AGENT PROVOCATEUR IN THE LEGISLATION OF THE CZECH REPUBLIC, THE SLOVAK REPUBLIC AND THE USA¹

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COUFALOVÁ, Bronislava. Agent provocateur in the legislation of the Czech Republic, the Slovak Republic and the USA. *International and Comparative Law Review*, 2016, vol. 16, no. 1, pp. 55-68. DOI: 10.1515/iclr-2016-0004.

Summary: In relation to the activities of organized crime groups and their dynamic development in the areas of corruptive behavior which seems to be aimed at not only the leading representatives of the national political scene, but also at the area of national economy, economy and culture, discussions keep arising especially in the lay public about the enactment of the institute of the so called agent provocateur into the Czech legal environment. This institute has many supporters and also many opponents. Also some foreign legislations could be an inspiring element for the Czech legislation.

Keywords: criminal liability, entrapment, encouragement, organized crime, corruption, police provocation, reactive agent, agent provocateur.

1 Introduction

In relation to the activities of organized crime groups and their dynamic development in the areas of corruptive behavior which seems to be aimed at not only the leading representatives of the national political scene, but also at the area of national economy, economy and culture, discussions keep arising especially in the lay public about the enactment of the institute of the so called agent provocateur into the Czech legal environment. The voices pleading for the enactment of this institute support the need for such a step by the fact that corruption is one of the most common and at the same time the most effective tools not only for the advancement of interests of criminal structures, but also for the establishing and successful growing through the strategic areas of our state. This is why it is essential to search for other, more effective tools in order to eliminate this undesirable phenomenon. It is good to say that the corruptive behavior mentioned above is not the one and only reason² for the enactment of this institute, however, it is the primary reason.

1 This article was elaborated under the project IGA_PF_2015_026: Current threats of organized crime and the means of combating them.

2 The institute of the agent provocateur could be applied e.g. in cases of drug dealership or

Before we can deal with the issues concerning the constitutionality of the institute of the agent provocateur as well as the subsequent impact upon the criminal liability of the person who has committed a crime as a result of the police provocation it is essential that we should define the terms “provocation” or “police provocation” respectively. There are several definitions available that can be found in the professional literature when talking about police provocation. Chmelík offers the following definition: “Police provocation is an intentional and active incentive or inducement into or an initiation of a commission of a crime by another person who would not have acted otherwise”³ According to Vrtěl the agent provocateur is the person who actively provokes or induces someone else into the commission of a crime with the aim to denounce somebody or obtain their confession.⁴ Kratochvíl states that “Police provocation is usually a secret police operation the result of which is an act committed by another person which later became the subject of the person’s criminal prosecution or which originally should have become the subject of such a criminal prosecution.”⁵ Based on the above mentioned definitions of the police provocation the following characteristic features can be derived:

- inciting, soliciting into or other initiating of commission of a crime by another person
- the activity described above is carried out by a person different from the one who committed or is supposed to commit the crime
- the aim of the activity described above is to prosecute the person who under the influence of the provocation behaved in a way which was showing signs of a criminal activity

2 Consistency of the Institute of the Agent Provocateur with the Constitutional Order of the Czech Republic

When assessing the issues related to the establishment of the institute of agent provocateur within the Czech legal order it is important that we should realize that an option has to be made choosing either the protection of human rights and freedoms on the one hand or breaking into the constitutional guarantees of these rights and freedoms for the sake of securing a more effective protection of the society against aggravated criminal activity on the other hand. Thus, allowing the enactment of the institute of agent provocateur would be meant as an active protection of the society at the expense of the untouchability of the rights and freedoms of individuals. The opposite option would mean a certain satisfaction with the current state of protection of the rights and freedoms of

money counterfeiting.

3 CHMELÍK, Jan. Úvahy k agentu provokatérovi a korunnímu svědkovi. *Kriminalistika*, 2005, č. 1, pp. 69.

4 VRTĚL, Petr. Nepřípustnost policejní provokace. *Trestní právo*, 2001, č. 5, pp. 6.

5 KRATOCHVÍL, Vladimír. Policejní provokace „trestného činu“ z pohledu právního a ústavněprávního. *Trestní právo*, 2001, č. 10, pp. 3.

individuals even at the expense of the inefficiency of the state in the fight against this type of aggravated criminal activity. This is why it is very important to assess the consistency of the institute of the agent provocateur with the sources of law of the highest legal power, i.e. the Charter of Fundamentals Rights and Freedoms⁶ (hereinafter just "Charter") and also the Convention on the Protection of the Human Rights and Fundamental Freedoms⁷ (hereinafter just "Convention"). Criminal proceeding in the form as it is regulated by the criminal procedure code⁸ is based upon certain legal ideas which have a foundation which can be traced back to the two legal documents mentioned above. One of the fundamental principles behind the criminal proceeding is the right to a fair trial which is expressed in the article 6 clause 1 of the Convention, according to which every individual has a right for his case to be justly, publicly and within a certain limit of time dealt with by an independent court of law which was created under the law of the country which will at the same time decide upon his/her civil law claims, duties and obligations or upon the fairness of any criminal accusation against him/her. One of these specific manifestations of this right is also the principle of prosecution based solely on lawful reasons which is regulated on the constitutional level in the article 8 clause 2 of the Charter⁹, which states that no individual shall be prosecuted or deprived of his/her own freedom in a way that is not lawful. As far as the issues relating to the consistency of the police provocation with the principles mentioned above the Constitutional Court of the Czech Republic has expressed its views on the subject matter discussed in this paper. As the most important ruling of the Constitutional Court on this issue the ruling under the file number III. CC 597/99 as of June 22, 2000 can be considered as a landmark ruling. In order to have all the important and essential details of the case for the purpose of full understanding of the ruling we offer some facts of the case below. The defendant was found guilty of the crime of abuse of power of a public official under the § 158 clause 1 letter a), clause 2 of the criminal code and the crime of accepting bribes under the § 160 clause 2, clause 3 of the criminal code. The verdict was given by the Circuit Court in Prague 7 and the Municipal Court in Prague. The defendant as a police officer was allegedly supposed to create an imprisonment in another person that he was able to secure that the other person who was being investigated would not be taken into custody and finally that he would not be prosecuted at all (it is good to say that the person was facing prosecution). The police officer allegedly suggested that he was expecting a cer-

6 Constitutional Act N. 2/1993 Coll., as amended by later legal regulations.

7 The Convention on the protection of human rights and freedoms as of November 4, 1950. Ratified on the March 18, 1992.

8 The Act N. 141/1961 Coll., upon the criminal justice procedure (criminal order), as amended by later legal regulations.

9 The express legal regulation of the principles of the prosecution based solely on lawful reasons can be found also in § 2 clause 1 of the Act N. 141/1961 Coll., as amended by later legal regulations.

tain amount of money that was not specified (in order to “cover the expenses”). Thus he allegedly set up the situation in such a way that he could be offered the amount of money. This is what really happened. The defendant took over the amount of money in the value of 250 000 Kč in cash from the other person and subsequently he was arrested by the Police. This person was prosecuted for this crime and he was also convicted. During the time when the defendant was to suggest the necessity of the bribe to the witness, it was the witness who turned to the Police of the Czech Republic and denounced the conduct of the defendant. The inspection of the Ministry of the Interior began to deal with the whole case which provided the witness with an electronic device in order to make it possible for the witness to record the conversation and at the same time they arranged that the witness will give the amount of money, specifically 250 000 Kč over to the defendant. It was the Inspection of the Ministry of the Interior which provided the witness with the money and it also monitored the takeover of the amount and at the same time they arrested the perpetrator. The Constitutional Court took into account the fact that at the time of the commission of the crime the perpetrator had never been prosecuted or accused of any crime, not even in relation to the bribery he was later charged with and convicted of. If in fact previously there was a suspicion that the defendant more or less is acting in such a way that he is suggesting that he requires the bribe and if this suspicion was relevant then the procedure and the steps taken by the police were justifiable as they were consistent with the criminal procedure code.

The Constitutional Court in its ruling clearly stated that it is an unacceptable violation of the article 39 of the Charter and the article 7 of the Convention when the conduct of the state (of the police in this case) becomes part of the facts of the case, the whole subsequence of the steps constituting the crime (e.g. provocation or initiation of the crime, the completion of the crime, etc.). In other words it is unacceptable for the state to intervene into the facts of the case itself in such a way as described above or in other words the state's participation in the person's activity which is qualified and considered as a crime.

The Constitutional Court has ruled in a few previous cases before that one of the most significant elements of a state respecting the rule of law is, apart from other things, the fact that the definition of a crime, the prosecution of the perpetrator and the subsequent punishment of the perpetrator is something that falls within the relations between the state and (or the state power representing the state itself) the perpetrator, i.e. something which happens under the circumstances when the state decides in accordance with the rules of criminal procedure whether a crime has been committed or not. Thus if the state becomes the initiator of the commission of a crime through its bodies of authority, then it also becomes a deciding factor in matters where it should be decided whether a particular person has committed a crime or not. In this way the state intervenes into the free will of such a person and thus it unacceptably deprives the person

of their own free will. The Constitutional Court has taken into consideration the fact that the defendant in this case complained about the state's intervention especially in those cases where the state officials do not appear clearly against the commission of a crime but on the other hand they pretend to be participating in the criminal activity knowingly and willingly then such an activity is subject to scrutiny by other independent bodies of authority.¹⁰

The Czech criminal procedure code is in fact not familiar with the type of police intervention that is supposed to initiate the decision to commit crime and thus such an intervention on the part of the police officers is necessarily *extra leges* and as thus it is inadmissible. In this way all the evidence gained through such a procedure is illegal and subsequently unacceptable for the purposes of criminal proceedings.

Based on what has been said above it is essential that the following questions should be asked:

- Did the perpetrator intend to commit a crime or did he decide to commit the crime as a result of the police provocation?
- Is the perpetrator acting out of his own free will or is he acting as a result of the police provocation?
- Would the perpetrator have committed the crime even if there had been no police intervention?

It is even the European Court of Human Rights (herein after just ECHR) which has dealt with the issues relating to the agent provocateur in its rulings. The ruling in the case of *Teixeira de Castro v Portugal*¹¹ became a key decision in this matter as it is this case which sets the boundaries and limits of usability of the evidence gained through the activity of these agents. In accordance with this ruling it is not possible to commit a crime if this crime was to be initiated through the police intervention. Such an intervention would deprive the accused of the right to a fair trial as guaranteed by the article 6 clause 1 of the Convention. The ECHR admits that the widespread expansion of the organised crime requires an adoption of further adequate measures, however, it prefers the rights to proper justice. The ECHR does not accept the view that public interest can justify the use of evidence gained through the police provocation.

What is, then, the conclusion that can be drawn from the above mentioned? Based on the rulings of the ECHR which further interpret the provisions of the

10 See e. g. the provision § 363 of the criminal code upon the legality of the agent working within organized crime group.

11 The ruling has been published in the collection of rulings and decisions of the ECHR under the file number 55/1997/828/1034, next e.g. *Van Mechelen and others v Netherlands* published in the collection of rulings and decisions under the file number 55/1996/674/861-864, *Kostovski v Netherlands* published in the collection of rulings and decisions of the ECHR Series A, Vol. 166, p. 6–28, Vol. 170, p. 27–30. All decisions are available at: www.hudoc.echr.coe.int.

Convention and based on the decisions of the Constitutional Court of the Czech Republic we can reach the conclusion that the introduction of the institute of the agent provocateur in the Czech legal environment would definitely mean a contradiction with the Convention which is binding for the legal order of the Czech Republic and any further provisions of the law (no matter whether it would be a norm regulating the criminal procedure or legal rules regulating the activity of the police of the Czech Republic) would not be consistent with the Constitution of the Czech Republic. As, however, it has been said above, there is a large number of those who support the police provocation even though it has to be said that it is mainly the lay public who usually do not have professional knowledge necessary for assessing the results of the introduction of the institute from the legal perspective or especially from the perspective of the Czech Constitutional Law.

One of the arguments which is frequently used to justify the police provocation is the fact that this provocation is aimed against persons who have certain tendencies towards the commission of a crime. However, as Chmelík states, our legal order does not provide room for distinguishing between persons who have a tendency to commit a crime and those who do not have such tendencies.¹² If we were supposed to admit such a distinction, not only would we have to consider a certain group of persons a priori as the perpetrators without these persons committing any crime at all, but it would have great negative impact on the application of the principle of presumption of innocence.¹³ Not only would we have to view the person against whom the criminal proceeding has been initiated as someone who is guilty of a crime, but this view would de facto include the person who has not committed any crime so far and no criminal proceeding can be initiated against him or her.

Logical reasoning only brings us to persuasion that it could have been this person who has committed the crime or that he/she will commit the crime if they have the opportunity to do so. According to the supporters of the institute of the agent provocateur those who are law-abiding people have no reason to be afraid as in their case the police provocation could not result in a commission of a crime at all and thus no subsequent sanctions would follow. The second argument which has, in our view, better logic and justification is the fact that recently there has been a widespread expansion of organized crime groups committing crimes. Their activities are becoming more and more sophisticated and the position of the bodies of investigation during the investigating and revealing the criminal activities is therefore becoming more difficult. Thus this situation

12 CHMELÍK, Jan. Úvahy k agentu provokatérovi a korunnímu svědkovi. *Kriminalistika*, 2005, č. 1, pp. 70.

13 The principle of the presumption of innocence is a principle of the Constitutional level. It is expressed in the article 40 of the Charter and further in the provision under the § 2 clause 2 of the criminal procedure code.

brings us to consideration whether the current tools of criminal law are sufficient for the fight against this phenomenon or whether it is necessary to introduce other tools that could make the struggle of the bodies active in investigation with the organized crime groups easier. Thus the Czech criminal law does not have the institute as a part of the legal regulation of the country now and taking into account the circumstances and facts briefly outlined above the Czech Republic will probably not have this institute enacted in the near future either. Those provisions of the criminal code and of the criminal procedure code are provisions regulating the institute of the agent controller and not the agent provocateur.

Thus the police officer cannot induce the person to commit a crime nor can he cause the person to start thinking about committing a crime. On the contrary, the task of the police officer is motivated by other purposes. The activity of the police officer is to monitor conspiratorially the criminal activities of organized criminal groups which is carried out in a secret manner and to actively operate in a manner that cannot be beyond the limits set by the law. It is this active operation where it is important to make sure that the police operation is not beyond the limits of law and that the police operation does not go so far as to become a police provocation. The agent, as a part of his efforts, can easily cross the limits and thwart the whole process of investigation in this way.

This is also the reason why the position of an agent should be occupied by a person who is experienced and prepared well enough as to not go beyond the limits set by the law and thus thwart not only their own efforts but also the efforts of all the others who have been participating in the whole operation.

3 Criminal law consequences of the police provocation

When looking for the answer to the question what are the criminal law consequences for the person who has committed a crime as a result of a provocation which was generated by the state or its law enforcement section we have to base our conclusion on the results that the police provocation is according to the Czech legal order an unconstitutional activity, activity that is illegal and thus not allowed and supported by the law of the land. Then, it is also very important to answer the question what are the criminal law consequences of the police provocation on the person of agent provocateur himself. First we should be dealing with the criminal liability of the person provoked. This person is acting in the sense of the criminal law, however, there is a discrepancy between what the person knows, perceives or imagines and what is reality.

With respect to the fact that this discrepancy between falsely perceived and real reality is concerns factual circumstances, we come to the conclusion that the person provoked is acting in a positive factual misrepresentation which is, from the perspective of subjective aspect of the criminal activity, assessed as an attempted crime. That is why it is very important to realize that the criminal

code is built upon the principle of materialized and formal concept of a crime.¹⁴ According to this legal regulation the substantive criminal corrective of the criminal injustice is the principle of subsidiarity of criminal repression as expressed in § 12 clause 2 of the criminal code, according to which the criminal liability of the perpetrator as well as the criminal law consequences connected with the liability can only be applied in cases where the conduct of the perpetrator is harmful to the society and where the application of the liability is not sufficient in accordance with other legal regulation. Thus, it is possible that the person who has been provoked in this way would not be criminally liable for their actions based on the principle mentioned above. In the same way any situation of this kind could be assessed on the basis of former legal regulation¹⁵ which was based upon formal material concept of a crime, i.e. in order for a crime to be committed it was necessary for the person to fulfill not only a formal sign, i.e. those signs stated in the law, but at the same time the material sign would have to be fulfilled sufficiently, i.e. the level of social harmfulness.

And it is just the material sign or its insufficient level that could be the reason which made the activity of the person provoked in its results legal. As it has been mentioned above it is inadmissible for the state to behave in such a way which can induce another person to commit a crime with intent. Based on the ruling of the Constitutional Court¹⁶ it is clear that the police authority cannot through the use of its provocation activity participate in the completion of the facts of the case which can serve as a base for a crime which is later prosecuted nor can it create such a factual base itself. If we then came to the conclusion that the person provoked is not criminally responsible for his/her conduct as a result of failing to fulfill the principles of subsidiarity of the criminal repression, then we still have to answer the question of criminal liability of the person of provocateur.

Under the provision of the § 127 of the Criminal Code the agent provocateur is the person who is at the same time the member of the Police of the Czech Republic or a member of the General Inspection of the Security Corps. The conduct of this person acting as an agent provocateur is motivated by the intention to induce the other person into the intention to commit a crime which could subsequently be prosecuted, i.e. de facto to cause the person provoked a certain type of damage in the form of the criminal prosecution of this person. As a damage, in this case, is not considered merely a material damage, i.e. a damage that can be calculable in a monetary value, but also an immaterial damage, especially the violation of the rights of a physical person.¹⁷ And as it has been said a few times before, provocative conduct is a conduct which crosses the constitutional

14 See more in JELÍNEK, Jiří (eds). *Trestní právo hmotné. Fourth edition.* Praha: Leges, 2014, pp. 118.

15 Act N. 140/1961 Coll., criminal law, as amended by later legal regulations.

16 See report of the Constitutional Court file number III. ÚS 597/99 as of 22. 6. 2000. Available at: www.nalus.usoud.cz.

17 The ruling of the Supreme Court of the Czech Republic N. 25/75. Available at: ASPI.

rules and as such it is a type of conduct that is prohibited. Thus the result of police provocation is the fact that the provocative subject carries out the duty in a way that contradicts with the law of the land i.e. with the intent to cause somebody else a damage by which the agent provocateur fulfills the signs of a crime of the abuse of power of the public official as regulated by the § 329 clause 1 letter a) of the criminal code. However, the conduct of a public official can also be directed in a way the aim of which is not to cause someone else damage.

The activity of the agent provocateur can be aimed at getting an unlawful benefit which can consist in e.g. showing the results of his/her success rates as far as the detecting of criminal activity is concerned.¹⁸ However, even in such a case it is necessary to take into account the fact whether the principle of subsidiarity of criminal repression was fulfilled or not. We personally believe that compared to the person who has been provoked into the commission of a crime, the acting of an agent provocateur fulfills this principle sufficiently. Based on what has just been said above it is clear that it is not the person who has been provoked that should become criminally liable but it is on the contrary the person who is acting as an agent provocateur who is then facing the consequences in the form of criminal prosecution as a result of his/her provocation.

4 Entrapment and Encouragement in the legal environment of the USA

In the Anglo-Saxon legal system or in the criminal justice environment of the United States of America it is important to distinguish between two specific operational methods which are frequently used for the detection of corruption but also for other types of criminal activities such as for example the drug dealership, money laundering, etc. Specifically these institutes are the institutes of so called defense of entrapment and government encouragement.¹⁹ In order to distinguish between the institutes mentioned above in the text it is important to ask a question whether in the situation before the crime was committed there was a certain contact between the accused and the law enforcement bodies the accused was influenced by the activity of the bodies to such extent that he would not have committed the crime if he had not been provoked to such an act. If the answer to this question is positive then the accused would be allowed to use the defense of entrapment.

From a historical perspective it is possible to say that the use of so called government encouragement has had a long tradition not in the USA only. These activities are frequently connected with a whole number of historically well known characters from all over the world who are interconnected by a common aim – i.e. the effort to remove undesirable persons from the political scene

18 CHMELÍK, Jiří. Úvahy k agentu provokatérovi a korunnímu svědkovi. *Kriminalistika*, 2005, č. 1, pp. 71.

19 These institutes can be translated into Czech as “obrana proti vyprovokování trestného činu“ and “povzbuzování ze strany úřední moci“.

through making them commit a crime or engage in a type of criminal activity even though these persons are in fact innocent, but through the commission of the crime they discredit themselves. On the contrary the use of the so called defense of entrapment which results in the acquittal of the accused by the court has not had such a long tradition in the American history as the government encouragement mentioned above. Most of the time of the existence of the American justice system, the American courts did not recognize the “entrapment” as a defense of the accused. In 1864 the Court in New York expressed its view upon this issue when it stated that “the statement of the accused who said that he was forced to commit the crime by the law enforcement authorities is so old as the world itself and this type of defense was first used in the Biblical Paradise.”²⁰ In a similar way another American court expressed its view upon the subject in 1904 when it stated that the requirement to apply the defense of entrapment is a result of the requirement for the protection of the accused not because he is innocent but because a strenuous clerk went beyond the limits of his power and entrapped this person. However, the courts, in its opinion, are not looking for the one, who entrapped the person, but they are looking for the one who has been entrapped.²¹ Thus, based on the above mentioned we can say that once the crime was committed then it should not be the matter of interest whether there were any specific inducements and what they were, but rather who was the one who offered them to the accused. However, it is good to say that the practice has changed a lot since then, the changes having been made in favor of the accused. The current legal regulation dealing with the encouragement towards the commission of a crime is trying to find a type of balance between the criminal presuppositions of an accused person and the practice of the authorities active in the proceedings. The aim of such a conduct is not to “catch in a trap of the law the law-abiding citizens” but rather to affect the incorrigible recidivists. However, the current state is not the answer to the violent crime but rather it is the result of the difficulties connected with the detection of such crimes where the victims do not want to announce the commission of the crime to the police. Among such crimes we can usually count pornography, prostitution, hazard, etc. The inducement towards the crime usually shows these signs:

- the members of the authorities active in criminal proceedings usually pretend to be the victims of a crime themselves
- there is an intention to induce the suspicious person into the commission of a crime
- there is an influence upon the decision to commit a crime

In cases where the inducement into the commission of a crime went beyond the limits generally accepted the accused can apply the so called defense of entrapment. However, there is a question where the dividing line between the

20 SAMAHA, Joel. *Criminal procedure*. Belmont: Thomson Wadsworth, 2005, pp. 381.

21 The same as in 19.

acceptable conduct of the authorities active in the criminal proceedings and the unacceptable conduct should be drawn? A number of states as well as the federal government base their presumption on the so called “subjective test” which is supposed to prove whether or not the specific conduct was an act of entrapment. This test is focused primarily upon the finding out of the predispositions of the criminal tendencies with the accused. Based on the results of this test the accused is then allowed to apply the defense of entrapment in case he/she is able to submit the evidence of these two features:

1. before the inducement conducted by the authorities active in the criminal proceedings the accused did not have any intention to commit the crime
2. the inducement was the real cause why the accused committed the crime

The essential question to be asked in order to assess the results of the subjective test is where the origin of the intent to commit a crime is. If this origin can be found with the accused person, then it was not the state official who committed the offense of prohibited entrapment. In other words if there was a predisposition with the accused person to commit the crime and the state authority merely helped the accused to commit the crime then it cannot be said that entrapment occurred. As an example the case *Sherman v U. S.* can be used where the Supreme Court of the United States ruled as follows. In this case two characters met in a Drug Addicts Detox Center, namely the Government informer and an agent in disguise Kalchinian and a drug addict Joe Sherman. Kalchinian made friends with Sherman and asked to get some heroin for him. However, Sherman refused to do so, but after a few weeks’ time after urgent pleas from the part of Kalchinian he gave in and got the drug for him. Right after this Sherman was arrested. The conclusion of the court was that the intention to commit the crime in this case did not come from the accused but from the state authority.

In cases where the accused submits evidence that he/she has been made to commit the crime by the state authority it is up to the state authority to prove that the accused really is predisposed to commit the crime. Those circumstances that can be used to prove this can differ based on the different legal orders of the specific states of the federation, however, the factors that are, in such cases analyzed are usually the character of the accused or his/her type of behavior. As an example that can be used in this context we can use the legal regulation of the state of Minnesota which takes into consideration the following facts and circumstances:

- any previous convictions
- any previous criminal activities which however did not end up in convictions
- criminal reputation of the accused
- other circumstances²²

22 SAMAHA, Joel. *Criminal procedure*. Belmont: Thomson Wadsworth, 2005, pp. 383.

Apart from the subjective test described above there is also another one, so called objective test which is applied less frequently than the subjective one, however, it is good to say that it is being used more and more in the justice practice. This test that is also called hypothetical person test is not based on the predisposition of the accused to commit a crime as it is in the case of the subjective test, however, it is based on the assessment of the state authorities and the fact whether or not the operation was “clear” or not from the perspective of the law. Both of the above mentioned tests represent a type of last resort solution and as such they contain different types of obstacles and drawbacks. If we reach the conclusion that the accused is or is not allowed to apply the defense of entrapment merely on the basis of the subjective test then we put the accused in danger of being convicted of crime merely on the basis of his past or poor criminal reputation. The previous behavior of the accused though it could be undesirable or even dangerous from the viewpoint of the society, cannot be in itself the sufficient evidence of the accused’s guilt. On the other hand, however, the application of the objective test merely, in order to assess the guilt of the accused would, on the other hand, mean not to make differences between those who have committed a crime for the first time and those for whom the criminal environment and activities relating to the environment is very close and familiar. However, how can the optimal solution be found? In our view the solution is in the combination of both elements of the two above mentioned tests. The state authority can use certain procedures which lead towards the initiation of the commission of the crime based on the presumption that the accused has such predispositions towards the commission of the crime that he/she would have committed the crime even if there had not been for the intervention from the state authority.

5 The agent provocateur in the Slovak legal regulation

As far as the legal regulation of the agent provocateur in Slovakia it is good to say that this regulation is very progressive, disputable and even daring. At the beginning it is also good to say that there have been some objections towards the expression agent “provocateur” and some of the authors incline towards the expression “active” agent²³ instead. The provision which can give rise to many questions and doubts is contained in the § 117 clause 2 of the criminal code. According to the second sentence of this provision the agent cannot initiatively induce into the commission of a crime, i.e. cannot be the one who intentionally initiates in another person the decision to commit a crime. However, this prohibition cannot be applied generally and the law admits certain exceptions. The above mentioned cannot be applied in cases when the crime falls within the category of the bribery of a public official or a foreign public official and the facts and circumstances found show that the perpetrator would have committed the crime even when the order to use the agent had not been given. These are,

23 LIPŠIČ, Daniel. Jako je to naozaj s tzv. agentom provokatérom? *Bulletin slovenskej advokacie*, 2007, č. 4, pp. 29.

then, the cases, where the evidence material, obtained by the authorities active in criminal proceedings, clearly indicates that the public official is already decided to commit the crime and this decision of his was formed based on his own free will. Šanta mentions two possible cases of provocation allowed by the law:

- the public official has required from certain person or from several different persons a bribe several times and such a bribe is required by the perpetrator even in the future
- it was found out that the public official has already required or accepted the bribe in the past, however, he/she would not have committed such a crime in the future had it not been for the initiative of the agent provocateur, who offered the bribe to him/her.²⁴

In the above mentioned cases it is clear that the conduct of the agent provocateur is not unlawful and this agent can induce the perpetrator, who is already decided to commit the crime, into further activity, e.g. as far as the form and the manner in which the bribe will be provided, the place and the time, the way it will be given over to the other person, etc. As far as the specific conditions are concerned we have certain objections towards the examples given by Šanta. The first situation, in our view, fulfils the requirements of the law in the sense of the provision of § 117 of the clause 2 of the criminal code. However, the same cannot be said about the second example. It cannot be said, based on the fact that the public official has already committed a crime of bribery in the past that he/she will do the same in the future and in this way automatically force the official to accept and carry out such a decision in the future. In such a situation we would have to come to the conclusion that those persons who have committed a crime in the past are logically predetermined to commit a crime again in the future and in this way we would be allowed to induce them into committing another crime and automatically arouse their intention to commit such a crime. Such a situation is a fatal violation of one of the fundamental principles of criminal procedure and the principle of the presumption of innocence and as such it is unacceptable and unjustifiable in terms of the protection of the human rights of individuals in a state respecting the rule of law.

In the same way we have strong doubts that are justifiable in our opinion concerning the fact that the agent provocateur can induce into the commission of a crime and at the same time suggest the monetary value of the bribe required. One of the obligatory signs of a crime is also the consequence of the crime which in such cases as described above has the characteristic feature of harm calculable in monetary value. Thus the consequence or the amount of the harm is a sign which can be a circumstance conditioning the application of a higher criminal sentence, i.e. the condition for a stricter legal qualification of the criminal conduct. Thus if we admit that the agent provocateur sets the specific

24 ŠANTA, Ján. Právní úprava postavení agenta v České a Slovenské republice. *Trestní právo*, 2007, č. 3, pp. 9.

monetary value of the bribe then he/she at the same time sets a stricter legal qualification and subsequently de facto the maximum penalty for such a crime committed. Our last reproach is aimed at the definition of the subject against which the possible provocation could be used. As it has been said above one of the conditions for the application of the institute of the agent provocateur is that it is used against a perpetrator who enjoys the position of a public official or a foreign public official. The efforts of the legislator to deal with this type of criminal activity where it could have a long term negative impact seems to be obvious and justifiable from the viewpoint of the lay public, however we believe that as such it goes beyond the limits of Constitutional Law and thus it is unacceptable. If we take into account the provisions of the Constitution and the Charter of the Fundamental Rights and Freedoms clearly proclaiming the equality of all the citizens before the law, then we cannot automatically consider a certain category of the society as potential perpetrators of crime and in this way approach this category of citizens. It is true that the crime of bribery usually occurs in these circles, on the other hand, this cannot always be absolutely true. If then, the main aim of the institute of the agent provocateur in Slovakia is to contribute towards the lowering of the number of the cases of bribery then it is logical to apply the police provocation in all cases of such conduct without any limitations as far as the person of the perpetrator is concerned.

6 Conclusion

The development of the criminal activity and especially the area of the activities of organized crime groups which has been developing dynamically in the recent period necessarily leads towards the questions relating to the efficiency of the current legal tools and the possibilities of the adoption of new and sometimes self-contradictory means which could play an important role in the fight against these forms of serious criminal activity. The institute of the so called agent provocateur could be one of these means. The current Czech legal regulation does not allow the application of this tool as it merely regulates and is familiar with the operatively investigating institute of the agent controller. However, it is always important to assess in specific cases whether or not it is the provocation from the state authorities as the final solution of the issues is not always an easy one. The tests mentioned above in this paper as well as a diligent activity on the part of the authorities active in the criminal proceedings could be used to assess this fact when clarifying all the facts and circumstances of specific cases.