

PLACE OF POLYGRAPH IN CRIMINAL PROCEEDINGS

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Abstract: Polygraph examination has been used in criminal cases in Hungary since the late 1960s. In the beginning, the Hungarian legislation did not name or regulate the polygraph examination. The expert was the polygraph examiner, whose activities were subject to statutory provisions. The new Penal Procedure Act, which entered into force in Hungary in 2018, placed instrumental credibility examination of testimonies among the evidence acts. The polygraph is performed by an adviser. As in international practice, consent is required in Hungary for conducting a polygraph test. The result of the polygraph examination is recorded, which can be brought to court. The aim of the paper is to show what the polygraph is suitable for and what the international practice is. The paper will also take into account the potential of polygraph and the method's concerns, for example the mistakes that can lead to the wrong direction.

Keywords: polygraph, lie detection, evidence, adviser, testimony

INTRODUCTORY THOUGHTS

One of the innovations of the Hungarian statutory Act on criminal procedures that came into force on July 1, 2018 (Act XC of 2017 on criminal proceedings, hereinafter referred to as Be. IV.) is that it regulates instrumental credibility examinations amongst the evidentiary actions. The previous statutory Act on criminal proceedings did not refer to instrumental credibility examinations, but only to one of its best known and the most widespread method, to the polygraph examination. The statutory regulations on polygraph examination were stipulated amongst the rules on the interrogation of the defendant and of the witness, thus in this way the polygraph examination was not an individual evidentiary act. This study aims to analyse whether the Hungarian legislation has made the right decision to implement and regulate instrumental credibility examinations among the rules on evidentiary actions. For us, it also raises the issue whether instruments other than the polygraph can be approved in criminal procedures. Furthermore,

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it is worth analysing whether it is required to have stipulations on instrumental credibility examinations in the criminal procedural act.

Evidentiary measures and evidentiary actions

Section 165 of Be. IV. gives exhaustively listed stipulations on evidentiary measures, namely evidence may only originate from the expressly stipulated evidentiary measures. Evidentiary measures are the following: the statement of the witness, the statement of the defendant, the opinion of the probation officer, the physical evidence (including documents and other instruments) and the electronic data. For this reason, evidentiary measures can be regarded as the origins of evidence. Evidentiary measures provide data that can be used as evidence by the court.

Evidentiary actions are intended to provide evidentiary measures if completed by the authorities. In accordance with the provisions of Section 206 of Be. IV. such evidentiary actions are ‘especially’ the crime scene investigation, the on-site interrogation, the reconstruction, the presentation for identification, the confrontation and the instrumental credibility examination. By using the expression ‘especially’, the Hungarian statutory act, Be. imposes that the specification is not a closed list, but evidentiary measures might arise from evidentiary actions other than those expressly stipulated in the specification. The Preamble of the statutory act refers to smell identification facilitated by criminal justice dogs that can be considered as an evidentiary action, although it is not expressly stipulated in the statutory provisions (Horváth, 2018).

ISSUES OF INSTRUMENTAL CREDIBILITY EXAMINATIONS

Be. IV. refers to instrumental credibility examinations among the rules of evidentiary actions that aim to acquire circumstantial evidence in accordance with the Preamble of the Act. Namely, there are three innovations regarding the instrumental credibility examinations:

Ad 1) Whereas Be. III. only refers to the polygraph, Be. IV. stipulates regulatory provisions on instrumental credibility examinations.

Ad 2) Instrumental credibility examinations became specific evidentiary actions expressly mentioned in the Act.

Ad 3) Instrumental credibility examinations aim to acquire circumstantial evidence.

INSTRUMENTAL CREDIBILITY EXAMINATIONS INSTEAD OF POLYGRAPH

According to the provisions of Be. III., polygraph examinations were construed by an expert advisor (Budaházi, 2015), whereas its subject could only be the major witness and the adult suspect, if consent was given to complete the examination (Sections 180 (2); 181 (4); 182 (2) and 453 (7) of Be. III.). However, the specification of the polygraph did not necessarily mean that other instruments were not allowed in the Hungarian criminal justice. True, much less frequently than polygraph examinations, two other, script-based credibility examination methods were used, namely, the computer graphometer examination and the graphometer. According to the admitted practice, an expert was appointed to conduct the examination and the statutory provisions on experts applied to computer graphometer and graphometer examinations accordingly. Although volunteering is not the characteristic of expert examinations, likely to polygraph practice, the conduct of such examinations was also condition to the consent of the subject. We must admit the significance of such consent, since not only the polygraph examination, but also the two other, script-based credibility examinations require intense cooperation from the examinee. If the subject does not approve to the examiner's orders, the examination cannot even start or it will be interrupted.

Using the expression of instrumental credibility examination reflects the aim of standardisation, whereas Be. IV. gives a unified regulation on different measures of instrumental credibility examinations. If instrumental credibility examination is conducted, it may only be completed by an expert advisor, who may later be interrogated as a witness regarding his procedure and conclusions (Section 212 (2) of Be. IV.). Experience has shown that such interviews mostly refer to the circumstances of the examination, explicitly to the reliability and to the operational principles of the credibility examination method. According to Section 79 (8) of the Nyer. (Gov. Decree on the detailed rules of the investigation and the preliminary procedure) the expert advisor shall take notes on the instrumental credibility examination, including the results of the examination. Such notes shall be included in the investigation documents, thus the memorandums taken upon the provisions of the Nyer. shall practically replace the interrogation of the expert advisor as a witness, in case the authority does not require more information regarding the examination. Interviewing the expert advisor is most likely conducted before court and less often during the investigation procedure. I have started an empiric research in April, 2019, acquiring questionnaire replies of 131 police officers until May 14, 2019, out of which 67 persons were engaged as detectives or examiners in their duty. The survey proved that only three out of the 67 detectives or examiners were subject to a witness interview as expert advisors completing instrumental credibility examinations during the investigation. Nevertheless, the interrogation of the polygraph expert may also be reasonable if the defence opposes the results of the polygraph examination upon the grounds that the defendant was in no condition to analyse, or, in the given case, the un-

favourable result of the examination was caused by the fact that the subject was under the influence of drugs. Since the operation and reliability of the polygraph method is quite commonly known (at least, for the authorities), questioning the expert advisor as a witness may be more significant for other instrumental methods, whereas he must also provide detailed introduction of the applied measure.

According to Section 82 (2) of Be. IV. the witness under the age of eighteen shall not be subject to an instrumental credibility examination. The reason behind this provision is that instrumental credibility examination requires a certain level of physical and mental maturity of the subject. Most likely it is the polygraph that raises the issue, since it takes a certain maturity of the subject person to properly get himself right into the examination situation. On the other hand, we may interpret this statutory provision in a way, that for witnesses under the age of eighteen the sense of a special treatment reflecting to the requirement of tolerance also appears, as a reason for protecting the witness from certain stressful evidentiary actions. Nevertheless, it is a legislative failure that Section 212 (1) of Be. IV. allows the instrumental credibility examination of the defendant without explicitly stipulating a prohibition regarding minor defendants. Due to the above reasons, expert advisors chose not to complete the polygraph examination on minor subjects, even though otherwise there would be no legal obstacles to the examination.

Instrumental credibility examinations have become specifically stipulated evidentiary actions

Not only theoretically it allows instruments other than the polygraph, as another one of its innovations, Be. IV. specifies instrumental credibility examinations as an individual group of evidentiary actions. Its statutory position assumes that ideally the instrumental credibility examination shall result in a memorandum of the expert advisor that might be considered as an evidentiary measure by the proceeding authority. It is also the speciality of instrumental credibility examinations that apart from other evidentiary actions, it may only and exclusively be conducted in the course of the investigation. In itself, this particular characteristic assumes that instrumental credibility examination is not a typical form of evidentiary actions, further supported by the practice of the courts, whereas the result of the instrumental credibility examination shall not be deemed as an evidentiary measure. Such court practice has been previously established in the era of Be. III., when instrumental credibility examinations were not evidentiary actions. According to the opinion No. BK 4/2007 of the Supreme Court's Criminal Law Department there are no references to the expert advisor or to the polygraph examination in the specification of evidentiary measures (Section 76 (1) of Be. III.). The Supreme Court established that polygraph examinations are not allowed in court procedures, nevertheless, the records taken on the proceedings of the expert advisor can be approved to be the subject of the trial. Decision No.

Bhar.II.1271/2013/8 of the Curia further confirms the opinion No. BK 4/2007, whereas the decision allows the court to approve the results of the polygraph examination as part of the trial and to read such results before the court. Judgement of the Nyíregyháza Appeal Court also assumes that the results of the polygraph examination can be approved as part of the trial (Nyíregyháza Appeal Court, Decision No. I.B.88/2013/81). However, contrary to the above, the Decision No. Bfv.III.953/2012/34 of the Curia refers that the polygraph does not assist the interpretation of the evidence (the content of the testimony), it can only effect the adjudication of the credibility and trustworthiness of the testifying person. Nevertheless, the latter may only be considered as an aid assisting the actual orientation, as in the testimony is subject to free adjudication, in other words, the result of the polygraph examination cannot be considered as evidence. The Opinion No. 5/2014. (IX.29.) BK. of the Metropolitan Appeal Court confirms the same approach, declaring that the opinion of the expert advisor on the polygraph examination shall not be considered as means of evidence, not being enlisted in the exclusive stipulations of Be. III. Moreover, in its decision of 2015, the Metropolitan Appeal Court has again stated, that Be. III. does not mention polygraph examination amongst the evidentiary measures (Metropolitan Appeal Court Decision No. Bf.218/2015/17). The Metropolitan Appeal Court has also interpreted polygraph examinations in the era of Be. IV. Adjudication of the appeal court confirms that the legislator 'did not specify instrumental credibility examinations amongst the evidentiary measures, but we can find the method among the evidentiary actions, likely to reconstruction and presentation for identification. The aim of such evidentiary actions is the credibility analysis of a testimony already given. As for the instrumental credibility examiner, the instrument is used to detect the changes in the body activities during the analysis of the testimony, thus, the facts detailed in the testimony may either be verified or, on the contrary, they can be confuted' (Metropolitan Appeal Court Decision No. B./1286/2017/13). The decision proves that the court practice of the Metropolitan Appeal Court has not changed after the coming into force of Be. IV. I have consulted with several Hungarian judges in the past few months. Solidly they stated that we cannot expect any changes in the judicial interpretation of instrumental credibility examinations.

Nevertheless, police personnel has a different approach on judicial changes. Prior to the coming into force of Be. IV., they expected the significance of polygraph examinations to grow in evidentiary procedures after the July 1, 2018. Between April 11, 2018 and May 11, 2018, altogether 418 police officers have completed my electronic questionnaire, namely, 119 detectives (28.5%), 79 investigators (18.9%) and further 220 officers (52.6%) assigned to other duties, serving in Budapest and in all Hungarian counties except for Hajdú-Bihar County. Different number of police officers filled out the questionnaire in each county, I did not try to have an equal number of police officers per county in the survey. I asked my sergeant students to send their colleagues the availability of the questionnaire and encourage them to complete it. The volunteer-based, anonymous questionnaire survey was not representative, but it shows what we can see in polygraph

cases. When I conducted interviews with investigators, they had similar thoughts to those shown in the questionnaire responses. The questionnaire contained 14 questions. 208 officers (50.01%) answered 'yes', 65 officers (15.7%) gave negative response and 142 persons (34.2%) said 'maybe' to question No. 10 ('Be. IV. stipulates the provisions on instrumental credibility examinations within the scope of evidentiary actions. Do you agree, that it will increase the significance of the results of the instrumental credibility examinations in evidentiary procedures?') I have implemented further electronic questionnaire surveys in November 2018 on 106 police officers. They worked for the police for 8 years on average, and they were serving in Budapest and in all Hungarian counties. This survey was also not representative. This time I asked sergeant students from another class to send the questionnaire to their colleagues. 68.9% of the questioned (73 officers) responded 'aye', 17.9% (19 persons) gave the answer 'maybe', while 13.2% (14 officers) said 'no' to question No. 5. (5. 'Do you agree that instrumental credibility examinations becoming evidentiary actions shall increase polygraph examination's role in evidentiary procedures?'). During my empiric research implemented in the spring of 2019, out of altogether 131 officers questioned, 104 (79.38%) said 'yes' to the same question, (this time, it was question No. 2. 'Do you agree, that instrumental credibility examinations becoming evidentiary actions shall increase polygraph examination's role in evidentiary procedures?'), while other 20 (15.26%) said 'maybe' and 7 (5.34%) replied 'no'. This survey was also not representative. This time I asked the students of our university to send the questionnaire to their colleagues. The questionnaire came from all Hungarian counties.

These three empiric, but not representative surveys lead to the conclusion that the more time goes by the less police officers believe that the importance of instrumental credibility examinations will not grow in evidentiary procedures. Certainly, this theory cannot effect court practice, however, it might have an influence on the growing number of cases, whereas an instrument is used for liability examination purposes during the investigative sequence of the procedure.

Do instrumental credibility examinations aim to acquire circumstantial evidence?

It is worth to examine, whether instrumental credibility examinations result in direct evidence or not. Since the expert advisor shall not establish an opinion on the facts to be proved, consequently, 'what he states, shall not prove the criminal act/culpability, etc.' (Bejczy, 2013). Neither his records taken on the results of the examination, nor his testimony taken as a witness shall give rise to direct evidence. On the other hand, eventual testimonies of either the witness or of the defendant might follow the instrumental credibility examination, however, such statements might include data on the provable facts. Thus, even if the expert advisor's records do not result in direct evidence, instrumental credibility examination may still play part in leading authorities to acquire direct evidence (Budaházi, 2008).

Examining the issue of circumstantial evidence, we may state, that the conclusions made in the memorandum implementing the results of polygraph examination cannot even be considered as circumstantial evidence, since the expert advisor may only establish whether the physiological changes of reaction of the examinee imply deception when giving denying answers to relevant questions. For example, the perpetrator's denial to the question, whether he has killed the victim with a knife was deceptive or not. Although the expert advisor's question refers to the provable fact, he may only examine the physiological changes of reaction of the examinee when analysing the answer. The physiological change of reaction does not correlate to the provable fact, neither can it presume the provable fact. The memorandum taken on the results of the examination can either confirm the credibility of the testifying person, as in the witness of the suspect sincerely denies the conduct of the crime, or, on the contrary, it points out to the deceptive nature of the examinee's denial, since his physiological changes of reactions show his fear of being caught a liar. This is exactly why we see that court practice does not approve of the results of instrumental credibility examinations, whether it is direct or circumstantial evidence. Actually, instrumental credibility examination is not about 'acquiring evidence', but it is about the 'credibility inspection of the evidence originating from the evidentiary measure (Belegi, 2018). Namely, for circumstantial evidence, the evidentiary measure does not directly refer to the provable fact, but to another fact, from which we may conclude to the provable fact upon the rules of logic, the principles of science, practical knowledge and experience, and upon other evidence available regarding the given case (Fantoly & Budaházi, 2019). Due to these reasons, neither the records of the expert advisor, nor his testimony will result in circumstantial evidence. However, circumstantial evidence may arise from instrumental credibility examination if, for example, the location of the hidden weapon used to conduct the criminal act or the location of the victim's body is revealed by using the polygraph examination (Krispán & Pusztai, 2016).

THE ROLE OF INSTRUMENTAL CREDIBILITY EXAMINATION IN CRIMINAL PROCEEDINGS

Instrumental credibility examinations have their most significant place and role in the inspection sequence of the investigation, whereas the objective is the identification of the perpetrator, furthermore, the gathering and recording of the evidentiary measures necessary to do so. In general, even judges agree to have no doubt on the significance of polygraph's role in orienting the investigation and in the identification of the suspect (Budaházi, 2009). Nevertheless, investigating authorities must be alert, and should not have unquestioning belief in instrumental measures, or namely, in the polygraph. To one of the questions exposed in my empiric questionnaire research implemented in the spring of 2019, according to which 'In your professional practice, has it ever occurred, that the result of

the polygraph examination proved to be wrong?’ I have collected altogether 119 answers, 105 of them (88.2%) replied ‘no’, but 14 of those answering the questionnaire (11.8%) said ‘yes’, confirming that the result of the polygraph examination proved to be wrong in their practice. Nonetheless, the results of the empiric analysis show that the authority must also consider other data when determining the direction of the investigation, or when changing its focus from one suspected perpetrator to another. During the inspection sequence of the investigation, polygraph examination may also be used to determine, whether the suspect’s denial of crime is plain and sincere or not. If the denial is solid, the investigating authority or the prosecutor’s office should reconsider, whether the suspect has committed the criminal act or not. On the other hand, in case of deceptive denial polygraph examination may conclude to the suspect’s change of mind, or in other words him seeing no point in further denial.

Although the court may rely on the results of the polygraph examination, it will actually do so in case of damning adjudication or if the results of the examination are incriminating the defendant. In this relation, ‘relying’ means a reference worded in the court’s judgement, stipulating that the result of the polygraph survey has also weakened the credibility of the defendant’s denial. Contrary enough, examination results referring to the defendant’s innocence are typically not part of the acquittal’s statement of reasons. Since polygraph examination may only and exclusively support or weaken the credibility of the testimony, generally, for the purpose of inspection, it truly has no justification in the court procedure. Since alike to instrumental credibility examinations, both presentation for identification and reconstruction may also strengthen or weaken the credibility of the testimony, I cannot see a problem in its implementation amongst the evidentiary actions. Even less so, because ideally it may lead authorities to both direct and circumstantial evidences. The same way other evidentiary actions do so.

INTERNATIONAL ASPECTS OF THE REGULATIONS ON POLYGRAPH EXAMINATION

I have analysed the criminal procedural statutes of forty-two European countries, furthermore, of Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, and Uzbekistan, moreover, the criminal procedural regulations of the USA and of Canada, from the aspects of their approach to referring to polygraph examination, more actually, whether they have statutory provisions on polygraph or on instrumental credibility examinations. Besides the Hungarian stipulations, only the Polish and the Montenegrin criminal procedural act have statutory provisions on polygraph or on instrumental credibility examinations. 2003’s modification of the Polish criminal procedural code has implemented Article 199 (Hofmansk & Kunštek, 2004), according to which any examinations analysing the non-conscious reactions of the human body may only be executed upon the consent of the examinee. By these means, the Polish criminal statute does not exclude the possibility of

using instrumental credibility examinations other than the polygraph in criminal procedures. The Montenegrin criminal procedural act (Criminal Proceedings Code, Official Gazette of Montenegro, no. 57/2009, 49/2010, 47/2014 – the Decision of the Constitutional Court of Montenegro, 2/2015 – the Decision of the Constitutional Court of Montenegro and 35/2015 - Articles 88-91 are not in the consolidated text) allows the polygraph examination during the preliminary investigation. Besides other procedural actions, a polygraph examination may be used, for the purpose of conducting such preliminary tasks, in accordance with the provisions of Section 257 (2) of the statute. However, the act does not have any other stipulations on the polygraph examination.

Although the Lithuanian act on criminal procedures does not regulate polygraph examination, the Lithuanian legislation has dedicated an individual statute to polygraph examinations (LIETUVOS RESPUBLIKOS POLIGRAFO NAUDOJIMO ĮSTATYMAS (2000 m. rugpjūčio 29 d. Nr. VIII-1906)), nevertheless, this act does not refer to polygraph examinations used in the course of criminal procedures, but on survey approved for recruitment purposes or aptitude tests taken at certain government bodies.

Polygraph survey has a certain place and role in several countries' criminal procedures, however, statutory implementation of such procedural action is a rather unique legislative method. Usually, polygraph examinations are conducted by an expert, in turn, to whom the statutory provisions of the given criminal procedural act on experts are accordingly applicable, therefore, polygraph examinations are not deregulated or uncontrolled. Typically, polygraph examinations are subject to prior consent, their results are concluded in the expert opinion, whereas the latter shall only be used for the purpose of orientation of the investigation, and cannot be used as evidence. Out of all instruments, the polygraph has the utmost significance, other instruments usually do not have any role in criminal cases whatsoever.

CLOSING REMARKS

Generally, both polygraph examination and instrumental credibility examinations have a place in the investigating sequence of the procedure, while their functional role is limited to the orientation of the investigation. They may assist the perpetrator's identification, moreover, they may support or weaken the credibility of the testimonies, and may generate further testimonies.

The statutory provisions on instrumental credibility investigations in Be. IV. refer to and confirm its significance in criminal proceedings. Due to its importance, the Act stipulates the institution amongst the evidentiary actions. Such relevance was mainly achieved by polygraph examinations, since other instruments, such as computer graphometer analysis (Agárdi, 2018), graphometer (Farkas, 2005), Layered Voice Analysis (Kis & Takács, 2018)] have only marginally appeared in Hungarian criminal cases, and even Be. IV. could not break this tendency yet.

Nevertheless, this is not an actual problem, since the polygraph examination is an adequately validated method, while the internationally approved validation of other measures has not been completed yet.

All is not lost that is delayed, but polygraph examination will surely preserve its dominance for years, not only in Hungary, but in foreign countries as well.

My non-representative empirical researches in 2018 and 2019 show that police reckons a greater role for polygraph in evidence because the new Criminal Procedure Law placed instrumental credibility examination of testimonies among the evidence acts. Conversely, case law shows otherwise, judges still do not consider polygraph results as evidence. This is not expected to change in the near future.

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