

The background of the cover features a close-up, slightly blurred view of several books and stacks of papers. The books have various colored spines, including blue and black. The pages are a warm, yellowish-tan color, suggesting they are aged. The lighting is dramatic, with strong highlights and deep shadows, creating a sense of depth and texture. The overall composition is centered around the text, which is overlaid on a dark, semi-transparent rectangular area.

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ANALYSIS OF EVIDENTIAL GRAVITY OF POLYGRAPH**Arun Tamang***

Lie detecting machines are an achievement of today's modern investigation system. The machine brought from the Frye vs The United States' case into the practices for the best evidence has also been used in Nepal since 2015. The rationality of the polygraph in the international investigating arena was based on this case. The introduction of the polygraph in the investigating system reflects the dynamic nature of the legal system. The Nepali Police Polygraph Directives 2014 has helped for the smooth functioning of the polygraph's use in the investigating procedure. The principle that stands the polygraph when corroborated by the other circumstantial evidence is the only take on the evidence. Further, the precedent established by the Supreme Court of Nepal as to the gravity of the polygraph as the evidence seems to be rational when there is a critical view over its faults. There have been several cases of the polygraph test with the consent of suspects. This has brought about a systematic way of obtaining evidence. However, there lacks consistency in the acceptance of it as the core evidence. The polygraph test is carried with a suspect's consent under the provision of the Nepali Police Polygraph Directives 2014. This has created a fluctuation in the use of this modern technology. In some cases, as in the case of Nirmala Panta, the suspect was tried with this technology, whereas in the case of Aalam, when the court requested it, it was refused by Aalam. With these two cases, there is a lack of consistency. In this investigating system, the note of the abnormal function of the body is recorded by the machine. Respecting the fact about the suspects' Rights as well, it might be unjust to keep this evidence as the core evidence. Therefore, the polygraph is only taken in the core evidence if the circumstantial evidence corroborates that.

BACKGROUND

Nepal's long historical legal development has made its path to the Common law system from the 2008 B.S with the Pradhanyayalaya Act, 2008. Further, for strengthening Nepal's proper investigation system, the Central Intelligence Bureau as a Division (CID) was established in 2008 B.S.¹ There are several changes and update carried out for creating a better investigation system. The gradual development and the innovation of various technologies in legal investigation and other tools and

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¹ Crime Investigation Department, <<https://cid.nepalpolice.gov.np/>> accessed 16th February, 2021.

technologies are some of this department's achievements. The new tools and technologies for detecting the truth and false in the investigation process were in need of Nepal's investigation system. The need for the machine, which was to detect the truth or lie, was also in demand of Nepal's investigation system. The polygraph machine is also named the lie-detecting machine after John Larson called *Cardio-Pneumo-Psychogram* was used as the vetting tool for the investigation in the San Francisco Murder case in the early 1900s.² Since then, the polygraph machine has been considered one of the best ways to find out the truth. The polygraph machine detects human beings' stimulation like blood pressure, heartbeat, skin contradiction, and many more and gives the result with the figure like the ECG report of humans. This process is carried out in various ways like CQT, which stands for Control Question Test, and GKT, which stand for Guilty Knowledge Test. To understand these two technical terms, we can understand one question carrying a single answer and a question having alternatives answer respectively.

The U.S Embassy's training introduced the idea about the polygraph in Nepal through the Academy of Polygraph Science of Fort Myers, Florida and Stoelting Company in 2015.³ There were trainees from both Security Personal Armed Police Force (APF) and Nepal Police in this very training. There were altogether 10 trainees, where there were 3 officers from APF and 7 officers from Nepal Police. Further, there were also the 4 women trainees among the 10 trainees. On the very training, there was also the donation of the 11 full polygraph kits from the Government of the United States of America.⁴

HISTORICAL DEVELOPMENT OF POLYGRAPH IN WORLD

In the early 1900s, after the San Francisco murder case, this machine-made its stance on the international investigation system. With the case of *Frye vs The United States*⁵ trial court ignored the polygraph test from the William Marston of James Frye, who was charged with murder. But the twist was at the appellate court when he appealed with the base of that very polygraph test. The appellate court accepted the polygraph test claiming it as scientific evidence free from sanction to James Frye. For around 70 years, the polygraph test had been highly used in the American investigation system.

² Don Grubin, 'The Polygraph and Forensic Psychiatry' [2010] *The Journal of the American Academy of Psychiatry and the Law*, 446 <<http://jaapl.org/content/38/4/446>> accessed 16 February 2021.

³ 'Police Officer Trained in Polygraph (Lie-Detector) Technology Police Officers Trained in Polygraph (Lie-Detector) Technology' (2015) 08 *Spotlight Nepal* 17 <<https://www.spotlightnepal.com/2015/03/21/police-officers-trained-in-polygraph-lie-detector-technologypolice-officers-trained-in-polygraph-lie-detector-technology/>> accessed 16th February, 2021.

⁴ *Ibid.*

⁵ *Frye v. United States* (1923) 293 F. 1013 (App. D.C. 1923).

From its development phase, it was used by both sectors--sometimes in the private sector and some times in the public sector for various lie detection.⁶ Even President Ronald Reagan released National Security Decision Directive 84 in 1983, which required all government agencies to use polygraphs to test whether any of their workers had leaked sensitive materials.⁷ It comes in control after the Employee Polygraph Protection Act, 1988⁸, which banned the polygraph test in the private sector, but it doesn't apply to the public sector. The polygraph became the tool for federal agencies like the police force, Military, etc.

With the case of the *Daubert vs Merrell Dow Pharmaceuticals*, 1993⁹, the Supreme Court of America gave freedom to judges whether to admit experts' evidence, including polygraph examiner, depending upon relevance, reliability, and extent to which it meets scientific standards. There are various studies, and research carried out over this machine in the western world. The American National Research Council also published the polygraph's accuracy on lie detection, which seems to have been satisfactory. About the accuracy of the polygraph, Dr. Saxe and Gershon Ben Shahar, Israeli psychologists, have also made arguments on the polygraph's accuracy, claiming that "it may be impossible to conduct a proper validity study".¹⁰

With the case of the *United States vs. Schiffer*, 1998, the Supreme Court of the United States of America rejected the polygraph as the evidence with the reason as inherent unreliability. In this case, the argument of Dr. Saxe and Gershon Ben Shahar were cited. Therefore, the United States of America did not support the Polygraph as scientific evidence under the best evidence principle.

POLYGRAPH AND THE LEGAL SYSTEM OF NEPAL:

In the context of Nepal, the polygraph is a new idea and new tools for investigation. Though it is required for the method of investigation, the systematized law is not being regulated. It's been almost 5 years since the polygraph was introduced in the investigation process in Nepal, but the legislation is

⁶ Ibid.

⁷ John Synnott, 'David Dietzel and Maria Loannou, A review of the polygraph: History, Methodology and Current status' (2015) 1 (1) *Crime Psychology Review* <<https://www.tandfonline.com/doi/full/10.1080/23744006.2015.1060080>> accessed on 14th February, 2021.

⁸ Employee Polygraph Protection Act, (1988) U.S. Department of Labor, <<https://www.dol.gov/agencies/whd/polygraph>> accessed on 16th February, 2021.

⁹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993) 509 U.S. 579, also available at <<https://supreme.justia.com/cases/federal/us/509/579/>> accessed on 17th February, 2021.

¹⁰ The Truth about lie detectors (polygraph tests), American Psychological Association, <<https://www.apa.org/research/action/polygraph>> accessed on 18th February, 2021.

in need of today's investigation process. The case laws have made a stand in the regulation of the polygraph and its validity. To understand the case law system's analysis regarding the use of the polygraph and investigation procedure, the case of Bhagyanarayan Baitha vs Nepal Government¹¹ could be the referential status in the context of polygraph in the legal system of Nepal.

This case is related to the kidnapping and hostage-taking of the child (Bittu Kumar Chaudhary) of Rakesh Chaudhary by Dinesh Singh, coordinating with Manoj Kumar Baitha, Bhajya Narayan Baitha and Amal Dev Thakur. In this case, the child was kidnapped, and a ransom was demanded. The child was taken to the border of India. The ransom was one and a half crore rupees. This team was caught before the transaction of money, and the child was rescued before it. In this case the concept of the polygraph machine was used for the investigating procedure. The idea about the polygraph examination was carried under the Bhaktapur District Court. This case was appealed to the Appeal Court Patan and again appealed to the Supreme Court. All the Courts gave similar decisions in this case. Further, the principle of polygraph had also been established in this case. It further established the precedent, which states that if the result of the polygraph is under the investigation process recommended by experts and corroborated by other factual evidence, it can be accepted by courts. Therefore, this precedent established the space for the polygraph in the investigation system with the conditional approach.

Further, there are several cases in which the polygraph idea is mentioned in the investigating system of the respective cases. In the Nirmala Panta case and Alam Case case, the court permitted polygraph in the investigation. However, Alam refused it¹². And several other cases have also used the system of the polygraph under the investigating procedure. By the time of the 6th February 2014, there were 1,314¹³ polygraph tests carried out after introducing this system of Nepal.

RATIONALITY AND WAY FORWARD

The concept of the polygraph was in need of Nepal's investigation system. The idea of the polygraph introduced by the USA embassy in Nepal was progressive in Nepal's investigating system. This has

¹¹ NKP:2075

¹² Shiva Puri, Alam refuses to undergo polygraph test, The Kathmandu Post, 23rd October, 2019, <<https://kathmandupost.com/province-no-2/2019/10/23/alam-refuses-to-undergo-polygraph-test>> accessed on 5th February, 2020.

¹³ Polygraph test conducted on 1,314 suspects so far, The Himalayan Times 6th January, 2017, <<https://thehimalayantimes.com/kathmandu/polygraph-test-conducted-on-1314-suspects-so-far>> accessed on 10th February, 2020.

been a stepping stone towards the familiarization with the modern technology in the modern investigating system. The functioning of the polygraph system became more functional after the release of Nepali Police Polygraph Directives, 2014¹⁴. These directives made the proceeding of the polygraph in investigation; though there are several functioning rules and regulations, the system of the polygraph is not efficient to the evidence in the court. The reliance on this is not as fruitful as it is expected in the investigation system. Since this system's result is only valid when there is support from corroborative evidence. Therefore, the polygraph's idea is to have the supporting hand in the formation of the main evidence rather than acting as the core evidence.

The several events in a series of investigation prove that the consistency of the acceptance of the polygraph is not in order. This lacks its consistency for understanding the exact gravity of the evidence. There are many issues mentioned by several researchers, which state the idea regarding the psychological problem that may lead to the negative result and punish the innocent. This machine itself works from the heart rate, blood pressure, respiratory, etc.,¹⁵ which directly relates to the body's functions. Here, when the person is in pressure, he/she himself/herself gets under those functions in the body, resulting in the false result, which sanctions the innocent. With that, there might be violations of the principle of criminal law, which states that lets 100 criminals be outside the bar but does not let a single innocent individual inside the bar. Here, if the result is made as to the core evidence, there might be an innocent person inside the bar. Therefore, the use of the polygraph in the investigating system would be rational only when there is the use of it as the corroborative evidence rather than the core evidence.

The polygraph system initiated from the case of the Frye vs The United States¹⁶ has made its impact in the globe for the investigation system by detecting the truth and false response. The consistency in the acceptance of its result is always under the fluctuation in the national to international cases. However, from the case mentioned above, i.e., Bhagyanarayan Baitha vs Nepal Government¹⁷, the principle has given the more descriptive concept about using the polygraph during the investigating

¹⁴ Nepal Police Polygraph Directives, Nepal Police Headquarter, Naxal Kathmandu, Magh, 2070.

¹⁵ Suresh Bada Math, Supreme Court Judgement on Polygraph, Narco analysis and Brain Mapping: A boon or bone, Indian Journal of Medical Research, July, 2011 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3171915/>> accessed on 1st January, 2021.

¹⁶ Frye v. United States (1923) 293 F. 1013, (App. D.C. 1923).

¹⁷ NKP, 2075.

procedure. From the overall information and the idea, the polygraph would be the rational evidence if other evidence corroborates this.