

# **ADMISSIBILITY OF AN AGENT PROVOCATEUR AND AN ADVOCATE ACTING AS AN AGENT**

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## **Abstract**

The issue of an agent in criminal proceeding has been the topic of scientific discussion for several years in European countries as well as in the Slovak Republic. In particular, the topic of agent provocateur is constantly interesting and controversial in a view of its problematic practical implementation in relation to the national legal regulation of that institution, existing jurisprudence, including the practice of the European Court of Human Rights. This issue is worthy another discussion because there are many opinions that it intervenes into the fundamental rights of individuals and many lawyers point out that is not in compliance with the basic principles of the democratic state respecting rule of law. Theoretical aspects of the topic have caused its complicated way of application in the relation to respect towards the basic principles of the democratic state respecting rule of law

By analyzing and comparing the domestic regulation, case law of domestic courts and the European Court of Human Rights the authors have ambition to suggest different views on problematic aspects of this institution, especially its form as agent provocateur. Special attention is dedicated to the question whether a lawyer, concretely advocate can act as an agent. The nature and purpose of all these institutions, including the question of legal entrapment, raising polemics dividing the society. The article does not aim to offer one satisfactory solution. The reason is, as the reader will have a chance maybe to come to the same idea, there are many different state approaches worldwide and especially in the

States of the Council of Europe, which affected different ways of understanding of the Agent Provocateur, its role and purpose in the democratic state with rule of law. The authors' intention is to seek arguments acceptable for both parties to the dispute.

**Key words:** *agent, criminal proceedings, police provocation, legal entrapment, agent provocateur, advocate as an agent*

## 1. Introduction

The agent is an institution of criminal procedural law. The agent is a person who secretly infiltrates the criminal environment, works in it, gains the trust of the criminals and pretends to cooperate with them, collecting information on specific criminal acts and their perpetrators. The agent thus contributes to the detection and conviction of perpetrators of serious crimes which would otherwise be significantly more difficult or impossible to prosecute.

The main question which should be answered in this article is whether the institution of an Agent Provocateur is admissible in the legal orders of the Council of Europe member states, especially in the Slovak Republic. If yes, are there any conditions specified? In what extend the fundamental rights of an individual can be touched by the means of the police provocation. Another question is whether it is in accordance with law when an advocate is acting as an agent.

According to Šuchter "Agent services ... are used by all states, especially their police systems, whether legal or semi-legal, to successfully fight the most serious crimes. This contributes to the protection and development of democracy, humanism, legality and the overall functioning of the rule of law." (Šuchter, 1996, p.6). This is a possible reason for the use of agents in the fight against crime. However, in order to be usable in criminal proceedings, the use of an agent must have a legal basis in each legal state and his action should be in accordance with the law. Abovementioned 'semi-illegality' as the basis for the agent's activity is what, in practice, causes the most common problems and theoretically it should be avoided in order for the evidence to be useful in criminal proceedings. In practice, it is very difficult not to cross this fine line.

We focus separately on the institution of the agent provocateur. In the older scientific literature, the following information can be found. "In the English context, though there does not appear to be any legal definition, an agent provocateur is a person who entices another to commit an express breach of law which he would not otherwise have committed and then

proceeds or informs against him in respect of such offences” (Royal Commission on Police Powers and Procedure, 1929 in Fijnaut, C., Marx, G.T., 1995, p. 196). As the agent is a person who is operating on the edge of the law, it is difficult not to cross this fine dividing line and at the same time serve a legal purpose. The question with agent provocateur is, what can be called a provocation and what not?

At the same time, it is important to stress that guarantees of the use of an agent adopted in Resolution of XVI of the International Criminal Law Congress are fully respected by the Slovak legal order.

The use of this and similar means of so-called proactive detection of crime must be accompanied by certain guarantees. There are four principles:

- the principle of legality (the instrument must be governed by law and must respect human rights when used),
- subsidiarity principle (a device can only be used if its purpose cannot be achieved otherwise),
- the principle of proportionality (the device may only be used for particularly serious offenses), and
- the principle of judicial control (the remedy may be used only with the authorization and under the control of the judge). (Ivor, J., 2010, p. 407-408).

The institution of the agent provocateur has been established within the Slovak legal order since December 2003. Actually the agent is defined in § 10 par. 20 and subsequently in § 117 of Law No. 301/2005 Coll. Code of Criminal Procedure of the Slovak Republic (hereinafter referred to as Criminal Procedure Code). The Criminal Procedure Code defines the agent as follows “An agent shall be an officer of the Police Force or a member of the Police of other state who, based on the order by a prosecutor or by the court, contributes to the detection, identification and conviction of the offenders of a crime. “The area of his interest is strictly limited to the criminal offences of terrorism and the criminal offences referred as the corruption, the criminal offence of abuse of power by a public official and money laundering. In detecting, identifying and convicting offenders of corruption or criminal offences of terrorism, an agent may also be a person other than the officer of the Police Force, appointed by a prosecutor upon a motion filed by a police officer or by

member of the Police Force authorized by the Minister of the Interior of the Police Force.<sup>1</sup>

The decision to use the agent in the process of the investigation, including for the detection and conviction of offenders, of crimes should be based upon permission. The main and prevailing reason for taking such decision is the existence of the strong belief that the detection, investigation and conviction of offenders of abovementioned criminal offences would otherwise be much more difficult, and the learned facts justify the suspicion that a criminal offence was committed or such criminal offence is to be committed. The Slovak legislation also put an importance to the fact that agents must act in conformity with the purpose of the legal regulation. Their actions must be proportional to the unlawfulness of the activities they help to detect, identify or prove. The intention of the legislator to protect the fundamental rights and freedoms is secured by the obligation which should be respected in all cases of investigation. Agents may not incite to the commission of crime. This shall not apply to the corruption of public officials or foreign public officials, in the situation the ascertained facts indicate that the offender would have committed such criminal offence even if no order to use an agent had been issued.

The actions taken by the agents must be always possible to be considered to be proportional to the unlawfulness of the activities they help to detect, identify or prove. Here are listed conditions under which the use of the institution of the agent provocateur is permissible in the Slovak Republic.

Considering the nature and constitutional conformity of this institution, the question raised again is what should be understood as a incitement by Police Officers, which is a well-known and utilized police measure in Slovakia. The current legal regulation of the institution of the agent provocateur does not avoid controversy in its legal definition. The following paper proposes to indicate answers to the legal questions that arise from this controversy.

## **2. Admissibility of an agent provocateur**

The institution of agent provocateur originates from the U.S.A., where it has been necessary to respond to the rising waves of crime by

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<sup>1</sup> All of the quotations in the text are translated into the English by the authors of this Article.

effective means, in order to protect society when evidence by classical methods was ineffective. In the USA, in particular, the detection of corruption and drug offenses is based on the 'sting operation' method. It is a deceptive operation, is defined as any effort by the authorities to encourage wrongdoing, with the intention of punishing the offenses that result. Normally a sting operation is carried out by agents acting undercover, that is, concealing the fact that they work for the authorities. (Hay, B., 2005, p. 3). The activity is based on operative information which are unproven. Of course, such a police agent's behavior must have its limits, and they are inherent in an illegal institution called 'entrapment' into which sting operation can slip, consisting in inciting a person to commit a criminal offense without substantiated information that the person is committing a crime.<sup>2</sup>

The issue of the so-called. 'Sting operation' is as a permissible form of initiation to commit an offense by public servants, resp. agents and the issue of the so-called 'Entrapment' as an illicit form of initiation to commit an offense by public servants, resp. agents in the Anglo-American legal system. There are many different definitions of legal entrapment. Considering Dworkin's definition of legal entrapment: Dworkin holds that "proactive law enforcement occurs whenever a law-enforcement agent (presumably, acting in that agent's official capacity): 1. uses deception; 2. to produce the performance of a crime; 3. in circumstances in which the agent can observe the performance of the crime." Dworkin regards all cases of legal entrapment as cases of proactive law enforcement that meet the following additional conditions: 4. the agent procures the crime (by solicitation, persuasion, or enticement); 5. counterfactual condition: the target would not have committed the particular crime but for the agent's having procured it. (Dworkin (1985, p. 17, 21)

Another definition is presented by Stitt and James. According to Stitt and James, entrapment (of Type 1) occurs (in the context of their discussion) whenever the following four conditions are all met: 1) a law-enforcement agent *plans* a particular crime; 2) the agent *induces* the target to commit it; 3) the agent *arrests* the target for having committed it; 4) *counterfactual condition*: if it were not for the agent's actions, then the

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<sup>2</sup> Authors note: Reference, see : Robinson, P. H, 1988, p. 979 -1000 or: Israel, J. H. – Kamisar, Y. – LaFave, W. R, 1992, p. 216 - 234.

token (as opposed to type of) crime would not have been committed by the target. (Stitt and James (1984, p. 114).

Authors D.J. Hill, S.K. McLeod and A. Tanyi came with an ambition to present more complex concept and definition of this term. According to these authors

Legal entrapment to commit a crime occurs whenever: 1. a law-enforcement agent (or the agent's deputy), acting in an official capacity as (or as a deputy of) a law-enforcement agent, plans that the target commit an act; 2. the planned act is of a type that is criminal; 3. the agent procures the act (by solicitation, persuasion, or incitement); 4. the agent intends that the target's act should, in principle, be traceable to the target either by being detectable (by a party other than the target) or via testimony (including the target's confession), that is, by evidence that would link the target to the act; 5. in procuring the act, the agent intends to be enabled, or intends that a third party should be enabled, to prosecute or to expose the target for having committed the act.

(Hill, Daniel and McLeod, Stephen and Tanyi, Attila: *The Concept of Entrapment* (2018). *Criminal Law and Philosophy* 2018, 12: p. 551-552).

For instance, in Germany now distinguishes between admissible and inadmissible entrapment, linking different consequences to each other (Görlitz F, Hubert J, Kucher J, Scheffer M, and Wieser P., 2019, p. 496–509). In the Slovak Republic, it is legal entrapment – sting operation, if the legal limits for its application are met. In this case, this is allowed if reliable operative information is available that the perpetrator is likely to commit the crime of corruption. And this “... was previously settled according to factual evidence from other evidence, not from indications.” (Čentěš, J., 2016, p. 319) The problem with this evidence is that they create a measure of probability only, but they are not themselves able to prove corruption. If they were able to prove it on their own, it would not be necessary to use the agent provocateur. In principle, it would not be possible to use agent provocateur because it would be in contrary to the principle of subsidiarity.

In the American practice and in the Slovak legislation is used so-called „subjective test“ so for the purpose of use of permitted initialization to commit an offense is required objective existence of a predisposition of the offender to commit an offense. (Príbelský, P., 2004, p. 15) The

admissibility of the agent provocateur as such is often questioned from the moral, legal, international, and constitutional point of view. The international and constitutional aspects have a common basis for the protection of human rights.

According to M. Tóthová “the basis of agent provocateur lies in active and initiative activities, which do not aim to induce criminal activity where has not previously existed, but is aimed at active and initiative activity leading to detection and collection of evidence. The agent does not incite criminal activity itself, but it only uncovers criminal activity and allows evidence to be gathered “(Tóthová, M., 2011, p. 378-394). At the same time, she emphasizes ‘the importance of incitement in the process of corrupcy detection’. However, there are contradictory opinions according to which the incitement must be fundamentally rejected (under all circumstances), it is unacceptable for the state to simulate committing the crime and to interfere in stages that are not relevant for criminal law. It is also not acceptable that state would cover criminal activities incitement by police subjective conviction based on operative information. For example, agent inspector can be regarded as an important mean of detecting serious criminal activity and can also be used in police operative information. The agent provocateur is explicitly abuse of the state power for the purpose of organization of criminal activity in case of persons who has not committed crime so far and had not tendency to do so before. The idea could stay only in the form of thoughts. (Šamko, P., 2011; Hulínský, P., 2007). The above-mentioned opinions show a diametrically different approach of experts to the establishment of the institution of agent provocateur into the legal order of the Slovak Republic.

## **2.1 The moral aspects of using the agent provocateur**

The moral objection to this institution is that the state, represented by its bodies and employees, may not, under any circumstances, incite persons to commit a criminal offense, and particularly not for the purpose of the person’s subsequent repression. There are only a few counterpoints to note. First, public authority has a supervisory role vis-à-vis natural and legal persons, and in a democratic society governed by the law, the persons have to respect the law. However high-quality legislation is always brought to life by people. From the public power point of view, they are public officials and employees of the public power's bodies. They are, in principle, able to adapt it to their specific needs, to evade the law, or violate it directly and followingly cover their dubious activities. In general, a state with a high

level of corruption among public officials can certainly not be considered as a state respecting rule of law and therefore a democratic state. Therefore, the fight against the corruption of public officials must definitely be one of the priorities of each democratic state, and the agent provocateur institution is regarded as one of its most effective means in fighting against corruption. Indeed, it is well known that corruption shows a high degree of latency so it is very difficult to prove it.

We can often meet with the argument that a public official would not have committed a crime without previous instructions. We can just mention that the public official is an adult who is responsible for his or her decisions and actions. In this respect, a democratic state with rule of law can only correctly set legal standards for the application of individual forms and methods of combating corruption, and even organized crime. However, the application of established standards and legal institutions will always remain a matter of the political culture of a given society and of human moral values.

## **2.2 The legal aspect of the admissibility of the agent provocateur**

The legal aspect of the admissibility of the agent provocateur in the investigation of corruption is unquestionable in the legal order of the Slovak Republic and if other states have regulated the use of such an agent by law, any questioning of this law (with the exception of human rights aspects discussed below) is irrelevant. In Slovakia it is governed by the norms of a legal procedural law specified in the Criminal Procedure Code. The unlawfulness of acts of agent provocateur in relation to corruption offenses (Sections 332 to 335 of Law No. 300/2005 Coll., Criminal Code) and indirect corruption pursuant to Sect. 2 of the Criminal Code is expressly excluded by § 30 par. 3 Criminal Code as a circumstance excluding the unlawfulness of the offense. In addition, if a public official or a foreign public official accepts a corrupt offer, whether he promises a bribe, he fulfills the facts of one of the offenses of accepting a bribe pursuant to Sections 328 to 331 Criminal Code or indirect corruption pursuant to Sections 336 para. 1 and a criminal offense of abuse of authority of a public official according to § 326 Criminal Code. “Certainly, it is agreed that the fairly often presented view that in such a case, that by accepting or having promised a bribe from an agent provocateur, the offender does not attack the object of corruption, because it is not a bribe actually with the intention of exercising an influence upon the execution of power by a public

authority, thus the public official acts in a positive deed, thereby committing an ineligible attempt, but which does not itself exclude criminal liability. ” (Pribelský, P., 2004, p. 18) The object of these offenses is, in particular, the interest “in the sound, impartial and lawful procurement of matters of general interest” and the social interest in “the purity of public life through the proper, objective and lawful fulfillment of employment obligations, professions, positions or functions.” (Burda, E., Čentěš, J., Kolesár, J., Záhora, J., 2011, p. 1083) Even if a public official accepts promise of bribe or receives a bribe, there is a minimum threat to the proper, impartial and lawful procurement of matters of general interest, as the perpetrator is prepared to cause malfunction in this interest. Criminal acts of accepting a bribe (Sections 328 to 331 Criminal Code) and indirect corruption pursuant to Sections 336 para. 1 of the Criminal Code are thus completed crimes even if they are committed on the basis of incitement.

### **2.3 The international legal aspects of the admissibility of agent provocateur**

The international legal aspects of the admissibility of the agent provocateur is assessed with regard to Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) of November 4, 1950. Ratified on the March 18, 1992. As well known, Article 6 of the ECHR is entitled “Right to a Fair Trial”. Contravention of the right to a fair trial as a result of a conviction for a crime incited by State authorities is unique in the context of other infringements of Article 6 ECHR in the sense that it does not, in principle, relate to the State authorities' action during the actual proceeding but relates to procedure directly in this act. “Therefore, when it is discovered that the act for which the complainant was convicted was indeed incited by the police, there is a violation of the right to a fair trial, even if the criminal proceedings themselves would fully comply with ECHR requirements.” (Kmec, J., Kosář, D., Kratochvíl, J., Bobek, M., 2012, p. 771).

The European Court for Human Rights (herein after just ECtHR) has dealt with the issues relating to the agent provocateur and police incitement in its rulings. The key decision came in case of *Teixeira de Castro v. Portugal* (Application no. 25829/94, Judgement of 9 June 1998) which set the boundaries and limits of usability of the evidence gained through the activity of these agents. It is also noted that the use of special investigative methods, and therefore of secret agents, does not itself lead to a breach of

the right to a fair trial. However, the agent's actions must comply with certain standards so as not to depart from the limits of legality. Clear restrictions and warranties distinguish the permissible police procedure from guiding, and respectively inciting an offense contrary to Article 6 of the ECHR. In the context of that decision, the ECtHR concluded that it was not possible to commit a crime if the crime was initiated through the police intervention. Such an intervention would deprive the person to the right to a fair trial as guaranteed by Article 6 of Clause 1 of the ECHR. The right to proper justice is preferred. According to this judgment in point 36.

The use of undercover agents shall be restricted and secured, even in cases involving the fight against drug trafficking. While the rise in organized crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice does not yet hold such a prominent place (see *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, p. 15, § 25) that it cannot be sacrificed for the sake of expedience. The general requirements of fairness contained in Article 6 apply to proceedings concerning all types of criminal offenses, from the most straightforward to the most complex. The ECtHR explicitly states that the public interest cannot justify the use of evidence obtained as a result of police incitement.

This reasoning is sometimes not fairly used to deduce the inadmissibility of the institution of agent provocateur in the legal order as such, since if it is contrary to Art. 6 par. 1 of the present ECHR (which in the legal environment of the Slovak Republic takes precedence over laws under Article 7 (5) of the Slovak Constitution), its use is contrary to fundamental human rights and freedoms and its existence in the Criminal Procedure Code is contrary to legal norm of a higher legal power. Such a conclusion would therefore make it absolutely impossible to use the agent provocateur in the legal systems of all member states of the Council of Europe, thereby clearly undermining the legal possibilities of the fight against corruption. However, ECtHR in the case of *Teixeira de Castro v. Portugal* highlighted following difference : “ Firstly, that dispute is distinguishable from the case of *Lüdi v. Switzerland* (Application no. 12433/86, Judgement of 15 June 1992), in which the police officer concerned had been sworn in, the investigating judge had not been unaware of his mission and the Swiss authorities, informed by the German police, had opened a preliminary investigation. The police officers' role had been confined to acting as an undercover agent.”

## Admissibility of an agent provocateur and an advocate acting as an agent

There were no prosecutions in the case and the agents acted on their own and without the control of a court or other authority. There was no suspicion of criminality against the applicant, not yet punished. The role of agents was not limited to passive crime monitoring, but they themselves incited it. The incitement by agents and the use of evidence thus obtained in criminal proceedings against the applicant had deprived him from the beginning and definitively of his right to a fair trial. (Repik, B., 1999, p. 27-28).

In the case of *Bannikova v. Russia* (Application no. 18757/06), Judgement of 4 November 2011, the ECtHR went through its own case law on the admissibility of the use of an agent provocateur, concluding that it has not ruled out the possibility of using it, but stressed the need to distinguish between inciting a crime and using legitimate secret techniques during criminal investigations. The use of legitimate secret techniques in the course of criminal investigations does not constitute a violation of the right to a fair trial. The concept of entrapment breaching Article 6 § 1 of the ECHR has been developed, as distinguished from the use of legitimate undercover techniques in criminal investigations. It has held that “ while the use of special investigative methods, in particular, undercover techniques, cannot in themselves violate the right to a fair trial, [though] the risk of police incitement entailed by such techniques that their use must be kept within clear limits”(see *Ramanauskas v. Lithuania*, Application no. 55146/14, Judgement as of 5 May 2008, § 51).

Within this context, the ECHR developed a number of criteria. It first asks whether the investigation had been essentially passive and if the authorities had good reasons to suspect criminal activity when they first approached the person. As regards the latter, it can be particularly relevant to determine whether the suspect has a criminal record or if there have been preliminary investigations which would indicate a predisposition to his involvement in a particular criminal activity. To elaborate, even the fact that a suspect can obtain drugs on short notice and is familiar with the correlating prices can be of significance. The possibility that the suspect was pressured by the police into taking part in criminal activities also has to be considered. When the State’s agent goes as far as making a second offer, especially a higher offer, to the suspect after the suspect’s initial refusal, or appealing to the person’s compassion, the existence of entrapment is affirmed. (Görlitz F, Hubert J, Kucher J, Scheffer M, and Wieser P, 2019, p. 500).

In so far as police incitement is concerned, the Court has held that the right to a fair trial would be violated where police officers had stepped beyond an essentially passive investigation of a suspect's criminal activities and had exercised an influence such as to incite the commission of an offence that would otherwise not have been committed (see *Teixeira de Castro v. Portugal*, § 38). In case of *Vanyan v. Russia* (Application no. 53203/99, Judgement as of 15 December 2005) the Court went further and considered that the issue of entrapment could be relevant even where the operation in question had been carried out by a private individual acting as an undercover agent, when it had actually been organised and supervised by the police.

In its extensive case-law on the subject, the Court has developed criteria to distinguish entrapment breaching, in Article 6 § 1 of the ECHR, from permissible conduct in the use of legitimate undercover techniques in criminal investigations. The Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement and criteria were summarised in the case of *Matanović v. Croatia* (Application no. 2742/12, Judgement as of 4 April 2017). Generally, the ECtHR's examination of whether the proceedings were fair is not limited to the undercover police activity, but also covers the subsequent criminal trial.

According to complex assessment of the *Teixeira de Castro v. Portugal* and the related case-law one can conclude that police provocation is refused in cases where one of the two mandatory conditions is not met. These mandatory conditions are: the agent provocateur institution must be enshrined in the law of that State (this condition was absent, for example in case of *Tchokhonelidze v. Georgia*, Application no. 31536/07, Judgement of 28 September 2018) and the use of a provocateur agent must be lawful, which may include under the supervision of the court. Indeed, if any conduct of the investigation is based on, and is actually consistent with, legal norms and is not contrary to other, more specific provisions of the ECHR in question, the criminal procedure is fair and therefore it cannot be a violation of Art. 6 of ECHR. Furthermore, any covert operation must comply with the requirement that the investigation must be conducted in an essentially passive manner. It is therefore crucial in each case to establish if the criminal act was already under way at the time of the police intervention (*Lagutin and Others v. Russia*, Application n. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09), Judgement as of 24 July 2014).

However, the question of determining the permissible limits of police provocation remains open, especially in the practical implementation of the operational-investigative activity. The problem is that it is not possible to verify the credibility of operative information to the extent that it is sufficient to prove a fact sufficient to convict the accused person. The ECtHR has defined political provocation as it can be characterized as a situation where an agent is not confined to a criminal investigation in a passive manner, but in order to obtain evidence and to prosecute, exerts an influence on the subject to incite him to commit a crime he would not otherwise commit. Here is of special importance phrase “which he would not otherwise commit”. This means that if an agent incites a crime without having specific knowledge resulting from evidence (albeit insufficient for a valid conviction) of such a incited crime, then he incites the person to an act he would not otherwise have committed. However, if the agent has specific knowledge resulting from the evidence that the person is committing exactly such offenses, it can no longer be a incitement to commit a crime that the person would not otherwise have committed. In this case agent provocateur is admissible.

The consequences of an inadmissible act of entrapment are probably even more controversial than the factual side of defining such an act.<sup>3</sup> Thus, the evidence obtained by incitement plays a role especially in cases where, at a certain level, police incitement has occurred, but it was not expressly the incitement of the offense that the person was found guilty of. In such cases, the ECtHR addressed the question of the role played by police incitement in otherwise legitimate guilt in unprovoked offenses and whether that role was decisive. ECtHR in the case of *Eurofinac v. France* (Application no. 58753/00, Judgement of 2004) has ruled that the police provocation of a prostitute has not triggered a criminal offense because the police had previously been informed that data communication services were used by prostitutes to contact clients and therefore the conviction was not essentially based on evidence obtained during a police operation, in which prostitutes were incited to offer their services.

In accordance with ECtHR decision making entrapment is legal in the Slovak Republic, when the legal limits are fulfilled and information were gathered from operative-investigatory activities. As it was mentioned

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<sup>3</sup> Note: The ECtHR dealt with issue of entrapment in another aspect regarding the person who delivered the information upon which started the whole incitement. See details in *Lagutin and Others v. Russia* (§45).

at the beginning of this article there are certain standards set out by the Slovak legislator. It can be said that these standards meet the standards and criteria created by the jurisdiction of the ECtHR. With respect to mentioned information the institution of agent provocateur can be regarded in compliance with international law.

#### **2.4 Domestic constitutional view of the agent provocateur**

Pursuant to the Art. 1 of the Constitution of the Slovak Republic published under no. 460/1992 Coll., the Slovak Republic is a sovereign, democratic state with rule of law. The proclaimed principle of the rule of law is the fundamental constitutional principle in the Slovak Republic. The principle of legality is one of those principles that the Constitutional Court of the Slovak Republic has included in its previous case-law under the term “principles of a democratic state and the rule of law”. In addition, it has included the principle of protection of human rights and fundamental freedoms, the principle of protection of citizens' trust in the legal order, the principle of justice also referred to as the principle of material rule of law, the principle of prohibition of arbitrariness, respectively the prohibition of abuse of power, the principle of proportionality, and the principle of transparency (public controllability) of the exercise of public authority. These principles, expressing the essence of a democratic state with rule of law are most often mentioned as threatened by the realization of the activity of an agent provocateur. The Slovak Constitution in the broader sense of the field of human rights also incorporates in its content decisions of the Constitutional Court of the Slovak Republic and decisions of the ECtHR, which are the basic basis of sources for determination of constitutional limits.

Presumption of innocence is crucial for the evidence taking process. “It places the burden of proving the accused's guilt on the prosecution and allows the accused the benefit of doubt. It can be said that it is a fundamental principle, protecting everyone against being treated by public officials as guilty of an offence before such an offence is established by a competent court in accordance with law. “(Stavros, S., 1993, p. 49). The presumption of innocence is guaranteed by Article 50 par. 2 of the Constitution of the Slovak Republic and Article 6 par. 2 ECHR. The presumption of innocence is one of the basic principles of criminal proceedings, it is also expressed in §2 of the Criminal Procedure Code. The purpose of establishing the presumption of innocence by the Slovak

criminal legislation can be questioned in the context of police incitement, in the case of an agent provocateur action. Here arises the question of its real application when the state incites the commission of a crime through its authorities, which serves for the accusation of the perpetrator and his sentencing. There is a possibility that the primary purpose of the presumption of innocence would not be fulfilled when “Court judges in fulfilling their duties should not start with the conviction or assumption that accused committed the act with which he is charged.” (Stavros, S., 1993, p. 49). Presumption of innocence, as a principle, was dealt with by the Constitutional Court of the Slovak Republic in its decision-making activities, concluding that the law enforcement authorities have the duty to ensure the implementation of this principle, but they may also violate it. The mere assertion by the law enforcement authorities of the offender's perpetration of the offense does not interfere with the presumption of innocence as long as they are expressed with reservations justifying the procedural status and also the stage of the criminal proceedings. The presumption of innocence is not violated by statements that merely convey the state of suspicion of a crime. (Decision of Constitutional Court of the SR file no. III. ÚS 83/01). In the case of the action of the agent provocateur, his or her actions are based on suspicion of a crime possibly being committed, and it should be set up upon credible operational information. Since it is a suspicion, it is not a statement that the person concerned is guilty. In general, such allegations of suspicion can be considered acceptable or unobjectionable to respect the presumption of innocence. At the same time, however, it is always necessary to assess the statements made by the official and the possible breach of the presumption of innocence in the context of the specific circumstances in which those statements were made (Daktaras v. Lithuania, Application no. 42095/98, Judgement of 10 October 2000).

The Constitutional Court of the Slovak Republic has not yet dealt with the problem of police incitement. With respect to certain common history and legal order (the Czech and Slovak Federative Republic) we can point out that the Constitutional Court of the Czech Republic, decision file no. III. ÚS 597/99, ruled that police incitement as a part of acting of a State constitutes an inadmissible violation of Article 39 of the Charter of Fundamental Rights and Freedoms and Art. 7, par. 1 of the ECHR if the conduct of the State becomes part of the deed, of the entire sequence of acts constituting the criminal act (e.g. Incitement). At the same time, the court stated that the police incitement is in conflict with Art. 8 par. 2 of the

Charter of Fundamental Rights and Freedoms. We can find interesting argumentation in this case. The Constitutional Court came to the conclusion that there is kind of State's intervention (in this case represented by the Police) to the actions which is not admissible because it in its complexity creates crime itself, resp. that kind of State's participation in acting of a person which resulted into the criminal qualification of such acting. The Court mentioned also possible conflict with constitutionally guaranteed principle of democratic state with rule of law expressed also in the form of principle that "no one shall be prosecuted or deprived of liberty except for a reason and in a manner prescribed by the law". Later in 2014, the Supreme Court of the Czech Republic issued a statement defining police incitement as follows,

Police incitement is considered to be an active police activity aimed at inciting a specific person (natural or legal) to commit a specific crime with the aim of obtaining incriminating evidence and prosecution and the consequence of which is to arouse the intention to commit an offense by a person, even if that person had not previously had any such intention. Police incitement is also the active activity of the police, which adds the missing legal elements of the basic facts of a certain crime, intentional substantial increase in the scope of the act committed by the instigated person, or otherwise caused by a change these are circumstances requiring the use of a higher penalty, even if that person would otherwise have been determined to commit the offense in a general sense.

Opinion of the Criminal Board of the Supreme Court of the Czech Republic as of 25th September, 2014, file no. Tpjn 301/2014.

The Constitutional Court of the Czech Republic concluded that the activity of agent provocateur is in a contradiction with fundamental rights. The most problematic aspect of using a police agent is the fact that his or her activity is based on delusion and pretending. It is difficult to set a threshold where it is no longer a simple surveillance and there is some influence on the will of the persons being monitored. The scientific community tends to criticize the institution, because it overcomes the previously clearly apparent boundaries between pre-trial police activity and the criminal trial and, secondly, because this relatively new method involves extremely drastic interference with the aforementioned human rights. As such, criminal proceedings should fully reflect the principle of a

fair trial and should not provide any scope for distinguishing between a person with a predisposition to commit a crime or a person without such inclinations. (Coufalová, B., 2016, p. 59-61) As it has been mentioned the decision of the Czech Constitutional Court dealt mainly with the question of police incitement, though so far this has not been a matter of review before Slovak Constitutional Court. The reason could be that the institution of agent provocateur is used as a mean of operative and investigative activity in limited way and in prevailing cases there is different type of evidence for the Court.

It is also problematic for the agent's activity to ensure that his procedures do not interfere with what is strictly necessary with regards to the rights of others. The Constitution of the Slovak Republic does not contain any regulation that would prohibit it directly from incorporating the agent provocateur into our legal order. Police incitement as such is forbidden indirectly in the Constitution of the Slovak Republic using extensive interpretation in Art. 17 par. 2. states, "No one shall be prosecuted or deprived of liberty other than for reasons and in a manner prescribed by law." (the formulation of the principle is similar to the abovementioned Czech principle). If police incitement is not permitted by law, the grounds on which criminal liability is derived have been established and proven by the unlawful act of the agent as a delegate of the state power (unlawful reason). We can then conclude that criminal prosecution against the perpetrator could be stopped. However, the agent provocateur has a legal basis for the investigation in a case of corruption. The agent provocateur is an institution not directly prohibited by the Constitution of the Slovak Republic. At the same time, however, it should be added that its activities may endanger several of the abovementioned principles constituting the essence and content of the principle of democratic state and rule of law, and may endanger fundamental rights and freedoms whether or not the Constitutional Court has ruled on the case-law. However, according to previous jurisdiction, the court is likely to proceed with a proportionality review/ test in a particular infringement case. Using proportionality test would be the only way to provide an analytic framework for balancing individual rights and collective interests. According to previous decision-making it could be applied in the following way. This common method of balancing has expanded from Germany among many jurisdictions and usually involves three or four stages, which can be summarized as follows. "Was the state measure suitable for a legitimate purpose of the state? Was a less restrictive, but equally effective and reasonably feasible, measure

available? Does the measure balance costs and benefits appropriately?" (Van Harten, G., 2013, p. 35-36)

There is a specific definition, in the Slovak legislation, of the subject against whom police incitement can be used. As mentioned above, the offender must be a public or foreign public official. According to the Constitution of the Slovak Republic, people are equal before the law and therefore it is unimaginable to identify a certain category of persons as potential criminals. Although corruption mainly occurs within the remit of these persons, it is undesirable to choose and identify only this specific group of persons as perspective criminals. Although corruption mainly occurs within the remit of public officials, it is undesirable to absolutely make it a general and only applicable rule, and it would be wiser to use police incitement, irrespective of the offender, in all cases of such conduct in order to effectively reduce the incidence of corruption.

Contextual elements of the rule of law do not include only legal factors. The presence or absence of a common political and legal culture in society, and the relationship of that culture to the rule of law, help to determine to what extent and at what level the specific elements of the rule of law should be explicitly expressed in written law. It is important that a strong political and legal culture protects the specific rule of law mechanisms and procedures in each state, and these mechanisms and procedures should be constantly improved.

### **3. Admissibility of acting of an advocate as an agent**

Another question which should be analyzed in the relation to the admissibility of the agent provocateur can be the following one. Is it acceptable and in the compliance with the ethics and law to let an advocate act in a role of agent? If yes, are there any conditions to obey? We have analyzed this question using the case which happened in the Slovak republic.

It has only happened once in the history of the Slovak Republic that a lawyer has allowed himself to act as an agent, not an as agent provocateur, but as agent inspector, in detecting corruption associated with attempted judicial fraud. In this case it was an advocate who was offered a bribe (became an agent later) by another advocate. The purpose of the bribe offering was to make the advocate speak to her client and make him change

his testimony in favor of client of the advocate who offered bribe. Following the publication of this case, many advocates and lawyers, including the Slovak bar association as a professional organization, have objected to the possibility of an advocate acting as an agent. This case eventually was concluded by the judgement of the Supreme Court of the Slovak Republic declaring that the advocate is not allowed to act as an agent (file no. 3 Sž 36/2006).

There were opinions opposing the possibility of an advocate acting as an agent. It was supported by the following arguments: An advocate remains a citizen even after taking the lawyer's promise, i.e. he has duties towards the state, but by becoming an attorney he assumes other responsibilities that other citizens, even lawyers in general, do not have. An advocate acting as an agent agrees to record his conversations, not just phone conversations, including conversations with clients. Clients are not aware that their advocate is an agent. They rely on him legitimately, and it is guaranteed by the law that their communication with the advocate is confidential, subject to the regime of compulsory confidentiality. The trust between the client and the advocate, which is also one of the pillars of the profession of advocates, is undermined by the fact that the lawyer has accepted the role of an agent (Michalková, D., 2006, p. 5 – 6). Another fact was pointed out regarding advocate in a role of criminal defense attorney. The legal status of the legal aid provider is regulated as independent and the provider is required to maintain confidentiality of facts which he had learned in the course of or in connection with the provision of legal services (Krym, L., 2006, p. 9). A lawyer in the position of an advocate should follow only the interests of the client and follow his instructions. The advocate's primary interest is the interest of the client, whose interests take precedence over other interests, shall not, as a lawyer, use the information obtained in connection with the provision of legal services from the client to cause harm to the client. (Gereg, J., 2006, p. 13 – 14.) Martvoň states, “The principle of an independent advocate... excludes an advocate from acting as an agent and executing the orders of another person. This would make the advocate a manipulatable instrument of the state power” (Martvoň, A., 2007, p. 620).

On the other hand, there were few voices from the ranks of lawyers claiming that a lawyer could in principle act as an agent, provided that this does not harm the interests of his client. (See Petřík, M., 2006, p. 25 – 27).

The Supreme Court of the Slovak Republic in case file. no. 3 SŽ 36/2006 concluded that an advocate cannot act as an agent. The decision in question was based primarily on provisions of the law no. 586/2003 Coll. Act on Advocacy (hereinafter Advocacy Act). Using argument that the lawyer is independent in providing the legal services, is bound by generally binding legal regulations and within its limits by the client's orders. The advocate should refuse any position, occupation, profession or function capable of disturbing his independence. It follows from a systematic and logical interpretation of the relevant provisions of the Advocacy Act, that the status of an agent is incompatible with the practice of advocacy. Hereby the Court also mentioned that “the activity of the agent is documented by the police and therefore the confidentiality of the information of the clients is directly affected, especially in cases of necessary (mandatory) defense. The advocate acting as an agent cannot guarantee the client that his interests will not be affected by his activity as an agent, because the use of the facts obtained by the agent by an advocate is not decided by the him but by the law enforcement body which controls it.”

The decision of the Slovak Supreme Court does not have the nature of generally binding act, but on the other hand, it has considerable factual authority, and therefore no other advocate, lawyer dared to become an agent. The advocates' concern about their possible cooperation as agents with law enforcement agencies is understandable because, although there are legal guarantees of their independence, law enforcement authorities can actually use their position and the advocate can unknowingly "lead" their client. On the other hand, sometimes there is a chance the advocate can help his client through this cooperation.

However, even in view of the above-mentioned consequences, it is perhaps worth considering the legal regulation of the possibility of an advocate acting an agent. Then it would be necessary to explicitly stipulate that the advocate acting as agent manages all his interception, telephone and personal, and this interception when he or she is communicating with his or her clients, except in the case of communications relating to the case in which an advocate does not provide legal advice to his clients. Technically, such a way of controlling the interception by an advocate acting as an agent is easily realized not only for telephone interception, but also for interception of the vis-a-vis conversation e.g. there is a possibility of remote controller to the recording devices on the watches.

#### 4. Conclusion

In the European states police incitement is refused in cases where either one of the two mandatory conditions is not met. These conditions are as follows: the institution of agent provocateur must be enshrined in the law of that state and the use of it must be under the court supervision. Indeed, if any conduct of the investigation is based on, and is actually consistent with, legal norms and is not contrary to other, more specific provisions of the ECHR in question, the criminal procedure is fair and therefore it cannot be a violation of Art. 6 of the ECHR.

Police incitement is inadmissible if the agent is not limited to investigating the crime in a passive manner, but is involved in obtaining evidence and prosecute, and will thus exert an influence on the subject to incite him to commit a crime he would not otherwise have committed. And here is an important phrase "which he would not otherwise commit". This means that if an agent incites a crime without having specific knowledge resulting from evidence (albeit insufficient for a valid conviction) of such incited crime, then he incites the person to an act in a way he would not otherwise have. However, if the agent has specific knowledge resulting from the evidence that the person is committing exactly such offenses, it can no longer be a incitement to commit a crime that the person would not otherwise have committed. Thus, in this case, the agent provocateur is admissible. The Czech Constitutional Court had the possibility to deal with a case with this topic and adopted completely different approach from the Slovak one and ruled it is unconstitutional. It is necessary to say the Czech criminal procedure is not familiar with the type of police incitement, the Czech criminal law does not have institute as a part of legal regulation. The Czech Constitutional Court took it into the consideration and mentioned that it is inadmissible for the state to behave in a such way which can serve as a base for crime. Concretely it is inadmissible that the State authority itself acting through its bodies incites and same way initiates the commission of a crime, it is contrary to basic constitutional principles.

The Slovak legal approach to agent provocateur is completely opposite to the Czech. The institute is following the law and justifiable from the constitutional point of view. So, the conduct of the agent provocateur is considered lawful when it respects requirements set out by the law. But is still remains a little bit controversial as it was outlined in the article. The purpose of the institute is to help to detect a crime but the consequence of its use is criminal liability and criminal prosecution of participating subjects.

On one side there is a possibility to use this institution under specifically stated conditions (must be enshrined in the law of that state and its use must be under the court supervision). But on the other side there is a question why have Slovak legislator limited use of agent provocateur only to specific criminal offenses. There are at least two others which could be added to existing ones (is limited to the criminal offences of terrorism and the criminal offences referred as the corruption, the criminal offence of abuse of power by a public official and money laundering). There are criminal activities that have long time negative impact and are connected to organised crime groups such as drugs criminal offences (e.g. drug dealership) and economic criminal offences. The other question is whether it is really practically possible to assess by state authority whether has person predisposition to commit a crime merely on the basis of his criminal history and some other indications. The other thing is formation of criminal liability as a result of incitement. There is still chance to discuss the role of agent provocateur in the criminal proceedings, but keep in the mind it can be regarded as a one of last legal chances to keep justice and fairness in the society. Slovak legal regulation of this institution still has possibilities for improvement, as suggested above.

We have briefly mentioned the case when advocate acted as an agent. It was also pointed out that the Slovak judgement on agent-advocate is very sensitive issue because of the nature of advocacy. It is still worthy of discussion if such an option should be provided by the law, it can be a preventive measure for the purity of public life. If this option is subject to incorporation in legal order, then strict limits and conditions of its use have to be stipulated, especially in the relation to the interception of communication with client. It should not be used if there is another option, but if there is need, then use the institution as effectively as possible. Indeed, in the proportionality test, the general interest in protection of society against crime must always prevail.

As Marcus Tullius Cicero put it: "Injustices often originate in the clever and mischievous application of law". (Cicero, M.T., 1970, p. 38)

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