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INADMISSIBILITY OF POLICE ENTRAPMENT EVIDENCE IN THE US AND GERMAN TRIALS IN THE LIGHT OF THE CASE-LAW OF THE US SUPREME COURT AND THE ECTHR

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INTRODUCTION

Covert operations using entrapment in the US trial were carried out by FBI agents in the 1930s and their importance grew with the development of organised crime. As a result, other federal agencies involved in fighting crime began to use their entrapment powers in the 1970s. In consequence, in the US trial, active entrapment is permitted in the sense that a secret agent may, under certain circumstances, incite or otherwise actively participate in a criminal activity and then witness the prosecution.[1] To standarize the practice of the legal use of these operations by FBI agents, the Attorney General issued *Guidelines on FBI Undercover Operations* in 1981 (updated several times, including in 2002 for terrorist offenses).[2] Since the institution of entrapment has not developed in state legislation, an important role is played by the US Supreme Court, which in its jurisprudence sets the limits of its legality in undercover operations based primarily on the directives of a fair trial resulting from the 14th Amendment to the US Constitution. With the development of organised crime in Europe at the end of the 20th century, police and secret services in Europe were also equipped with the powers to use covert special operations, including

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1 Wagner, G.A., 'United States' Policy Analysis on Undercover Operations', *International Journal of Police Science & Management*, 2007, Vol. 9, No. 4, pp. 371–379, (here: pp. 372–373).

2 Hochberg, J.R., 'The FBI Criminal Undercover Operations Review Committee', *United States Attorneys' Bulletin*, 2002, Vol. 50, No. 2, pp. 1–2; Sherman, J., 'A Person Otherwise Innocent: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations', *University of Pennsylvania Journal of Constitutional Law*, 2009, Vol. 11, No. 5, pp. 1475–1510, (here: pp. 1587–1510).

police provocation which, however, unlike the US, is passive in nature and should, in principle, be based on the verification of suspicion of the commission of crimes. The analysis of the study covered the German system as a representative example of a continental inquisitorial and adversarial system which differs from the American system, inter alia, with the principle of the legalism of prosecution and the obligation of the court to actively pursue the material truth. In the sphere of evidence, it should be pointed out that there are no formal rules of evidence such as the "*exclusionary rule*" or the non-obligation of the "fruit of the poisonous tree doctrine". The issue analysed in the study should emphasise the statutory definition of the prerequisites for the admissibility of involvement of secret police agents and police informers in combating crime. Since Germany has ratified the ECHR, the fairness of the German trial in the area of, among other things, the application of police entrapment has been the subject of many ECtHR' rulings, and therefore the Strasbourg standard in this regard will constitute an important aspect of consideration in this article.

1. THE LIMITS TO THE LEGALITY OF POLICE ENTRAPMENT IN THE US CRIMINAL TRIAL

In the American doctrine there is a principle called *entrapment*, referring to people who have been subjected to forms of unlawful entrapment. This institution, in a way, excludes the criminal liability of such persons. It has not been introduced in the form of a legal act, but it has been functioning since the US Supreme Court judgement in 1932 in the case of *Sorrells v United States*[3] as a suspect's defence.

In this judgement, the US Supreme Court stated that "it is not appropriate to impose criminal sanctions on a person who would not be involved in a crime if the government had not tried to induce such behaviour". However, the US Supreme Court judges have been divided on how to understand the justification for *entrapment defence*. Some judges have adopted a "subjective" approach to entrapment, according to which defendants should be able to defend themselves if they can show that they are not "predisposed" to commit a crime or the crime with which they are accused. The subjective position is based on the intuitive assumption that police actions have triggered a desire and intention to commit a crime and that the provoked persons would have no intention of committing a crime which would not have happened in the absence of those provocative police actions. Therefore, people who are not predisposed and who have succumbed to police persuasion should be acquitted, even though they committed the crime charged. Other judges represented an "objective" view of entrapment, which does not focus on the mental state of the defendant, but on the conduct of the state officials. For this reason, defendants should have the right to defend against an entrapment if they can show that the police went too far from merely presenting the possibility of committing one or more crimes, to more actively persuading or enticing the defendant. From an objective point of view, whether or not the defendant was predisposed to

[3] *Sorrells v United States*, 287 U.S. 435, 441, 53 S.Ct.310, 77 Ed. 413 (1932).

commit the crime, overly intrusive police action is considered to be a key factor in committing the crime. In the absence of such police action, the crime would not have occurred and the defendant should therefore be acquitted.[4]

The next U.S. Supreme Court ruling on entrapment did not come until twenty years later in *Sherman v United States*.[5] In this case, a drug addict, an informant of federal agents urged Sherman (a recovering drug addict) to obtain drugs for him. Sherman then, having relapsed, repeatedly carried out drug transactions with federal agents. As a result, he was accused of violating the Federal Drugs Act and his case went to the grand jury to decide on his *entrapment defence* based on the position of the US Supreme Court in the *Sorrells v United States* case, expressed by a majority of its judges, on the question of 'whether the informant convinced an unwilling person to commit a crime or whether that person [Sherman] was already predisposed to commit a crime'. The grand jury sentenced Sherman, because of among other things his previous convictions for drug offences. Ultimately, however, the Supreme Court in the *Sherman* case overturned the conviction, and Chief Justice Earl Warren, who was in charge of the case, briefly stated that although law enforcement agencies can and often must use "deception and strategy" to prevent crimes and detain perpetrators, nevertheless, […] "*a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.*"[6]

In the Sherman case, the US Supreme Court proposed a two-step test for the validity of entrapment defence: First, it examines whether there was an inappropriate incentive from the government, and thus whether the government employs overreaching method that excessively persuades or exploits an individual's non-criminal motives. Secondly, it is important to check whether the defendants were not ready and willing to commit a crime regardless of government inducement.

In *Jacobson v United States* case[7] Supreme Court generally favoured a subjective approach to the entrapment doctrine in federal matters, which most state legislation has also adopted. In this case, two government agencies made repeated efforts through five official organisations over two years to investigate Jacobson's willingness to violate the 1984 Child Protection Act by ordering pornographic images of children through the mail. The Supreme Court set aside Jacobsen's conviction on the grounds that zealous law enforcement prevents government agents from initiating a crime, implanting in an innocent person an order to commit a criminal act and then inducing him to do so, so that the government can prosecute him. The Court referred to the *Sorrells v US* ruling and accepted that it is the responsibility of the prosecution to prove beyond reasonable doubt that the defendant had been willing to commit the act before the government agents first approached him. As to

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[4] Lippke, R.L., 'A limited defense of what some will regard as entrapment', *Legal Theory*, 2017, Vol. 23, No. 4, pp. 283–306, (here: pp. 285–289).

[5] *Sherman v United States*, 356 U.S., 369, 386 (1958).

[6] Roth, J.A., 'The Anomaly of Entrapment', *Washington University Law Review*, 2014, Vol. 91, pp. 979–1034, (here: p. 998).

[7] *Jacobson v United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992).

predisposition, the Court ruled that, although after twenty-six months of repeated dispatches and messages from the government agents, Jacobson finally became predisposed to commit the alleged crime, it concluded that the government failed to prove that Jacobson's predisposition was self-sustaining and not the result of prolonged government pressure.

However, the US Supreme Court, in the Jacobsen judgement, did not indicate exactly how you should understand predisposition and therefore how the prosecutor should prove that predisposition.

As the doctrine and jurisprudence of the American courts points out, there is a choice between: (1) understanding predisposition as a purely mental state of *willingness* to engage in a crime at the first opportunity or (2) when predisposition means not only willingness but also having the necessary skills to commit the crime ("*positional predisposition*").

Therefore, the case-law of the US Federal Courts of Appeal has formulated at least three different standards for confirming predisposition to a crime.[8]

1. The First Circuit Court of Appeals in its judgement of *United States v Gendron*[9] adopted the "ordinary opportunity" test, which means that the government only has to demonstrate that, in the absence of government *inducement*, the defendant would have committed a crime if there had been an "ordinary" *inducement*. Indeed, Judge Breyer suggested that the standard set by the Jacobson judgment only implies that the government cannot, in an attempt to induce a person provoked to commit a crime, confront them with circumstances that are different from those of a normal private inducement.[10]
2. The Seventh Circuit Court of Appeal, in turn, adopted a "position" test which requires the government to prove not only that the defendant was mentally ready or willing to commit the crime, but also that the defendant was capable of committing the crime. This understanding of predisposition was accepted by a judge of that Court, R.A. Posner, in the case of *Hollingsworth v United States.*[11] The ruling is based on the concept of "*positional predisposition*", which means that the government should prove that, on the basis of the education, skills, experience or profession of the defendant, it is reasonable to assume that he/she would be able to commit the crime, even if the government had not induced him/her to do so. As indicated in the doctrine, *this approach would not only successfully separate the "unwary innocent" from the "unwary criminal," it would also ensure that defendants receive justice*.[12]
3. Another position was taken by the Ninth Circuit Court of Appeal in the case of *United States v Thickstun.*[13] It adopted a standard which requires the government to

[8] Schultz, C., 'Victim or the Crime: The Government's Burden in Proving Predisposition in Federal Entrapment Cases', *DePaul Law Review*, 1999, Vol. 48, No. 4, pp. 949–987, (here: pp. 967–976).

[9] *United States v Gendron* (18 F.3d 955, 966 (1st Cir. 1994).

[10] Schultz, C., 'Victim or the Crime…', op. cit., pp. 982–983.

[11] *Hollingsworth v United States*, 27 F3d 1196, 1215, (7th Cir. 1994). See McAdams, R., 'Reforming Entrapment Doctrine in United States v Hollingsworth', *University of Chicago Law Review*, 2007, Vol. 74, Special Issue, pp. 1795–1812.

[12] Schultz, C., 'Victim or the Crime…', op. cit., p. 986.

[13] *United States v Thickstun*, 110 F.3d 1394, 1398 (9th Cir.), 118 S. Ct. 305 (1997).

prove predisposition by means of a multi-element test which examines (1) the nature and reputation of the defendant; (2) whether the government initially suggested the crime; (3) whether the defendant was involved in a gainful activity; (4) whether the defendant showed any dislike; and (5) the nature of the government's incentive. This standard was previously used by other courts as well.[14]

On the other hand, the drafters of the Model Penal Code (MPC) agreed, as "objective test" fit better with the more progressive agenda of having juridical, and more mechanical, regulation of law enforcement. As states adopted portions of the MPC into their own statutes, several included the MPC's "objective test" for entrapment. a few states, most notably Florida, have attempted to use both approaches simultaneously.[15]

It is worth adding that the jurisprudence of the federal courts sometimes recognises *derivative entrapment defence* as applies when a government agent acts through an unsuspecting intermediary to induce the defendant, who is the right target, to commit a crime.[16]

Despite relatively restrictive U.S. Supreme Court jurisprudence based on the entrapment doctrine, in areas with high levels of drug abuse, police often employ schemes to buy drugs from dealers and others and then arrest them, or, more rarely, police officers sell drugs themselves and arrest those who buy them, or, less frequently, police officers sell drugs themselves and detain those who buy them, or, for example, in districts particularly affected by theft, police officers run a pawn shop and buy stolen goods. Some judges even claim that such police action does not prevent crime, but even create it. However, many courts accept or even support operations based on police entrapment (e.g. the New Jersey Court of Appeal in the case of *State v Long*[17] upheld a conviction in a criminal case which started as a result of a police decoy operation.[18]

It is worth noting that, the premises of entrapment defence are, in accordance with the specific nature of the US adversarial trial, verified by the court at the request of the defence, and their existence has the strong effect of acquitting the defendant on the basis, in particular, of the 14th Amendment to the US Constitution, which provides for a *due process* directive. As the comments on this amendment raise, the subjective presentation of entrapment defence follows a two-pronged analysis: "First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."

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[14] Schultz, C., 'Victim or the Crime…', op. cit., pp. 974–975 and the Federal Courts' judgments cited therein.

[15] Stevenson, D., 'Entrapment by Numbers', *University of Florida Journal of Law and Public Policy*, 2005, Vol. 16, No. 1, pp. 1–6, (here: pp. 10–11).

[16] Leonardo, T.J., 'Criminal Law – Derivative Entrapment Defense Applies When Government Agent Acts through Unsuspecting Middleman to Induce Targeted Defendant – United States v Luisi', *Suffolk University Law Review*, 2008, Vol. 41, No. 2, pp. 379–386.

[17] *State v Long,* N.J. Super. App. Div., 523 A.2d, 672,678, (1987).

[18] Colquit, J.A., 'Rethinking Entrapment', *American Criminal Law Review,* 2004, Vol. 41. No. 4, pp. 1389–1437, (here: pp. 1396–1400).

If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement. On the other hand, "[when the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."[19]

2. POLICE ENTRAPMENT IN THE GERMAN LEGAL SYSTEM

Even before 1990, German police services (primarily BKA – German Federal Criminal Police) were authorised to use secret agents in their operational work, who – as part of special operations – used the institution of entrapment. The uniform powers of the German services in this area, regulated by the *Organised Crime Prevention Act* (OrgKG),[20] came into force in 1992. There is no legal definition of entrapment in German legislation and, as in other legal systems, there is rather a definition of the nature of illegal entrapment or of the requirements that entrapment should meet in order to be lawful. The concept itself was created on the basis of the regulations of § 110a–110b and § 110c introduced on 15 July 1992 into the German Code of Criminal Procedure (*Strafprozeßordnung – StPO*), concerning the powers of an undercover officer (*verdeckter Ermittler – VE*).
It should be pointed out here that § 110a of StPO defining in section I. the basic premise for using in the criminal trial of this institution with the aim of explaining the circumstances of committing a crime, namely the existence of a reasonable factual basis (*zureichende tatsächliche Anhaltspunkte*) for assuming that a crime of significant importance from the list of crimes was committed: illegal trade in narcotics, arms trafficking, counterfeiting of cash and means of payment, a crime against national security, a crime committed professionally, out of habit or in an organised group or in an organised manner.

The institution of secret agents may also be used in cases of crimes, if there is a justified fear of returning to such a crime (§ 110a II sentence 1 of StPO).

This provision also formulates a subsidiarity clause, as this measure can be used only when solving the case by other means would be impossible or much more difficult.[21] As a result, if an undercover police officer (NOEP) using a false identity performs a specific action, in a short period of time, e.g. a fake purchase, he cannot be considered a secret agent.[22] Thus, a change of identity alone should not be the

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[19] *The Constitution of the United States of America: Analysis and Interpretation*, Thomas, K.R. (editor in chief), Washington, 2014, pp. 2003–2004.

[20] Gesetz zur Bekämpfung des illegalen Raushgifthandels und anderer Erscheinungsformen der Organisiarten Kriminalität, 1992.

[21] Cf. Schmitt, B., Meyer-Goßner, L., *Strafprozessordnung. Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, München, CH Beck, 2017, pp. 493–495; Hegmann, S., in: Graf, J.P. (org.), *Strafprozessordnung. Mit Gerichtsverfassungsgesetz und Nebengesetzen. Kommentar*, München, CH Beck, 2010, pp. 377–378.

[22] Schmitt, B., Meyer-Goßner, L., *Strafprozessordnung,* op. cit., pp. 496–497; Hegmann, S., op. cit., pp. 379–380.

basic criterion for classifying a police officer as a secret agent. The use of NOEP agents does not require the fulfilment of statutory prerequisites for secret agents using the legend, so they may also be involved in matters not covered by the list in § 110a I of StPO, and their powers result from the general investigative powers of the police regulated in §§ 161–163 of StPO.[23] In view of the above mentioned limitations, provided for in StPO, in the use of secret police agents in the trial (VE – § 110a–110c) the procedural practice currently also observes the involvement of third parties as police informants (*"trusted persons" – V-Leute*) who, engage in special operations, for remuneration, thus avoiding legal regulations giving officers the status of secret agents.[24] With regard to the procedural consequences of police entrapment made contrary to the requirements of a fair trial (Article 6(1) of the ECHR) the case-law of German courts previously emphasised that the court adjudicating in a case should indicate the illegality of such evidence in the justification of the judgment, but at that time it was not a circumstance releasing the defendant from criminal liability (a negative premise for the trial) but a basis for mitigating that liability.[25] This line of jurisprudence of German courts, and in particular of the Federal Supreme Court (BGH), also resulted from the jurisprudence of the Federal Constitutional Court (BVerfG), which was to a large extent in conflict with the case-law of the ECtHR. The situation changed after the ECtHR judgment of 23.10.2014. *Furcht v Germany*[26] and the current line of jurisprudence of the German Federal Supreme Court, including the judgement of BGH of 10.06.2015[27] assumes that *"Illegal entrapment to commit a crime by members of law enforcement agencies or third parties controlled by them is in principle a premise for discontinuance of proceedings."* This judgement of BGH (against the background of the facts of controlled drug purchases by undercover police agents with the help of third parties) refers to the case-law of the ECtHR and assumes that a situation in which the investigators involved, acting in order to prove a crime, i.e. to obtain evidence against a specific person and initiate criminal proceedings are not limited to a largely passive criminal prosecution, but rather influence the person in such a way that he or she is inclined to commit a crime that he or she would not have committed without such influence.

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[23] Roxin, C., Schünemann, B., *Strafverfahrensrecht*, München, CH Beck, 2009, pp. 278–279.

[24] The German literature of the end of the 20th century raised a number of doubts concerning the compatibility of the application of this institution both in the light of the standard of the German Constitution (*Grundgesetz – GG*) and the jurisprudence of the Federal Constitutional Court and the standard of a fair trial as defined in Article 6 of the ECHR – see the monograph: Krauß, K., *V-Leute im Strafprozeß und Menschenschrechtskonwention*, Freiburg im Breisgau, MPICC, 1999, pp. 31–140.

[25] See e.g. Reindl-Krauskopf, S., 'Strafmilderung bei unzulässiger Tatprovokation', *Juristische Blätter*, 2009, No. 10, pp. 664–666.

[26] *Furcht v Germany*, No. 54648/09 (2014). See next part of this article.

[27] BGH 2 StR 97/14.

3. INADMISSIBILITY OF POLICE ENTRAPMENT IN ECTHR CASE-LAW

Until the end of the 20th century, the ECtHR did not generally address the specific problem of whether the testimony of police informers who provoked a suspect to commit a crime is subject to a ban on evidence. The decision of 9 June 1998 in the case of *Teixeira de Castro v Portugal*[28] in which the Court stated that the general principles of a fair trial, as set out in Article 6 of the Convention, apply to all types of proceedings, from the simplest to the most complex, including organised crime[29] can be regarded as a breakthrough here. In the circumstances of this case, the applicant, *F. Teixeira de Castro*, was persuaded by two undercover police officers to get three portions of heroin from a third party and then sell them. The court, considering that there was a violation of Article 6(1) of the Convention in this case, assumed that police officers did not act as "*agents provocateurs*", but provoked a crime that would not otherwise have happened.[30] It also indicated that the police authorities had no reason to believe that the suspect was involved in drug trafficking: there were no drugs in his home, he was contacted by a third party (and the third party only heard of him from another intermediary) with the police, he had no criminal record and under no circumstances did it appear that he was predisposed to commit the crime. The Court concluded from these circumstances that police officers did not confine themselves to following *Teixeira de Castro*'s criminal activities in a fundamentally passive manner, but exerted influence in order to persuade him to commit the crime. Moreover, the ECHR indicated that the action of police officers was not ordered or controlled by a judge[31]).

Following this ruling, German doctrine and case-law have also adopted the principle that the public interest cannot justify the use of means of evidence resulting from police entrapment. The German Supreme Federal Court explicitly recognised that bringing persons who are not suspects and initially not prone to a crime by police informers headed by the authorities of the State and then using this in a criminal trial leads to a violation of the principle of a fair trial as set out in Article 6(1) of the Convention. This principle is also constantly developed in the jurisprudence of the German Constitutional Court (BVerfG) as the highest order of the whole criminal procedural law analysed in the context of Article 1(1), Article 2(1), Article 20(3), Article 101(1), Article 103(1) of the German Constitution (GG) and Article 6(1) of the Convention.[32] As the German comments on this ruling emphasize, inciting someone, in a way for which the State is responsible, to commit a criminal act in order to subsequently prosecute and punish him or her for that very act is an unacceptable way of violating human dignity and freedom of action

[28] *Teixeira de Castro v Portugal*, No. 25829/94 (1998).

[29] *Teixeira de Castro v Portugal*, op. cit., § 36.

[30] *Teixeira de Castro v Portugal*, op. cit., § 33.

[31] *Teixeira de Castro v Portugal*, op. cit., § 38.

[32] Cf. Kulesza, C., 'Czynności operacyjno-rozpoznawcze a zasada rzetelnego procesu w orzecznictwie Trybunału w Strasburgu i sądów polskich', *Przegląd Policyjny*, 2008, Vol. 90, No. 2, pp. 49–67, (here: pp. 52–56).

– it becomes the subject of crime-fighting tactic. In a material sense, there are no pending preparatory proceedings against him or her, but rather proceedings of a police state aimed at excluding the suspect from the circle of citizens.[33]

In the case-law of the ECtHR relating to the institution of police agents in the German trial, an important role was played by the judgement of the Grand Chamber of the ECtHR of 23 October 2014 in the case of *Furcht v Germany*[34] in which the Court formulated substantive criteria for assessing when the actions of police officers making controlled purchases were passive and when they took the form of incitement and entrapment to crime. It pointed out that police incitement to a crime occurs when police officers do not confine themselves to investigating criminal activities in an essentially passive manner, but exert influence on an individual to induce him or her to commit a crime that would not otherwise have been committed, so as to make it possible to establish whether a crime has been committed, i.e. to obtain evidence and initiate criminal proceedings. In the Court's view, the first criterion for determining whether an investigation was carried out 'essentially passively' is to examine the reasons for the use of classified operational activities and the behaviour of the authorities carrying out such activities, namely whether there were objective suspicions that the applicant was involved in criminal activities or was willing to commit a crime.[35] The ECtHR referred to its case-law according to witch the national authorities had no reasonable cause to suspect that the person was previously involved in drug trafficking when the person had no criminal record, no prosecution was initiated against that person and there were no indications that he was willing to engage in drug trafficking before contacting the police. It added that, depending on the circumstances of the specific case, the indication may be provided by prior criminal activity or intention to commit a criminal act: the applicant's knowledge of current drug prices and the possibility of obtaining the drugs in a short period of time, as well as the financial gain the applicant makes in such a transaction. The Court then examined whether the applicant was under pressure to commit the crime. In drug-related cases, it was found that abandonment of a passive attitude by law enforcement agencies should be associated with behaviours such as taking the initiative in dealing with the applicant, renewing the proposal despite an initial refusal, constant hurrying, increasing the price above average and invoking the applicant's sympathy and withdrawal symptoms. In applying the above criteria, the Court imposed on the authorities the burden of proving that there was no incitement to commit the crime, with the proviso that the applicant's claims were not entirely unreliable. In practice, the authorities may not comply with the burden of proof if no formal authorisation has been issued and no control of a classified operation has been carried out.[36] Against the background of the facts of the case, the Court noted that, at the time of the applicant's first contact with undercover officers in November 2007, there was no objective suspicion that he was involved

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[33] Herzog, F., 'Infiltrativ-provokatorische Ermittlungsoperationen als Verfahrenshindernis', *Strafverteidiger*, 2003, No. 7, pp. 410–412.

[34] *Furcht v Germany*, No. 54648/09 (2014).

[35] *Furcht v Germany*, § 49–52.

[36] *Furcht v Germany*, § 53.

in drug trafficking, he had no criminal record, there was no ongoing investigation against him and the police became interested in him as a good contact with another person (S). In examining whether the applicant was subject to covert pressure, the Court, on the basis of documentation gathered by the district court and the applicant's own explanations, found that officials took care not to propose specific illegal trade transactions or specific types or quantities of drugs before the applicant and S. took the first step. However, the Court noted that the applicant, after being contacted by undercover officer P. on 1 February 2008, explained to him that he was no longer interested in participating in drug trafficking, and yet the officer contacted the applicant again on 8 February 2008 and persuaded him to continue arranging drug sales by S. to undercover officers. With this behaviour against the applicant, the investigating authorities clearly abandoned their passive stance and made the applicant commit the crime.

In the light of all the circumstances of the case, the Court therefore concluded that a confidential measure in the form of an apparent transaction went beyond merely a passive investigation of pre-existing criminal activity and boiled down to police incitement within the meaning of the Court's case-law developed on the basis of Article 6(1) of the Convention. The evidence obtained through police incitement was then used in subsequent criminal proceedings against the applicant.[37] It is important in German practice for the ECtHR to recognise that leniency of a national court against a defendant who has been convicted on the basis of evidence obtained as a result of solicitation by secret agents does not mean that the evidence obtained as a result of such persuasion is not acceptable. In view of this ruling, which is limited to leniency for the defendant in such a situation, it should be regarded a violation of Article 6 of the ECHR and therefore the right to a fair trial.[38]

In its judgement in the case of *Furcht v Germany*, it applied the procedural test in principle without any reference to its substance. The broader considerations for this test are contained in one of the recent ECtHR judgments concerning Germany, namely the judgement in case *Akbay and Others v Germany* of 15 October 2020.[39] Referring to previous case-law,[40] the Court stressed that, following the substantive test, a procedural test should be carried out not only when the first test confirms that the applicant was the subject of the instigation, but also when the findings of the Court in the substantive test are ambiguous due to a lack of information in the file, their non-disclosure or contradictions in the interpretation of events by the parties. The Court applies this procedural test to determine whether the national courts took the necessary steps to disclose the facts of the alleged incitement at issue and whether, if the incitement is found (or if the public prosecutor's office has not refuted the allegation of incitement), appropriate conclusions were drawn in accordance with the Convention.[41] Also in this case, although the Court considered

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[37] *Furcht v Germany*, § 54–59.

[38] *Furcht v Germany*, § 68–71.

[39] *Akbay and Others v Germany*, No. 40495/15 and 2 others (2020).

[40] *Matanović v Croatia*, No. 2742/12,(2017), § 134; *Ramanauskas v Lithuania* (No. 2), No. 55146/14 (2018), § 62.

[41] *Akbay and Others v Germany*, § 120–124.

that the German courts had followed the correct procedure for hearing the complaint of entrapment, it considered, as in the *Furcht* case, the judgement which, when the charge was confirmed, was limited to leniency for the defendant was a violation of the right to a fair trial under Article 6 of the ECHR.[42]

It is worth adding that in both the *Furcht* and *Akbay* cases, the Court found it incompatible with the requirements of a fair trial for the court to allow the merits of proof of the defendant's confession of guilt as a result of unlawful entrapment.

In order to find a plane of comparison with the subjective test adopted in the US trial described above, it is necessary to go beyond the case-law of the ECtHR on German cases and to try the essential features of the substantive test of incitement adopted also in other ECtHR judgements.[43]

We should also note here the ECtHR case-law as regards private persons who are not police officers but co-operate with the police in the criminal trial. As for the complaints against the United Kingdom heard by the Court of Justice in Strasbourg, the ruling of the Grand Chamber of the ECtHR of 27 October 2004 in *Edwards and Lewis v the United Kingdom*[44] [45] deserves attention. In resolving this case, the ECtHR referred to the *Teixeira de Castro* ruling, but stressed that it cannot determine whether or not the applicants were the victims of police *entrapment*, as the relevant information had not been disclosed by the prosecution, as would be required by the principle of a fair trial, contained in Article 6(1) of the Convention. The Court was, thus, unable to strike a balance between the public interest requiring the secrecy of the proceedings and the requirements of an effective defence. Throughout the course of the trial in the various instances, the defence had been unable to address the covert evidence of the prosecution and lead the judge to conclude that applicants were accused of "*state created crime*". Therefore, the ECtHR considered that the procedure used to address the issue of disclosure of evidence and entrapment met the requirements of ensuring an adversarial process and equality of arms and included guarantees of respect for the interests of the defendant and concluded that there had been a violation of Article 6 § 1 of the Convention.[46]

I. The analysis of the current case-law makes it possible to identify, among other things, the following circumstances examined in the *substantive test*:
   a) Circumstances relating to the accused person and his or her predisposition to commit a crime. In particular, it must be established whether there were grounds for suspecting him of the crime for which he was provoked and, consequently, whether there is evidence that the crime would have been committed without operational police action. The Court emphasises that the state of a person's suspicion or predisposition to commit a criminal offence

[42] *Akbay and Others v Germany*, § 140–142.

[43] Cf. Lach, A., *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego,* Wolters Kluwer, Warszawa, 2018, pp. 185–195, and the ECtHR's judgments cited therein.

[44] *Edwards and Lewis v the United Kingdom*, No. 39647/98 and 40461/98 (2004).

[45] *Edwards and Lewis v the United Kingdom*, § 58.

[46] *Edwards and Lewis v the United Kingdom*, § 59.

must be assessed in relation to the moment when the secret agents engaged in operational activities. Domestic courts may prove an accused person's predisposition to commit a criminal offence, for example by relying on the accused person's criminal history and whether there is sufficient suspicion to order infiltration of a person in accordance with national law. For example, in *Ramaunskas* v *Lithuania*,[47] where the Court found a violation of the principle of a fair trial by considering corruption offences committed by the prosecutor as provoked by the police when there was no information that he had accepted bribes beforehand and that the police took action on their own initiative and obtained subsequent approval from their superiors. In contrast, there was no breach of the principle of a fair trial in the *Calabro*,[48] case, as the undercover officer's action boiled down to informing about his willingness to purchase large quantities of drugs, and then the applicant contacted the defendant himself. In the *Volkov and Adamskiy v Russia*[49] case, the Court also found the actions of police officers who called the applicants and asked them about the possibility of installing certain computer programs, and the applicants brought unlicensed programs for installation on their own initiative.

b) Circumstances relating to the infiltration activities of the officers themselves, including their compliance with the requirements of national law to initiate and conduct them, their activity in inducing directly the applicant or persons associated with him or her. The Court stresses that national law must provide for precise and appropriate conditions for the ordering of operational activities with adequate control (by recommending judicial review) (see e.g. *Veselow and Others v Russia*[50]).

II. With regard to the *procedural test*, the Court requires that domestic courts should effectively examine the allegation of entrapment by the applicant, maintaining an open and adversarial procedure and safeguarding the defendant's rights of defence. For example, it considered the control of the courts in relation to a number of illegal transactions involving counterfeit currency in *Grba v Croatia*,[51] ineffective, as it was limited to the domestic court's finding that there was no indication that the officials incited the defendant to commit the crime "in the sense that they offered him an advantage or provided him with gifts or the like". In this case, the ECtHR did not consider that the applicant was wrongly convicted of counterfeiting currency, but concluded that the procedure involving police entrapment was unreliable, as it led to more severe punishment of the applicant for committing repeated acts of currency counterfeiting.

The current case-law of the ECtHR emphasises the need to apply both tests (substantive and procedural) together, especially in situations where there is no formal procedure for conducting classified operations in a given national system.

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[47] *Ramaunskas v Lithuania (Grand Chamber)*, No. 74420/01 (2008), § 62–74.

[48] *Calabro v Italy and Germany*, No. 59895/00 (2002), § 2.

[49] *Volkov and Adamskiy v Russia*, No. 7614/09, 30863/10, (2015), § 40–46.

[50] *Veselow and Others v Russia*, No. 23200/10, 24009/07 and 556/10, (2012) § 126–128.

[51] *Grba v Croatia*, No. 47074/12 (2017), § 116–126.

For example in *Mills v Ireland*,[52] the Court, applying the substantive test, found that the role of the police was "essentially passive" and that the behaviour of police officers providing the applicant with a 'mere opportunity' to buy drugs did not go beyond entrapment or incitement to commit the crime. The ECtHR rejected the complaint on the grounds that the proceedings before the court of first instance also met a standard of fairness, as it was adversarial, the applicant's defender had the opportunity to interview police witnesses and, as a result, all relevant information about the conduct of the controlled purchase operation was clarified before the court.

CONCLUSIONS

To sum up the considerations relating to the US criminal trial, it should be noted that judicial decisions allow for active forms of police entrapment, but based mostly on a subjective understanding of entrapment defence requires, in order for the actions of federal agents or the police to be based on pre-existing predispositions to commit a crime. These predispositions (which are different in the case-law of federal courts) must therefore have existed before the agents came into contact with the person being provoked, and the agents' actions merely reinforced it and ultimately led to the commission of the crime with which the person was later charged Thus, under the entrapment rule, entrapment is illegal if a police or federal officer, or a person cooperating with him, encourages or causes another person to take actions that bear the hallmarks of a crime in order to obtain evidence of a crime. However, the doctrine emphasises the difficulties faced by defendants who, even at the stage of the court hearing before the trial, have to prove that they were intensively provoked by the police or federal agents to commit a crime in case of entrapment defence. When significant doubts arise in this regard, it is incumbent on law enforcement authorities to demonstrate that the defendant was not provoked to commit a crime committed by state officials.

Thus, the US criminal justice system must be recognised as containing far-reaching guarantees for the defendant, which are not found in continental European systems. According to the entrapment doctrine, which is understood as a justification to the behaviour of the perpetrator provoked by a secret agent, if the perpetrator was brought to the scene of a crime by a secret agent in a way that violates the law, he or she should be acquitted even if the alleged (and proved to him or her by means of entrapment) crime was committed.[53] Moreover, we should not forget the fruit of the poisonous tree doctrine of the American trial, which prohibits the use not only of direct but also indirect illegal evidence.[54]

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[52] *Mills v Ireland*, No. 50468/16 (2017), § 23–25.

[53] Cf. Gontarski, W., *Granice legalności prowokacji policyjnej. Glosa do wyroku ETPC z dnia 5 lutego 2008 r.*, 74420/01, LEX/el. 2016.

[54] Cf. Thaman, S., 'Fruits of the Poisonous Tree in Comparative Law', *Southwestern Journal of International Law*, 2010, Vol. 16, No. 2, pp. 334–384, (here: pp. 334–337).

In turn, the analysis of the case-law of the ECtHR gives rise to the question whether the substantive incitement test adopted in recent rulings includes elements of both the subjective *entrapment defence* test developed by the US Supreme Court (and by the federal courts) and the objective test (related to the assessment of the intensity of the actions of the police and federal agents inciting the defendant to commit the crime with which he or she is subsequently accused). It seems that the Strasbourg standard in this regard appears to be more expansive and appears to place greater emphasis on the assessment of police actions, in particular their compliance with the statutory criteria for the admissibility of special operations under cover in those legal systems which provide for such premises. The ECtHR also regards as illegal police provocation of defendants through or with the help of third parties (in particular police informants, e.g. *V-Leute* in Germany),[55] which can in a sense be referred to the American doctrine of *derivative entrapment defence*. The Court also emphasises the role of control mechanisms for the management of undercover police operations, with a clear preference for preliminary judicial review. However, as for example, the *Akbay* or *Furcht* cases, show, judicial control is not always effective, which is mainly due to the judges' lack of knowledge of the operations requested by the police and their unfamiliarity with the specific nature of police work.

The fundamental difference between the US and European systems (apart of course, from the qualitative differences between common and civil law systems, e.g. in the field of evidence law) in this issue should be sought in the consequences of considering police entrapment as illegal evidence. The Strasbourg standard (which also applies to the German system) does not presuppose the automatic elimination of such evidence, but allows for the possibility of convalidating the negative consequences of such illegal evidence in court proceedings when the Court finds that "the trial as a whole was fair", in particular when the evidence from illegal entrapment did not constitute an important basis for the defendant's conviction. This conception of procedure seems to be manifest precisely in the procedural test, which is based both on an examination of the fairness of the court proceedings verifying the claimed use of unauthorised operational methods by the police against him and, on the other hand, on the adequacy of the effects of the court's finding that the allegations are justified. As stated ECtHR in *Akbay* case: "While the Court will generally leave it to the domestic authorities to decide what procedure must be followed when the courts are faced with a plea of incitement, it has indicated that the domestic courts deal with an entrapment complaint in a manner compatible with the right to a fair hearing where the complaint of incitement constitutes a substantive defence, places the court under a duty to either stay the proceedings as an abuse of process or to exclude any evidence obtained by entrapment or leads to similar consequences."[56] Thus, in the light of the Strasbourg standard, the prohibition on the use of evidence of illegal provocation (incitement to crime) is not absolute, because if such a breach of the defendant's right to a fair trial does not

[55] Cf. the previously cited Texeira and Akbay case.

[56] Akbay and Others, op. cit., § 122.

have a decisive influence on the outcome of the case, it can be compensated in court proceedings and then the applicant can "lose his status as a victim of a breach of Article 6(1) of the ECHR" as a result of a decision by a domestic court adequately compensating for that breach. If however, the inducement occurs in violation of the free will of the person being provoked in the form of a breach of Article 3 of the Convention – the trial is automatically considered unreliable, regardless of whether the evidence of the inducement has determined the conviction or the severity of the sentence.[57] It should be added that recent case-law of the ECtHR includes in the absolute prohibition of Article 3 of the Convention also evidence from the confessions of the accused obtained by torture by third parties, not connected with the law enforcement authorities.[58]

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[57] Gontarski, W., *Granice legalności prowokacji policyjnej*, op. cit.

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INADMISSIBILITY OF POLICE ENTRAPMENT EVIDENCE IN THE US AND GERMAN TRIALS IN THE LIGHT OF THE CASE-LAW OF THE US SUPREME COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

Summary

The aim of this paper is to compare the American and European standards of the inadmissibility of evidence of unlawful police entrapment. In US criminal procedure, which permits active forms of entrapment, the US Supreme Court and most federal courts apply a subjective test for the entrapment defence, focusing on the predisposition of the person provoked to commit the crime and, less often, an objective test examining the legality of government agents' actions. The Strasbourg standard (including German cases) is based on two tests: a substantive one (examining both the predisposition of the person being provoked and the legality of the police actions) and a procedural one, which consists in verifying the reliability of the national courts' recognition of the charge of incitement to commit a crime by the police The basic difference between the analysed standards is to be found in the effects of illegal entrapment. In the US system, it is a justification to the perpetrator's responsibility for a crime committed as a result of entrapment, and the Strasbourg standard allows for sanctioning the negative effects of such illegal evidence to be convalidated in criminal trial when the Court considers that "the trial as a whole was fair".

Keywords: entrapment, fair trial, Germany, USA, European Court of Human Rights, US Supreme Court

NIEDOPUSZCZALNOŚĆ DOWODU Z PROWOKACJI POLICYJNEJ W PROCESIE AMERYKAŃSKIM I NIEMIECKIM W ŚWIETLE ORZECZNICTWA SĄDU NAJWYŻSZEGO USA I ETPCZ

Streszczenie

Celem artykułu jest dokonanie próby porównania standardu amerykańskiego i standardu europejskiego w zakresie niedopuszczalności dowodów z nielegalnej prowokacji policyjnej. Mimo jakościowych różnic pomiędzy systemem common law i systemem civil law (opisywanym tu na przykładzie Niemiec) w obu systemach uznano prowokację policyjną za efektywną metodę zwalczania przestępczości, jednakże przyjęto różne standardy jej stosowania. W procesie amerykańskim, która dopuszcza aktywne formy prowokacji zarzut Sąd Najwyższy USA i większość sądów federalnych przy ocenie zarzutu obrony stosuje subiektywny test obrony opartej o zarzut prowokacji, koncentrujący się na predyspozycjach prowokowanej

osoby do popełnienia przestępstwa. Z kolei wypracowany przez orzecznictwo ETPCz (w tym w sprawach niemieckich) standard oceny dopuszczalności dowodów z nielegalnej (przede wszystkim aktywnej) prowokacji opiera się na stosowaniu dwóch testów: materialnego (badającego zarówno predyspozycje prowokowanej osoby jak i legalność skierowanej wobec niej działań policji) jak i procesowego, polegającego na weryfikacji rzetelności rozpoznawania przez sądy krajowe zarzutu podżegania przez policję do przestępstwa. Podstawowej różnicy między analizowanymi standardami należy szukać w skutkach nielegalnej prowokacji. W systemie amerykańskim stanowi ona kontratyp odpowiedzialności sprawcy za przestępstwo popełnione wskutek prowokacji, zaś standard strasburski dopuszcza sanowanie negatywnych skutków takiego nielegalnego dowodu w postępowaniu sądowym wtedy gdy Trybunał uznaje, że „proces sądowy oceniany jako całość był rzetelny", zaś dowód z nielegalnej prowokacji nie był istotny dla skazania oskarżonego.

Słowa kluczowe: prowokacja, prawo do sądu, Niemcy, USA, Europejski Trybunał Praw Człowieka, Sąd Najwyższy USA

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