

# The Legal Status of the Polygraph in Germany

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## Abstract

The use of the polygraph in German court proceedings has been made almost impossible by a large number of decisions over the last few decades. In contrast to developments in some neighbouring European countries, the German judiciary does not think much of the measuring device and it has been successfully banned from German courtrooms over the years for various reasons. This legal development is described in this article. On closer inspection, it becomes clear that underlying the rejection of the polygraph is the opinion that it cannot itself provide results that have a sufficiently scientifically based foundation for court proceedings. At the same time, this criticism also makes it possible to establish access for the polygraph to German courtrooms through targeted scientific research.

**Key words:** Legal status, court decision, Federal Court of Justice, inadmissible evidence, human dignity, prohibited interrogation methods, Germany

## Historical development

The German psychologist, physiologist, and philosopher, Wilhelm Wundt is named as the founder of psychology as an independent science. In 1880, he standardised the experiment with the word association test, which was used by his student, Max

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Wertheimer, as the basis for identifying perpetrators when solving crimes. The first studies using the polygraph were published in Germany in 1913 by the psychologists Wertheimer and Jung. This was followed by polygraph tests by Keeler in 1935 (Schneider, 2010, p. 15; Wegner, 1981, p. 5 ff.).

### Judicial judgement of the polygraph in Germany

In Germany, the highest court, the Federal Court of Justice (Bundesgerichtshof (BGH)), has dealt with the legal admissibility of the use of the polygraph in the German jurisdiction on several occasions. These proceedings always arose from the judgements of court decisions by instances subordinate to the BGH. A slight change in the attitude of the court can be detected over time, and it is also reflected in the lower court instances. However, it must be noted that the use of the polygraph has not been permitted in criminal proceedings in Germany since the first landmark decision of the BGH in 1954, although this assessment has become much more nuanced over time. This legal development is illustrated by three decisive BGH judgements and examples from other courts.

First, though, it is necessary to briefly discuss the type of procedure used in criminal law in Germany that makes clear why the BGH considers the polygraph test to be inadmissible. German criminal law is designed to ensure that every sentence imposed also presupposes individual guilt (the substantive principle of guilt) (Trüg, Habetha, 2016). This is derived from the principle of the rule of law and human dignity which is directly related to the German constitution (BVerfGE 80, 182 (182)). This constitutional principle must therefore also be explicitly observed in German criminal proceedings (BVerfG, NJW 2013, 1058 (1060)), from which it can be deduced that the actual facts of the case must be objectively investigated (Vieten, 2023, p. 124).

### Decision of the BGH of 16.02.1954

In 1954, the BGH ruled in principle that polygraph testing was not admissible in criminal proceedings as a whole or in preliminary investigations (by the police or the public prosecutor's office). This principle also applies even if the accused or defendant expressly agrees to its use (BGHSt 5, 332).

In its judgement, the BGH explicitly referred to Art. 1 (1) of the Basic Law (Basic Law of the Federal Republic of Germany, the Grundgesetz (GG)), which states:

“Human dignity is inviolable. Respecting and protecting it is the duty of all state authority” (Art. 1 (1) GG). From this, the court derived the principle that the accused is always a party to the proceedings and must not be made an object, which would be the case if the polygraph were used. Furthermore, the accused does not need to comment on the charges or participate in the clarification of the facts. These rights of the accused cannot be sacrificed to the will of the public to solve crimes. The protection of the accused is also underlined by §136a of the Code of Criminal Procedure (Strafprozessordnung, (StPO)), which emphasises the “freedom of the accused’s decision of will and confirmation of will” in relation to a statement on the charge, provides examples of unlawful interference with these rights of the accused, and makes such interference a punishable offence. Even with this legal standard, it is not possible for the accused to consent to the use of such “prohibited interrogation methods”.

From the court’s point of view, this right of the accused is deliberately disregarded and violated by the use of the polygraph. It is considered to be an “insight into the soul of the accused”, as the rights of the accused are disregarded and violated in an unauthorised manner through the recording of unconscious bodily processes (e.g., blood pressure, pulse rate, breath length) (GG: Human dignity / §136 a StPO: Prohibited interrogation methods). By using the polygraph, the accused answers questions in an unconscious manner without being able to prevent it (BGHSt 5, 332, reasons: 1.).

This fundamentally negative attitude of the BGH is also reinforced by the accusation that the polygraph does not have the necessary level of reliability from a scientific perspective. The BGH took up the decision of the Regional Court (Landgericht (LG)) of Zweibrücken, which cited the reliability of the polygraph as a scientifically based method of investigation on the basis of English and American court practice. At the same time, the BGH referred to the German criminal law science, which almost completely rejected the use of polygraphs. Furthermore, the English and American court practice was not transferable to the StPO or the GG (BGHSt 5, 332, reasons: 2.; BGHSt 5, 34).

### Decision of the BVerfG of 18.08.1981

More than 25 years after the first landmark judgement of the BGH, the Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)) was called on to make a constitutional assessment on the basis of a trial decision by the LG. The LG had

rejected the use of polygraphs to exonerate a defendant on a charge of murder (LG Mannheim of 02.06.1980 - 2 KLS 3/80) and sentenced him to life imprisonment. Contrary to the BGH, the BVerfG has the task of determining compliance with the GG and the interpretation of the constitution. Contrary to the decision of the BGH, the BVerfG did not base its decision on Art. 1 (1) GG (human dignity), but on Art. 2 (1) in conjunction with Art. 1 (1) GG (general right of personality). By using the polygraph, the accused would have become “a mere appendage of an apparatus”, which would significantly affect their personal rights, and this could not be compensated by the goal of the criminal procedure of establishing the truth (Busche, 2016, p. 45).

In principle, the BVerfG criticised the fact that even with a success rate of 90%, there was still the possibility that the accused could be the perpetrator even if the test result was negative. Moreover, the defendant’s consent to the test procedure was not considered voluntary, as he would not have been able to prove his innocence due to a lack of other evidence, and he faced a substantial prison sentence (BVerfG 2 BvR 166/81 NJW 1982). This court decision was assessed very negatively in the specialised literature as having little or no justification (Schwabe, 1982, p. 367; Amelung, 1982, p. 38).

In 1998, the BVerfG again dealt with the use of polygraphs in criminal proceedings on the basis of a constitutional complaint. The complainant had wanted to introduce the results of a voluntary polygraph test he took as evidence in the trial brought against him for the sexual abuse of a child. In doing so, he invoked Art. 103 GG (a fair trial in accordance with the rule of law). This application was rejected by the BVerfG as it once again considered the use of polygraphs to be a threat to the protection of the accused’s personality (Art. 2 GG) and that the refusal of the polygraph was not an indication of unfair criminal proceedings. However, the court left open whether the “screening of a person” by means of a polygraph was a violation of Art. 2 GG (BVerfG 2 BvR 1827/97).

### Admission of the polygraph in German court proceedings outside of criminal proceedings until 1998

Contrary to the decisions in criminal procedure law, court proceedings in Germany were occasionally decided with the use of polygraph tests. In 1995, for example, the Senate for Family Matters of the Higher Regional Court (Oberlandesgericht (OLG)) admitted a private polygraph test that had been carried out to refute the

suspicion of abuse (OLG Bamberg 7 WF 122/94). Comparable decisions were made by the OLG Koblenz (OLG Koblenz 15 UF 121/96), the OLG Oldenburg (OLG Oldenburg 4 UF 60/96), the OLG Dresden (OLG Dresden 24 WF 1201/10) and the OLG Munich (OLG München 12 UF 1147/98). The OLG Koblenz justified its decision by stating that the use of the polygraph does not speak contradict the expert's expertise in court and that the test should be regarded as a further indication in the evidence procedure. In the context of a custody dispute, the OLG Oldenburg admitted the polygraph test as evidence based on the 95% probability level that it determined.

In its judgement, the OLG Munich compared the application of the polygraph between criminal proceedings and the family court cases. In family custody disputes, the difficulty is often that one party must refute the allegations made against them (in this case, the sexual abuse of a child) in order to be entitled to custody. This person must therefore actively prove their innocence in order to be able to realise their claim to custody or contact with the child. There is a clear difference between the criminal procedure approach and that of the family court. The polygraph test can, therefore, be a useful means of establishing the truth (OLG Munich 12 UF 1147/98).

#### Decision of the BGH of 14.10.1998

In 1998, two decisions were made by the BGH on the use of polygraphs in criminal proceedings. In the first, the defendant's appeal against the judgement of the LG Mönchengladbach was dismissed. The court referred both to the BGH judgement from 1954 and the judgements of the BVerfG, whereby the use of the polygraph was not permissible on the basis of Art. 2 (right of personality) and Art. 1 GG (human dignity) GG. Furthermore, the 3rd Criminal Senate criticised the implementation of the test procedure. A control question test was carried out without the knowledge of the court at the defendant's own request. The court held that the circumstances justified deferring action until the results of the test procedure were available, and that, should the outcome be favourable to the accused, an application for the admission of the evidence could appropriately be submitted. If the result is negative, this would not be done. In addition, the court expressed general doubts regarding the reliability of the test method used — the control question test (BGHSt 3 StR 236/95).

## Decision of the BGH of 17.12.1998

In the same year, the 1st Senate of the BGH took up the fundamental evaluation of the polygraph test again on the basis of an appeal against a judgement of the LG Mannheim for sexual abuse. The accused had requested the test himself for his own exoneration, which was again rejected in principle by the BGH as evidence in criminal proceedings.

Specifically, the BGH cites a variety of reasons which, in its opinion, prohibit the admission of the polygraph in criminal proceedings. Firstly, the BGH referred to the prevailing opinion within German literature which is largely unfavourable towards this procedure. Only occasionally was the demand made to allow the use of the polygraph in court (Gundlach, 1992, § 136a StPO, m. n. 57; Undeutsch, 1977, p. 193 f.), or at least in preliminary proceedings (Schünemann, 1990, p. 131); (BGHSt 44, 308, 315, m. n. 657).

The BGH had also appointed a commission of experts (Fielder, Jänig, Steller, Undeutsch), which issued a written opinion on the applicability of the polygraph in court proceedings on 09.12.1998. On the basis of these expert opinions, the BGH deviated from its opinion of 1954 and now no longer sees the use of the polygraph as a violation of Art. 1 GG (human dignity) in the case of a voluntary test. The previously stated reason for refusal—the “insight into the soul” of the accused—is now denied. Likewise, §136a StPO (prohibited interrogation methods) is no longer raised. The polygraph is not used with the aim of deceiving the accused. Voluntary use at the request of the accused also does not reach the necessary degree of severity of the protective framework of §136a StPO. The BGH thus states that the use of a polygraph against the will of the accused is not permissible, whereas voluntary use does not violate human dignity or constitute a prohibited interrogation method (BGHSt 44, 308, 315, m. n. 658).

The main point that the BGH takes up in order to categorise the polygraph as inadmissible evidence is that it is unsuitable evidence is its lack of scientific validity (§ 244 (3) No. 2 Alt. 4 StPO). In its reasoning, the BGH considers the two test variants (control question test (CQT) and guilty knowledge test (GKT)) individually and refers to the expert opinions of Jänig, Fiedler, and Steller. They state that, according to scientific opinion, it is not possible to recognise clear connections between the reaction patterns of the vegetative nervous system and cognitive or emotional states. In conclusion, the three experts state that the use of the polygraphic procedure cannot be used to measure whether the subject was telling the truth or not. The risk of manipulation of the test cannot be conclusively assessed either

(BGHSt 44, 308, 315, m. n. 659). With regard to the control question procedure, it is not considered to be conceptually sound by the court and the way it works is not considered to be verifiable. This circumstance cannot be conclusively assessed in favour of the polygraph due to the very high hit rates of approx. 70 to 90 % in parts of the control question test (according to the expert opinion of Undeutsch) (BGHSt 44, 308, 315, m. n. 660). The BGH also considers the GKT to be unsuitable as soon as the offender is aware of the accusation against him and the related investigation results. The use of a polygraph in the court hearing is therefore always ruled out (BGHSt 44, 308, 315, m. n. 662).

### Decision of the BGH of 30.11.2010

In its judgement, the 1st Criminal Senate of the BGH fully confirmed the case law from 1998 and continues to regard the use of the polygraph as unsuitable evidence (in accordance with § 244 (3) No. 2 Alt. 4 StPO). In addition, the BGH does not see any changes in the scientific data basis, as there is still insufficient connection between the body reactions measured by the polygraph and a certain behaviour (BGHSt 1 StR 509/10). This judgement is viewed negatively in the literature, firstly because of its very brief reasoning and secondly because it ignores the evolving findings on the polygraph (Steller, 2000, p. 31, 42) (Putzke, 2011, p. 559; see also Putzke, Scheinfeld, Klein, Undeutsch, 2009, p. 607).

### Admission of the polygraph in German court proceedings outside of criminal proceedings from 2010

In 2013, the Local Court (Amtsgericht (AG)) of Bautzen admitted the use of polygraphs as evidence in criminal proceedings relating to rape, both for the injured party and the accused (AG Bautzen 40 LS 330 Js 6351/12, m. n. 80, 83). In the grounds for the judgement, the AG also refers to European practice, for example in Poland, where the polygraph has long been admitted as evidence in criminal proceedings (AG Bautzen 40 LS 330 Js 6351/12, m. n. 84). In 2016, the AG Bautzen again admitted the polygraph in criminal proceedings on suspicion of sexual abuse to the detriment of a child. In doing so, the AG specifically addressed the points criticising the use of the polygraph listed by the BGH, i.e., if the accused voluntarily submits to the test, it cannot be assumed that the result is inappropriate evidence (AG Bautzen 42 Ds 610 Js 411/15, m. n. 52). Rather, the polygraph is admissible in favour of the accused under the following conditions:

1. The physio-psychological examination must be voluntary.
2. The procedure must be ordered by the court or public prosecutor in the context of judicial or prosecutorial proceedings after the accused has voluntarily consented.
3. The procedure must be carried out by a certified expert under laboratory conditions with monitoring of at least four parameters (blood pressure fluctuations, respiration, skin resistance, vasomotor activity).
4. The procedure must deal with the offence.
5. The result may only be used to exonerate the defendant (in full or as circumstantial evidence) (AG Bautzen 42 Ds 610 Js 411/15, m. n. 58).

In 2021, the AG Schwäbisch Hall ruled that the polygraph was admissible as evidence in court in a family law case for the purpose of invalidating allegations of sexual abuse of a child. The court also made a comparison between the polygraph with its expert assessment and a psychological expert witness. Both would be admissible if they had the appropriate professional or scientific qualifications (AG Schwäbisch Hall 2 F 150/20). In 2022, the same court again admitted the polygraph as evidence in court in family law proceedings. However, this would only be possible if it were used voluntarily by the parties involved (AG Schwäbisch Hall 2 F 88/21).

### Looking to the future

In conclusion, it must be clearly stated that the widespread use of polygraphs in German criminal procedural law is very unlikely in the near future. It is true that the case law of the highest German court, the Federal Court of Justice (BGH), has opened up slightly to the authorisation of the polygraph. It is also worth noting that there have been isolated decisions by lower courts that have clearly contradicted the decision of the highest court and allowed polygraphs to be used as evidence in court in some cases. For the time being though, the need within Germany seems to be not so much on the legal side but rather on the scientific side, to reduce the fundamental concerns of lawyers regarding the suitability of the polygraph in conjunction with psychological experts through well-founded research. In any case, there is certainly less distrust of the experts than of the technical assistant, the polygraph, yet it is precisely this player who has the greatest potential

for development. In addition to the constant improvement of medical knowledge and measurement methods, IT-based examinations such as video technology represent new opportunities to recognise and, if necessary, assess further parameters of physical interactions or reactions.

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