

Polygraph Examination in the Criminal Procedure

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Abstract: *People have always been interested in whether the other person is telling the truth or not. This is all the same in criminal procedure. There have been thousands of experiments to develop a method in order to make sure the accuracy of testimonies. Among the instrumental methods the polygraph is the most commonly used instrument, besides there have been the most data concerning its validity. Although its validity is not too high (according to international studies it is between 50 and 98,6 percent), the polygraph examination is an important kind of search for the truth. The conduction of a polygraph examination is subject to certain conditions. Besides the necessary statutory regulation, some material and personnel conditions and requirements should also be satisfied. The material side comprises the polygraph instrument itself and the examination room where the polygraph testing is conducted. The personnel requirements imply the polygraph examiner and the subject of the examination (examinee).*

Key terms: *polygraph, validity, polygraph instrument, examination room, subject of examination, truth.*

Rezumat: *Oamenii au fost întotdeauna interesați dacă semenii lor spun adevărul sau nu, interes care se întâlnește și în procedura penală. Au avut loc mii de experimente pentru a dezvolta o metodă care să asigure acuratețea mărturiei. Printre metodele utilizate, poligraful este instrumentul cel mai frecvent utilizat. Deși validitatea sa nu este prea mare (conform studiilor internaționale se situează între 50% și 98,6%), testul poligraf este un mijloc important de căutare a adevărului. Efectuarea unei examinări poligraf este supusă anumitor condiții. Pe lângă reglementarea legală necesară, sunt necesar a fi îndeplinite și unele condiții materiale și de personal. Condițiile materiale se referă la instrumentul (mecanismul) poligraf în sine și la sala de examinare în cazul în care testul poligraf este efectuat. Cerințele de personal se referă la persoana examinatorului și subiectul examinării (examinatul).*

Termeni cheie: *poligraf, instrument poligraf, cameră de examinare, subiectul examinării, adevăr.*

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1. The lie detector and the examination room

The most important material requirement is the polygraph, a multi-channel instrument that simultaneously measures diverse changes in the activities of the human body¹, and records these as curves either by writing needles on a paper tape, or on the hard drive of a computer. Greely and Illes write that ‘polygraphs measure several physiological features that are associated with nervousness or stress, such as systolic blood pressure (the first and more rapidly variable number in the familiar blood pressure measurement of, for example, 125/75), heart rate, breathing rate, and skin sweatiness (measuring the electrical conductivity of skin, known as galvanic skin response).’² The most commonly accepted theory at present is that, when the person being examined fears detection, that fear produces a measurable physiological reaction when the person responds deceptively. According to this theory, the polygraph instrument is measuring the fear of detection rather than deception per se. The examiner infers deception when the physiological response to questions about the crime or unauthorized activity is greater than the response to other questions. However, the examinee’s intelligence level, state of psychological health, emotional stability, and belief in the detector are among the several other factors that may, at least theoretically, affect physiological responses.³

The examination room, which is also a material requirement, should be located in a calm environment where the examinee is not exposed to external influences. With simple equipment and only a few pieces of furniture a low-stimulus area should be provided where nothing distracts the attention of the examinee who would thus be able to fully concentrate on the examination. It is useful to install a detective mirror in one of the walls of the room through which a member of the investigating authority or the prosecutor may monitor the examination. The presence of more than one examiner in the room would disturb the examination and the examinee would not be as open as in private with the polygraph examiner.⁴

2. The subject of polygraph examination

As far as the personnel side is concerned, everybody is suitable for taking the test who fulfills certain requirements (satisfactory health and physical status, etc.), and who is fully aware of the examination situation and is able to answer the questions adequately. The examinee must comprehend that he must say the truth, otherwise, if he lies the polygraph will detect and reveal it. In the event of the examinee's absence of cooperation, the examination may not be conducted. Therefore, the examinee can be neither obliged nor compelled to take a polygraph test since the examinee's cooperation is necessary for obtaining a proper diagnosis. In practice, cooperation implies that the examinee follows the examiner's instructions and responds to the questions. The examination may not be conducted if the examinee suffers from some serious circulatory or

¹ American Polygraph Association, What is a Polygraph? <http://www.polygraph.org/section/resources/frequently-asked-questions> (downloaded on 8 October 2012)

² Henry T. Greely, Judy Illes, Neuroscie-Based Lie Detection: The Urgent Need for Regulation in *American Journal of Law Medicine*, 2007/2-3, Boston University School of Law, Boston, USA, 2007, p. 386.

³ U.S. Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A Research Review and Evaluation. A Technical Memorandum. Washington, D. C., OTA-TM-H-15, November 1983. p. 6.

⁴ Michael J. Janniro, Interview and interrogation, Department of Defense Polygraph Institute, Columbia, USA, 1991. p. 32.

respiratory disease. The examinee's mental and physical state should allow him to recognize and properly interpret the examination situation, to take the possible consequences of detection and denunciation into consideration, and to be able to produce the physiological activities that are necessary for rendering a diagnosis. Therefore, the examinee is not supposed to be too tired for the examination, nor should he suffer from great pains.

In international practice, the polygraph examination may be conducted for the examination of both the defendant and the witness, whereas in Hungary this possibility has always been debated. According to certain views, only the accused may be the subject of polygraph examination. Some others claim that the witness may also be tested. There has not been a consensus, either, whether polygraph examination may or may not be conducted in the court procedure for the examination of the accused.

Before summer 2011, the Hungarian Act on Criminal Procedure (Act XIX of 1998) regulated the polygraph examination of the suspect only. Section 180 (2) provides that '*Without the consent of the suspect, his testimony may not be examined with the help of a polygraph*'. Section 182 (2) provides that '*It is obligatory to employ an advisor, if the testimony of the defendant is examined with the help of a polygraph during the investigation*'. The provisions of the law suggest that the polygraph may be used for the examination of the defendant during the investigation since the law mentions the polygraph in connection with the suspect. According to another interpretation, in the absence of prohibition, the accused may also be subject of the examination.

According to the Act on Criminal Procedure the suspect's testimony may not be examined by polygraph. Consequently, a further requirement of polygraph examination is that it may be conducted for the testing of a suspect who formerly gave testimony and did not exercise his right of silence. Nevertheless, in my view, it is not justifiable to deprive the suspect of his right to propose polygraph testing. The same may be established regarding the authorities, as the omission of the examination of a suspect who exercises his right of silence but is willing to take the polygraph test would impede the investigation. During my research I have discovered a number of cases in which the suspects insisted on polygraph testing even though they refused to testify. However, when they faced the test results most of them testified, and generally confessed to having committed the particular crime.

Until summer 2011, the Act on Criminal Procedure had not regulated the polygraph examination of the witness which lead to uncertainty among law enforcers since, according to certain interpretations, the law would have explicitly prohibited polygraph examination – if that had been the legislator's intent. Since, however, the law did not contain such prohibition, I agree with the view that the witness may also be subjected to polygraph examination. Nevertheless, the Chief Prosecutor's Office, according to their position expressed twice within the past seven years, did not find the examination of the witness permissible. The Chief Prosecutor's Office permits⁵ the employment of the polygraph in the case of an adult suspect and forbids the same in the case of witnesses and complainants. The same is expressed in the Ig. 404/2009. Legf.Ü. Reminder, Article 209/b: 'With reference to polygraph examination, Section 41 of the Act XXXIV of 1994 (Police Act) contains rules that are partially different from those contained by Section 180 (2) of the Act on Criminal Procedure. According to Section 11 (2) of the Act on Criminal Procedure, the rules of the Act on Criminal Procedure are authoritative for criminal procedures. Since the

⁵ The NF.3797/2005/10-1. position of the Department of Supervision of Investigation and Preparation of Accusation of the Chief Prosecutor's Office issued in July 2005 on the scope of employment of polygraph lie detection

testimony of the defendant may be examined with the help of a polygraph during the investigation according to Section 180 (2) of the Act, the polygraph may be employed exclusively in the investigation phase of the procedure and for the examination of an adult defendant. The Chief Prosecutor's Office based their position on the principle that the Act on Criminal Procedure is to be applied in all criminal proceedings, and the Police Act, or Section 12 (1) of the Act XVIII of 2001 on Arrest and Seizure Warrant, that otherwise allow witness polygraph examination, cannot overwrite the regulation of the Act on Criminal Procedure that declares that exclusively the defendant may be the subject of polygraph examination.

Yet, their position has not effectuated the omission of the polygraph examination of the witness from 2005. My research has confirmed that witness polygraph examinations are being conducted, though it always depends on the actual law enforcer whether the polygraph may be used for the examination of the witness in a given case.⁶

On 4 July 2011 the Parliament passed a Bill on the amendment of other laws on procedure and the administration of justice which created a new situation as the amended Act on Criminal Procedure permitted the polygraph examination of the witness⁷ in cases of grave importance.⁸ The law does not specify the phase in which the witness may be subjected to polygraph testing, consequently, it may be used both during the investigation and the court procedure. In practice, however, there is contradiction regarding the assignment of an advisor in the court phase for the conduction of polygraph examination. As the law does not permit this, the general practice is the assignment of an expert. In my opinion, this practice may not be considered appropriate, since, on the basis of the legislative intent, no expert opinion may be prepared about the polygraph examination. I believe, in case the polygraph examination is conducted in the court phase, the assignment of an advisor should be rendered permissible, with reference to the exception to the general rule, and in both phases, following the example of the hearing of the expert, the hearing of the advisor, as an act of procedure, should be introduced – wherein the advisor shall not be heard as witness about the result of the examination, provided that it is necessary that the advisor responds to the questions of the court orally.

I believe, the legislator, by permitting the polygraph examination explicitly in cases of grave importance, excluded the possibility of polygraph testing in other cases. If this is the correct interpretation of the legislator's intent – what is the reason for the prohibition of polygraph examination in cases of no grave importance? Given the reliability, the requirements and the guaranties of the polygraph examination, I claim that such differentiation is unnecessary.

My standpoint, which is in accordance with the official position of the Chief Prosecutor's Office, somewhat contradicts the position of the College of Criminal Affairs of the Supreme Court on Bill T/3522 on the amendment of the other laws on certain procedures and the

⁶ According to advisors, this primarily depends on the interpretation of law by the prosecution.

⁷ Section 554/E of the Act on Criminal Procedure: In cases of grave importance the witness testimony may be examined with the help of a polygraph if the witness gives consent.

⁸ On the basis of Section 554/B of the Act on Criminal Procedure, cases of grave importance are, for instance, the Abuse of Authority (Section 225 of the Act IV of 1978 on the Criminal Code), the Establishment of a Criminal Organization (Section 263/C), all criminal acts committed in criminal organization (Section 137, Article 8) and the graver cases of homicide (Section 166 (2a–j)). The procedural regulations concerning cases of grave importance are enclosed within the special procedures in the fifth part. The Hungarian Act on Criminal Procedure mentions among the special procedures the criminal procedure against juveniles, military justice, the procedure of private prosecution, the committal for trial, the procedure against an absent defendant, the waiver of court trial, the omission of court trial, and the procedure in the case of persons enjoying immunity. The main feature of special procedures is that this part of the law mentions only those rules that are different from the general rules.

administration of justice⁹ which states concerning the provision contained by the aforementioned Section 554/E (that has entered into force in the meantime): 'The Act on Criminal Procedure currently regulates the polygraph examination of the testimony in the case of the defendant and does not mention the witness. There is no prohibiting rule concerning the polygraph examination of the witness, therefore, the provision is redundant.' In spite of the position of the Supreme Court, the prevailing Act on Criminal Procedure still contains the controversial section (as the controversial amendment was passed by the Parliament), which may imply that according to the legislator's intent the polygraph examination of the witness may exclusively take place under a special procedure, since the law specifies the provisions different from the general provisions among the rules of special procedures. However, the Supreme Court merely states that Section 554/E is 'redundant' and not exclusive, therefore, the conclusion may also be drawn that the legislator intended to emphasize the possibility of the polygraph examination of the witness. Thus, the Supreme Court has failed to resolve the contradiction. Should the Supreme Court have defined their position earlier, they would have cut the long dispute short and would also have prevented the occurrence of different jurisdiction.

In the past few years, a number of concerns have been formulated regarding the polygraph examination of the witness. The witness, contrary to the suspect, is bound by the obligation to declare the truth and the obligation to cooperate. Therefore, if the examination of the witness is ordered, the 'contradiction' arises that the authority presumes that the witness lies, that is, the investigating authority and the prosecutor doubt the trustworthiness of the witness. This also raises the suspicion that the member of the investigating authority contemplates the possibility of the perpetration of perjury and that is the reason why the polygraph examination is ordered. In my opinion, this is an incorrect interpretation, as the witness is bound by the obligation to declare the truth and the authorities may even force the performance of this obligation by the instruments of public authority.¹⁰ Consequently, the witness testimony may by all means be tested by polygraph examination without even contemplating the possibility of perjury. This, however, ought to be enclosed in Section 181 on the Questioning of the Witness of the Act on Criminal Procedure *de lege ferenda*, and thus the uncertainty would at long last come to an end. The regulations concerning the obstacles to testifying as a witness must also be considered: in the event of an absolute obstacle it should be forbidden, while in the event of relative obstacles, in accordance with the prohibition of self-incrimination, it would be used strictly in the case of the voluntary commitment of the witness.

The dispute related to the polygraph examination of the witness is not new. It is rooted in the Act on Criminal Procedure that does not specify the legal status of the person suspected of the perpetration of a crime. If there is reasonable suspicion that someone has committed a crime, that person shall participate in the criminal procedure as the suspect. If, however, there is only a

⁹ www.birosag.hu/resource.aspx?ResourceID=T3522 (downloaded on 20 September 2012)

¹⁰ Before mentioning the witness, the opinion of the College of Criminal Affairs of the Supreme Court deals with the consent of the defendant: 'it is not by chance that the Act on Criminal Procedure requires the consent of the defendant for the polygraph examination of the defendant [Section 180 (2)]. If the witness does not wish to cooperate with the investigating authority and lies already when the controlling questions are asked, there is no reason for the conduction of polygraph examination.' Thence it follows that the College does not find the consent of the witness to the examination necessary. I myself share this view, despite the fact that according to both the Hungarian and the foreign practice the prior consent of the witness is required for the conduction of polygraph examination.

suspicion and there are not enough evidences to incriminate the suspected perpetrator¹¹, the person is questioned as a witness and it is the legal status of the witness that determines the person's rights and obligations since the person who is merely suspected is not a real subject of the procedure.

According to Erdei, Árpád, without the clarification of procedural rights the polygraph must not be used. Erdei is convinced that the polygraph examination of the witness is not permissible. The basis of his reasoning is that while in the case of the defendant the polygraph examination may as well be advantageous, in the case of the witness the polygraph examination may rather lead to disadvantages.¹²

On the contrary, Kertész, Imre claims that the polygraph examination may be applied in the case of the witness, too, if the honesty of the witness or the complainant becomes doubtful. In one of his writings Kertész states that he disagrees with the view that the suspected person may only be subjected to polygraph examination after the indictment of the defendant, and with the person's consent given without constraint. Kertész also disagrees that a person of unclear status cannot be subjected to the examination. In a constraint-free situation it is the right of any citizen to decide whether they give their consent to be subjected to the examination.¹³

In another of his papers Kertész writes that 'in case of voluntary consent a person should not be excluded, on the basis of the person's legal procedural status, from clarifying the person's role in the perpetration of a crime in this way (i.e. by polygraph examination) if the person wishes to do so. This requires that the concerned person may receive adequate information not only about the essence and the purpose of the examination, but also about the fact that the person may not be considered to be a suspect on the basis of the available evidence, has the right to refuse to participate in the examination and the person's doing so shall not be taken as incriminating for the person; with the person's consent, however, the person may contribute to the clarification of the circumstances of the crime, the exclusion of doubts arisen concerning the person and the termination of further checking of the person.'¹⁴

3. The polygraph examiner

The polygraph examiner belongs to the personnel side of the polygraph examination. According to Section 182 (2) „*It is obligatory to employ an advisor, if the testimony of the defendant is examined with the help of a polygraph during the investigation*”. The Law has

¹¹ 'We would find it appropriate if there was no need for 'reasonable' suspicion for ordering the investigation and for declaring a person a suspect *de lege ferenda*. It would simplify the procedure and render the defense of the concerned person more effective if it was revealed that it is being investigated whether the person has committed any criminal act, and the person would be given the possibility of defense from the moment the suspicion falls on the person.', as Kertész, Imre claimed in 1992. In: Kertész Imre: Diogenész lámpása vagy elektronikus vallatópad? *The Lantern of Diogenes or an electronic interrogation bench?* Magyar Jog, 1992/November. p. 655.

¹² Hautzinger Zoltán, Az igazságügyi őszinteségvizsgálat. *Forensic truthfulness examination*, in Korinek László, Kőhalmi László, Herke Csongor (editors), Emlékkönyv Irk Albert Egyetemi tanár születésének 120. évfordulójára. *A Memorial Volume for the 120th Birth Anniversary of Professor IRK, Albert*. PTE ÁJK, Pécs, 2004. p. 48.

¹³ Kertész Imre, A poligráfós vizsgálat helye a büntetőeljárásban II. rész. *The role of polygraph examination in the criminal procedure. Part*, in Főiskolai Figyelő. Rendőrtiszti Főiskola, Budapest, 1991\1. p. 12.

¹⁴ Kertész Imre, Diogenész lámpása vagy elektronikus vallatópad? *The Lantern of Diogenes or an electronic interrogation bench?* in Magyar Jog 1992/November. p. 655.

contained this provision since it came into force in 2003. This provision changed the legal regulation of the usage of polygraph by replacing the former expert examination, conducted on the basis of the Police Act, with the procedure of the employment of an advisor who possesses special knowledge and skills, as regulated by the Act on Criminal Procedure.

According to the explanation of the reasons presented by the Minister to the Act on Criminal Procedure, the activity of the advisor, as opposed to that of the expert, is not aimed at producing a means of evidence (expert opinion), the information given by the advisor is for informational purposes only. Therefore, as the employment of an advisor does not create a means of evidence, the prosecutor or the member of the investigating authority – provided that they are in possession of the necessary special knowledge – may generally disregard of the employment of an advisor. The terminology 'may generally disregard' refers to cases when the employment of an advisor is obligatory. The aforementioned conduction of polygraph examination during the investigation¹⁵ exemplifies such a case.

Before the prevailing Act on Criminal Procedure came into force polygraph examinations were conducted by experts, however, initially, there were cases in which criminal psychologist experts were assigned as advisors.¹⁶ When the Act XXXIV of 1994 on the Police took effect, the expert became the exclusive polygraph examiner, who also provided an expert opinion of the result of the emanation. The Act on Criminal Procedure that entered into force in 2003 returned to the practice of the times before the Police Act, however, obligatorily, the advisor became the polygraph examiner and the provider of an advisory opinion about the result of the examination.

In his opinion the advisor does not provide answers to the questions whether the subject of the examination committed the crime or not, whether the subject is guilty or not, neither does the advisor specify which testimony corresponds to the truth. Rather, the advisor provides an opinion about how, on the basis of the physiological changes of the subject during the testing, the honesty of the defendant may be judged¹⁷. In the advisory opinion, the following answers may appear concerning the respective questions: '*the reactions of the examinee indicated deception*', '*the examinee gave a misleading response*', or '*on the basis of the reactions the honesty of the examinee is questionable*'. The advisor may also hold that '*the examinee gave honest response*', or that '*the reactions did not indicate deception*'. If the advisor is unable to take a clear stand, the opinion may contain that '*the reality content of the answer given to the question cannot be established*'. In the future, the advisory statements will change since the Hungarian Institute for Forensic Sciences that coordinates the polygraph examinations on a national level aims to standardize the possible advisory responses. Thus, the advisory opinion may state that '*the response is deceptive*' (the examinee intentionally gives untruthful response; the examinee's response is untruthful according to the examinee's own knowledge; the examinee intends to deceive the examiner), '*the response is not deceptive*' (honest), or (the honesty of the response) '*cannot be determined*'.

¹⁵ Act XIX of 1998, Section 182 (2).

¹⁶ Szíjártó István, Poligráf a büntetőeljárásban. *Polygraph in the criminal procedure*, in *Belügyi Szemle* 1998/7-8. p. 37.

¹⁷ The investigating authority generally asks the examiner whether the truthfulness of the information given by the subject of examination in connection with the criminal act is disputable or questionable. In: Mikolay Sándor: *Kriminálpszichológia a magyar rendőrségen a Fejér Megyei Rendőr-főkapitányság példáján. Criminal psychology at the Hungarian Police upon the example of the Fejér County Police Headquarters*. *Belügyi Szemle* 2004/6. p. 34.

On the contrary, in international practice¹⁸, the advisory opinion states whether the examinee's personality is globally¹⁹ 'deceptive', 'not deceptive', or if it cannot be determined then the examination is 'unconvincing'. The advisory opinion also contains the responses given to the questions asked during the polygraph examination.²⁰

According to the explanations of the reasons presented by the Minister to of the Act on Criminal Procedure, because of the characteristics described it is necessary that the polygraph is not operated by the member of the investigating authority or the prosecutor. Rather, the examination should be conducted by a qualified person, since it is the physiological data recorded by the polygraph from which the advisor concludes the existence or the absence of the examinee's excited state induced by the questions asked during the examination, and in order to properly interpret the data and draw the conclusions adequate knowledge is required. The conduction of the examination itself also requires great expertise, generally not possessed by either the prosecutor or the member of the investigating authority. Considering the fact that the polygraph examination represents some kind of psychological effect on the examinee's personality, only a specialist should be permitted to conduct the examination. And this specialist is the advisor.

The rules of law and the aforementioned explanations of the reasons presented by the Minister merely require that an advisor should conduct the polygraph examination, but there are no further regulations concerning the examiner. For instance, the necessary qualifications for an examiner are not specified.²¹ Before giving the answers to these questions, I believe, it is useful to outline the required competencies of a polygraph examiner.

The polygraph examiner interprets the graphic image of the recorded physiological changes and draws conclusions regarding the trustworthiness of the subject of the examination directly from the intensity and formal characteristics of these changes.²² The polygraph examiner must be able to create a special examination atmosphere that ensures that the examination results shall display the changes on the basis of which the examinee's deceptive intent or the absence of

¹⁸ Contrary to international practice, in our country the advisor does not examine whether the person is globally deceptive, rather the advisor establishes deception on the basis of the received answers for the questions. By this practice, in foreign countries, the rare mistake may also be eliminated that an answer to a question generates such physiological reactions that further influence other answers, and thus, even if the examined person's further answers are truthful, his or her physiological reactions may indicate continuous deception. In foreign countries, when the examined person is called deceptive the examiner is not considered to make a mistake since the examiner's task was not to select and mark the critical deceptive answer. In Hungary, however, such practice would be considered a serious mistake.

¹⁹ David T. Lykken, The validity of tests: caveat emptor in *Jurimetriss Journal*, 1987/3, American Bar Association, USA, 1987, p. 264.

²⁰ In the case of a defendant accused of taking the law in his own hands, the advisor asked the following critical (that is, relevant) questions: 1. Do you still owe some part of the borrowed sum to X? (Answer: 'No'). 2. Do you still owe any part of the price of the purchased items to X? (Answer: 'No'). 3. Did X make the children sit in X's car so that X can blackmail you only on one occasion? (Answer: 'No'). 4. Did you purposefully mislead the police with your testimony? (Answer: 'No'). The advisor established that in the case of the answers given to questions 1, 2, and 3, the truthfulness of the accused is questionable.

²¹ Section 801.26 (b) of the American Employee Polygraph Protection Act of 1988 (EPPA) provides two requirements: the polygraph examiner must have a valid current license and a minimum bond of USD 50,000 that may serve as a guarantee of the fidelity of the examiner and also as a professional liability coverage.

²² Krispán István, A poligráfós hazugságvizsgálatok rendőrségi alkalmazásának magyarországi múltja, jelene, jövője. *The past, present and future of the employment of polygraph lie-detection by the Police in Hungary*, in *Belügyi Szemle* 2004/6. p. 46.

such intent may be diagnosed.²³ The advisor must ensure the cooperation of the examinee, and must direct the examinee's attention to the object of the examination all through the examination. Furthermore, the examiner must maintain a neutral and objective relationship with the examinee. The examiner's verbal manifestations, gestures and mimicking must all be kept under control and serve the purpose of maintaining the examinee's motivation to avoid detection all through the examination procedure.²⁴ The polygraph examiner must be able to interpret the examinee's meta-communication when the examinee enters the examination room, must be able to anticipate the examinee's personality features, the way the examinee should be addressed, the way the examinee's emotional manifestations should be handled, etc. If the examiner lacks this competence it will leave a mark on the entire examination and may even compromise its effectiveness.

The examiner must be in possession of the ability to ask the right questions during the polygraph examination. The examiner must not make distinctions on the basis of the examinee being male or female, rich or poor, young or old. The examiner must have a general interest in people, their conduct, behaviour and motivations. The examiner must be able to make the subject believe that it is the most advantageous to say the truth even if it leads to imprisonment. The examiner's every sentence and every movement must inspire confidence. The polygraph examiner must be an understanding, open and likable person. The examiner must have a good command of psychology, physiology, criminology and sociology, and must be able to formulate the questions so that they may be understandable for the subject. The examiner must possess at least an average – but preferably higher than average – level of intelligence (that is the reason why, in foreign countries, a university degree is a requirement), since all sorts of different people may turn up at the examinations. A further requirement for the examiner is to be well-qualified and have investigative experience. The examiner must be familiar with the mysteries of investigation like, for instance, the rules of conducting a survey of the scene of a crime, of collecting and recording of evidence. If the examiner is not familiar with the basics, he shall not be able to think for the examined person.²⁵

The examiner must be highly motivated for the work and have a personality that renders him or her an appropriate partner for the person to be examined. Therefore, the examiner must be liked by others – be they friends or colleagues. Inbau claims that a lot of polygraph examiners do not meet these requirements, and, consequently, a poorly trained examiner who does not have the required personal characteristics has a tendency to make mistakes.²⁶

In order that a polygraph examiner may correctly interpret the result of the procedure and may truly help the work of the investigating authority, the examiner must be able to correctly interpret the information available in the given case, reconcile the needs of the investigating authority and the possibilities and the professional requirements of the examination; and realize

²³ The advisors interviewed during the research claim that those subjects of the polygraph examination who committed criminal acts all believe, without exception, that they are able to deceive the polygraph. However, they unanimously declared that a well-prepared polygraph examiner would be able to detect and disclose all such attempts.

²⁴ Krispán István, A poligráfós hazugságvizsgálatok rendőrségi alkalmazásának magyarországi múltja, jelene, jövője. *The past, present and future of the employment of polygraph lie-detection by the Police in Hungary* in Belügyi Szemle 2004/6. p. 47.

²⁵ Michael J. Janniro, Interview and interrogation. Department of Defense Polygraph Institute. Columbia, USA, 1991. pp. 34-35.

²⁶ Fred E. Inbau, Some avoidable lie-detector mistakes. In: *The Journal of Criminal Law and Criminology*, 1999/4. Northwestern University School of Law, USA, 1999. p. 1373.

the type of information that needs to be clarified so that he may most effectively contribute to the success of the investigation. For this the examiner needs an extensive knowledge of criminology. According to certain opinions, the role of a polygraph examiner should be filled by a criminal psychologist with experience in criminology. They claim, the establishment of personal suitability for being tested by polygraph examination definitely requires a psychologist (and it is of extreme importance in the case of criminals among whom abnormal personality structure is fairly frequent).²⁷ Others, however, believe that it is easier to retrain a detective than training a psychologist to be a polygraph examiner, since the special psychological knowledge an advisor must possess for the conduction of an examination is very little, and it is not psychotherapy but his knowledge of criminology the examiner must utilize at the planning of the questionnaire and the examination.

In accordance with the polygraph examiners' opinion, I also believe that a degree in psychology should not be a requirement, however, a university degree that implies the knowledge of criminology²⁸ should definitely be a requirement. Additionally, a legislation should provide that the candidate must complete the course organized by the Department of Polygraph Examination of the Hungarian Institute for Forensic Sciences – HIFS (hereinafter HIFS; in Hungarian BSZKI). This would be especially necessary since the polygraph examiners have only trained (excluding a course this year) one another in the recent years. The standardized course would ensure that polygraph examiners conduct the examinations at a similar level nationwide, and thus the subjects of the examination will not expect that certain advisors will not question the honesty of their answers and will not establish the involvement of the accused in the investigated case. A well-prepared and experienced polygraph examiner is able to detect if the subject of the examination intends to manipulate the examination result in various ways. The standardized course and the continuous professional control would guarantee that only those advisors may conduct examinations who are able to detect attempts of deception and manipulation. In addition to preparatory courses for the polygraph examination, compulsory training courses should also be organized by the HIFS for ensuring and maintaining the professional level of the examinations.

In foreign practice, the majority of polygraph examiners employed in law enforcement possess both qualifications and experience in the field of criminal investigation. Generally, a college or university degree is a requirement, while no specialization is prescribed.²⁹ Inbau claims that a polygraph examiner should not necessarily be a medical doctor or a psychologist, however, due to the requirement of higher-than-average level of intelligence at the examinations renders it necessary that the examiner has a university degree.³⁰ For the appropriate conduction of the examinations, and also for the maintenance of the appropriate level, constant practice is required, therefore, in those countries where polygraph examinations are extensively utilized, a minimum number of obligatory examinations per year is established for the examiners and the

²⁷ Brósz Tünde, Horváth András, Érvék és tények a poligráf alkalmazása mellett. *Arguments and Facts in favour of the employment of the Polygraph* in *Rendészeti Szemle* 1992/12. p. 77.

²⁸ Earned primarily at the Faculty of Law Enforcement of the National University of Public Service – FLE NUPS, or at one of the Faculties of Law.

²⁹ Krispán István, A poligráf hazugságvizsgálatok rendőrségi alkalmazásának magyarországi múltja, jelene, jövője. *The past, present and future of the employment of polygraph lie-detection by the Police in Hungary* in *Belügyi Szemle* 2004/6. pp. 47-48.

³⁰ Fred E. Inbau, Some avoidable lie-detector mistake, in *The Journal of Criminal Law and Criminology*, 1999/4. Northwestern University School of Law, USA, 1999 p. 1373.

failure of passing these exams implies that the examiner loses his license.³¹

Inbau claims, that even though a few weeks of intensive course would be sufficient for the proper acquisition of the knowledge necessary for the operation of a polygraph, ideally, the candidate should complete at least a six-month-long course. This course would provide physiological and psychological knowledge and the candidate would attend and monitor a number of examinations. It is also necessary for the candidates to perform their own experiments, conduct their own examinations under the supervision of their instructor, and study and evaluate the polygraph examination of several such cases in which final decisions have already been passed. The course should also provide practical guidelines that are based on impressions and personal experiences. The participant of the course should become familiar with such psychological and tactical methods that shall enable him to provide the authorities with testimony or important data in future cases when the subject of the examination proves to be dishonest. It is also a requirement that an instructor supervises no more than six candidates, in order to ensure the effectiveness of the course.

Inbau finds it necessary for the polygraph examiner to focus on polygraph examinations solely, and not to be employed as an expert at any other field. He claims, the police makes a mistake when they fail to comply with this rule. It is a mistake, therefore, for any police department to assume that laboratory personnel can be readily shifted from a chemistry section or a firearms section into the laboratory's lie-detector unit.³²

4. The controlling of the polygraph examination

The polygraph examiner, the examiner's preparedness and the applied instrument together determine the quality of the examination. The quality related to the examiner may be maintained and improved by compulsory trainings, on the one hand, and by continuous control, on the other hand. In case the quality control reveals that the examination conducted by the examiner does not meet the professional requirements, the HIFS shall point out the error. If they identify new errors later, the polygraph examiner must monitor an experienced HIFS-advisor for some months so that the examinations conducted by this examiner cease to be unprofessional. As soon as the necessary ability is acquired, the examiner may again conduct examinations independently.

Continuous control has been exercised since spring 2011, when the Department of Polygraph Examination was established at the HIFS. In our country, the institution of quality control is not new, it was already a general practice at the time of centralized polygraph examinations. In later years, however, the control was exercised insofar as the examination was repeated with the participation of another polygraph advisor or expert. The advantage of the present system is that the polygraph examiner immediately forwards the data of the examination by e-mail to the central HIFS-server. Thus, there is no lengthy waiting for examination results, nor does compliance with the chain of command take time. Nevertheless, this method is not suitable for making it obvious from the data of the findings why the examined person's

³¹ Krispán István, A poligráfus hazugságvizsgálatok rendőrségi alkalmazásának magyarországi múltja, jelene, jövője. *The past, present and future of the employment of polygraph lie-detection by the Police in Hungary*, in Belügyi Szemle 2004/6. pp. 47-48.

³² Fred E. Inbau, Some avoidable lie-detector mistakes, in *The Journal of Criminal Law and Criminology*, 1999/4. Northwestern University School of Law, USA, 1999. p. 1375.

physiological reactions changed. Was it only a reaction to the question asked, or to the examiner's intonation or glance, etc. If, for instance, a mobile phone starts ringing when a question is asked the examiner must make a note about it in the recordings, but if no such palpable event occurs during the examination the HIFS-supervisor may not know the answer either and may only criticize the questionnaire or the non-recognition of the clear physiological changes. The checking may be made more efficient by installing a web-camera to the advisor's laptop which would record, in addition to voice-recording, both the examiner's and the examinee's behaviour, expression and look. The newest HIFS instruments have built-in web-cameras, however, due to the size of the image recording file it may not be forwarded to the server of the HIFS so this means of control is, in fact, still not available. The situation is expected to change, but the exact date of the change is not yet seen. If the polygraph examiner received information about the outcome of the case it would serve as a kind of feedback and would also entail the improvement of the quality of the examination. Such feedback would reveal whether the polygraph oriented the investigation adequately, whether the examination was followed by confession, whether the requested material means of evidence was found, and whether the court considered the advisory opinion about the subject's involvement in the crime, etc. According to Lykken, the polygraph examiner, contrary to an engineer, for instance, is unable to recognize and face the mistakes made at the examination since the examiner shall not receive any information about the case following the examination.³³

5. Final thoughts

A good quality polygraph, a poor-stimulation examination room, a well-prepared and experienced polygraph examiner, and a subject who is suitable for the examination are all prerequisites of a successful polygraph examination. In our country, the requirements are fulfilled as far as the material side is concerned, however, as far as the personnel side is concerned, certain changes are necessary.

- In accordance with the international practice, the conduction of polygraph examination of the witness should be permitted in our country, too – and not only in cases of grave importance. Since it is the Act on Criminal Procedure that contains provisions as to the polygraph examination of the suspect in Hungary, the possibility of the polygraph examination of the witness should be enclosed in Section 181 about the questioning of the witness *de lege ferenda*. The rules relevant to the obstacles to witness testimony should also be taken into consideration: in the event of an absolute obstacle, the polygraph should not be applied at all, whereas in the event of relative obstacles, in accordance with the prohibition of self-incrimination, it could only be used in the event of the voluntary commitment of the witness.

- Due to the inaccurate regulations of the Act on Criminal Procedure, law enforcers are divided on the question whether the polygraph may be used in the court procedure. In my opinion, the law should provide the possibility of the use of polygraph in the court phase. At the end of Section 288 (Chapter XIII, Title I of the Act on Criminal Procedure) regulating the questioning of the accused the following addition may be placed (in a new paragraph): 'the

³³ David T. Lykken, The validity of tests: caveat emptor, in *Jurimetrics Journal*, 1987/3. American Bar Association, USA, 1987. p. 269.

testimony of the accused may not be examined by polygraph without the consent of the accused'. The same provision may be implemented concerning the witness, following Section 294, with the difference that the consent of the witness shall not be required.

- The current Act on Criminal Procedure in force provides that the polygraph examination must be conducted by an advisor. In my opinion, it is unnecessary to change this provision, and there is no reason to require an expert opinion about the outcome of the procedure. However, similarly to the former Act on Criminal Procedure (Act I of 1973) the employment of an advisor exceptionally for the event of polygraph examination should be made possible again.

- The Act on Criminal Procedure should contain that at the court procedure the polygraph examination of the testimony of both the accused and the witness is conducted by the advisor.

- The act of procedure of 'hearing of the advisor', the events and content of which shall be recorded in minutes, should be introduced in the Act on Criminal Procedure. At the hearing, both the defendant and the counsel for the defense, and if a witness was also examined then the witness, too, could ask questions from the advisor.

- The advisor conducting the polygraph examination should be required to complete a HIFS-course and also to possess a college or university degree that implies the acquisition of knowledge in the field of criminalistics.

- Continuous trainings as well as official (HIFS) control should be ensured for the advisors.

In my opinion, if the defined suggestions were to be carried out, the case-law would be more unified and the constructional discussions, which have been there for years, would come to an end.