CONSTITUTIONAL LIMIT OF ENTRAPMENT AS A METHOD OF CRIME DETECTION IN NIGERIA

By

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Introduction

Recently, a number of journalists posing as lobbyists for an American company approached a couple of International Federation of Association Football's (FIFA) officials and offered them bribe in exchange for their votes. The officials fell into the trap, were exposed, tried before the ethics committee of FIFA and had varying range of penalties imposed on them. One of them, who had the temerity to appeal his conviction had his appeal dismissed and conviction and punishment affirmed.[1] The FIFA officials never solicited for the bribe. They probably never even thought of the possibility of making any money from the abuse of their office until they were approached by the journalists posing as lobbyists. In spite of all these, the Ethics Committee of FIFA still found them guilty of wrongdoing and imposed severe punishments on them. This is a classic case of entrapment.

Entrapment as a means of inducing people to offend against established rules and regulations goes back to the beginning of time when the biblical Serpent induced Eve to eat the forbidden fruit in the Garden of Eden.[2] However, the

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1. "Amos Adamu filmed in FIFA bribery scandal" http*://uk.klikfc.com/article/178057:/amos-adamu-filmed-in-fifa-bribery-scandal* (accessed on February 2011).
2. See Rebecca Roiphe: "The serpent beguiled me: A history of the entrapment defence" *33 Seton Hall Law Review* 257. See also, Dru Stevenson: "Entrapment and the problem of deterring Police misconduct"

use of entrapment as a crime detection method by law enforcement agencies the world over was a product of the changed socio-political and economic conditions of the eighteenth and nineteenth centuries.[3] In South Africa, the use of the technique dates back to the latter part of the nineteenth century diamond and gold rushes, when secret agents were used by the police to trap people dealing illegally in diamond and gold.[4]

The rationale for entrapment as a method of crime detection includes the following: that crimes in which law enforcement agencies often use the method are consensual types of offences in which, oftentimes, there is no complainant and, thus, no evidence of the crime. Also, that many of the relevant offences are committed secretly; often preceded by elaborate plan to cover up, and thus, there is very little chance of discovery. Additionally, that some of the offences are not morally reprehensible as such or that, at least, the society does not regard them as such; there is, thus, little support from the public at attempts to stamp them out. Furthermore, that entrapment is often used against persons involved in organised crimes, or persons who commit crimes habitually and not against isolated offenders. Finally, that the knowledge among criminals that their comrade in crimes might be undercover police agents helps in deterring criminal activities.[5]

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37 Connecticut Law Review 67 at 68 -72 where the author recounts the story of the biblical Balaam, who when he could not curse the Hebrews tricked them into offending against the laws of their God and thereby caused them to bring greater curses upon themselves.

3. Rebecca Roiphe, *supra*, note 1.
4. Narnia Bohler: "Lead us not into temptation: The criminal liability of the Trappee revisited" *12 South African Journal of Criminal Justice (1999)* 317.
5. See, J Heydon: 'The problems of entrapment' *32 Cambridge Law Journal (1973)* 268 at 269-270.

Notwithstanding the above-mentioned justifications for the use of entrapment, the method has been condemned and subject to much criticism by courts[6] and writers[7] alike, it being regarded as unethical, improper, open to abuse, and not an ideal method of crime detection. Also, that it is against human natural abhorrence of temptation. Yet, entrapment method has survived all attacks and is still a thriving method of crime detection today.[8] In view of this, it becomes important in a constitutional democracy as Nigeria's to interrogate the constitutional limits of such invasive method of crime detection as entrapment. This is so against the backdrop of recent calls by well meaning Nigerians on law enforcement agents to use intelligence gathering, which often-times include entrapment, as a major tool of countering terrorism, kidnapping and other serious crimes in Nigeria.

In interrogating the constitutional limits of entrapment, this essay will be divided into six segments. The first segment will discuss the types and meaning of the term 'entrapment'. The second segment will be a brief comparative examination of the law on entrapment in jurisdictions similar to Nigeria. The third segment will identify and discuss constitutional rights implicated by the use of entrapment by the police. The fourth segment will engage with whether, despite the fact that unfair entrapment is a violation of some of the rights in the Constitution, it is justifiable under section 45 of the 1999 Constitution of the

6. See for instance, *Stegmann J in S v. Ohlenschlager* 1992 (1) SACR 695; *Browning v. J.W.H. Watson (Rochester) Ltd* [1953] 2 All ER 775, *R v Israel David & Ors* (1960) All NLR 170.
7. See for instance, J. Heydon: "The problems of entrapment' (n 4 above) 268 at 270-273; M Stegmann: 'A point at which the law and morality may part" *108 South African Law Journal (1991)* 688; Victoria Bronstein: "Unconstitutionally obtained evidence-A study of entrapment" *114 South African Law Journal (1997)* 108.
8. See Narnia Bohler, note 4 above.

Federal Republic of Nigeria, (the Constitution). The fifth segment will identify the constitutional limits of entrapment. Segment six will conclude the essay.

Meaning and Types of Entrapment

The most commonly given definition of a trap is that given by Gardiner and Lansdown[9] which was adopted and cited in the South African cases of *S v. Malinga*[10] and *S v. Tsochlas*[11] as follows: "a trap is a person who, with a view to securing the conviction of another, proposes certain conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence." According to Heydon, the appellation 'trap, trapper, informer, decoy, spy, stool pigeon, agent provocateur' refer to three types of persons: 'one who in no way causes the crime but merely observes it; one who by passively acceding to the accused's suggestion or by exposing him to temptation helps cause him to commit it by providing him with an opportunity; and one who urges the accused to take advantage of an opportunity to commit crime'.[12] Entrapment is the conduct resulting from the activities of any of the type of persons identified by Heydon above.

Bronstein[13] identified five different circumstances of trapping and entrapment.[14] The first is the Stardust Jewellers' trap type of scenario:[15] this is a case where policemen set-up

9. *Gardiner and Lansdown's South African Criminal Law and Procedure* Vol. 1, 6th ed. (1957) 659-660.
10. 1963 (1) SA 692 (A) at 693 F-G.
11. 1974 (1) SA 565 (A) at 574 (B).
12. J. Heydon: "The problems of entrapment" *supra*, note 5, p. 268.
13. Victoria Bronstein: "Unconstitutionally obtained evidence-A study of entrapment", *supra*, note 7.
14. The words 'trapping' and 'entrapment are ordinarily used interchangeably and will be so used in this essay.
15. This refers to the case of *R v. Christou and R v. Wright* [1992] QB 979 (CA).

a shop, ostensibly engaged in the buying and selling of illicit jewellery on a commercial basis, in order to entrap burglars and persons dealing in stolen property. The second circumstance entails cases of pre-existing criminal schemes: here policemen get involved in on-going criminal schemes as traps in order to apprehend the criminal. This type of situation is aptly illustrated by the case of *R v. Smuthwaite*[16] where the accused, in search of a hitman to murder his wife, contacted a man who reported the matter to the police. The police sent the accused police officers disguised as hitmen. After the first instalment for the murder has been paid by the accused, he was arrested and charged with the offence of soliciting a person to murder his wife.

The third type of circumstances of trapping is cases of illegal dealing where police agents approach a targeted person and offer to buy or sell contraband. This scenario is well illustrated by the case of *R v. Small*[17] where the appellant was approached and induced by the police to buy illicit gold.[18] The fourth type of trapping is referred to as 'manner from heaven'. In these cases the police usually leave items that can be stolen in unsecured places where people are likely to steal them. This occurred in the case of *William and Anor v. Director of Public Prosecutions,*[19] where police officers left cartons of cigarettes in an unsecured Van; the appellants went there and stole some of the cartons. They were arrested and charged with and convicted of the crime. Decoys are the final type of entrapment. This is a case where the police plant 'victims' in locations where certain types of

16. [1994] 1 All ER 898.
17. 1968 (3) SA 561 (RA).
18. The conduct of the policemen in this case was deplored by the court on appeal.
19. [1993] 3 All ER 365.

offences[20] are prevalent in order to apprehend elusive criminals.

It is apposite to state here that a distinction is generally made between fair and unfair trapping. Fair trapping is a situation where police agents merely provide opportunity, without any inducement or instigation, to an offender in pre-existing criminal schemes[21] or one who is already under a prior reasonable suspicion to commit the offence.[22] Unfair trapping, on the other hand, is "where the accused was incited, instigated or persuaded to commit the offence by state officials or agents and there was no prior reasonable suspicion that the accused was engaged in criminal conduct which should be stopped…"[23] While unfair trapping is generally frowned upon and condemned[24] fair trapping is generally accepted as a necessary part of crime detection and law enforcement.[25]

There is, however, a thin line between fair and unfair trapping in practice. As pointed out by Heydon '[t]he second kind of conduct [fair trapping] at first sight seems remote from the third [unfair trapping] but commonly forms a prelude to it and in practice is difficult to distinguish from it'.[26] The foregoing observation is borne-out and illustrated by a case mentioned by Stegmann in his article.[27] A police informer got wind of a conspiracy to steal some sheep from a

20. Examples of these types of offences are muggings, rapes, among others.
21. As occurred in *R v. Smuthwaite*, note 16 above.
22. This scenario is more in line with the first two of the three types of traps identified by Heydon. See segment 2 of this paper.
23. Nico Steytler: 'An accused's right to fair trial' in Constitutional criminal procedure: A commentary on the Constitutiton of the Republic of South Africa, 1996 (1998) 205 at 219 (footnote omitted).
24. See notes 6 and 7 above for the cases and literatures cited therein.
25. Victoria Bronstein: "Unconstitutionally obtained evidence-A study of entrapment", *supra*, note 7, pp. 120-121.
26. J. Heydon: "The problems of entrapment" supra, note 5, 268.
27. M. Stegmann: "A point at which the law and morality may part" *supra* note 7, 702-703.

farm. He reported the matter to a police sergeant who arranged with the informer to join the conspirators. The sergeant also provided the informer with a bakkie to be used as transport by the thieves. As instructed, the informer joined the conspirators and drove them to a farm on a pre-arranged day. They stole and slaughtered eight sheep, after which the informer drove the thieves to a pre-arranged destination to be arrested by the sergeant.

A Brief Comparative Examination of the Law on Entrapment

Though, entrapment is not a defence to a criminal charge in Britain; nevertheless, entrapment whether fair or unfair, is generally frowned upon by the English courts. In *Browning v. J.W.H. Watson (Rochester) Ltd,*[28] the respondents were charged with conveying unauthorised persons in their vehicle in contravention of section 72 (1) of the Road Traffic Act of 1930. In order to prove this offence, two employees of the Minister of Transport situated themselves among the authorised passengers without the knowledge of the respondents. Although, the Court of Appeal affirmed the conviction of the respondents, it nevertheless registered its abhorrence of that method of investigation by saying that: "[n]o court in England has ever liked action by what are generally called agents provocateurs resulting in imposing criminal liability."[29] English courts are at liberty to exclude evidence considered to have been illegally or unfairly obtained, including evidence obtained through unfair entrapment.[30] It has, however, been held by the House of

28. *Supra*, note 6.
29. *Ibid* at 779.
30. See, for instance, *Marsh v. Johnston* (1959) *Crim L. R. 444.*

Lords that the appropriate remedy for unfair entrapment is an order of a stay of proceedings.[31]

However, in 1998 the European Commission on Human Rights held, in the case of *Teixera de Castro v. Portugal*[32] that unfair entrapment is a violation of Article 6 fair trial provision of the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention). Britain is a signatory to and bound by the provisions of the European Convention and the decisions of the European Commission and the European Court of Human Rights in that regard. The implication of the *Teixera* decision is, thus, that unfair entrapment is a violation of human rights in Britain.

There is also no substantive unfair entrapment defence in Canada. However, if an accused alleges and proves unfair entrapment[33] the law in Canada is that further prosecution of the case must be stayed by the court. In *R v. Mack*[34] the appellant, a former drug addict, was coerced by threats and induced with a large amount of money, over a six months period, to sell drugs to a police informer. In allowing the appellant's appeal, the Supreme Court of Canada held that entrapment is not a substantive or culpability based defence. The defence is not based on the state of mind of the accused person but rather on police misconduct. Thus, where an accused person alleges entrapment, the trial court must scrutinize the conduct of the police and if that conduct violates any right guaranteed under the Canadian Charter of Rights in a way that is likely to bring the administration of justice into disrepute, an order of stay of proceedings must be made.

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31. *R v. Looseley: Attorney-General* Reference No 3 of 2000 [2001] UKHL 53.
32. (1999) 28 EHRR 101.
33. An issue he must prove on preponderance of evidence.
34. (1988) 44 CCC 3d 513.

There exists a substantive defence of unfair entrapment in the United States of America.[35] Initially, the focus of this defence is the predisposition of the accused person to commit the charged offence.[36] Consequently, if the accused person is already predisposed to commit the offence the defence of entrapment will not avail him. However, if the accused proves that he would not have committed the offence but for the conduct of the police then the defence will avail him. Thus, in *US v. Russell*[37] a narcotics agent, investigating the respondent for illicit drug manufacture, supplied him with an essential ingredient for the manufacture of the drug on the understanding that the agent was to share in the finished product. The respondent was later arrested and charged with the offence. The respondent raised the defence of entrapment. It was held by the US Supreme Court that the entrapment defence which prohibits law enforcement agents from instigating criminals did not bar the conviction of respondent in view of the evidence of respondent's involvement in making the drug before and after the narcotics agent's participation. The respondent's admission that he may have harboured a predisposition to commit the charged offences was also taken into account.

More recently in the United States, the subjective approach is, however, being jettisoned for the objective approach which focuses more on governmental misconduct rather than the accused disposition.[38]

Prior to the advent of the Bill of Rights in South Africa, there is no defence to unfair entrapment under the law. Evidence obtained from such unfair entrapment may not even

35. *Woo Wai v. US* (1915) 223FG 412 (9TH Circ. CA).
36. Referred to as the subjective approach to the defence.
37. (1973) 411 US 423.
38. *Jacobson v. US* 112 Sct 1535 (1992).

be excluded.[39] The only option open to the court was the mitigation of the sentence of persons caught in unfair trap.[40] The only controversy in issue at the time and where judicial opinion differed was whether a police trap is criminally liable for his conduct.[41] However, following the coming into effect of the Interim Constitution in 1994[42] and the criticisms of the law on entrapment, the government established a Commission on the Application of the Trapping System to look into the issue. The Commission in its report[43] recommended giving courts the discretion to exclude evidence obtained through unfair trapping, among other things. In 1996, the Criminal Procedure Act, 1977 was amended and section 252A was inserted to implement the Commission's recommendations. Section 252A (3) of the Criminal Procedure Act of 1977 as amended, thus, provides for the exclusion or admission of evidence obtained via unfair trapping in appropriate cases.[44] As a result of the influence of these constitutional and statutory changes, the conviction of an accused person was, for the first time in South African legal history, set aside for unfair trapping in 1997.[45]

39. *S v. Desai* (1997) (1) SACR 38.
40. *S v. Maslangho* 1983 (4) SA 292 (T).
41. See M. Stegmann: "A point at which the law and morality may part" (*supra*, note 6) for a detailed analysis.
42. Which contained a similar Bill of Rights as the 1996 Constitution.
43. Report on Project 84: The Application of the Trapping System (October, 1994).
44. Bronstein has however pointed out, rightly in my view; that section 252A of the Act cannot water down rights guaranteed under the Bill of Rights. She therefore submits that section 252A (3) may be unconstitutional if it purports to authorise the admission of evidence obtained in violation of rights guaranteed under the Bill if Rights. Victoria Bronstein: 'Unconstitutionally obtained evidence' (n 7 above) 128-132.
45. *S v. Nortje* (1997) (1) SA 90 (C). A case decided under the Interim Constitution.

In Nigeria, there is a slight difference between the positions of the law on entrapment from that in England.[46] If the trapping is unfair: that is, law enforcement agents have acted beyond merely providing opportunity for the accused person to commit the offence, but had incited or instigated him, the agents will be held to be *agent provocateurs* whose evidence requires corroboration before the accused can be convicted.[47] If the trapping is fair: that is, law enforcement agents merely facilitated the commission of the offence by the accused person without more, they are not regarded as *agent provocateurs* whose evidence requires corroboration before the accused can be convicted.[48] The implication of this is that once the evidence of the *agent-provocateur* is corroborated such evidence becomes relevant and admissible to ground conviction.

Rights Implicated by Unfair Entrapment under the Constitution

In order to determine the constitutional limits of unfair entrapment; it is necessary to first point out the constitutional rights implicated in that regard.

The first right in the Constitution implicated by unfair entrapment is the right to privacy. The right to privacy is also protected under international human rights law.[49] This right

46. A distinction is drawn in England between non-private and private persons acting under the authority of officials of state on the one hand and private persons acting on their own initiative on the other. The former are not regarded as accomplices whose evidence need corroboration in entrapment cases while the latter are. See J. Heydon: 'The problems of entrapment' (n 5 above) 274. Such distinction is not drawn in Nigeria. All trappers, private and non-private are regarded as accomplices whose evidence need to be corroborated in all cases of unfair trapping.
47. *R v. Israel David & Ors* (n 6 above).
48. *R v. Gilbert Fanugbo* (Unreported) Charge No. AB/7C/63.
49. Articles 12 and 17 of the UDHR and the ICCPR respectively. It is noteworthy that there is no right to privacy under the African Charter.

have been defined variously as: the right to be let alone,[50] the right to determine, ordinarily; to what extent an individual's thoughts, sentiments, and emotions shall be communicated to others,[51] and '…the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation'.[52]

Right to privacy is protected under section 37 of the Constitution. According to the South African Constitutional Court in *Bernstein v. Bester NNO*,[53] citing Neethling[54] '[p]rivacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state'[55] Examples of wrongful breach of this right includes 'entry into a private residence, reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion…'.[56]

When a person is unfairly entrapped, there would have been unsolicited contact from officials of the state. He most probably would have been shadowed before the unauthorised and unsolicited contact. The entrapment would most probably also give rise to a criminal charge which exposes the person entrapped to unwarranted and undesirable publicity and societal ridicule. Viewed from the foregoing perspective, unfair entrapment is a breach of the right to privacy guaranteed under section 37 of the Constitution.

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50. Cooley on Torts, 2nd Edition, 29.
51. Brandeis L. and Warren S.: 'The Right to Privacy' (1890) 4 Harvard Law Review 205.
52. Human Rights Committee, General Comment No. 16 of 1988 para 1.
53. (1996) (2) SA 751.
54. *Neethling Potgieter and Visser Law of Delict 2 ed*. 333.
55. *Supra* note 53, para 68 (footnotes omitted).
56. *Ibid*. para 69 (footnotes omitted).

Another right in the Constitution implicated by unfair entrapment is the right to personal liberty guaranteed by section 35 (1) of the Constitution. The right to personal liberty is equally protected under international human rights law.[57] This right has been negatively defined by Ackerman J. of the South African Constitutional Court in *Ferreira v. Levin*[58] as "the right of individuals not to have "obstacles to possible choices and activities" placed in their way by… the State'.[59] According to the Canadian Supreme Court,[60] "…if a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free".[61]

It can hardly be contested that unfair entrapment entails either the coercion or inducement of an individual to a course of action he would not otherwise have chosen: the commission of an offence. Unfair entrapment is therefore a violation of section 35 right to personal liberty.[62]

In addition to the rights mentioned above is the right to the dignity of the person. This right occupies a pride of place in international human rights jurisprudence.[63] In *S v.*

57. See also article 6 of the African Charter; and Articles 3 and 9 of the UDHR and the ICCPR respectively.
58. 1996 (1) BCLR 1 (CC).
59. Same above para 54 (footnotes omitted).
60. *R v. Big M Drug Mart* (1985) 13 CRR 64.
61. *Ibid*. at 97.
62. It is noteworthy to point out that the majority of the Court in *Ferreira v Levin* (n 58 above) disagreed with Ackerman J expansive definition of freedom and security of the person. That disagreement was, however, in connection with the peculiar facts of that case and will not, in my opinion, affect the section's operation to protect against unfair entrapment.
63. Dignity right is protected under articles 1, 10, and 5 of the UDHR, ICCPR, and the African Charter respectively.

Makwanyane and Another,[64] the Constitutional Court of South Africa pronounced as follows:

> The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3'.[65]

Again, in *the National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice and Others*[66] the Constitutional Court said "…the right to dignity is a cornerstone of our Constitution."[67]

No doubt, "[d]ignity is a difficult concept to capture in precise terms'.[68] Content has, however, been given to the concept by Nussbaum who said:

> The core idea [of the right to dignity] is that of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a "flock" or "herd" animal. A life that is really human is one that is shaped throughout by

64. 1995 (6) BCLR 665 (CC).
65. *Ibid*. para 328. This case was decided under the Interim Constitution.
66. 1999 (1) SA 6 (CC).
67. *Ibid*. para 28.
68. *Ibid*.

> these human powers of practical reason and sociability.[69]

Thus, implicit in the right to dignity is freewill and choice of individuals unimpaired by coercion or undue influence from either private or public actors.

Unfair entrapment involves the instigation or coercion of a person to criminal acts with the sole aim of exposing such individual to the terrible sanction of the criminal law. In addition to this, the person so exposed is also liable to societal shame and embarrassment that comes with a criminal conviction. Unfair entrapment is, in this sense, incompatible with human dignity. It is, therefore, a gross violation of section 42 dignity provision of the Constitution.

Fair trial is another right implicated by unfair entrapment in the Constitution.[70] The content of the right to fair trial is set out in section 36 (3) – (12) of the Constitution. It has however been argued, rightly in my view, that the content of the right to fair trial goes beyond those enumerated in paragraphs a - o of sub-section 3 of section 35 of the South African Constitution which are similar to the provisions of 36 (3) – (12) of Nigerian Constitution.[71] According to Steytler, fair trial includes 'notion of substantive fairness'[72] which also '…depends on what happens outside the court and what happens in the course of police investigation'.[73] Thus, implicit in the right to fair trial is the right to fair prosecution.

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69. Martha Nussbaum: Women and Human Development- The Capabilities Approach (2000)1 at 72. Footnotes omitted.
70. Fair trial is also guaranteed under articles 10,14, and 7 of the UDHR, ICCPR, and the African Charter respectively.
71. Nico Steytler: "An accused's right to fair trial" *supra*, note 23, 215-16.
72. *Ibid*. at 218.
73. Victoria Bronstein: "Unconstitutionally obtained evidence" *supra*, note 7, 115.

Since unfair entrapment is an unfair method of police investigation, it is a violation of the right to fair trial because the entrapped accused ought not to have been prosecuted at all. This conclusion is confirmed by the decision of a South African court in *S v. Nortje*[74] and the European Commission on Human Rights decision in *Teixera de Castro v. Portugal*.[75]

Lastly, the conviction of a trappee on evidence obtained through unfair entrapment is a violation of an accused's right to have evidence obtained in violation of a constitutionally guaranteed right excluded because such evidence will render the trial unfair. Such evidence is also detrimental to administration of justice. In *Pillay v. S,*[76] the South African Supreme Court of Appeal put the point succinctly thus:

> To allow the impugned evidence derived as a result of a serious breach of accused's constitutional right to privacy might create an incentive for law enforcement agents to disregard accused persons' constitutional rights since, even in the case of an infringement of constitutional rights, the end result might be the admission of evidence that, ordinarily, the State would not have been able to locate. (Cf *R v. Burlingham, supra,* at 265.) That result – of creating an incentive for the police to disregard accused persons' constitutional rights…is highly undesirable and would, in our view, do more harm to the administration of justice than enhance it.[77]

74. *Supra* note 45.
75. *Supra* note 32.
76. 2004 (2) BCLR 158 (SCA).
77. *Ibid*. para 94.

The administration of justice argument is even stronger in the case of unfair entrapment. This is because it is not only the breach of constitutional rights that is in issue. Of equal importance is the fact that crimes are likely to escalate. Persons who otherwise would not have committed crimes will be incited so to do by the police. Law enforcement agents who are supposed to put down crimes will themselves become criminals in the course of entrapping supposed criminals. The resultant effect of all these can only be widespread distrust and corruption of the administration of justice system. As a result of the foregoing, it is submitted that unfair entrapment is caught by section 36 (3) – (12) fair trial provisions of the Constitution.

Is Unfair Entrapment Justifiable under Section 45 of The Constitution?

No right in the Constitution is absolute. They can all be limited in terms of section 45 of the Constitution to protect public security, welfare, health, among other things. It therefore becomes important to determine whether in spite of its invasive nature, unfair entrapment will pass constitutional muster.

Enquiry under section 45 of the Constitution should involve a two stage process. That in this writer's opinion represents example of best practice.[78] The first stage involves the determination of the question of whether there has been violation of a right under the Constitution. The second stage involves the determination of the question of whether that violation is justifiable in an open and democratic society.[79]

78. A two stage approach to violations of constitutional rights is what has been adopted by the South African Constitutional Court.
79. See for instance, *Prince v. President, Cape Law Society 2002* (2) SA 794 (CC).

As regards the first stage, it has been established above that unfair entrapment is a violation of sundry rights under the Constitution. Turning to the justifiability stage, it is clear from the jurisprudence of the South African Constitutional Court that the justifiability or otherwise of an act or a law alleged to have infringed a constitutional right must be measured against the following factors:

(i) the nature of the rights in question
(ii) the importance of the purpose of limitation
(iii) the nature and extent of the limitation
(iv) the relation between the limitation and its purpose
(v) less invasive means to achieve the purpose.

Section 45 of the Constitution, it is submitted, falls to be analysed against the foregoing factors. These factors are now discussed in turn.

(i) *Nature of the rights in question*
This factor refers to the nature and importance of the right in question. The constitutional rights in question in this case: privacy, dignity, fair trial, *et al* are those that touch upon the very essence of the human person. They are fundamental rights recognised under both international and municipal laws.

(ii) *Importance of the purpose of limitation*
This has to do with the objective and goal of violative acts or laws under examination. The purpose of the limitation in the instant case is the combating of crime and the bringing of criminals to book. It is admittedly an eminently worthy purpose deserving of the highest consideration.

(iii) *Nature and extent of the limitation*

This refers to the examination of the nature and scope of the violative acts or laws under enquiry *vis-à-vis* guaranteed rights. In this instance, unfair entrapment has been found to be a very invasive method of law enforcement. The manner and extent that the method violates rights is beyond all propriety; this fact accounts for why it is frowned upon by courts worldwide.

(iv) *Relation between the limitation and its purpose*

Here, the focus is to examine the rational connection between the limitation of right and the purpose of the limitation. If such rational connection cannot be established the limitation is too wide and will be held unjustifiable in a democratic society. In this instance, there is no rational connection between the limitation and the purpose of unfair entrapment. How can crime be combated by instigating those who, ordinarily, would not have done so to commit crimes? Such a proposition is obviously a contradiction.

(v) *Less invasive means to achieve the purpose*

Here, the focus is to determine whether there is a less invasive method or means through which the purpose or goal of the law under examination could be achieved. If there is, the law or act in question is not justifiable under a democratic society. Less invasive means to achieve the purpose in this case is available. Law enforcement agents can make use of fair trapping or other less invasive means of crime detection. Resort need not be to unfair trapping.

From the foregoing analysis, unfair trapping by agent-provocateurs is a violation of sundry rights and will not

pass constitutional muster under section 45 of the Constitution.

The Constitutional Limit of Entrapment as A Method of Law Enforcement

As established earlier in this paper, there is a distinction between fair entrapment and unfair entrapment. There is fair entrapment where law enforcement agents merely facilitated the commission of the offence by the accused person without more. Entrapment is unfair where law enforcement agents have acted beyond merely providing opportunity for the accused person to commit the offence, but had incited, procured or instigated the accused person. The constitutional/human rights dimension and implication of entrapment create not merely a procedural but a substantive defence to charges found on evidence obtained through unfair entrapment. Such evidence founded upon violations of rights, if such violations cannot be justified as in the cases of unfair entrapment, becomes illegally obtained and liable to be excluded at trial.

Thus, where entrapment is fair and the accused person is already predisposed to committing the offence a number of rights[80] may still be violated by the fact of entrapment. Such violation may still pass constitutional muster under section 45 of the Constitution as an act or rule necessary in a democratic society to secure public order, security and well being. Where entrapment is unfair, the violation of rights that occurs cannot pass constitutional muster as established earlier in this paper[81].

From the foregoing analysis, entrapment whether fair or unfair is violative of constitutional rights and is not to be resorted to in the investigation of crimes. However, where imminent and present danger to the society demands that it

80. Rights like privacy, dignity and personal liberty may still be violated by fair entrapment depending on the particular facts of each case.

81. See discussions in segment 5 above of this paper.

be used, its use is to be restricted to only facilitating the commission of the offence by pre-disposed accused persons; anything other than this may not pass the scrutiny of section 45 of the Constitution.

Conclusion

It has been established from the foregoing, that entrapment whether fair or unfair is a violation of sundry rights under Chapter IV of the Constitution. It has also been established that unfair entrapment is not justified in an open and democratic society as stipulated by section 45 of the Constitution. For it to be pass constitutional scrutiny, entrapment must be restricted to merely providing opportunities to predisposed accused persons to commit offences.

It is also established in this paper that the human rights dimension of entrapment creates not merely a procedural but a substantive defence to charges founded on evidence obtained through unfair entrapment. Such evidence is liable to be excluded at trial as evidence obtained in violations of constitutional rights. Thus, the rule of admissibility of evidence in Nigeria as represented by the case of *Musa Sadau v. State*[82] and other cases which is to the effect that an illegally obtained evidence, if relevant is admissible is unconstitutional and should be changed. These conclusions are in accord with comparative international law on the subject.

82 (1968) 1 All NLR 124.