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Polygraph in Austria

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The legal classification of polygraph use in Austrian criminal courts was established almost 50 years ago. It was based on the permanent judiciary practice of the Supreme Court from the 1960s on – that the use of polygraphs during any part of a criminal procedure is not allowed. This article will provide a short review of this practice of the Supreme Court, followed by a discussion on the positions taken in the literature as well as general dogmatic considerations about the rules laid out in the Austrian code of criminal procedure.

Decisions of the Supreme Court

In its history, the Supreme Court has only had to adjudicate a few cases concerning polygraphs, which will be presented in chronological order. Not only

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do the rulings in these cases show the constancy of its decisions, but also that the Supreme Court has so far never doubted its original reasoning.

The first judgment was rendered in 1966 (OGH 24.11.1966, 9 Os 6/66). The convicted, who had been sentenced for fraud, misappropriation and other financial crimes, had applied for an examination with a polygraph during the proceedings before the court of first instance. By this measure, he wanted to prove that he had never intended to harm anybody. The court of first instance rejected the application. The convicted then claimed before the Supreme Court that his rights of defense had been violated. For several reasons, the Supreme Court ruled against the motion of the convicted. The Supreme Court stated that the use of a polygraph contradicts the nature of a criminal trial and is therefore forbidden, even if the accused asks for it. On the one hand, the court doubted the reliability of a polygraph procedure. The court stated that the causes of potential outcomes of a polygraph examination cannot be known and that therefore they cannot be used as evidence of the innocence or guilt of the accused. In particular, the connection between physically measurable events (e.g. sweating, pulse, etc.) and their possible causes (lying, nervousness, etc.) cannot be clearly determined.

But even if it was possible to provide reliable evidence as to whether a person was lying or not, polygraphs are not compatible with the principle “*nemo tenetur se ipsum accusare*” (the principle against self-incrimination) of Austrian criminal procedure. According to the procedure, it lies within the remit of the accused to decide if and what they want to say before the court. The accused must not be influenced at all therewith. Therefore, every form of influence, including polygraphs or hypnosis, is forbidden. The accused must be able to decide at any moment of the proceedings if they want to make a statement and whether this statement contains the truth or not. This principle is considered so important that there is no way to abandon it, not even if the accused themselves so requests.

In 1977, the Supreme Court had to make a decision regarding the use of LSD-administration during a trial, in which it also pronounced on polygraphs in an *orbiter dictum* (OGH 24.3.1977, 12 Os 47/77). Confirming that any influence on the free will of the accused must be prevented, the Court classified such a procedure as prohibited. In no case may anybody – including the accused – be obliged to provide themselves or their body as a piece of evidence. According to the court, any method resulting in the accused making statements without being able to control them, not only through LSD-administration but also through a polygraph investigation, must not be used. Moreover,

the accused cannot agree to or wish for such a procedure, as it would violate the right to a fair trial, according to Article 6 of the European Convention on Human Rights. Other methods banned from trial under this ruling are, for example, hypnosis, narco-analysis or the administration of any inhibition reducing substance.

More than 20 years later, in 1999, the Supreme Court came to a similar decision (OGH 15.4.1999, 12 Os 34/99). Again, the accused had applied for a polygraph opinion during a trial before the court of first instance. The application was rejected. Next, the accused argued that his rights of defense had been violated through this decision. The Supreme Court again followed its former decisions that the power of disposition of the accused is a fundamental and indispensable right, which cannot be contradicted.

In the same year, a similar case led to a different argument in the Supreme Court's reasoning (OGH 9.11.1999, 14 Os 77/99). Once more an accused had applied for a polygraph opinion and the application had been rejected. In this case, the Supreme Court departed from its usual way of argumentation, focusing not on the legitimacy of polygraph procedure, but on its necessity during a trial. The Supreme Court argued that judging the credibility of the accused is the main task of the Court, which does not need the opinion of an expert. The free appraisal of evidence is a fundamental principle of the Austrian code of criminal procedure. Leaving the evaluation of the credibility of the accused to an expert would contradict this principle.

The latest decision concerning polygraphs dates back to the year 2007 (OGH 24.4.2007, 11 Os 11/07p). The Court repeated its first decision from 1999 that through a polygraph examination, the possibility of the accused to dispose freely of their statements is inhibited. Therefore, the investigation is incompatible with basic principles of the Austrian legal system, even if the accused asks for the use of a polygraph during the trial.

Discussions in literature

Several reasons why the polygraph plays no role in the Austrian judicial system must be enumerated. First, its reliability is doubted by the Supreme Court (9 Os 6/66) as well as in opinions in the literature (Wagner, 2012; Seiler, 1996; Pilnacek, 2002). Second, there are specific dogmatic reasons, emerging from principles of the Austrian code of criminal procedure, which prohibit the use

of a polygraph during any part of a criminal procedure. These reasons will be discussed in the following paragraphs.

One of the arguments against the use of a polygraph, which was once used by the Supreme Court (14 Os 77/99) but can also be found in the literature (Wagner, 2012; Seiler, 1996, Hinterhofer, 2011), is that its results would constitute a statement (pronouncement) concerning the credibility of the accused. However, the evaluation of testimony of the accused lies only with the judge. In § 14 Austrian code of criminal procedure, one of the basic principles of criminal proceedings is defined: the free consideration of evidence by the judge (§§ 14, 258 (2) Austrian code of criminal procedure).

Seiler (1996) argues that judges lack the ability to evaluate the reliability of the polygraph method. Therefore they would need an official expert to undertake this task. The consideration of evidence would lie with the expert. In the “Viennese commentary on the code of criminal procedure”, one of the most reputable treatises on this law, Hinterhofer (2011) states that an official expert should only be consulted if it is necessary. This necessity derives from whether special expertise is needed which the judge lacks. To judge whether the testimony of an accused or a witness is believable is however an inherent part of the tasks of the court and should not be the subject of an expert’s report. Instances in which an expert is needed to give a statement about a person’s credibility may only occur if the mental health of the accused is doubtful for substantial reasons.

Wagner (2012) disagrees with this line of reasoning. She argues that in no case is the court bound by the report of an official expert. Like any other piece of evidence, the report is subject to the free consideration of the judge. If they do not appraise it to be believable, they can disregard the results of the report in the decision: they simply have to give an explanation as to why they do not consider the report to be valuable for the outcome of the trial.

Seiler (1996), furthermore, cites as evidence against the use of polygraphs that – since there is no guarantee that the results are true – the risk remains that an innocently accused will incriminate themselves by showing physical reactions during the examination, even if they do not result from lying. In his opinion, paired with the potential need for an expert’s report, this argument justifies the complete prohibition of polygraphs in court.

The most important argument in literature refers to the principle “*nemo tenetur se ipsum accusare*”, which states that nobody must be forced to accuse

themselves (Wagner 2012, Seiler, 1996, Pilnacek, 2002). It is based on both Art. 90 (2) Federal Constitutional Law (“In criminal proceedings the procedure is by indictment.”¹) and Art. 6 of the European Convention on Human Rights: the right to a fair trial. By combining these two regulations, which are warranted under constitutional law, the principle of liberty to testify can be derived. The relevant regulations of the Austrian code of criminal procedure can be found in §§ 7 (2) and 164 (4). § 7 standardizes the right of defense: “The accused must not be forced to incriminate themselves. At any moment they must be free to testify or to refuse to give evidence. They must not be forced or induced through coercion, threats, promises or pretense to give evidence.”² § 164 specifies that the free act of will and the free volitional acts of the accused must not be affected by any measures. These regulations are based on the subject status of the accused. Following from this status, the accused must never be an object during the trial. Therefrom it follows that they can decide at every single moment of the procedure whether they want to testify or not and whether this testimony contains the truth or a lie. Whereas the law states clearly that the accused has the right to remain silent, opinions differ as to whether they have a “right to lie” (Wagner, 2012). But even if it is not classified as a “right to lie”, there must not be any disadvantage for the accused if they get caught lying. A polygraph could hinder the accused in deciding freely whether they want to answer a question truly or use a lie. That is why polygraphs are classified as banned measures according to § 164 (4) Austrian code of criminal procedure. (Kirchbacher, 2009)

An often discussed question is whether the situation is different if the accused agrees to - or asks for - an examination with a polygraph. In contrast to the legal situation in Germany (§ 136a (3) German code of criminal procedure), this case is not explicitly regulated in the Austrian code of criminal procedure. The Supreme Court has stated constantly in its decisions that the accused cannot dispense with their right of disposition. In the literature, this topic is controversial. Seiler (1996) claims that the accused is not forced to testify against themselves if he asks for the examination. Taking away the possibilities the polygraph could offer would mean taking away maybe the only chance for the accused to defend themselves and prove themselves not guilty.

Hollaender (2002) argues in a similar way, following the decision of the German BGH in 1998 (1 StR 156/98). He is convinced that the legal situation in

¹ Official translation: http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf (last update 14.1.2013).

² Translation by the author.

Austria concerning the regulatory prerequisites is not too different from the one in Germany, especially with respect to constitutional civil rights. Polygraphs are not explicitly banned measures in either legislation. Hollaender (2002) claims that the protection the code of criminal procedure is obliged to give to the accused must never have negative effects on the accused themselves.

Summing up these positions, the main argument is that an innocently accused person who would like to take the opportunity of using a polygraph to prove their innocence is being hindered in order to save the guilty accused who wants to avoid the examination.

Wagner (2012) argues in a different way. The most important argument for her in favour of banning polygraphs from the court room is the indirect pressure it would put on the accused if they were allowed. In a case where somebody who was innocently accused – but did not believe in the reliability of the polygraph – were asked whether they want to undergo an examination, it would leave them without a (real) choice if polygraphs were allowed during the criminal procedure. The judge would expect them to prove their innocence by undergoing the examination. Thus, contrarily to the opinions put forward in previous paragraphs, Wagner (2012) is arguing that it is not the guilty accused who is protected by the ban. Instead, those who are innocently accused, but who do not believe in polygraphs and would suffer from the disadvantage of the bad impression given to the judge by refusing the examination, benefit from the prohibition. Whereas one right might be taken away from the accused willing to use the polygraph (if a polygraph ban is in force), accused persons who do not want to undergo the procedure would be deprived of their right to have free control over their testimony (in the case of lifting of a ban).

Although some authors claim that the argument concerning indirect pressure would apply to the right to remain silent as well (e.g. Seiler, 1996), it seems that at this point in the discussion, it is the most important argument for banning polygraphs from trials.

As explained above, certain measures are prohibited by § 164 (4) Austrian code of criminal procedure. However, the situation can arise that the criminal prosecution uses these methods. In this case, § 166 Austrian code of criminal procedure states that the results must not be utilized during the trial. Following the argumentation that the use of a polygraph is a banned measure in the sense of § 164 (4), the usage of its results in court would be

forbidden on the basis of § 166 Austrian code of criminal procedure. (Michel-Kwapinski, 2011)

If the prohibition is ignored, the convicted can appeal for nullity at the Supreme Court, based on § 281 Austrian code of criminal procedure. (Ratz, 2011)

Conclusion

The use of a polygraph during a criminal procedure is prohibited in Austria for various reasons. The Supreme Court follows the line of argumentation that a polygraph would contradict the fundamental principle that nobody must be forced to testify against himself. Furthermore, the polygraph is classified as a banned measure in the sense of § 164 (4) Austrian code of criminal procedure. Other arguments to underpin this line of reasoning are the insufficient reliability of polygraphs as well as the principle of free consideration of evidence, which shall rest with the judge alone. Although one can find rare supporters of the polygraph among the scientific community, the majority of commentators agree on the prohibition of polygraphs for the indicated reasons. At this point in the discussion, it seems unlikely that this situation in Austria will change in the near future.

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