*Gia Markoidze**

PERMISSIBLE LIMITS OF ENTRAPMENT IN COVERT INVESTIGATIONS AND OPERATIVE-INVESTIGATIVE MEASURES

ABSTRACT

A parallel can be drawn between the idea of entrapment and the biblical story of Adam and Eve. In the Garden of Eden, Eve was tempted by the serpent, leading her to partake in the forbidden fruit at the urging of another.[1]

Temptation is a social phenomenon and an inseparable part of human interaction as societies evolve. The Law, in its turn, which permeates all spheres of social life,[2] encompasses the aspect of temptation as well, bringing about the development of a separate legal doctrine. Criminal law encompasses the idea of temptation through the concept of entrapment, which applies to situations where a law enforcement officer provokes someone to commit a crime, leading to prosecution.

Criminal proceedings function as an effective tool for the state to combat crime while ensuring the protection of individuals' fundamental rights through procedural safeguards. Among these guarantees, the right to a fair trial holds significant importance, with the entrapment defense serving as one of its key components. In legal doctrine, establishing an acceptable equilibrium in the use of provocative measures during covert investigative activities is of critical importance. This article examines that balance, offering the author's perspective on the interpretation of relevant legislation and the incorporation of best practices.

I. INTRODUCTION

Criminal proceedings serve as an important tool against unlawful actions, yet safeguarding human rights remains the highest priority, forming a fundamental pillar

* Doctoral Student and Visiting Lecturer, Faculty of Law, Ivane Javakhishvili Tbilisi State University; Magistrate Student, George Washington University (Washington, USA); Deputy Head, Border Management and Coordination Division, Ministry of Internal Affairs of Georgia [giamarkoidze@gmail.com]

[1] Cf. Anthony M. Dillof, 'Unraveling Unlawful Entrapment' (2004) 94 (4) Journal of Criminal Law & Criminology 827.

[2] Giorgi Khubua, Theory of Law (2nd edition, Meridiani Publishing House 2015) 74-132 (in Georgian).

of any rule-of-law-based state. It is a general assumption that law enforcement officers serve the important public good by preventing and responding to crime. The obligations to society motivate law enforcement bodies to identify criminals using various tools including covert investigation activities and operative-investigative measures for this purpose. Resorting to these tools, on the other hand, significantly increases the risk of entrapment, which, at first glance, might seem justified as the person did commit a criminal offense. However, as emphasized at the outset, the human being is the highest value and should not merely become a passive object in the fight against crime.

Let us take the example of an undercover police officer who, intending to identify and detain a pickpocket, impersonates a so-called vulnerable victim in the subway station at night. Resembling an elderly woman being under the influence of alcohol, the officer visibly carries a large sum of money in the open pocket. As a result, she is robbed by a person who takes money from her pocket[3]. Or let us imagine a case of a person who desperately needs money for tuition he/she does not have. The person is approached by an undercover officer offering him/her drugs to sell. The person succumbs to the offer and is apprehended during the sale.[4]

In both cases mentioned above, the persons could resist the temptation meaning they are no less dangerous to society than other offenders are. However, according to the Criminal Procedure Code of Georgia, conducting illegal searches, seizures, or other actions, even against a well-known criminal, cannot serve as a basis for a guilty verdict since this approach might create an unjustifiable risk of punishing innocent persons. That said, the question is: what legal risks exist for individuals who are the targets of entrapment? Isn't the conduct of those who have been entrapped morally justifiable?[5]

This article aims to reconsider the issues related to entrapment and provide a systematic analysis of the problematic areas revealed in practice from a comparative legal perspective. It is written using a comparative legal approach, combining analysis and synthesis of practice and doctrine. The majority of the article examines court decisions and doctrinal materials using historical, socio-legal, analytical, and systematic methods. These methods enhance the understanding of the problems surrounding the subject matter and the means of addressing them.

Notably, a lawsuit involving the entrapment defense, as analyzed in this article, has been submitted to the Constitutional Court of Georgia and is currently pending.[6] The author hopes that the arguments developed herein will contribute meaningfully to both legal practice and doctrinal development.

[3] Cf. Judgment of the New Jersey Superior Court, Appellate Division, State v. Long, 523 A.2d 672, 678 (N.J. Super. App. Div. 1987).

[4] Cf. Judgment of the Court of Appeals of Indiana, Kats v. Indiana, 559 N.E.2d 348 (Ind. Ct. Apps. 1990).

[5] Dillof, supra note 1, 830.

[6] Constitutional Claim of Georgia's Public Defender N1630, 22 July 2021.

II. GENERAL DEFINITION OF ENTRAPMENT

The principle prohibiting entrapment bars the state from inducing individuals to commit a crime solely to initiate criminal prosecution.[7] In the criminal law textbooks, the persons who carried out such actions are commonly referred to as agent-provocateurs.[8]

The concept of defense against entrapment emerged in the legal system of the United States in the 19th century[9] and, until recent times, has been absent in other countries practicing common and continental law.[10] From 1870 to 1932, some American courts considered the issues of inadmissibility of entrapment,[11] although the United States Supreme Court did not officially recognize the concept until 1932[12].[13]

The case *Sorrells v. United States*[14] laid the basis for prohibiting the practice of entrapment in the United States. During the National Prohibition Act, a federal agent visited Sorrells under the guise of a tourist and claimed to be a World War I veteran serving in the same military division as Sorrells. After about an hour of conversation, the agent asked Sorrels five times to get him a gallon of liquor. Despite Sorrell's initial refusal, the agent persisted until Sorrells eventually succumbed to pressure and procured him a half-gallon of whiskey. The US Supreme Court ruled that law enforcement officers could use covert techniques only against individuals who had criminal intent[15], but such methods were deemed unacceptable against law-abiding citizens.[16]

For the next 25 years, the US Supreme Court did not hear any similar case until the case *Sherman v. United States*.[17] Sherman was receiving treatment for drug addiction when he met an agent at the pharmacy who was pretending to be a person undergoing the same treatment. After several encounters, when the two discussed the details of addiction treatment, the agent started asking Sherman to get him drugs. In the beginning, Sherman refused but later agreed, got some, and shared with the agent. As

[7] See definitions, Daniel J. Hill, Stephen K. McLeod and Attila Tanyi, 'The Concept of Entrapment' (2018) 12 (4) Criminal Law and Philosophy 546-554.

[8] Levan Kharanauli, Panishability of Unfinished Crime according to Georgian and German Criminal Law (comparative analysis) (Dissertation, Tbilisi State University Press 2013) 365 (in Georgian).

[9] See the brief history: Dru Stevenson, 'Entrapment and Terrorism' (2008) 49 (1) Boston College Law Review 148-152.

[10] Jessica A. Roth, 'The Anomaly of Entrapment' (2014) 91 (4) Washington University Law Review 990.

[11] Gregory J. Deis, 'Economics, Causation, and the Entrapment Defense' (2001) 5 University of Illinois Law Review 1211-1216.

[12] In the judgement of US Supreme Court judgment in 1928 Casey v. United States 276 U.S. 413 (1928) the judge Louis Brandeis expressed his dissenting opinion defending the entrapment prohibition, but the majority of judges did not support him.

[13] Roth, supra note 10, 990.

[14] Judgement of the US Supreme Court, Sorrells v. United States, 287 U.S. 435 (1932).

[15] Cf. Hock L. Ho, 'State Entrapment' (2011) 31 (1) Legal Studies 86.

[16] Sorrells v. United States, supra note 14, 440-453.

[17] Judgement of the US Supreme Court, Sherman v. United States, 356 U.S. 369 (1958).

a result, Sherman again started using narcotics. After several such transactions, the agent informed the law enforcement agency, which required additional transactions as evidence of a crime. So, the agent made Sherman engage in more transactions, based on which the law enforcers initiated a covert police operation.[18] The court qualified the agent's actions as entrapment.[19]

Regarding European law practice, Article 6 of the European Convention on Human Rights provides for the right to a fair trial that implies the protection of defendants from entrapment.[20] The European Court of Human Rights (hereinafter - the ECtHR) defines that investigation - or, in some cases, administrative proceedings - should aim to prosecute those who committed a crime or other administrative violations but not by instigating them to commit a crime. The state's end goal should not be to indict individuals by entrapping them.[21] By using the means of entrapment, a state is engaged in/facilitates a criminal activity in order to prosecute a person.[22] More specifically, the entrapment means an active engagement of a state representative or other private person acting under the former's guidance in the special police operations, aiming at inducing a person who would not have committed a crime otherwise.[23]

The ECtHR recognizes the need for covert investigative methods and operative-investigative measures for combating organized crime, corruption, and other complex offenses[24]. However, it underscores that while applying such covert techniques, the appropriate procedural safeguards must be ensured to prevent abuse of authority.[25] Public interest in investigating crime cannot justify obtaining evidence or prosecuting individuals through entrapment, as this violates the right to a fair trial.[26]

As to the Georgian context, Article 31, paragraph 1 of the Georgian Constitution provides for the right to a fair and timely trial. Despite the Constitution does not

[18] ibid, 371-372.
[19] ibid, 376.
[20] Judgment of the European Court of Human Rights N18002/02 "Gorgievski v. the former Yugoslav Republic of Macedonia", 16 July 2009. Paragraph 38.
[21] Judgment of the European Court of Human Rights N6228/09, 6228/09, 19678/07, 52340/08, 7451/09 "Lagutin and others v. Russia", 29 April 2014. Paragraph 94.
[22] Judgment of the European Court of Human Rights N18757/06 "Bannikova v. Russia", 04 November 2010. Paragraphs 37, 51.
[23] Judgment of the European Court of Human Rights N74420/01 "Ramanauskas v. Lithuania", [GC] 05 February 2008. Paragraph 55.
[24] Judgment of the European Court of Human Rights N2689/65 "Delcourt v. Belgium", 17 January 1970. Paragraph 25.
[25] Ramanauskas v. Lithuania, supra note 23, 51.
[26] Judgment of the European Court of Human Rights N44/1997/828/1034 "Teixeira de Castro v. Portugal", 09 June 1998. Paragraphs 35-36, 39. Judgment of the European Court of Human Rights N59696/00 "Khudobin v. Russia", 26 October 2006. Paragraph 135. Judgment of the European Court of Human Rights N53203/99 "Vanyan v. Russia", 15 December 2005. Paragraphs 46-47. "Ramanauskas v. Lithuania", supra note 23, 54.

explicitly prohibit entrapment, it is nevertheless implied under the above provision.[27]

Entrapment is criminalized under Article 145 of the Criminal Code of Georgia and is defined as inducing another person to commit a crime for the purpose of criminal prosecution. While the Criminal Procedure Code does not explicitly prohibit entrapment, it does, at the level of principles, prohibit influencing a person's free will through torture, […] deception […]. (Article 4, paragraph 2). Deception is a central element of entrapment,[28] respectively, that norm can be interpreted as prohibiting it.

According to Article 2, paragraph 5c of the Law of Georgia on Operative-Investigative Activities, operative-investigative measures that involve deceit, blackmail, coercion, or the commission of a crime or other unlawful acts are prohibited.

As shown above, neither the Criminal Code nor the Law on Operative-Investigative Activities defines the concept of entrapment; however, in the latter case, the prohibition of deception and coercion can be interpreted as a prerequisite for prohibiting entrapment. Nonetheless, this provision should be interpreted narrowly, as operative measures are generally based on deception, and excluding it would make the entire operative system ineffective. For example, when acquiring a prohibited item during a controlled transaction, a person purchases it without knowing the agent's identity.[29]

Moreover, deception has its degree, and its proper assessment is no less important for addressing the above-mentioned challenge in legal proceedings.

III. COMPLIANCE OF GEORGIAN LEGISLATION AND PRACTICE WITH EUROPEAN STANDARDS OF HUMAN RIGHTS

According to the ECtHR practice, for determining whether a crime was committed as a result of state-incited actions, the following two tests are applied:[30]

a) Substantive test - evaluates whether the law enforcement agents were acting in "essentially passive manner" and whether the crime would have taken place without state intervention; [31]

b) Procedural test – evaluates whether overall, the legal process was conducted in a fair manner.[32]

[27] Similar approach is shared by the European Court of Human Rights; See also the Constitutional Claim of Georgia's Public Defender N1630, 22 July 2021.

[28] For example, Stefan Trechsel, Human Rights in Criminal Proceedings (Oxford University Press 2009) 135-137 (in Georgian).

[29] Irakli Dvalidze, Impact of Motive and Purpose on the Qualification of Actions and Criminal Liability (Dissertation, Tbilisi University Press 2008) 121 (in Georgian).

[30] Cf. Hill, McLeod and Tanyi, supra note 7, 546-549.

[31] Ramanauskas v. Lithuania, supra note 23, 55.

[32] Judgment of the European Court of Human Rights N39647/98, 40461/98 "Edwards and Lewis v. the

Before studying the ECtHR's standards, it is important to note that the Supreme Court of Georgia agrees and shares this practice, and refers to the citations derived from the ECtHR judgments. For example, in exchange for helping a person secure a job in a government office, the defendant demanded a bribe. The transaction of handing over the money was covertly recorded by the police. Both the trial court and appellate court found the defendant guilty, and the judgment was appealed to the Supreme Court. The Supreme Court, based on the ECtHR test, concluded that since the investigative body became involved in the process only after the defendant demanded the bribe, there was no room/need for entrapment.[33]

1. SUBSTANTIVE TEST

The ECtHR applies different criteria to assess whether the state's actions equated to entrapment. By a broad definition, it should be assessed whether a state initiated a crime or merely joined it. This latter falls within the permissible limits defined by Article 6 of the Convention, while "joining the crime" itself means that the role of the state in the process was "essentially passive', which in turn is determined by assessing whether the:

a) entrapment was carried out by law enforcement agent;
b) law enforcement body initiated contact with the defendant;
c) offer has been repeated despite refusals;
d) proposed price increased;[34]
e) investigative body acted insistently;[35]
f) provoking mechanisms were used to influence the defendant[36] (E.g., obtaining empathy by helping him/her in relieving drug withdrawal syndrome);[37]
g) prior evidence is available of the defendant's involvement in criminal activity;
h) law enforcement agent offered/received legal or illegal service;
i) the process was effectively supervised.[38]

United Kingdom", [GC] 27 October 2004. Paragraph 46. Judgment of the European Court of Human Rights N40412/98 "V. v. Finland", 24 April 2007. Paragraph 72. Judgment of the European Court of Human Rights N23782/06, 46629/06 "Constantin and Stoian v. Romania", 29 September 2009. Paragraphs 56-57.

[33] Judgement of Supreme Court of Georgia on case N497ap-16, 25 January 2017.

[34] Ronald J. Allen, Melissa Luttrell and Anne Kreeger, 'Clarifying Entrapment' (1999) 89 (2) Journal of Criminal Law and Criminology 414-415.

[35] Judgment of the European Court of Human Rights N74355/01 "Milinienė v. Lithuania", 24 June 2008. Paragraph 37.

[36] Dan Squires, 'The Problem with Entrapment' (2006) 26 (2) Oxford Journal of Legal Studies 363.

[37] Vanyan v. Russia, supra note 26.

[38] Cf. Hochan Kim, 'Entrapment, Culpability, and Legitimacy' (2020) 39 (1) Law and Philosophy 80-87.

1.1. ENTRAPMENT CARRIED OUT BY LAW ENFORCEMENT AGENT

The prohibition of entrapment is primarily the obligation of the state, and therefore, it applies to its representatives.[39] If the agent-provocateur does not represent the state either directly or indirectly, it means that Article 6 of the Convention is not violated. Direct representation refers to the cases where a law enforcement agency employs a person, whereas indirect representation involves individuals who are not formally employed by the agency but cooperate with it officially or unofficially, receive instructions, etc.[40]

The state representation should be effectively determinable, and the state should not be able to evade responsibility with artificial arguments. In the case of *Ramanauskas*,[41] the prosecutor-in-charge was contacted by a person who offered him a USD 3,000 bribe in exchange for dropping criminal charges. In the beginning, the prosecutor refused the offer but later, after repeated persistent requests, accepted it. The initiator of the bribe turned out to be an officer of the anti-corruption bureau.[42] The prosecutor was found guilty, with the primary evidence being wiretaps of exchange between the two. The state argued that the anti-corruption officer acted out of personal interest and did not represent the state, but the European Court disagreed, pointing out that the state had been involved in the criminal activity not from the official start of the investigative operation but from its very inception. Judging otherwise would allow the law enforcement body to abuse its powers.[43]

In the Georgian context, a challenge exists since the legislation regulating procedural and operative-investigative measures does not provide for either the definition of entrapment or the regulations related to its prohibition. By the definition given in Article 145 of the Criminal Code of Georgia, any person can be the subject of entrapment; albeit this definition cannot be considered as a comprehensive norm defining the term/concept since it pertains to substantive law, i.e., it identifies what exactly is criminalized. Consequently, the definition cannot be deemed relevant for state representatives.

It is recommended that the regulation governing both the procedural and operative-investigative measures formulates a comprehensive definition of entrapment that would include both the direct and indirect engagement of the state.[44]

[39] Allen, Luttrell and Kreeger, supra note 34, 421.
[40] For example, Ho, supra note 15, 74.
[41] Ramanauskas v. Lithuania, note 23, 67.
[42] ibid, 10-14.
[43] ibid, 62-64.
[44] In the USA, the Attorney General's guidelines set restrictions and defines other aspects. Additionally, there are state-level directives and constitutional provisions in the context of rights protection. See critical analysis, Stevenson, supra note 9, 162-166.

1.2. INITIATING CONTACT

The ECtHR emphasizes the aspect of initiating contact with the defendant. Once the law enforcement authority initiates the contact, it points to the presumption of entrapment, necessitating a thorough examination of the matter.

Entrapment extends to the cases when an agent, i.e., a state representative, causes the commission of a crime. Specifically, this refers to the situations, where a person did not do anything unlawful prior to the agent's involvement. If a person had already been engaged in criminal activity and the agent got involved afterward, Article 6 of the Convention is not violated. In the case of *Sequeira*,[45] it was found that persons A and C began cooperating with law enforcement agents after the applicant had already been involved in organizing an illegal transportation of cocaine (being in possession of one of them) to Portugal. Thus, A and C cannot be regarded as agent provocateurs. [46]

The above criterion is often applied in cases where investigative authorities receive information about potential crime not from covert but identifiable sources, such as, for instance, a private person.[47] In the case of *Shannon*,[48] the source of information on the possible commission of the crime was a journalist who was not a state agent and so did not act under police instructions/control. After receiving the information, the police got involved, which points rather to the "joining" than "instigating" the process.[49] The ECtHR upheld this approach in subsequent cases such as, for instance, the case of *Milinienė*.[50] A person contacted the police after being asked for a bribe to achieve the desired result. The police equipped the person with a wire, and the information about committing a crime was obtained in this manner. Clearly, the law enforcement authority influenced the course of events by equipping and instructing a person on how to participate in the special operation. Yet, it merely joined the criminal activity without initiating it. Therefore, Article 6 of the Convention was not violated.

Conversely, in the case of *Malininas*,[51] the contact with a defendant was initiated by police; the officer asked the latter where the drugs could be purchased. The defendant responded by offering the agent to supply the drugs; however, when offered a large amount of money, he got motivated to produce drugs himself. Considering that the

[45] Judgment of the European Court of Human Rights N18545/06 "Sequeira v. Portugal", 20 October 2009.
[46] Ho, supra note 15, 91-92.
[47] In this respect, the doctrines of private and public entrapment were developed in academic literature. See Daniel J. Hill, Stephen K. McLeod and Attila Tanyi, 'What Is the Incoherence Objection to Legal Entrapment?' 2022 22 (1) Journal of Ethics and Social Philosophy 48-50.
[48] Judgment of the European Court of Human Rights N6563/03 "Shannon v. the United Kingdom", N6563/03, 04 October 2005.
[49] About the British model see Squires, supra note 36, 355-360.
[50] Milinienė v. Lithuania, supra note 35.
[51] Judgment of the European Court of Human Rights N10071/04 "Malininas v. Lithuania", 01 July 2008.

police initiated the contact with the defendant and later instigated him by increasing the monetary offer, the police was qualified as the agent provocateur, pointing to the violation of Article 6.

The above-mentioned criterion is somewhat problematic in Georgian legislation. As it was noted, the risk of entrapment arises in practice with launching the operative-investigative measures. Article 8 of the Law on Operative-Investigative Activities defines the grounds for conducting such measures, stipulating, specifically for the purpose of entrapment, an assignment given by the prosecutor (or on his/her consent, by an investigator) to the operative(s) prior to or during the investigation. The law does not require justification for the assignment or the formulation of preconditions (including related evidence and formal details) in the relevant operative documentation. The absence of such instructions makes it difficult to identify the initiator and ensure that subsequent actions will be conducted in a safe environment, guaranteeing the protection of rights. Provided that operative information has a covert nature, the defendant becomes aware of the measures undertaken only at the stage of court proceedings or does not at all, which impedes elaboration of the defense strategy. Therefore, it is advisable to produce a written document of justification for such assignments, which will be attached to the criminal case materials, and thereby ensure the efficacy of the procedural guarantee stipulated by the ECtHR, as outlined above.

As for specifying the issues related to the initiator in the legislation, no such requirement exists currently in subsequent regulations. Nevertheless, the investigative authorities should strictly uphold all due guarantees, with the view that in the framework of legislative reforms, it will be of utmost importance to include the identification of the initiator as a criterion for commissioning entrapment. [52]

1.3. METHODS OF PERSUASION: REPEATED OFFERS, COERCION, PRICE INCREASE, ETC.

To classify an act as entrapment, the methods of persuasion employed by a law enforcement agent are taken into account. Specifically, it is assessed whether the state representative made the offer once or multiple times, whether coercive methods were used such as increasing price; manipulating a person through drug addiction, exploiting the knowledge of his/her personal problems, etc.[53] In practice, determining the level of influence exerted on an individual is extremely difficult.[54]

[52] Hill, McLeod and Tanyi, supra note 7, 542.

[53] Richard H. McAdams, 'The Political Economy of Entrapment' (2005) 96 (1) Journal of Criminal Law and Criminology 153-158.

[54] Squires, supra note 36, 362.

In the case of *Teixeira de Castro v. Portugal*,[55] two police officers contacted a person, and pretended to be interested in purchasing heroin. The person said he did not have it but suggested another person for the job. Not knowing that person's address, the concerned person asked the second individual. As a result, two police officers and these two individuals went to the suggested contact and expressed interest in buying heroin. It turned out that the contact person also did not have drugs and bought them from a third person who had been apprehended on the way back.

The ECtHR stated that the police officers approached the suspect through two other intermediaries. Furthermore, the defendant did not have heroin in possession; he obtained it from another person due to persistent requests; and when detained, was found to possess no more than the amount he had been requested for by said persons. Accordingly, there was no indication of the defendant's prior criminal intent/activity. Therefore, the police officers did not limit themselves to a "passive role" but, to the contrary, significantly influenced the defendant to commit a crime. The Court found clear evidence of entrapment and ruled that there was a violation of Article 6 of the Convention.[56]

The above-mentioned criteria established by the ECtHR should undoubtedly be incorporated into the legislation regulating procedural and operative-investigative measures since the absence of such is challenging. This issue is less problematic with regard to covert investigative activities since, thanks to the recent legislative amendments each procedure has been formulated in detail. However, when it comes to the operative-investigative measures, the relevant procedures remain minimally regulated. For example, the Criminal Procedure Code does provide detailed regulations on the rules for covert telephone surveillance and recording, procedural documentation and evidentiary standards, technical tools, supervisory bodies, document circulation systems, etc., while the Law on Operative-Investigative Activities lacks such details. According to Article 4, paragraph 2 of the mentioned law, the state bodies authorized to carry out operative-investigative activities are entitled to issue the internal legal normative acts on specific aspects of such activities within their jurisdiction, based on this law, the rule established by the law and the approval given by the Prosecutor General of Georgia. It should be noted, however, that these normative acts belong to the category of state-secret information, meaning that even in the case of detailed formulation of all procedures contained therein, they still cannot meet the criteria established for laws by the ECtHR.[57] Specifically, the law should be accessible to the public, either through proactive publication or upon request from the relevant authority; and secondly, the qualitative law must be clear and understandable.

[55] Teixeira de Castro v. Portugal, supra note 26.

[56] ibid, 37-39.

[57] Judgment of the European Court of Human Rights N45554/08 "Ashlarba v. Georgia", 15 July 2014. Paragraph 33.

Conversely, an opinion might emerge in academic literature suggesting that detailing such procedures could harm the interests of operative-investigative measures. While this argument is certainly noteworthy, it is not convincing. Outlining procedures for operative actions does not bring any jeopardy, while on the other hand, certain aspects such as measures of informants' control, number of meetings, etc., can be regulated through secret legal acts. It is notable as well that certain covert investigative activities, which previously had been considered as operative-investigative measures (E.g., covert telephone surveillance and recording), now have a clear and detailed procedure to follow that did not anyhow compromise the public interest.

Unlike the Criminal Procedure Code, the relevant legislation does not provide for documenting the process and outcomes of operative-investigative measures, resulting in the absence of records outlining the process and results of specific operations. As a result, it's impossible to determine how often the state agent asked the defendant to commit a crime, when these requests occurred, or whether he/she raised the price, among other factors. One could argue that this information might be obtained through interrogation during the investigation stage; however, this approach is ineffective.

If we follow this logic, it can be suggested that the same approach should be applied to covert investigation activity as well. Clearly, drafting a report and documenting the process and outcomes of conducted operative measures is a higher and the most required procedural guarantee for the defendant since it allows reconstructing a full picture without prejudice, by excluding the risk of forgetting any detail/information.

According to Article 7, paragraph 7 of the Law on Operative-Investigative Activities, an official report should be drafted when carrying out operative measures reflecting the conditions under which technical means were used. This report, along with the obtained materials, is kept in compliance with the rules established by law. As it comes out, this requirement makes drafting the report only necessary when the technical means were used during operation(s). Moreover, the law does not specify the mandatory elements to be included in the report, which undoubtedly is a legislative gap.

1.4. PRIOR EVIDENCE ON A PERSON'S INVOLVEMENT IN CRIMINAL ACTIVITY

When planning entrapment, it is important to analyze the evidence available prior to the involvement of state agents in the actual process of committing a crime by a person.[58] In case such evidence exists, the issue of entrapment becomes less relevant, and vice versa.[59]

[58] David M. Tanovich, 'Rethinking the Bona Fides of Entrapment' (2011) 43 (2) U.B.C. Law Review 428-438.

[59] Squires, supra note 36, 364-366.

In the previously discussed case of *Ramanauskas v. Lithuania*,[60] the court noted that there was noother evidence of the defendant's involvement in criminal activity prior to offering him a bribe, which became one of the prerequisites of violating Article 6. Similarly, the lack of evidence of the applicant's involvement in criminal activity resulted in qualifying police action as entrapment in the *Teixeira* case described above. Namely, the defendant did not have a criminal record, nor was it found any evidence in the process of investigation pointing to his linkage with drugs. This factor turned out to be crucial for qualifying the state action as entrapment.[61] The court extended the same reasoning to the cases of *Eurofinacom*,[62] *Vanyan*,[63] *Khudobin*,[64] etc.

Possessing comprehensive information about the crime is not sufficient for proving a person's predisposition to commit one. As seen in the cases mentioned above, the court had often placed emphasis on the criminal history of a person in order to assess whether he/she was involved in criminal activity at the time of the legal proceedings[65]. The ECtHR specifies the approach further by stating that criminal history is the one but not sufficient indicator. In the case of *Constantin and Stoian*, an indication of the defendant's criminal history only when no other facts existed (no drugs were found in possession of the first defendant or in the house of the second defendant) was considered insufficient.[66] Existence of sufficient evidence could have been a person's visible proximity to narcotic drugs, ability to acquire them in a short period of time, etc.[67]

As noted repeatedly, Georgian legislation does not recognize the concept of entrapment, nor does it provide a list of criteria to assess whether the operative actions can be qualified as entrapment. This can be seen as a legislative gap, requiring the formulation of a corresponding definition and a list of criteria to address this gap.[68]

1.5. OTHER CHALLENGES RELATED TO SUBSTANTIVE TEST

One of the key issues related to the substantive test is whether the state offered/received a legal or illegal service since offering/receiving an illegal service creates a presumption of entrapment. E.g., if a state representative offers a city mayor a bribe in exchange for

[60] Ramanauskas v. Lithuania, supra note 23, 67.
[61] Teixeira de Castro v. Portugal, supra note 26, 37-38.
[62] Judgment of the European Court of Human Rights N58753/00 "Eurofinacom v. France", 2004-VII.
[63] Vanyan v. Russia, supra note 26.
[64] Khudobin v. Russia, supra note 26.
[65] Cf. Chris D. Sa, 'Entrapment: Clearly Misunderstood in the Dial-a-Dope Context' (2015) 62 (1-2) Criminal Law Quarterly 200-208.
[66] Constantin and Stoian v. Romania, supra note 32, 55.
[67] Shannon v. the United Kingdom, supra note 48.
[68] Cf. Khudobin v. Russia, supra note 26, 135; Vanyan v. Russia, supra note 26, 46-47; Teixeira de Castro v. Portugal, supra note 26, 38. Ramanauskas v. Lithuania, supra note 23, 64. Judgment of the European Court of Human Rights N7614/09, 30863/10 "Volkov and Adamskiy v. Russia", 26 March 2015. Paragraph 36.

a construction permit, this creates a presumption of entrapment, which must be rebutted by other parameters presented. The opposite scenario arises when a state representative offers or receives legal services from a person.[69] The ECtHR generally views such cases as passive involvement of the state.

The issue of whether the investigation was essentially passive was assessed in the case of *Volkov and Adamskiy*. A police officer called Volkov and asked to update his computer software. While talking, the officer mentioned the low price of the service, to which Volkov responded that he had been getting the software through semi-legal means. A similar situation took place with Adamskiy. Both were arrested for copyright infringement.[70] Unlike the *Teixeira de Castro* case, here, the police officer requested the individual to engage in legal activity. Services for software programming are legal, and the officer's request did not suggest entrapment as he did not initiate the crime but joined it. Thus, there was no violation of Article 6 of the Convention.[71]

A comparable situation occurred in the *Kuzmickaya* case. The law enforcement agent ordered drinks to determine whether customers were deceptively served smaller quantities of alcohol. It was found that customers were indeed being deceived, which resulted in holding the defendant accountable. Hence, the right to a fair trial was not violated in this case as well.[72]

Effective oversight is a separate subject of assessment. Legal guarantees become illusory without strong element of oversight. According to the ECtHR, judicial supervision serves as the most adequate mechanism for covert operations.[73] Absence of procedural safeguards in the court ruling authorizing covert police actions increases the risk of arbitrariness and entrapment.[74] In the Georgian context, covert operations include both the covert investigation activity and the operative-investigative measures.

Covert investigative activity is regulated by procedure law and is subject to effective judicial oversight. As for the operative-investigative measures, they are regulated by Article 21 of the special law and Article 25 of the Organic Law on the Prosecutor's Office. Generally, judicial oversight of the operative-investigative measures is limited. Law enforcement agencies can obtain information regarding a judge's telephone communications (such as time and duration of calls) only through a

[69] Ho, supra note 15, 81.
[70] Volkov and Adamskiy v. Russia, supra note 68, 7-15.
[71] ibid, 40-44.
[72] Judgment of the European Court of Human Rights N27968/03 "Kuzmickaja v. Lithuania", N27968/03, 10 June 2008.
[73] Khudobin v. Russia, supra note 26, 135.
[74] Judgment of the European Court of Human Rights N5753/09, 11789/10 "Nosko and Nefedov", 30 October 2014. Paragraph 64.

ruling by the Chairperson of the Supreme Court of Georgia based on a reasoned motion issued by the Prosecutor General.

Information on the individuals - confidential informants to the operative-investigative body, degree of their cooperation as well as tactics of obtaining operative information, organization of actions, operative files and the confidential part of actions are not subject to the prosecutorial oversight. Access to such information is granted only to higher officials of the Prosecutor's Office, as provided under Article 25, paragraph 2 of the Organic Law.

As outlined above, neither ex ante nor ex post judicial oversight is envisaged for operative-investigative measures that creates challenges in aligning them with European standards. E.g.: controlled deliveries can be carried out without such oversight. In practice, those are conducted through covert investigation activity such as covert audio or video recording, which do require judicial control. However, this control is clearly insufficient for ensuring adequate scope of oversight for operative actions.[75]

Prosecutorial oversight is a very important institution; however, proceeding from the doctrine of separation of powers, such oversight functions should rest not with prosecution but with an independent branch of the government - the judiciary. Procedures and guarantees of prosecutorial oversight are not codified at the legislative level, which makes unclear what specific measures this control should be composed of. Additionally, it is problematic to leave the tactics and methods of operative measures out of control, as those directly determine the degree of interference with human rights. E.g.: how many times an individual was approached with the offer of engaging in criminal activity, which method was used during the conversation, the tone and manner of communication, etc. If it is argued that prosecutorial oversight of tactics and methods used poses a risk to operative-investigative measures (which is unlikely), then it would be advisable for the legislation to incorporate respective guarantees (to mitigate those risks) rather than abandoning the oversight altogether.

2. PROCEDURAL TEST

The procedural test for assessing entrapment exercised by the state body aims to ensure that the overall process is fair. More specifically, the state should provide the defendant with adequate legislation and practices to effectively protect him/her from entrapment. While the ECtHR does not prescribe specific systems, it establishes minimum criteria that a legal system shall comply with and effectively implement in practice. The process shall meet the following standards:[76]

[75] See the similar argumentation on the example of UK, Squires, supra notes 36, 367.

[76] For example, Judgment of the European Court of Human Rights N31536/07 "Tchokhonelidze v. Georgia", 28 June 2018. Paragraph 46.

a) Defendant shall be able to obtain and present evidence against alleged entrapment. The legal proceedings should adhere to the adversarial principle, ensuring a comprehensive and thorough examination of issues;

b) The burden of proof to establish the absence of entrapment lies with prosecution;

c) National courts shall thoroughly examine:

c.a) The reasons for initiating covert investigative activity and operative-investigative measures against defendant;

c.b) Degree of state's involvement in the process;

c.c) Type of pressure/entrapment the defendant was subjected to;[77]

d) Court shall uphold the general standards of the right to a fair trial, including ensuring the cross-interrogation of agents and other individuals involved in the alleged entrapment. At a minimum, there must be objective circumstances[78] justifying the impossibility of such cross-examination that should be balanced by other factors;[79]

e) The court in its judgment shall provide reasoned responses to the defense's claims regarding entrapment.[80]

The ECtHR examines whether human rights were violated, but it is not authorized to review the decisions made by internal courts. It studies materials gathered during the investigation and hearing phases of the process. The court cannot establish factual circumstances independently; and in practice, there have been cases, where the state did not investigate the fact of entrapment, i.e. did not apply the procedural test for this purpose.[81]

Procedural test became challenging in *Tchokhonelidze's* case.[82] Based on the facts, the defendant serving as a deputy governor demanded USD 30,000 from a person in exchange for help with getting him a construction permit. Police recorded the events of handing over the money and subsequent meetings, gave the defendant marked money, and detained him. The ECtHR could not be provided with the evidence obtained internally; so, it was unclear whether the bribe was initially demanded by the agent or offered by the defendant. Consequently, it could not be established whether the

[77] Bannikova v. Russia, supra note 22, 48.

[78] Judgment of the European Court of Human Rights N26766/05, 22228/6 "Al-Khawaja and Tahery v. The United Kingdom", 15 December 2011; Judgment of the European Court of Human Rights N9154/10 "Schatschaschwili v. Germany", 15 December 2015.

[79] Judgment of the European Court of Human Rights N28823/04 "Bulfinsky v. Romania", 01 June 2010. Paragraph 45.

[80] Judgment of the European Court of Human Rights N17711/07 "Sepil v. Turkey", 12 November 2013. Paragraphs 37-40. Constantin and Stoian v. Romania, supra note 32, 64.

[81] Constantin and Stoian v. Romania, supra note 32, 56-57.

[82] Tchokhonelidze v. Georgia, supra note 76.

substantive test was adhered to, which compelled the Court to focus on procedural test instead. The defendant argued that by being engaged in the act of bribery he was subject to entrapment; alleging that the person giving the money was an agent provocateur. The prosecution failed to present any arguments to rebut the claim. At the same time, the operative-investigative measures were not subject to judicial oversight under the applicable legislation: according to Article 7, paragraph 3-7, the infiltration of undercover agents does not require judicial control.[83] Furthermore, in the process of substantive examination, the court did not find the reasons for initiating the operative-investigative measures, nor did it clarify the scope of the agent's involvement or potential entrapment/pressure exercised. In addition, the court did not provide for the possibility of cross-interrogation of the second agent. Hence, this part of the process was not conducted in accordance with the adversarial principle. Thus, the integrity of the procedural test was violated.[84]

It is important to assess compliance of Georgian legislation regulating procedural aspects and operative-investigative activity with the European standards in light of the procedural test.

2.1. CHALLENGES WITH ADMISSIBILITY AND ACCEPTANCE OF THE EVIDENCE OBTAINED THROUGH ENTRAPMENT

Admissibility of evidence is examined at the pre-trial hearing stage, while its acceptance is determined during the substantive hearing. According to Article 82, paragraph 1 of the Criminal Procedure Code of Georgia, evidence shall be assessed based on its relevance, admissibility, and reliability in connection with the criminal case. This provision primarily relates to the evaluation of evidence during the acceptance stage, but these criteria are also applied at the admissibility stage.[85] In legal doctrine, the admissibility stage is referred to as the verification of evidence, while the acceptance stage pertains to its evaluation.

There are various factors that exclude admissibility such as challenges with obtaining, procedural attachment, or the exchange of evidence. However, in the context of entrapment, assessing the admissibility of evidence upon its acquisition is important. According to Article 72, paragraph 1 of the Criminal Procedure Code, the evidence obtained with a substantive violation of the law as well as other evidence lawfully obtained based on such (first) evidence - in case it worsens the legal position of the defendant - is inadmissible and has no legal force.

[83] Cf. Judgment of the European Court of Human Rights N23200/10, 24009/07, 556/10 "Veselov and Others v. Russia", 02 October 2012. Paragraph 111.

[84] Tchokhonelidze v. Georgia, supra note 76, 49-52.

[85] For European Court practice on admissibility in the context of entrapment see Philip Leach, Taking a Case to the European Court of Human Rights (Oxford University Press 2013) 364-367 (in Georgian).

As mentioned above, the legislation regulating covert investigation activity and operative-investigative measures does not explicitly prohibit entrapment; however, both legislative acts prohibit deception that can be interpreted as including entrapment as well. On the other hand, Article 145 of the Criminal Code criminalizes entrapment. In practice and doctrine, the evidence obtained through entrapment, based on these legal grounds, should be considered as obtained with a substantive legal violation and, therefore, inadmissible. In this context, the Constitutional Court's judgement[86] is noteworthy, stating that any violations of the law be it the Criminal Code or the law on operative-investigative actions, shall be the grounds for considering evidence as inadmissible.

Another issue is whether the court can examine admissibility during the pre-trial hearing, as determining whether an individual was a victim of entrapment requires substantive investigation. While it is unlikely that this issue will be thoroughly examined at the pre-trial stage, is it still possible, therefore, the court should not limit itself or "make its work easier" by claiming the issue should only be addressed during substantive hearing?[87] E.g., A covert audio-video recording shows that a state agent offers narcotic drugs to the person who refuses to get it, but finally succumbs to pressure. In case of absence of the criminal record on this person, the mentioned recording with all related evidence shall be deemed inadmissible (similar to the "fruit of the poisonous tree" doctrine), and criminal prosecution shall terminate.

As for the acceptance of evidence, this issue is addressed once the court examines the evidence and draws up a judgment. The acceptance procedure is broader and includes the criteria for admissibility as well. At this stage, the judge has the opportunity to evaluate the version of entrapment. If such a fact is established, the obtained evidence clearly shall not be accepted.

An opinion might emerge in legal doctrine that if an investigation initiated under Article 145 of the Criminal Code fails to establish a fact of entrapment, with no responsibility imposed on anyone, the issue of evidence acceptance cannot be assessed. Such an opinion is inaccurate as the evidence in criminal proceedings is evaluated based on the procedures established by procedural legislation. Judges have procedural tools to examine the issue independently from the outcomes of another investigation, ensuring that the defendant's rights are not violated.

Inadmissibility, refusal on acceptance of the evidence, or automatic acquittal?

This issue causes controversies in legal literature – shall the evidence obtained through entrapment be considered inadmissible, not accepted, or shall the concerned person

[86] Judgement of the Constitutional Court of Georgia on case N 2/2/579, "Maya Robakidze v. Parliament of Georgia", 31 July 2015.

[87] For admissibility of entrapment see Giorgi Tumanishvili, Criminal Procedure, An Overview of the General Part (1st edition, World of Lawyers Publishing 2014) 284–291 (in Georgian).

be automatically acquitted?[88] In the landmark *Sorrells* case, the court left the final judgment on the jury, i.e. the issue was not assessed in the prism of admissibility of the evidence. Over time, this practice has changed, and cases involving entrapment were no longer presented to juries.[89]

In German legal doctrine, the issue of outcomes of entrapment has become the subject of debate following an ECtHR judgment of 2014,[90] which criticized the German approach established in practice.

A so-called *procedural obstacle based approach* prevails in German legal doctrine, meaning that if the state instigated a crime, it loses the right to issue a sentence.[91] Another approach suggests that the evidence obtained through the agent provocateur should not be accepted. [92] This perspective is argued to derive directly from the constitution, associated with the legal principle of excluding improperly obtained evidence from judicial proceedings.[93]

Before the ECtHR's *Furcht* case, Germany's Federal Court was guided by a so-called *sentence-based approach*,[94] whereby the fact of alleged entrapment should be assessed during sentencing instead of deeming it as a substantive factor excluding criminal liability. This means that entrapment was considered as a mitigating factor only, not having any other effect at all. Notably, this approach replaced the earlier dominant "procedural obstacle" approach applied by the German Federal Court.[95]

The compliance of the sentence-based approach with legal principles was verified by the Constitutional Court of Germany as well[96]. However, in the *Furcht* case, the ECtHR sharply criticized this approach[97], arguing that the sentence-based model contradicts the right to a fair trial and that mitigation of sentence cannot compensate for the negative effects of state-led entrapment.[98]

---

88 Roth, supra note 10, 1003.

89 ibid.

90 Judgment of the European Court of Human Rights N54648/09 "Furcht v. Germany", 23 September 2014.

91 Bernd Heinrich, 'State Entrapment' (2016) 1 German-Georgian Journal on Criminal Law 25 (in Georgian).

92 On criticizing the model, See Ho, supra note 15, 88.

93 Heinrich, supra note 91, 26.

94 According to the US practice, undercover agents determine themselves the quantity of drugs or type of weapon used in covert operations, which affects the penalty. This was the reason of developing a doctrine of sentence reduction. See Stevenson, supra note 9, 198-206.

95 Heinrich, supra note 91, 26.

96 ibid, 28.

97 For the US context See Kirstin Kerr O'Connor, 'Sentencing Entrapment and the Undue Influence Enhancement' (2011) 86 (2) New York University Law Review 615-618.

98 Furcht v. Germany, supra note 90, 70.

Following the above-mentioned case, Germany's Federal Court revisited its approach and opted for the procedural obstacle model.[99] However, the new practice cannot be considered finally introduced, as the matter has not been heard by the Grand Chamber, nor has the Federal Court's panel heard differing opinions from other panels.[100]

Professor Heinrich supports the procedural obstacle approach, arguing that the national courts' downplaying of the ECtHR's judgment undermines the idea of European Union integration and should not be supported. He also notes that further research is needed in legal doctrine to determine whether exceptions might exist; where, depending on the degree of entrapment, an approach other than the procedural obstacle model could be applied.[101]

The ECtHR does not provide detailed guidance on how states should implement its requirements, specifically which model they should adopt. The primary standard in this regard is that a sentence shall not be based on the evidence obtained in such a manner. Beyond this, compliance with European standards is a matter to be resolved at the national level.

Regarding the Georgian context, as noted, the legislation leaves room for its interpretation, which in turn allows the court to consider such evidence inadmissible or refuse to accept it. However, the practical aspects of this matter are particularly interesting.

The Supreme Court of Georgia, referring to the *Ramanauskas* case,[102] states the following: "The ECtHR in one of its rulings explicitly notes that the use of undercover agents in investigation processes does not violate the guarantee established under Article 6, paragraph 1 of the European Convention. In general, incitement of individual by an undercover agent does not exclude his/her criminal liability. Entrapment does not exempt the concerned individual from criminal liability from a substantive legal perspective".[103]

The Supreme Court's argument that entrapment does not exempt a person from criminal liability from a substantive legal perspective is not an ECtHR standard. The Court of Cassation quotes an argument presented by the Lithuanian Supreme Court, which had to be reviewed by the ECtHR.[104] Moreover, it does not fall within the ECtHR's prerogative to determine which act constitutes a crime; it should be addressed at the national level.

[99] German Federal Court of Justice (BGH), Judgement of 10 June 2015 N2 StR 97/14, Criminal Law Advocates Forum (StraFo) (2015) 509.
[100] For details on the procedure, see Heinrich, supra note 91, 28.
[101] ibid, 30-31.
[102] Ramanauskas v. Lithuania, supra note 23.
[103] Judgement of Supreme Court of Georgia on case N128ap-16, 28 July 2016.
[104] Ramanauskas v. Lithuania, supra note 23, 27.

Instead, the ECtHR evaluates whether, in the absence of evidence obtained through entrapment, there remains a legal basis for convicting a person.[105]

Given this error, it shall be assumed that Supreme Court's position on the matter does not exist. Furthermore, the sentence-based approach prevalent in German doctrine and legal practice should not be unequivocally replicated since it would allow the state to exploit the system by, for instance, repeatedly imposing minor penalties on the concerned person that would ultimately lead to the same result. Regarding the procedural obstacle-based approach, it can align with acquittal in the Georgian legal context; however, a question arises: should entrapment always lead to acquittal? Let us take the example of a person who had been persistently asked by the agent to produce counterfeit banknotes in exchange for a large sum of money. The individual refused the offer at the beginning but finally agreed. The audio and video surveillance materials were produced as evidence of the crime. The arguments given above make clear that the operative-investigative activities conducted in this manner are unlawful under Georgian legislation. Consequently, the evidence obtained in this way is inadmissible; and specifically it refers to the operative materials and the results of covert investigative measures since, it can be assumed that there are other private individuals - eyewitnesses to the process of making an offer, transferring money, or production of counterfeit banknotes - who can testify against the person in court. Therefore, there might be additional evidence against the person sufficient for conviction.

With regard to the above example, the ECtHR's standard requires that the court should not rely on the information obtained through special investigation measures. On the other hand, the question arises as to what approach should be taken regarding other evidence. One position might be that the state "created" only the evidence obtained through operative and covert investigative measures, while the testimonies of private persons exist independently and should not, therefore, be deemed inadmissible. Others argue that without the state's (covert) actions, the testimonies of private individuals would not have existed either, making their statements inadmissible as well.

From the outset, it should be clarified that this article addresses procedural issues and does not evaluate whether such actions constitute a crime in a substantive legal sense. With this in mind, the second position is more compelling, since accepting the first position would strip the defendant of the procedural guarantees against entrapment.[106] For example, state agents could attempt various methods to convey information to private individuals regarding the offer or possession of narcotic drugs, thereby rendering the prohibition of entrapment illusory.[107]

[105] Nana Mchedlidze, Standards for the Application of the European Convention on Human Rights by Georgian Common Courts (Study prepared within the framework of the EU and Council of Europe project 2017) 118-119 (in Georgian).

[106] For the similar practice of Canada, UK and other countries see Stevenson, supra note 9, 155-157.

[107] Ho, supra note 15, 88.

The above discussions may seem straightforward, not requiring further depth. Yet we can consider another example: a state agent has convinced a person to kill a government official. The person agreed, acquired a gun, and started preparing for the crime. For some reason, the law enforcement officers failed to stop the person who eventually committed a murder.[108] What happens to the evidence in such a case - the evidence proving the preparation and attempt and the evidence proving the completed crime?

2.2. RIGHT OF THE DEFENSE TO ACCESS EVIDENCE

According to ECtHR standards, the defense should be authorized to have access to the evidence.[109]

Article 83, paragraph 1 of the Criminal Procedure Code of Georgia provides for the procedure of transferring the evidence by the prosecution to the defense, upon relevant request. The same norm stipulates that the prosecution should make available to the defense the exculpatory evidence as well. This right may be restricted when it comes to covert investigation activity and operative-investigative measures before the pre-trial session upon the prosecution's motion. At least five days before the pre-trial hearing, both parties must disclose to each other and to the court all evidence they intend to present during the trial.

As seen above, the obligation to provide exculpatory evidence arises only under Article 83, paragraph 1, in case the defense requests the latter. On the other hand, this right may be restricted with regard to the materials related to alleged entrapment (covert investigation activity and operative-investigative measures) before the pre-trial session. The procedure of transferring evidence before the second pre-trial session does not mention exculpatory evidence but rather requires the disclosure of the evidence, which the prosecution is going to present in court. Hence, it may result in the prosecution withholding, for example, the evidence of an agent provocateur's initiation of the defendant's involvement in criminal activity. Besides operative-investigation measures, the prosecution might also refrain from transferring to the defense the covert audio-video recordings showing attempts of inducement.

This literal, word-for-word interpretation of the law is incorrect. Otherwise, if the defense requests evidence five days before the pre-trial session, it will be provided with the exculpatory evidence as well; but if the evidence is provided to the defense mandatorily, it may not include exculpatory evidence. Hence, it means that the defense should receive exculpatory evidence in all cases.

[108] For the issue of entrapment within the prism of so-called victimless crimes see Stevenson, supra note 9, 128-129.

[109] Judgment of the European Court of Human Rights N11170/84, 12876/87, 13468/87 "Brandstetter v. Austria", 1991. Paragraph 67.

Even with a correct interpretation of the law, it is still possible that the defense might not receive the evidence confirming entrapment. For example, if an agent provocateur contacts the victim via mobile phone and the conversation is covertly recorded, the prosecution might withhold the initial communication and provide only the subsequent recordings, where the actions of the state as the initiating agent are not visible. The defense would have no means to obtain these recordings as there aren't/can't be effective procedural safeguards in place to address this issue. The ECtHR emphasizes that the burden of proof to demonstrate the absence of entrapment lies with the prosecution.[110] Moreover, under Article 72, paragraph 3 of the Criminal Procedure Code of Georgia, the burden of proving the admissibility of evidence of the prosecution and of the inadmissibility of the evidence of the defense lies with the prosecutor. This logic applies to sharing evidence during the substantive examination of the case. The court must effectively apply this norm once the defense indicates that initial contact or other significant fact, the evidence of which is exclusively in the prosecution's possession, occurred. If the prosecution fails to provide detailed and credible information, the court should consider that suspicions of entrapment remain unresolved and should not accept the evidence.

2.3. OBLIGATION TO PROVIDE REASONING ON THE FACT OF ENTRAPMENT IN JUDGMENT

The ECtHR states that the procedural test requires proper reasoning regarding entrapment raised by the party, in final judgment.[111] In general, the reasoning of judgment is a crucial component of a fair trial. According to Article 259, paragraph 1 of the Criminal Procedure Code of Georgia, the judgment would be legitimate, reasoned, and fair. Moreover, Article 260 provides a detailed list of the issues to be addressed in judgment. Hence, Georgian legislation complies with European standards on the matter.

However, the application of this very criterion may be challenging in practice. In judicial practice, the most frequently cited judgments of the ECtHR are those emphasizing that a court is not obligated to address each and every argument raised by the parties but should focus on the principal issues. Notably, in many of these cases, violations were found precisely because the judgment lacked sufficient reasoning. Although it should be noted, that national courts use judgments for other reasons.

The above-described practice is rather common; however, applying reasoning towards entrapment would violate the integrity of the procedural test, and consequently – the right to a fair trial. Hence, courts should thoroughly examine arguments presented by the parties' arguments concerning entrapment.[112]

[110] Ramanauskas v. Lithuania, supra note 23, 70-71.
[111] Tchokhonelidze v. Georgia, supra note 76, 53.
[112] For example, the ruling of the Supreme Court of Georgia on case N799ap-22, 26 September 2022; the

IV. WAYS OF TRANSPOSING THE U.S. PRACTICE AND DOCTRINE TO THE GEORGIAN LEGAL FRAMEWORK

1. SUBJECTIVE THEORY (DOCTRINE)

In the U.S., the subjective doctrine is applied at the federal level and in the majority of states .[113] It was established through the doctrine and does not have a legislative basis.[114]

The subjective test for prohibiting entrapment considers so-called inducement measures legitimate if they target the individual predisposed to committing a crime.[115] If predisposition cannot be established, then these procedural actions shall be deemed as entrapping.[116]

Specifically, the subjective test for prohibiting crime provocation has two dimensions: a) the individual should present the evidence showing that state agents encouraged or induced him/her to commit a crime[117]; if such evidence does not exist, the entrapment prohibition doctrine cannot be invoked; b) if such evidence is provided, the burden of proof will be shifted towards the state. Namely, the state will have to prove, beyond a reasonable doubt, that the individual was predisposed to commit a crime.[118] If the state fails to do so, the individual shall be acquitted.

In the U.S. practice, the first part of the test is relatively easy to prove. Inducement is interpreted broadly and includes "requesting, offering, initiating, or indicating the commission of a crime."[119] It is clear that inducement aims more than merely creating an opportunity to commit a crime.[120] E.g., offering a person to buy narcotic drugs at the market price does not qualify as an inducement.[121] Yet, the act of inducement does not require that the agent's actions inevitably or categorically lead to the crime being committed; it is sufficient to create the opportunity.[122] As noted in the case of *Sorrells v.*

ruling of the Supreme Court of Georgia on case N397ap-20, 13 October 2020; the ruling of the Supreme Court of Georgia on case N145ap-22, 8 June 2022; the ruling of the Supreme Court of Georgia on case N903ap-21, 26 November 2021.

[113] For example, Judgement of the US Supreme Court, Jacobson v. United States, U.S. 540, 548-49 (1992).

[114] Allen, Luttrell and Kreeger, supra note 34, 407-410.

[115] Vincent Chiao, 'Policing Entrapment' (2021) 44 (1) Manitoba Law Journal 305.

[116] Ho, supra note 15, 82.

[117] For different definitions of instigation see Kevin A. Smith, 'Psychology, Factfinding, and Entrapment' (2005) 103 (4) Michigan Law Review 767-774.

[118] Dillof, supra note 1, 831-832.

[119] For example, Judgment of the United States Court of Appeals, Second Circuit, United States v. Dunn, 779 F.2d 157, 158 (2d Cir. 1985).

[120] Judgment of the United States Court of Appeals, Eight Circuit, United States v. Randolph, 738 F.2d 244 (8th Cir. 1984).

[121] Judgement of Alabama Court of Appeals, Ruggs v. State, 601 So.2d 508, 511 (Ala. Crim. App. 1992).

[122] Judgment of the United States Court of Appeals, District Columbia Circuit, United States v. Kelly, 748 F.2d 691, 691 (D.C. Cir. 1984).

United States, repeated requests to buy alcohol, combined with the shared background of both the agent and Sorrells as war veterans, were considered as an inducement.[123] Similarly, appealing to the withdrawal symptoms and evoking pity is enough to meet the required level for entrapment.[124] In reality, there is no established formal level the effort should meet (the degree of coercion, persuasion, or pressure) in order to be qualified as entrapment.[125] The essential factor, of course, is the instigator's connection to law enforcement agencies.[126]

Assessing to whether a person is predisposed to commit a crime depends on the period before the contact with investigation authorities.[127] The question to be answered is whether the individual "was ready and willing to commit the crime" when "he/she had been given the opportunity."[128] Clearly, this cannot be determined by simply asking the defendant.[129] Investigative authorities use other methods to obtain this information.[130]

In judicial practice, several factors have been identified as relevant when assessing a predisposition to commit a crime: [131]

a) A person's character, reputation, and criminal record; [132]

b) Whether investigative authorities had previously offered a person to be engaged in criminal activity;

c) Whether a person participated in the crime for personal gain;

d) The nature and intensity of inducement;

e) and the most importantly, whether a person resisted the law enforcement agent, that required the next series of inducement attempts.

True, the factors "b", "d", and "e" refer to the conduct of law enforcement authorities but are crucial in determining predisposition. If the inducement had not been extensive and the individual committed a crime, that indicates a high degree of predisposition.[133] Consequently, if an obvious fact of formal inducement did not occur, the entrapment

[123] Sorrells v. United States, supra note 14, 435, 439-440.
[124] Sherman v. United States, supra note 17, 369, 370-71.
[125] Dillof, supra note 1, 832.
[126] ibid, 833.
[127] Jacobson v. United States, supra note 113, 540, 549.
[128] ibid.
[129] Dillof, supra note 1, 833.
[130] ibid.
[131] Judgment of the United States Court of Appeals, Ninth Circuit, United States v. Smith, 802 F.2d 1119, 1125 (9th Cir. 1986); Judgment of the United States Court of Appeals, Seventh Circuit, United States v. Fusko, 869 F.2d 1048, 1052 (7th Cir. 1989).
[132] See the UK practice, Squires, supra note 36, 369-371.
[133] Jacobson v. United States, supra note 113, 540, 550.

prohibition doctrine will not apply.[134] Conversely, if the level of inducement is high, the doctrine will come into play, and balancing factors will need to be assessed.[135] Investigation authorities rely on the individual's factual actions following the inducement to determine the predisposition to the crime while being induced.[136]

Other aspects of the limits of prohibited entrapment require further examination. For instance, if an individual had a strong desire to commit a crime but could not physically accomplish it without the intervention of state agents, does this qualify as entrapment? E.g., person A wanted to counterfeit money but could not do so without equipment provided by the official body.[137] Similarly, should an individual be considered predisposed to crime if he/she had a wish to engage in criminal activity, but the behavior of state agents actually discouraged his/her involvement? And finally, how aligned must the committed crime be with a person's original intent? For instance, if a person intended to sell a specific type and quantity of drugs to the representatives of a specific group, but was induced to sell a different type and quantity of drugs to another group, does this constitute predisposition? These issues require separate analysis and research.[138]

2. OBJECTIVE THEORY (DOCTRINE)

In contrast to subjective doctrine, the objective doctrine is structurally simpler. The sole principal issue is determining whether the state agent's behavior created a significant risk that such a crime would be committed "by a person not predisposed to commit the crime" or, in other words, "by a law-abiding citizen."[139] This formulation of protection against entrapment is not shared at the federal level and in most states in the USA.[140]

According to the objective test, proving entrapment automatically leads to the acquittal of the defendant. The law enforcement is prohibited from "creating" a crime, as its primary obligation is its prevention.[141] Supporters of the test argue that the main purpose of the doctrine is to exclude the inappropriate behavior of law enforcement officers from the realm of criminal justice, [142] ensuring that the integrity of justice is protected from unethical actions of police officers.

Unlike the subjective test, an individual's characteristics, including the predisposition to crime, are irrelevant for the objective test. The objective test focuses more on the

[134] Gideon Yaffe, 'The Government Beguiled Me: The Entrapment Defense and the Problem of Private Entrapment' (2005) 1 (1) Journal of Ethics & Social Philosophy 7-15.
[135] Dillof, supra note 1, 834.
[136] ibid, 833.
[137] ibid, 835.
[138] ibid.
[139] Yaffe, supra note 134, 15-23.
[140] Dillof, supra note 1, 835.
[141] Ho, supra note 15, 84-84.
[142] Sorrells v. United States, supra note 14, 459.

actions of law enforcement agents,[143] trying to reveal what influence such behavior might have on society in broad terms rather than specifically on the defendant. Surely, the defendant must demonstrate that he/she was the target of law enforcement actions. According to the objective standards, entering into a close personal,[144] sexual relationship[145] or offering an excessively large sum of money[146] shall be deemed as inappropriate behavior.

A common challenge with implementing the objective test arises when considering the characteristics of a hypothetical law-abiding person not predisposed to commit a crime. For example, if a defendant, being a drug consumer, points to the fact of entrapment, should the court assess the case from the perspective of a person who does not consume drugs or of a person in recovery when neither of whom is predisposed to commit a crime? These alternatives may affect how the test's substance is interpreted, as capturing drug users may require less intense efforts compared to non-users.[147]

3. APPLICATION OF LEGAL THEORIES AT FEDERAL AND STATE LEVELS

3.1. FEDERAL LEVEL

At the federal level, the subjective doctrine of entrapment prohibition dominates. Over the years, it has been a common practice to resort to undercover operations such as sending minors into stores to purchase tobacco or alcohol to identify the facts of selling one to those.[148] Other examples are the state agents dressed provocatively and hanging out in special locations in order to get offers or acting as vulnerable victims to provoke a crime against them, disguising as taxi drivers in districts with high incidences of crime or conducting control purchases or supply of narcotics and other prohibited items. Operating pawnshops, where law enforcement agents would "buy" an unlawfully obtained property, used to be a widespread practice in the US as well.[149]

One notable example of the application of subjective doctrine at federal level is a so-called Operation Looking Glass. This precedent is noteworthy because, on the one

[143] Chiao, supra note 115, 305.
[144] Judgement of the Florida Court of Appeals, Dial v. Florida, 799 So. 2d 407, 409-10 (Fla. Dist. Ct. App. 2001).
[145] Judgement of Michigan Court of Appeals, People v. Wisneski, 292 N.W.2d 196, 199 (Mich. Ct. App. 1980).
[146] Judgement of Alaska Supreme Court, Grossman v. State, 457 P.2d 226, 230 (Alaska 1969).
[147] Dillof, supra note 1, 2004, 837.
[148] Dru Stevenson, 'Entrapment by Numbers' (2005) 16 (1) University of Florida Journal of Law and Public Policy 7-9.
[149] Joseph A. Colquitt, 'Rethinking Entrapment' (2004) 41 American Criminal Law Review 1398.

hand, it represents the U.S. Supreme Court's most recent judgment in this field, while, on the other hand, it contributed to making certain modifications to the entrapment prohibition doctrine.[150] Despite the operation resulting in multiple arrests, it could still be considered unsuccessful for law enforcement since, in fact, it came up with a new model of establishing the subjective test element of "predisposition to commit a crime."[151]

Jacobson's case is an illustrative one in this regard. Keith Jacobson was arrested in 1987 for violating the Child Protection Act of 1984, prohibiting possession, purchase, or any other activities involving sexual images of children.[152] Before the Act took effect, Jacobson had legally purchased two magazines displaying such images. After the Act was enforced, the federal authorities identified Jacobson's name in the post service's address list. Obviously, he could not be charged for the pre-enactment deeds; however, law enforcement spent two and a half years attempting to induce Jacobson, through five different fictitious organizations, to purchase the same materials.[153] Eventually, Jacobson accepted one offer and was detained. He had been convicted in the first instance court but acquitted by the US Court of Appeals for the Eighth Circuit.[154]

The Supreme Court imposed the burden of defining the risk of predisposition to crime on law enforcement officers before the initial contact. [155] According to the case materials, various organizations were not only offering Jacobson the printed products but also were criticizing the state policy, which facilitated censorship and violated the right of free expression. One organization created the legend of being a lobby group financed by sales of such materials. Ultimately, Jacobson purchased a magazine from a "Canadian Company" which assessed the ban as a historical absurdity. He was detained during magazine delivery, and the police found only those two magazines (acquired before the ban) in his apartment.

To establish a predisposition to crime (as an element of a subjective test), law enforcement referred to the fact of purchase by the defendant of the two magazines before the 1984 Act took effect. The Court did not agree to this reasoning, explaining that his previous purchases indicated an interest in such materials but not a predisposition to violate the law. [156] There was no evidence to prove that Jacobson would have been inclined to break the law under the ban; so the court separated the interest in pornography from a

[150] Allen, Luttrell and Kreeger, supra note 34, 427.
[151] Colquitt, supra note 148, 1411.
[152] Jacobson v. United States, supra note 113, 540.
[153] ibid 543.
[154] Judgement of the US Court of Appeals, Eighth Circuit, United States v. Jacobson, 916 F2d 467, 470 (8th Cir. 1990).
[155] Jacobson v. United States, supra note 113, 540, 553-54.
[156] Matthew W. Kinskey, 'American Hustle: Reflections on Abscam and the Entrapment Defense' (2014) 41 (3) American Journal of Criminal Law 258.

predisposition to commit a crime[157], and concluded that Jacobson's violation of the law was a result of law enforcement's two-and-a-half-year efforts and not his own wish.[158]

3.2. STATE LEVEL

At the state level, some courts are more inclined to apply the objective theory, although this is not the case in the majority of states. For instance, Florida adhered to the subjective test until 1985, when the Florida Supreme Court's judgment on the case *Cruz v. State* altered the given state of matters.[159] Based on the case materials, an undercover officer pretended to be intoxicated, was drinking alcohol directly from the bottle, and had a specific smell. In this condition, he went out into a public space and leaned against a wall, having USD 150 in cash in his pocket. Cruz, accompanied by a girl, passed by the officer, exchanged a few words without stopping by, and continued walking. Fifteen minutes later, he returned and took the money from the "drunk person's" pocket and was detained.

The Florida Supreme Court rejected the prevailing subjective test and developed a two-element test: "Entrapment does not take place unless (1) police does not create/ initiate criminal activity, and (2) police employs the reasonably tailored methods or mechanisms in this process."[160] The first component of the test emphasizes that the police must not "create" a crime, while the second element focuses on the methods used. The court stated that both aspects of the undercover operation had gaps: First, there is no prior information available, suggesting that stealing money from a "drunk person" was a common practice in that neighborhood.[161] Second, even if such evidence had become available, the second component of the test - conducting the operation with proper methods - would remain problematic. That is because police officers used a substantial sum of money (at the time, USD 150 had much higher purchasing power at the time of the case) and placed it in the pocket in a way that created a serious risk of inducing a person (who had no predisposition to commit a crime), to commit one.[162]

In the latter case *State v. Long*,[163] an undercover officer walked around a parking lot with money in his pocket, intending to become a victim of a robbery (other police officers were stationed nearby). Two individuals approached the "potential victim," stopped him, and started to talk with him, eventually attempting to push him to a more secluded

[157] Critical review of the case see Stevenson, supra note 148, 28-30.
[158] Jacobson v. United States, supra note 113, 550.
[159] Judgement of the Florida Supreme Court, Cruz v. State, 465 So. 2d 516 (Fla. 1985).
[160] ibid, 516, 522.
[161] Cf. Squires, supra note 36, 364-372.
[162] Cruz v. State, supra note 159, 516-522.
[163] State v. Long, supra note 3, 672, 678.

area physically. When the officer resisted, the two individuals threatened him with a stone and another hard object, prompting other officers to intervene and arrest those two.[164]

The defendant requested the jury to classify the act of "inducement by pretending an easy prey" as entrapment. The New Jersey Court of Appeals rejected this argument, stating that it would be "a sad commentary" on the (American) society if the mere presence of a vulnerable individual were to be held capable of inducing an ordinary person to succumb to a crime". The rule of law cannot excuse a person such behavior when an honest citizen expects effective protection from the justice system.[165] The court concluded that "inducement through an easy prey" could not incite an ordinary person to commit a crime. [166] As it is seen from the outcomes of the case, the evaluation of the elements of the doctrine changed; but not the doctrine itself.

New Jersey also supported a subjective test from the beginning but changed its approach following the *State v. Talbot* case.[167] The court argued that defendant's predisposition to crime could not compensate for the police actions. The court emphasized the objective test, which included the elements of the subjective test.[168]

The facts of the Talbot case were not exceptional. A person who was arrested for a drug-related crime was offered to be reduced a sentence in case of cooperation with the police. As a confidant, he contacted Talbot and asked for the heroin, which he bought himself and then organized "buying the drug by a police officer." As was judged by the Court, Talbot's every criminal act was a result of police activity.[169]

4. COMPARING THE UNITED STATES APPROACHES WITH ECTHR STANDARDS AND THE POSSIBILITIES OF INTRODUCING THEM INTO THE GEORGIAN LEGAL FRAMEWORK

The legal doctrine and practice regarding the prohibition of entrapment are highly developed in the United States. This is not surprising as the roots of the prohibition of entrapment lie in American law. As noted above, the subjective doctrine is more dominant, supported both at the federal level by the Supreme Court and by legal doctrine. Applying objective doctrine is challenging, since it is difficult to evaluate the permissible conduct of police, i.e., where is a "ceiling" of permissible police power beyond which an action

[164] ibid, 674-75.
[165] Cf. Alisdair A. Gillespie, 'Entrapment on the Net' (2002) 7 (3) Journal of Civil Liberties 143-146.
[166] State v. Long, supra note 3, 674-75.
[167] Judgement of New Jersey Supreme Court, State v. Talbot, 364 A.2d 9 (N.J. 1976).
[168] For relatively different doctrine and practice in Canada see Paul M. Hughes, 'Temptation and Culpability in the Law of Duress and Entrapment' (2006) 51 (3) Criminal Law Quarterly 342-359.
[169] State v. Talbot, supra note 167, 9-13.

is considered entrapment? Considering this and other complexities, the present article gives preference to the subjective approach; underlining at the same time that once the elements of objective doctrine have been correctly interpreted, the ultimate purpose is achieved anyway, so objective doctrine can surely also be used. The issue refers more to legal reasoning and logic than to human rights standards – this latter is achieved in all cases. Besides, specific approaches would become unnecessary since the proper interpretation of the elements of subjective doctrine would address the challenges that initially led to the creation of specific doctrines.

Due to these and other complexities, this article supports the subjective approach. However, with the correct interpretation of elements of the objective doctrine, its goals can also be achieved, making its application feasible. This issue is more about legal reasoning and logic than about human rights standards - both approaches ensure human rights protection. Additionally, unified approaches are not strictly necessary, as the challenges that led to the creation of unified doctrines can be addressed through the interpretation of elements of the subjective doctrine.

The ECtHR defines entrapment and, through its judgments, identifies what constitutes an "essentially passive" role of the state representative in the process. As discussed in Chapter 2, the Court uses the following indicators to assess this:[170]

a) Entrapment carried out by state representative;

b) Initiative to offer a "service" (including property);

c) Intensity of the offer;

d) Substance of the offer;

e) Previous criminal history of the person;

f) Oversight of the process.

The ECtHR focuses on the conduct of state agents, meaning that it should be essentially passive. Hence, the European Court tends to focus more on the objective approach, aiming at regulating the behavior of law enforcement officers. On the other hand, when defining an "essentially passive" role of the state agent, the ECtHR also considers a person's criminal record. So, it can be suggested that European practice assesses both the state's passiveness and a person's predisposition for a crime. However, if this is the case, why does the ECtHR use the general term "essentially passive"?

If we consider the issue from a broader perspective, the criteria for evaluating predisposition for a crime, characteristic of the subjective approach, will look similar.[171]

[170] See Chapter 2 (1) for details.

[171] See Chapter 3, Subsection 1.1; see also Andrew Carlon, 'Entrapment, Punishment, and the Sadistic State' (2007) 93 (4) Virginia Law Review 1088.

Thus, there are not any significant differences between the subjective theory and the ECtHR's approach - differences may appear in the interpretation of separate elements. For instance, the ECtHR might consider a certain circumstance as evidence of a criminal record, while the American practice and doctrine may not. It is clear that this difference stems from the dynamic nature of law and the methods of its interpretation, although it does not alter the general picture that the approaches are comparable.

The question arises: which framework is more relevant to apply - the subjective approach, which focuses on a person's predisposition to crime, or the ECtHR's standard emphasizing an essentially passive role of the state? Regarding the latter, it was noted that the standard does not fully encompass the criteria established by the Court's practice. Alternatively, one could argue that neither the predisposition to crime can fully address certain criteria, such as for instance, the number of offers made by state agents before the alleged entrapment, or the nature and intensity of inducement.

While these criteria directly relate to the conduct of state agents, they also indirectly refer to an individual's predisposition to crime. If a person agrees easily, without multiple efforts, it suggests he/she is predisposed to crime; similarly, if a person agrees to a relatively low price, this, too, indicates predisposition. Consequently, a predisposition to crime should be defined as a more precise term.[172]

Conversely, it could be argued that a person predisposed to crime in the classical sense might remain unsafe. E.g., a person who was convicted of counterfeiting is offered a similar opportunity again. While serving a sentence in the penitentiary, the person has been fully re-socialized and no longer has any desire to return to the criminal world but "cannot resist" and succumbs to the repeated offers of the state agent. In this case, assessment of all criteria, which the American practice and doctrine define as relevant for the predisposition to crime (including the numbers, intensity, and nature of these offers, etc.)[173] is crucial. Moreover, each element can be further examined in detail.[174] For example, in the Jacobson case given above, the person's criminal record was thoroughly studied, and a conclusion was made that without examining concrete details of similar behavior in the past, a person cannot be automatically labeled as predisposed to crime. Hence, the doctrine does not create problems from a human rights perspective.[175]

As for the Georgian context, it is advisable for the Georgian procedural doctrine to adopt the subjective theory as an assessment framework. Each element should be interpreted in the light of the ECtHR standards and the best legal practices of the United States. Notably, the discussion in this subsection pertains to the issue of evaluation of actions

[172] On each person's price for predisposition to crime, see Allen, Luttrell and Kreeger, supra note 34, 413-415.

[173] On clarifying the predisposition to crime, see Smith, supra note 117, 779-803.

[174] Stevenson, supra note 9, 138-139.

[175] Ho, supra note 15, 78.

as entrapment rather than addressing the procedural component of the ECtHR's second test. This procedural aspect should be implemented in accordance with the standards discussed in Chapter 2.

To better identify the scope and parameters of evaluation, let us consider the example of a so-called vulnerable victim described in the introduction. An undercover officer impersonates such in the subway during nighttime – aiming at detecting and detaining a pickpocket, the law enforcement agent pretends to be a drunk elderly woman, visibly carrying money in her pocket for all to see. So, some people do take money from their pockets.[176] As noted earlier, the United States courts approached similar cases differently at the state level.

In the Georgian context, the first step is to assess the first part of the subjective theory: did the state agent induce/instigate a person to commit a crime? Playing the role of a vulnerable victim is sufficient to create motivation for committing the crime. The subjective theory does not require a high degree of inducement/instigation to confirm the first part of the test; since creating an opportunity to commit a crime is already considered fulfillment of this first part, which automatically triggers the second part of the test – by shifting a burden of proof to the prosecution, which must show that person was predisposed to commit the crime.[177]

Regarding the second part of the test, it is notable that the agent did not make any offer, instead she merely passed by, playing a role of a vulnerable victim. The inducement, by its nature, was neither strong nor intense; and the person was not specifically targeted by using this method of vulnerable victims before repeatedly. Therefore, the fact that the person himself took the initiative to commit a crime gives the grounds to argue that he was predisposed to crime. Otherwise, such a little push would not have led to the commission of crime.[178]

However, this does not mean that all cases involving vulnerable victims are permissible. Each case requires a thorough and individual approach. For example, if the police is aware of a person's worsening drug withdrawal symptoms and repeatedly use the "vulnerable victim" method, each time making the pockets more visible/accessible or approaching closer, the issue of entrapment might be assessed differently. It is also important to consider that such a model requires an appropriate legal basis at legislative level. The measures listed in Article 7 of the Georgian Law on Operative-Investigative Activities do not include such scenarios as independent actions, without providing an extensive justification of other related action.[179]

[176] State v. Long, supra note 3, 672, 678.
[177] Dillof, supra note 1, 831-832.
[178] For example, Treschel, supra note 28, 136-137.
[179] Multiple other measures related to the law enforcement agents' activity are not specified in the law, confirming the need for further legislative reform.

V. CONCLUSION

As it was stated at the beginning, according to the Bible, the concept of entrapment can be traced back to the story of Adam and Eve. The article shows that covert investigation activities and operative-investigative measures are accompanied by a serious risk of entrapment, necessitating a deep and comprehensive knowledge of the issue in concern to ensure a fair and proper legal process.

The entrapment prohibition doctrine prevents the state from inducing a person to commit a crime for instituting criminal prosecution. Such actions are typically carried out by the individuals known in criminal law literature as agent-provocateurs. As to the issue of entrapment, the European and US practices differ: the European Court of Human Rights assesses entrapment within the framework of the substantive and procedural tests, while the US courts apply its subjective and objective theories.

The basis for prohibiting entrapment was laid down by the decision of the United States Supreme Court back in 1932. It's noteworthy that despite significant advancements in legal doctrine worldwide, the Georgian legislation does not explicitly prohibit entrapment; therefore, the direct prohibition is rather implied in the constitutional provision for a fair trial and in the legal norms regulating covert investigation activities and operative-investigative measures banning deception. In order to advance the Georgian legal practice further, it is crucial to formulate/introduce an explicit definition of the concept, as Article 145 of the Georgian Criminal Code (which serves as the basis for criminalization) does not address this gap.

Substantive and procedural tests developed by the European Court of Human Rights are important sources for Georgian legal practice. For the substantive test, it should be examined whether the entrapment did take place by a state agent, who initiated the first move, which persuasive methods were used, whether there was prior evidence of the person's past criminal activity, whether he/she offered/received a legal/illegal service, and whether effective oversight was in place. In this context, Georgian legislation requires substantial revision to close the gaps, such as the absence of a requirement for formulating a documented assignment for operative-investigative measures, draft protocols (this requirement is either absent or is prescribed only partially) as well as the absence of detailed legislative definition or detailed standard written procedure for covert investigation activities, etc.

With regard to the procedural test, while Georgian procedural law is relatively less problematic, certain challenges remain that require attention from Georgian scholars and practitioners. It is particularly important for Georgian legislation not to adopt a so-called sentence-based approach but rather apply the norms, which view the evidence obtained through entrapment as inadmissible and, therefore, refuse to accept it.

Additionally, courts must effectively shift the burden of proof onto the prosecution, provided the gaps in procedural guarantees for accessing the evidence by the defense. Finally, the courts should be discouraged from applying the established practice of referring to the ECtHR standard, which is not relevant, exempting it from the obligation to answer every argument presented at the hearing.

The objective and subjective theories developed in the United States legal doctrine are very important. The subjective theory is aligned with the standards of the European Court of Human Rights and provides a better model for entrapment prohibition, thus making the subjective theory desirable to be adopted in the Georgian legal practice and doctrine. Additionally, there is no need to unify the two theories, as the challenges raised in the legal literature can be fully addressed through the correct interpretation of all elements of subjective theory.