

# The Inadmissibility of the Use of the Polygraph in Criminal Proceedings

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The Article is devoted to the issues of equating the "polygraph" to the legal and full forensic method. The topic of possible assignment of powers to conduct forensic examinations to the Investigative Committee of the Russian Federation is raised.

**Key words:** *Forensic examinations, polygraph, criminal law, criminal cases.*

## Introduction

The Human Rights Council appealed to the State Duma not to equate the "lie detector" with the legal forensic method and to exclude it from the draft law on forensic examination in the Investigative Committee of the Russian Federation (RF IC).

Experts have differently assessed the position of the Human Right Council (HRC). Using psychophysiological studies in their practice, experts believe that the use of a polygraph is permissible subject to certain standards and proper control. Opponents of this type of examination are convinced of its opacity and believe that the "lie detector" should be excluded from the criminal process.

On April 8, the Council under the President of the Russian Federation for the Development of Civil Society and Human Rights addressed the Chairman of the State Duma Vyacheslav Volodin with a call to exclude the mention of the polygraph from the draft law on forensic examination in the Investigative Committee of the Russian Federation.

Recall that the State Duma is considering the presidential project No. 663034-7, which provides for amendments to the laws on state forensic science and on the Investigative Committee of the Russian Federation. The draft federal law has been prepared in accordance with the instructions of the President of the Russian Federation and is aimed at improving the



legal regulation of the organization and production of forensics by the Investigative Committee of the Russian Federation. Vladimir Putin proposed making the Investigative Committee a subject of forensic science.

Opinions of experts on the assessment of the draft law were divided. One of them noted that the amendments would make the forensic units of the RF IC full-fledged state forensic bodies. Another believes that in this case, the investigation of serious and especially serious crimes should be reduced, subject to the objectivity and scientific justification of the forensic examinations. At the same time, the third expert believes that the adoption of the amendments will create a system of actual control over the production of forensic examinations in criminal law, which will inevitably violate the fundamental principle of “independence” of a forensic expert.

The explanatory note to the amendments noted that the RF IC assigned not only the authority to organize and conduct a series of forensic examinations appointed in accordance with the criminal procedure law, but also the functions to ensure their legality.

The draft law clarifies the types of forensics, the production and organization of which will be the responsibility of the aforementioned department. Among them: molecular-genetic, computer-technical, video-technical, information-analytical, construction-technical, phonoscopic, linguistic, financial-analytical, psychophysiological (using a polygraph), handwriting, fingerprinting, ballistic, portrait, traological, physicochemical, fire-technical, environmental, medical and forensic examination, edged weapons and technical and forensic examination of documents.

Amendments to the Law on state forensic science activities clarify the relevant legal framework, the concept of forensic science and forensic state institutions.

Director of the Ryazan Scientific Research Center for Forensic Expertise Pavel Milyukhin believes that the draft law is the basis for official recognition of the IC of the Russian Federation as a subject of forensic activity. “When the Investigative Committee of the Russian Federation was formed in 2011, it was planned as an independent body to investigate the most complex criminal cases, which had as its main task the prompt and high-quality investigation of crimes in accordance with the jurisdiction,” he noted. - A forensic examination for its needs was assigned to other state forensic institutions and organizations (forensic expert institutions of the Ministry of Justice of Russia, Forensic Science Center of the Russian Ministry of Internal Affairs, etc.), as well as to non-state forensic organizations and experts with special knowledge in science, art, technique or craft”.



According to Pavel Milyukhin, then the RF IC also had its own experts, but the department's expert service was extremely small and consisted mainly of expert accountants, polygraph examiners, and computer-technical experts, who mainly worked as part of the checks of crime reports: "In this case, the principle of independence was implemented: the investigator conducts the case, the expert conducts a forensic examination. But such an approach did not always justify the main goal of the law enforcement agency, since investigators had to devote a lot of time to searching for experts, checking their qualifications, and in state forensic institutions, in addition, they were faced with long timelines for conducting expert examinations".

The amendments, according to the expert, will make it possible to attribute the RF IC to federal state bodies in which state forensic institutions and expert units can be created. "Already at the first stage it is planned to close the need of this department for forensic examinations in criminalistic and other demanded types of examinations, appointed in accordance with the criminal procedure legislation of the Russian Federation," said Pavel Milyukhin. He also suggested that the terms of investigation of serious and especially serious crimes should be reduced subject to the objectivity and scientific soundness of the forensic examinations, as well as appropriate supervision of this new activity.

The senior specialist of CCA Group LLC Oleg Bezik believes that the issue of the status of the expert units of the RF IC has been long overdue: "There is still no clear understanding of how the Law on state forensic science applies to them." According to the current version of the Law on the Investigative Committee of the Russian Federation, the latter is not authorized to carry out regulatory and legal regulation of the forensic activities of its units, although the employees of the mentioned department conduct expert examinations.

"It is understood that the proposed changes are intended to solve this problem by making the forensic units of the RF IC a full-fledged state forensic body," says Oleg Bezik. "After their adoption, forensic activities in the Investigative Committee will be regulated not only by the Law on state forensic activities and procedural legislation, but also by the Law on the IC of the Russian Federation and its internal legal acts."

Lawyer of the Togliatti Bar Association No. 100 "Legal Center" Alexei Motorin, on the contrary, believes that the draft law being commented does not contain at least any significant provisions that could affect the improvement of forensic activities in Russia. "The proposed changes are intended to "camouflage" the proposed amendments to the Law on the IC of the Russian Federation, which are actually aimed at expanding its powers by creating expert criminalistic units in this law enforcement structure," he believes.

According to the expert, the adoption of the amendments will create a system of actual control over the appointment and conduct of forensic examinations on criminal law structures, the investigation of which is under the jurisdiction of the RF IC, which will inevitably violate the fundamental principle of “independence” of a forensic expert, including from the body or person who appointed forensic examination. “To a greater extent, this applies to financial and economic examinations in the framework of criminal cases on tax and economic crimes, and the composition of the “extremist orientation”, said the lawyer. “The advisability of creating expert units in the RF IC is even more doubtful, given the presence of a wide system of existing forensic units in other departments, such as the Ministry of Internal Affairs, the Ministry of Justice, the Ministry of Health and the FSB”.

At the same time, Alexey Motorin noted that at present the system of state forensic expert institutions needs widespread reform, the result of which should be their maximum distance from forensic investigative authorities, for example, by creating some independent forensic expert service or by combining expert units of various departments on the basis of the Ministry of Justice. “The adoption of these amendments will only delay such a necessary reform and, possibly, will lead to an increase in the number of criminal cases based on biased expert opinions,” the lawyer concluded.

According to the draft federal law, the Investigative Committee of the Russian Federation refers to federal state bodies in which state forensic institutions and expert units can be created in order to organize and conduct forensic examination, appointed in accordance with the legislation of the Russian Federation. At the same time, the Investigative Committee of the Russian Federation is entrusted with the organization and production of forensic examinations (molecular genetic, computer-technical, video-technical, information-analytical, construction-technical, phonoscopic, linguistic, financial-analytical, psychophysiological (using a polygraph), Handwriting, fingerprint, ballistic, portrait, trasological, physico-chemical, fire-technical, environmental, medical and forensic oh, expertise of edged weapons and technical and forensic examination of documents), appointed in accordance with the criminal procedure legislation of the Russian Federation, as well as the authority to ensure legality in the implementation of this procedural action.

The project, among other things, proposes to include in the list of forensic examinations in criminal cases a psychophysiological examination “using a polygraph” - the so-called “lie detector”, which, according to the Human Rights Council, will turn it into an equal forensic examination method.

According to members of the Council, the evidentiary value of psychophysiological research (PFI) is controversial. Moreover, they refer to the unanimous opinion of the "overwhelming majority of Russian legal processists" on the inadmissibility of using this method in criminal proceedings. In addition, the HRC also mentions the position of the Supreme Court of the

Russian Federation, which has repeatedly indicated that the results of a polygraph study do not meet the requirements of the law for evidence, including the requirement of reliability.

Justifying its position, the HRC declares that "the technical device is unable to read the inner world of man." "And the point is not that polygraph research is still imperfect, that polygraph examiners are not sufficiently trained, and the methods are contradictory. Intervention in the consciousness, control and classification of thoughts and desires, examination of the subconscious violates the constitutional guarantees of the inviolability of the person, privacy and personal secrets," the Council notes, noting that in this regard the procedural legalization of such technologies is unacceptable, especially in criminal proceedings.

"We believe that if a draft law is passed in the first reading, it is necessary to exclude from it a mention of a psychophysiological examination (using a polygraph), making appropriate amendments to the second reading," the statement sums up.

Commenting on the appeal of the HRC, the Federal Chamber of Lawyers adviser Sergey Nasonov categorically opposed the use of the polygraph in the criminal process: "I am against any non-transparent evidence in principle. These findings are easily falsified. Then they replace the investigator and the court. It turns out a new version of the "Queen of evidence".

According to Sergei Nasonov, the HRC took a too soft stance on this issue, since the removal of the mention of the polygraph from the draft law will not become a serious barrier to current practice. "One can completely agree with the criticism of the HRC of psychophysiological examinations, however, just removing the mention of this type of expertise from the draft law will not eliminate their production in practice, since the Code of Criminal Procedure does not contain a closed list of permissible forensic examinations, which makes it easy to assign their production at present to the relevant expert institutions," he explained.

For the same reason, the Federal Chamber of Lawyers adviser believes, the mention of this type of expertise in the draft law is not a way of "legalizing" them - they are already legalized. Their use should be fought by establishing a regulatory prohibition or appropriate clarifications at the level of the resolution of the Plenum of the Armed Forces.

According to the practicing psychologist - polygraph examiner Yaroslav Marichev, even though this method does not have a 100% degree of reliability, it is still very necessary. "You can't just brush aside the fact that many crimes were solved thanks to the polygraph when working out various investigative versions with its help," he said. "Indeed, the main problem now is the lack of a single procedural standard and mutual control of specialists, although certain steps are being taken in this regard."



Yaroslav Marichev believes that in order to “legalize” a polygraph, it is not enough to enter it into any draft law. In his opinion, a regulated system for monitoring the conduct and analysis of psychophysiological research should be organized first. “For example, you can instruct the Federal Center for Judicial Expertise under the Ministry of Justice of Russia to create a supervisory authority. This is how it works abroad: the case is checked on a polygraph and all the information received is sent to the curator to verify the correctness of the study and its compliance with standards. Of course, this is a bureaucracy, but polygraph examiners will not “dig into” it with doubts about the quality of their work, “the expert concluded. At the same time, he expressed confidence that no matter how the dispute regarding the use of the polygraph in criminal proceedings is resolved, given the strength of domestic polygraphology schools, sooner or later, Russian law enforcement will still come to widespread use of psychophysiological research.

Yaroslava Komissarova, associate professor of the Department of Criminology at the Kutafin University (MGLA), recalled that psychophysiological research using a polygraph in criminal cases is carried out by expert units of the law enforcement agencies of the Russian Federation: since 2002 - the FSB, since 2004 - the Ministry of Defense, since 2009 - IC, with 2017 - Internal Affairs Department. In the early 2000s. they were conducted in the forensic laboratories of the Ministry of Justice, in 2010–2016 - in the Federal Drug Control Service. Educational standards have been developed for the training of expert polygraph examiners, as well as methodological support for their activities.

She emphasized that in 2018, the leaders of the Institute of Criminalistics of the Center for Special Equipment of the FSB, the Forensic Science Center of Ministry of Internal Affairs, 111 of the Main State Center for Forensic Expertise of the Ministry of Defense and the Department of Criminalistics of the IC approved the Interagency methodology for the production of forensic psychophysiological examinations using a polygraph, developed by decision of the Federal Interdepartmental Coordination and methodological council for forensic examination and expert research by an interdepartmental working group.

The provisions of the Interdepartmental Methodology, Unified Requirements and the Species Expert Methodology formed the basis of the Methodological Recommendations on the procedure for the appointment and production of psychophysiological examinations and studies using a polygraph in the system of the Ministry of Internal Affairs of Russia.

The research work on their preparation at the Forensic Science Center of the Ministry of Internal Affairs of Russia was completed in December 2018. Experienced specialists in the use of the polygraph as part of the forensic support of criminal procedure and operational-search activities from the expert units of the Ministry of Internal Affairs in the Republic of



Tatarstan, and the Main Directorate of the Ministry of Internal Affairs of Russia for Moscow, FSB of Russia, IC of Russia, Moscow State Law University named after O.E. Kutafina (Moscow State Law Academy).

Today it is the best practice for research and examination, not only in the internal affairs bodies, but in the system of domestic state forensic institutions.

Moreover, due to the universality of the above provisions, the Methodological recommendations on the procedure for the appointment and production of psychophysiological examinations and studies using a polygraph in the system of the Ministry of Internal Affairs of Russia may well be used by polygraph examiners in their work with personnel.

“Also last year, the Forensic Science Center of Ministry of Internal Affairs completed research work on the preparation of guidelines on the procedure for the appointment and production of psychophysiological examinations and studies using a polygraph in the Russian Ministry of Internal Affairs system. It was attended by experienced specialists in the use of the polygraph as part of the criminalistic support of the criminal procedural and operational-search activities from the expert units of the Ministry of Internal Affairs in the Republic of Tatarstan, the Main Directorate of the Ministry of Internal Affairs of Russia in Moscow, the FSB, IC, Moscow State Law Academy,” explained Yaroslava Komissarova.

At the same time, the expert noted, the availability of high-quality methodological material does not guarantee its correct use: “In practice, there are errors in the work of individual polygraph examiners. But this cannot serve as a basis for diminishing the scientific viability of the method”.

Polygraph research, as you know, aims to verify the veracity of the subject by assessing the stability of his breathing, heart function, skin condition and other bodily reactions. It is assumed that a polygraph specialist, based on the result obtained from the machine, can establish whether a person is lying or tells the truth. At the same time, the standard reactions of the organism of a “normal person” serve as evaluation criteria.

The members of the Council consider that the evidentiary value of psychophysiological expertise is controversial, while the vast majority of Russian legal processists are unanimous in their opinion on the unacceptability of using this method in criminal proceedings. The same is the position of the Supreme Court of the Russian Federation, which has repeatedly indicated that the results of a polygraph study do not meet the requirements of the law for evidence, including the requirement of reliability.

The scientific debate on this subject is mainly focused on the issue of “veracity” of the polygraph itself, i.e. its validity. In this case, the most convincing arguments against the procedural use of the polygraph are given by supporters of this method, including developers of the relevant programs and techniques. In the specialized literature and specialized scientific periodicals, advocates of the “lie detector” defend, first of all, the scientific validity of the method itself against accusations of anti-science and quackery. At the same time, they willingly acknowledge the “probabilistic nature of psychophysiological laws”, which “makes inevitable the appearance of a certain level of errors in the practical application of applied psychophysiological methods”.

This is the position of lawyers. Famous Processor Professor A.R. Belkin writes about psychophysiological research that “using a polygraph cannot be considered a strictly scientific and standardized procedure. The scientific validity of the results is justifiably questioned, and criticisms relate to the fact that this is more an art than a science, because it depends too much on the qualifications, experience and intuition of a specialist polygraph examiner.

Human rights activists are convinced that the technical device is unable to read the inner world of a person. And the point is not that the research on the polygraph is not yet perfect, that the polygraph examiners are not sufficiently trained, and the methods are contradictory. Intervention in consciousness, control and classification of thoughts and desires, examination of the subconscious violate the constitutional guarantees of personal integrity, privacy and personal secrets. Procedural legalization of such technologies is unacceptable, especially in criminal proceedings. After all, discrepancies found in the psychic sphere of the accused to standards whose origin is unknown, entail for him the most significant consequences - restriction of rights and imprisonment.

As previously reported, the Federal Chamber of Lawyers introduced a legal position on the draft law, which notes that it too expands the authority of the department and belittles guarantees of objectivity of expert research.

The idea of introducing expert units into the structure of the IC "will lead to a diminution of the main guarantee - the independence of expert activity."

So, paragraph 2 of part 2 of article 20 of the Code of Criminal Procedure of the Russian Federation, which prohibits an expert dependent on the parties or their representatives from participating in criminal proceedings, corresponds to part 1 of article 7 of the Law on State Forensic Expertise, according to which the expert cannot be in any way dependent on the body or person who appointed the examination, as well as parties and other persons interested in the outcome of the case.

According to the Federal Chamber of Lawyers, the proposed amendments increase the risk of situations when an expert de jure will be dependent on the head of the IC unit, and de facto on the investigator appointing the examination. “In these cases, nothing remains of its independence,” the document says.

At the same time, the legal position draws attention to the fallacy of the opinion that the Constitutional Court of the Russian Federation recognized the constitutionality of interpretation of the norms of the Code of Criminal Procedure and the Law on State Forensic Expertise, which admits the lack of dependence on the departmental expert conducting the examination at the request of this department.

It is emphasized that according to the Constitutional Court’s Decision No. 2371-O of October 23, 2014, the presence or absence of dependence of the person involved as an expert in a criminal case on the parties or their representatives is established by the body or official in whose proceedings the case is based on factual circumstances.

“For the defense, the guarantees of the independence of the expert are critically important, since the possibilities of defense to challenge the expert’s opinions are very limited,” the Federal Chamber of Lawyers recalls.

Thus, a lawyer in criminal proceedings does not have the right to present an alternative expert opinion to the investigator or the court, but can only operate with such types of evidence as the expert’s opinion or his testimony, which initially has less potential than the expert’s opinion.

This is because, unlike an expert, a specialist does not have the right to conduct research, which means that he cannot refer to them in his opinion in accordance with Part 3 of Art. 80 Code of Criminal Procedure.

In addition, in the Decree of the Plenum of December 21, 2010 No. 28, the Supreme Court of the Russian Federation clarified that “the specialist does not conduct research on material evidence and does not formulate conclusions, but only expresses judgment on issues raised by the parties. Therefore, if necessary, a forensic examination should be conducted”. Moreover, when identifying an irreparable gap or other defects in the conclusion, there is a reason for the appointment of a repeated or additional examination. Thus, the expert opinion cannot replace the expert opinion.

For the defense, as stated in the legal position, guarantees of the independence of the expert are critically important, since the mechanism of the expert’s withdrawal does not work in practice. The fact is that such a challenge is permitted by the investigator, which makes the



statement of the corresponding application meaningless based on the expert's dependence on the investigator meaningless. The possibility of appealing a refusal to satisfy a challenge statement is also seriously narrowed.

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