computer processing the responsibility for blubbering findings..."

3. Current Study - Opinions on scientific justification and probative force of polygraph investigation

- a) *The operation of this technique of psychophysiological investigation of emotion is based on the assumption that a conscious lie, in addition to the mental effort required to prepare it, produces a certain state of emotional tension (fear of being discovered).*
- b) *The production of emotional tension is identified in the changes in the*

³ Tudorel Butoi și colab. *Psihologie judiciară*, Șansa Publishing House, Bucharest 2000, pp. 263-264.

psychophysiological routes of the diagrams (BP pulse, respiratory (thoracic) abdominal), GSR (galvanic skin reflex), which is supposed to originate in involuntary emotional neuro-vegetative triggers concurrent to the awareness of the danger and the activation by it of fear energized by the preservation instinct itself.⁴

- c) *The use of the polygraph* is only possible after obtaining the informed consent of the subject and the agreement of the parties.
- d) *It is taken into account that the processing of emotional tension can be due* (and hence the obligation to interpret specialist opinions in a reasonable probabilistic credibility register) also to other etiological sources, frential / disturbing factors (other than simulated behavior) that can influence on the test accuracy, which does not give it the character of the certainty of the prediction by penalizing it for vulnerability/ imprecision and representing a 85/95% percentage of accuracy / success.⁵

An extremely serious issue is that if we can afford, in relation to the challenges of the act of justice and in relation to the current scientific state of the method, to grant the findings of the polygraph investigations a probative force of their own!

From this perspective, so that a means of probation to be effective as judicial evidence, it must be:

1. *solidly scientifically substantiated* (or the polygraph technique operates only with presumptions and probable data, resulting from psychophysiological

reactivity processing subjected to affective / emotional factor instability).

2. *the findings should be “erga omnes opposable”* - completely admissible and opposable to third parties (or the polygraph technique offers only specialized opinion reasonably disputed among lawyers and psychologists)
3. *the test must be meaningful, realistic, useful and legal* (or the polygraph opinion is questionable at least in terms of admissibility as evidence, interference with freedom of expression, etc.)

From this practical point of view, we are faced with the following situations that exploit (including indirectly as derived probative force) the findings of the polygraph investigations.

4. In the polygraph diagrams, psychophysiological changes of routes (specific to the emotional factor) are identified - but the subject does not recognize the facts for which he/she is examined.

- the specialist opinions (conclusions) alone have no probative value, remaining in the area of uncertainty of subject involvement.

5. *in the polygraph diagrams, psychophysiological changes of routes* (specific to the emotional factor) are not identified, and the subject (in pre-test) or after (post-test) recognizes the facts but cannot provide evidence, corpus delicti, corpses, does not show witnesses, does not show accomplices etc .

- the specialist opinions (conclusions) have no probative value,

⁴ See R. Gorni, Microwave Respiration Measurement for “Lie detector” Department of criminal Investigation, Israel, Tel Aviv, 1973.

⁵ See experiments - Ion Ciofu, *Comportamentul simulat*, Romanian Academy Publishing House – Cercetări psihofiziologice experimentale – Bucharest, 1974.

remaining in the area of uncertainty of subject involvement.

6. *in the polygraph diagrams, psychophysiological changes of routes* (specific to the emotional factor) are identified and the subject (pre-test) or after the (post-test) recognizes the facts for which he/she is examined by offering corpus delicti, corpses, witnesses, accomplices etc.

- the specialist opinions (conclusions) have certain derived evidence value, indirectly corroborating with material evidence offered by the subject.

7. *in the polygraph diagrams, psychophysiological changes of routes* (specific to the emotional factor) are not identified, and the subject (in pre-test) or after (post-test) does not recognize the facts

- the expert opinions (conclusions) have no probative value of indictment, at most the exclusion of the subject from the suspects pool is under discussion.

4. Opinions, options in the matter

Adhering to prof. Aurel Ciopraga PhD's opinion, we fully quote "the use of the results of the polygraph examination in the criminal trial is considered reluctant by the courts because the detection of an individual's sincerity or dishonesty can be subject to error, which would affect values of a special social, moral and legal significance. ..." or "... in a judiciary system characteristic of the rule of law where the rights and freedoms of individuals occupy a central position, it is not accepted (some jurists argue) that by a "legal fiction" this form of investigation to be included "in the

category of evidence - ciopraga 1996, quoted by Ioan Buș, Daniel David," "Investigația psihologică în practica judiciară" edit. Pres Univ. Cluj 1999/82.⁶

With the utmost scientific decency, we support the court's appreciation of the limits and vulnerabilities of polygraph technique in terms of prudent credibility solely in the initial approach to criminal prosecution of reasonable suspicions of insincerity, and which are confirmed or denied exclusively by corroborating the classical evidence "erga omnes opposable".

For that matter, "the polygraph does not identify lies but measures reactions, expressions" ... the lie detector is a convenience not a science, "said Raymond Nelson, president of the US Polygraph Association for Business Insider.

The former head of Interpol⁷, Marcel Sicot, in his paper "A la barre de l'Interpol" Paris 1961 pg. 170 underlined ... "it seems to me in the current state of works that they (the findings of polygraph examination) should be classified in the category of clues resulting from police technique rather than criminal proceedings. They certainly do not have the value of traces taken on-site, and still less the probative force of fingerprints recognized today universally ... "

We therefore fully support the decision of the High Court of Cassation and Justice no. 184/2012 as follows: ... "⁸ it was also pointed out to the Courts of Appeal that testing of the defendant's sincerity with the polygraph test should not be overestimated ... it cannot be a certainty of the guilt or innocence of the defendant and, on the other hand, many times, it is imperfect, dependent on many factors. The findings of the polygraph test cannot be considered as

⁶ Ioan Buș, Daniel David "Investigația psihologică în practica judiciară", University Press Publishing House, Cluj, 1999, p. 82.

⁷ Marcel Sicot, Ala barre de l'Interpol, Paris 1961, p. 170 and next.

⁸ Decision of the High Court of Cassation and Justice no. 184/2012.

evidence provider in the procedural sense of the notion, since the polygraph is not as it was shown an evidence means. These can be exploited for a solution only as indicators that corroborated with other factual elements lead to a certain conclusion ... / “(<http://legeaz.net/spețe-penal-iccj-2012/decizia-1894-2012>)⁹:

We appreciate the professionalism and competence in the interdisciplinarity of the “search for evidence” by the Supreme Court of Cassation and Justice, which judged in file no. 952/1/2016 of February 20, 2016; by the conclusion no. 162 on the Criminal Investigation Report no. 330613 of 18.01.2016 polygraph test subject Ovidiu Marian - referring to the substance vulnerability of the examination as follows: ... “or when the conclusions are formulated by comparing the physiological responses to the control questions, the way the latter were determined (for none of them being sure of a true answer) may influence the outcome of the test “...¹⁰

In Germany (Bundesgerichtshof: Entscheidung von 17.12.1998, 1 p. 156/98, 1 p. 258/59 ..), the German Federal Court of Justice decided that polygraph evidences are inherently unconvincing and can not be accepted by court. Requests for prosecution and / or defence to perform polygraph tests will be rejected in all situations ...”¹¹

Similarly, the Court of Appeal of Craiova in file no. 1925/54/2014 - the

defendant being Dumitrescu Dragoș Dan, decides....”¹² Regarding the request for the expertise in the field of clinical judicial psychology and the testing with the polygraph apparatus of the defendant Dumitrescu Dragoș Dan, the Court considers that it is not necessary to carry out such probative procedures, because they cannot be retained as relevant evidence involving elements of interpretation of the emotional factor not being certain of the guilt or innocence of a defendant, being known the imperfections of such tests such as increased emotions, nervousness, other positive or negative deficiencies of the subject. .. “- page 13/14 - chairman Gherhe Bărnău - clerk Robert Frumuselu.

On this issue, we submit to your appreciation the words of Prof. Gordon Barland, “... **not taking into account the findings of the polygraph investigations is just as serious as giving them a total credit or completely ignoring them ...**”

Conclusions

Polygraph testing aims to measure the physiological responses / reactions produced by the fear / concern experienced by the communicator and not on identifying the simulated behavior by observing the person's behavior or by psychologically analyzing his speech.

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⁹ <http://legeaz.net/spețe-penal-iccj-2012/decizia-1894-2012>.

¹⁰ Decision of the High Court of Cassation and Justice no. 952/1/2016 (conclusion 162).

¹¹ German Federal Court of Justice - polygraph evidences are inherently unconvincing and can not be accepted by court.

¹² See the Decision of the Court of Appeal of Craiova - file no. 1925/54/2014.

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