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The Use of the Polygraph in the Penal System of England and Wales

Summary

The criminal justice system of England and Wales increasingly deploys the polygraph to extract information from released offenders. Hereby I provide written evidence showing that the central claim for the understanding of the polygraph—i.e. the presupposition that the polygraph indicates deception—is widely discredited. With the use of the polygraph, the criminal justice system does not only infringe the released offender's human rights, but also fails to protect the public. Furthermore, the combination of inadmissibility of the polygraph in the criminal process and its use from probation services creates a major contradiction which is detrimental to the integrity of the legal order.

The author of this text is Senior Lecturer at Northumbria Law School (Northumbria University) and Research Fellow at the Ecole des sciences criminelles – University of Lausanne. His main area of expertise lies in criminal evidence and expert evidence. Recently, Kyri published widely on the issue of the use of the polygraph in the criminal justice system in England and Wales. The reason for submitting evidence are the author's major concerns regarding the legality and validity of the polygraph and last but not least the infringement of human rights through its use.

The Prevalence of the Polygraph in the UK [Q1, Q3]

1. In a masterpiece of world literature, Mary Poppins—upon her return to the Banks family— goes on to enquire how the children have been behaving during her absence. Mary Poppin's pipeline to the children's soul was an oral 'Thermometer' which informed her reliably that Michael had been 'Careless, Thoughtless and Untidy' (Travers, 2008: 156). One would assume that adults especially policy-makers find this amusing, as they can tell the **difference between fiction and reality**. Surprisingly, **recent developments in the UK criminal justice system suggest otherwise** (Kotsoglou 2021).

2. The polygraph test is in vogue, enjoying an unmistakable resurgence of usage. In England and Wales lie-detector tests are currently in use by Her Majesty's Prison and Probation Service to monitor sex offenders on parole and manage their level of compliance. Sections 28–30 of the Offender Management Act 2007 enable a 'polygraph condition' to be inserted in the release licence of released sexual offenders (note that this is **not a marginal phenomenon**. Sex offenders amount to ca. one fifth of the prison population and one tenth of offenders under probation supervision ((Stacey, 2019: 5)). Individuals who have been found in breach of their licence conditions may be recalled and return to prison at the instigation of their offender manager (for an overview, see HPPS

2019). The remit of the polygraph test has recently expanded with provisions in the Domestic Abuse Act 2021 and the Counter-terrorism and Sentencing Act 2021 respectively.

3. Furthermore, FOI research has uncovered remarkable inconsistencies within UK police forces in respect of polygraph use. Of the 46 police forces which replied (94% response rate), 37 used a 'neither confirm nor deny' response, whereas 5 forces denied the use of polygraphs, without any further NCND caveat (Kotsoglou & Oswald 2020).

4. Finally, the pilot scheme 'Choices and Consequences' (C2) run by Hertfordshire Constabulary 'aims to steer prolific, acquisitive criminals away from a life of crime' by offering a 'voluntary lie detector test' as a condition for bail albeit without any statutory basis for doing so (see Hertfordshire Constabulary, 2019). In a wider context, the EU has already funded and deployed at several airports security systems (e.g. iBorderCtrl) whose main objective is to secure the external borders of member states by using **algorithmic** devices that are 'ranging from biometric verification [to] automated deception detection'.

Hardware and Software [Q3]

5. One of the main insights arising from literature investigating the validity of lie-detection is that the polygraph test *cannot* be reduced to the polygraph, i.e. the rather banal technology that measures and records *physiological* indicators such as blood pressure, pulse, respiration, and skin conductivity. Crucial is not the device, but the underlying interview logic which aims at eliciting confessions. Note that even polygraph operators make clear that polygraphy is **primarily 'a psychological procedure and only secondarily of a physiological nature'** (e.g. Abrams, 1978: 178 - emphasis added) (Kotsoglou 2021).

6. It cannot be stressed enough that ever since the first deployment of the polygraph criminal courts, scientific institutions, and academic discourse have continuously and almost unanimously discredited the polygraph as regards its validity in fact-finding processes. The polygraph can only register neutral physiological data. Contentious, indeed deeply flawed is one of the main doctrines of Introspection, i.e. polygraph's underlying scientific paradigm, according to which *mental processes run parallel to physiological ones* (Wundt, 1902)—an idea which proved to be the fulcrum point for the polygraph. In other words, whereas it was William Marston (i.e. the inventor of the polygraph) who laid the groundwork for the *hardware*, it was Leonard Keeler the person who developed the 'interrogation rituals' for what we call today the polygraph *test*. Only the latter enables the operator to extract adverse statements from the interviewee. In fact, the polygraph (the hardware) is not even necessary for the polygraph test. Police officers in Detroit during the 1980s were using a Xerox machine as a polygraph device (Simon 1992). What *is* necessary, is that the interviewee believes (based on false claims) that the device can detect lies. As every blue-ribbon committee indefatigably has stressed, **there is simply no unique physiological indicator that reflects a single underlying**

psychological process, let alone deception (Kotsoglou 2021 for more discussion).

The Polygraph is an Interrogation Tool [Q3]

7. The polygraph is an interrogation technique, not a scientific device. It is a modern **Trojan horse** in which the extraction imperative is secreted under the veil of technological progress. Its purpose and sole potential are not to detect truth, but to enable interviewers to extract confession statements at the price of rationality and legitimacy—for three reasons (see Kotsoglou and Oswald, 2020 for more discussion).

8. *First*, released offenders are forced to undergo polygraph sessions, insofar as 'failure to attend or comply with the polygraph session as instructed would constitute a breach of the licence condition'. Interestingly, the Polygraph Examination Instructions (PEI) thus sanction non-attendance of a pseudo-scientific interview ritual whose output would be declared inadmissible in criminal proceedings.

9. *Secondly*, according to the PEI para 2.8.5, if deception is indicated ('DI') and the offender is not 'forthcoming in offering any explanation', then a 'sound guiding principle' is to 'address the issue "head on" with the offender and try to verify it'. But 'challenging the interviewee head on' is nothing but a way to gain leverage based on **malleable pseudo-scientific output** (see Kotsoglou and Oswald, 2020 for more discussion). The unanimously accepted lack of linkage between psychological/normative concepts such as truthfulness and physiological functions becomes relevant again, for, pursuant to para 2.74 PEI an offender who has failed the test (DI = deception indicated) 'will be given the opportunity to explain the test result in the posttest phase of the examination'. It is, however – and this cannot be stressed enough – unclear, what could count as a reliable indicator of deception ('DI') given the above-mentioned lack of linkage.

10. It becomes clear that what the polygraph examiner does is to increase the interrogative suggestibility which, as research clearly shows, appears to be significantly mediated by anxiety processes (Gudjonsson, 2003: 148). Thirdly, the legal obligation of the interviewee to provide an explanation with regards to a DI is highly informative for the simple reason that the PEI do not regard—even from within the flawed logic of the polygraph—the very possibility of a false-alarm as relevant. This is, I submit, the exact point where the **bogus-pipeline effect** kicks in: The polygraph interview, especially the stim-test are calibrated towards the goal of **extracting adverse statements** (see Kotsoglou 2021 for more analysis).

Arbitrariness: The Use of the Polygraph infringes Human Rights [Q3, Q8, Q10]

11. The use of the polygraph in the context of probation can routinely engage Article 5 (right to liberty and security of the person) and Article 8 ECHR (right to respect for private life). In the UK Government's view, the polygraph measures do not infringe Article 5 (or Article 8) 'as detention will be in accordance with the sentence of imprisonment as set by the court' (see Ministry of Justice, 2020: para. 17). Any interference, the UK Government asserts, 'is justified [...] owing

to the significant risk to the public potentially posed by this cohort of offenders in the current environment' (Ministry of Justice, 2020, para. 70). With regards to Article 8 the High Court reaffirmed in *Corbett* [2009] EWHC 2671 (Admin), para. 14) the lawfulness of the polygraph—with similar arguments as above.

12. It is striking that in both the UK Government's justification and the courts' jurisprudence there is barely any discussion about the **necessity and proportionality** of the polygraph, i.e. two central components for assessing whether Article 5 or 8 ECHR have been infringed (see Kotsoglou and Oswald 2020, for more discussion). It was rather an implied assumption that mere compliance with domestic law (i.e. Offender Management Act 2007, Domestic Abuse Act 2021, Counter-Terrorism and Sentencing Act 2021 respectively) provides sufficient procedural guarantees against *arbitrariness*. However, even a quick look at Strassburg Court's jurisprudence suggests otherwise. Notably, it has been well established by several rulings of the ECtHR's Grand Chamber that the key purpose of Article 5 ECHR, is to prevent *arbitrary* or unjustified deprivation of liberty (*S., V. and A. v Denmark* [GC]—35553/12, 36678/12 and 36711/12; *McKay v the United Kingdom* ([GC], no. 543/03, ECHR 2006-X). But also, regarding Article 8 ECHR the Strasbourg Court has made clear that the State must organise the practical implementation of measures in such a way as to prevent any abuse or arbitrariness (*Dumitru Popescu v Romania* (No 2) (App. no. 71525/01). Proportionality and procedural guarantees against *arbitrariness* are essential in that regard (*Barbulescu v Romania* [GC] (App. no. 61496/08), para. 119–122) (see Kotsoglou and Oswald 2020, for further analysis).

13. The standard of *arbitrariness*, salient in the Convention rights, **extends beyond lack of conformity with domestic law**. In effect, any deprivation of liberty might be 'lawful' in view of domestic law, but still be deemed arbitrary (*Creanga v Romania* [GC] (App. no. 29226/03), para. 84; *A. and Others v the UK* [GC] (App. no. 3455/05), para. 164. *Arbitrariness* is also the logical endpoint of the use of the polygraph. Early on it became clear that 'wide divergence' in the structure of the respective interview is inevitable due to the 'widely varying types of questions, examiners, and examinees' (Office of Technology Assessment, 1983: 11). The complex interaction between the examiner and the examinee shows that lack of standardisation signals a feature, not a bug in the system. The polygraph test's output is thus **deprived of any generality**. This becomes highly relevant in view of the fact that the polygraph test **cannot be standardised** due to the complexity of the interview qua discursive phenomenon. Lack of standardisation necessitates ad-hoc improvisation so that ultimately the term 'test' is a misnomer. What is more, the Strasbourg Court has stressed that arbitrariness may arise where there has been an element of bad faith or deception on the part of authorities involved (*Saadi v The United Kingdom* [GC] (App. no. 13229/03), para. 68–74). This becomes once again relevant since **deception** is built into the fabric of the polygraph interview (see e.g. US DoD 1997).

Validity and Utility [Q3]

14. It is not random that the evaluation of the pilot program of mandatory polygraph testing carried out in the East and West Midlands regions pursuant to the 2007 Act (Gannon et al. 2012) conveniently focused on the *utility* of the

polygraph (i.e. the indubitable fact that use of the polygraph leads to a **significant increase of the number of adverse statements and confessions**), not the *validity* thereof. Confessions have historically been useful instruments for securing convictions. The criminal justice system, however, is acutely aware of their intrinsic problems too. Ever since the 18th century it has been regarded as an uncontroversial view that **over-reliance on confession statements counts among the most significant causes of miscarriages of justice**. As Beccaria explained, it is not the actual events of the alleged crime that are unravelled before the eyes of the *oppressive* investigator but the strength 'of the will of the accused' (Beccaria, 1785; note that according to English law deception is a form of oppression (*R. v Heron*, The Times, 22 November 1993). The 'very means employed to distinguish the innocent from the guilty', Beccaria remarked, will make the difference between them disappear, so that we, ultimately, get information about 'the force of the muscles and the sensibility of the nerves' of the accused person rather than a truth-conducive statement. In the polygraph context, we are not dealing of course with physical pain, but with psychological pressure; we are not operating on the basis of the (false) assumption that 'God will give the defendant the strength to endure'; the explicit assumption though that the device will detect untruthful statements is playing the same role. I submit, therefore, that the difference between torture and psychological pressure is a matter of degree, not category. Remember that the main function of the stim-test is to instil fear of detection (OTA 1983). In a similar way to torture, **suggestibility** is not a reliable or legitimate way of conducting an interview as it generates confession statements while at the same time it **inflates their probative force**. Use of psychological/physical pressure and reliability of the method are inversely proportionate. By allowing polygraph examiners to exert psychological pressure, the UK Government undermines the accuracy of extracted information.

Use immunity [Q7]

15. The Government pays lip service to the **use immunity** enshrined in s. 30(1) OMA 2007. For the offender manager can inform the police about the so-called DI (deception indicator) —remember that there are no clear rules as to what counts as DI. The police can in turn investigate and secure new (admissible) evidence. In absence of a strict exclusionary rule for 'the fruit of the poisonous tree', police forces seem willing to take their chances with the (poisonous) 'fruit' of the polygraph. The problem, however, is that although investigations and new evidence might be able to bypass the ss. 76 and 78 PACE 1984 exclusionary rules, they cannot distract us from the main issue at this juncture. Police conduct hinges on the existence of "reasonable grounds" for suspecting that an offence may have been committed (PACE Code B, para 2.5 and 3.1). It is thus a contradiction in terms to base a suspicion for a crime on polygraphic evidence which **lacks validity** and is therefore inadmissible in criminal courts. The legitimacy of police conduct fails on the *reasonableness*-requirement, for pseudoscientific methods cannot provide us with reasonable grounds (see Kotsoglou and Oswald 2020; Kotsoglou 2021, for more discussion).

Integrity of the legal order [Q4, Q7]

16. The polygraph, though still limited in scope, threatens the moral and structural integrity of the English and Welsh legal order. Deploying the polygraph has been known for decades to be about its **deterrent effect** (Lee, 1952) rather than its truth-conducive character. And minimising risks of harm to the public is a valuable pursuit. But even though the behaviour of the released offender should be monitored, released offenders need—in liberal societies—the necessary breathing space, guaranteed by human rights legislation (right not to incriminate oneself, protection against oppression and arbitrariness, dignified treatment of offenders and reliable investigation methods). Liberal orders should be able to accept and absorb micro-disturbances. Subjecting (vulnerable) individuals to zombie forensics (Kotsoglou 2021) and interview rituals to **extract confession statements** means that, as the High Court of England and Wales on a different occasion observed, we 'undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.' (*Miller v College* [2020] EWHC 225 (Admin) at [259]).

17. What is necessary for criminal trials, i.e. a **sufficiently reliable scientific basis** for evidence to be admitted (*R v Dlugosz and Others* [2013] EWCA Crim 2, at [11]), is simply irrelevant in the context of probation. This divergence of admissibility standards creates a **deep rift** within the penal system of England and Wales with a criminal process pivoting on **rationalism** and respect of human rights and a **shadow process** powered by pseudoscientific devices and oppressive interview methods.

18. The polygraph can only give society a **false sense of security**. In the context of terrorism, but also in the context of domestic abuse and sexual offences, this can literally have fatal consequences. A confession has always been regarded as the convenient solution, and the dependence (or perhaps: addiction?) of judicial systems on confessions has, historically, provided the blueprint for **major failures**. The use of the polygraph is a low point in the long effort to make sure that the criminal justice system is tethered to its own promulgated principles including rationalism and liberalism.

19. The hereby submitted evidence will, hopefully, help policy-makers and law officials to mark the boundary between **fiction and reality** and confine lie-detectors to the world of phantasy where they belong.

20. I caution against use of the polygraph. The U.K. should not base its deterrent strategies on pseudoscientific methods which raise considerable concerns vis-a-vis the rule of law.

21. I call, once again (see also Kotsoglou and Oswald 2020), for an **urgent moratorium** on any further use of the polygraph, together with an independent investigation into all current deployments within the police and other public bodies [Q6].

[Note to the reader: Text in square brackets refers to the questions on your Call for Evidence.]

27 August 2021

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