JOURNAL OF ANTI-CORRUPTION LAW

2018 Volume 2 Number 1 Pages 109—131

ABUSING THE ACCUSED? UNPACKING THE USE OF ENTRAPMENT IN UGANDA'S FIGHT AGAINST CORRUPTION

Robert Doya Nanima*

ABSTRACT

In Uganda, an accused person enjoys a right to a fair trial. It is a requirement that the circumstances surrounding the collection and admission of evidence do not violate this right. This article argues that the use of entrapment in cases of corruption may lead to an abuse of the fair trial rights of an accused. The lack of a legislative framework regulating entrapment, the institutional entrenchment of entrapment in the criminal justice system and the inadequate guidance from judgments substantiate this argument. This article recommends amendments to the Criminal Procedure Code Act with a view to preventing abuse of the accused by agents of the criminal justice system.

* Dip LP (LDC), LLB (MUK), LLM LLD Candidate (UWC), Lecturer, Department of Criminal Justice & Procedure, Faculty of Law, University of the Western Cape. E-mail: rnanima@uwc.ac.za
Many thanks to Mr Ochwo Isreal and the anonymous reviewers for their insightful comments.

1 INTRODUCTION

The fight against corruption in Uganda is premised upon constitutional values,[1] which require recognition of and respect for an accused's human rights.[2] The government is interested in ensuring that all persons who are charged with corruption are prosecuted and convicted.[3] This indicates a result-oriented rather than a process-oriented approach. This approach has been adopted against the backdrop that corruption has become institutionalised and that, according to public perception, it is legitimate for a public servant to use his or her office for personal enrichment.[4] A process-oriented approach would encompass recognition of an accused person's rights in the course of establishing the commission of an offence, thereby insulating the criminal justice process against possible human rights abuses in the course of the collection and admission of evidence. This article discusses the use of entrapment in relation to corruption involving the soliciting and receiving of bribes. It engages the use of entrapment in this context as a result-oriented rather than a process-oriented approach.[5] On this basis, it justifies the need for the statutory regulation of entrapment in Uganda.

The use of entrapment in Uganda's criminal justice system poses both policy and constitutional issues regarding the recognition and upholding of the rights of an accused. The efforts of criminal justice personnel to deploy entrapment as an anti-corruption tool have to be measured against the protection of fair trial rights and the promotion of the administration of justice. What is more, the use of entrapment in Uganda is informal in that there is no statutory regulation of the practice, and there is no provision for a defence of entrapment in Uganda's criminal law. The National Objectives and Principles of State Policy guide all organs and agencies of the State on

1 These values include accountability by public officers under Objective XXVI of the national objectives and principles of state policy, a duty on citizens to combat corruption and misuse of public property under Article 17(1)(d)(i) of the 1995 Constitution of the Uganda, and the accused's right to a fair trial under Article 28(3) of the Constitution.

2 The Constitution provides for a Bill of Rights in Chapter Four. Article 28(3) thereof provides for the right to a fair trial of an accused person.

3 National Anti-Corruption Strategy 2014-2019, with support from the European Union through its Action Document for Strengthening Uganda's Anti-Corruption Response (SUGAR) at 4, available at https://ec.europa.eu/europeaid/sites/devco/files/ad-2-uganda-2016_en.pdf (visited 17 August 2018).

4 Asea WB (2018) "Combating Political and Bureaucratic Corruption in Uganda: Colossal Challenges for the Church and the Citizens" 74(2) *HTS Theological Studies* 1-14 at 1.

5 Section 2 of the Anti-Corruption Act.

the interpretation of the Constitution and the implementation of policy decisions.[6] As such, this includes the need to uphold the rights of persons who are accused of committing crimes.[7] In this regard, the zealous attempt to fight corruption through the use of entrapment presents instances of possible abuse of the rights of the accused. This clash between the strategy and constitutional values poses the need to question the legal status of entrapment.

The overriding feature of all entrapment is the use of deception, and the law enforcement officer's conduct is a crucial component in the commission of the illegal activity.[8] It has been defined as an intentional, covert, deceitful operation, where the law enforcement officer lays a trap to obtain evidence.[9] There are three typical entrapment scenarios. The first is where the trap is used to create an opportunity for a suspect to commit an offence, when, but for the trap, he would not have done so.[10] The second is where the trap is used as an opportunity by a person, who had already formed the intention to commit the offence, to do so.[11] The third scenario involves situations where the accused initiates the incriminating transaction that leads to the instigation of the trap to conclude the transaction.[12] Unsurprisingly, the practice of entrapment in its various guises has turned out to be a crime commission rather than a crime prevention strategy, because it entails luring an individual into committing an offence.[13] It is true that if the use of a trap shifts from its covert and informal nature to a formal process, a suspect would elude it. It is against this background that relevant checks and balances have to be in place to ensure that its covert nature is not abused in the course of investigations. Clarity in its covert nature speaks volumes about fairness in its application.[14] Once this clarity has been achieved, entrapment may become a

6 Objective I(i) of the National Objectives and Directive Principles of State Policy in the Constitution of 1995.

7 Article 28(3) of the Constitution.

8 Darren S & Nicci W (2011) "The Exclusion of Evidence Obtained by Entrapment: An Update" *Orbiter* 634-650 at 634.

9 Hock LH (2011) "State Entrapment" 31 *Legal Studies* 72-75 at 73-74. See also Bronitt S (2004) "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe" 33(1) *Common Law World Review* 35-80 at 35.

10 *Akash Lachman v The State* [2010] ZASCA 14 para 30.

11 *Lachman* para 30.

12 *Lachman* para 30.

13 Dillof AM (2004) "Unraveling Unlawful Entrapment" 94(4) *The Journal of Criminal Law and Criminology* 827-896 at 828.

14 Persuasive insights can be obtained in the South African Law Reform Commission Fourth Interim Report, Project 101 on The Application of the Bill of Rights to Criminal Procedure,

crime prevention strategy in relation to persons who habitually solicit and receive bribes.[15]

2 FORMS OF ENTRAPMENT

Entrapment takes on various forms. The common form is the use of police traps as a way of combating high crime rates in an area, for example, the police setting up jewellery shops to lure burglars to sell the stolen jewels there.[16] Sometimes the police join pre-existing criminal schemes, relying on information obtained from a person who has been contacted to aid with the commission of an offence.[17] However, it is debatable whether this is entrapment proper, especially if the police's joining the criminal activity did not necessarily create a criminal opportunity for the victim who already had purposed to commit the offence.[18] Entrapment may be used in an effort to counter illegal dealing. Here the police approach a targeted person and make him an offer which would enable him to commit an offence, as a way of thwarting illicit activities such as diamond smuggling.[19] The purpose of these traps is to deceive people into contravening the law by buying or selling products illegally.[20] Where these traps require infiltration of a given community and winning over the trust of targeted individuals, they would amount to an undercover operation.[21] This may be used either to obtain information or to lay a trap facilitating the commission of an offence.[22]

Entrapment may employ the manna-from-heaven model, where the police leave an object in a location where crime is prevalent and people are likely to steal it. For example, goods are placed in an unsecured vehicle from which they can be taken or grabbed by passing members of the public. This tactic is quite contentious for two reasons at least.[23] Firstly, it questions the role of the police as investigator of crime or

---

Criminal Law, the Law of Evidence and Sentencing, available at http://www.justice.gov.za/salrc/reports/r_prj101_2001may.pdf (visited 17 August 2018).

15 Bohler N (1999) "Lead us not into Temptation: The Criminal Liability of the Trappee Revisited" 12(3) *South African Journal of Criminal Justice* 317-330 at 317.

16 *R v Christou, R v Wright* [1992] QB 979 (CA). These cases from England are cited because they constitute common law as a source of law in Uganda, under section 14 of the Judicature Act, Cap 13 Laws of Uganda.

17 *R v Smurthwaite* [1994] 1 All ER 898.

18 *Smurthwaite* at 898.

19 *Nicholas Petrus Kotze v State* 2010 (1) SACR 100 (SCA) para 1.

20 *Kotze* para 3.

21 *Kotze* para 4.

22 *Kotze* para 22.

23 Hock (2011) at 78.

tester of virtue.[24] Secondly, the police create the opportunity for a person to commit an offence and then expect the court to admit evidence so constructed against said person. Another version of this model of entrapment is where the police provide a victim and wait for a criminal attack. The aim is to entice a target to reveal himself or herself. For instance, the police lure a serial rapist into selecting a chosen policewoman as his next victim. The potential victim is kept under surveillance.[25] The target is arrested when he takes the bait.

This article is concerned primarily with a hybrid model of entrapment that engages various forms. It begins usually with an individual soliciting a bribe in return for helping another (the complainant). The latter then tips off the police or other law enforcement agents, who facilitate the commission of the crime. They prepare a file and perform all the preliminary steps, such as obtaining statements, procuring the bribe money and recording its serial numbers.[26] After the day and time for the handover have been agreed upon by the suspect and the complainant, the law enforcement officers lay the trap. They monitor the complainant from a distance and arrest the suspect as soon as he has taken receipt of the bribe.[27] It has to be noted that, at this point, the story of the complainant usually is taken as gospel truth. While this may be corroborated by other evidence, it has to be established that he actually was solicited before the bribe was offered. Since the law enforcement officers do not indicate the use of any yardstick for proving malice or lies by a complainant,[28] an entrapment may lead to the conviction of an innocent person.

This entrapment procedure presents additional issues relating to the arrest. Typically, searches of the body of the suspect are performed, search certificates are procured and sometimes persons in the vicinity may be forced to sign these certificates.[29] It may be a traumatic experience for an accused to make a statement in the absence of legal counsel as a way to indicate his co-operation with the law

24 Hock (2011) at 78.
25 Hock (2011) at 78.
26 Author's communication with an officer from the IGG, November 2014.
27 Author's communication with the then Assistant Inspector of Police, Nakaseke Police Post, April, 2014.
28 *Uganda v Emmanuel Muwonge* High Court Criminal Case 738/2009 (3 September 2009).
29 *Uganda v Ekungu Simon* High Court Criminal Case 19/2011.

enforcement officers.[30] It is against this background that this article moots the statutory regulation of entrapment in order to ensure effective prosecution.

3 LEGISLATIVE FRAMEWORK RELATING ENTRAPMENT

As noted earlier, there are no statutory provisions that regulate the use of entrapment in criminal investigations in Uganda. Still, it is prudent to discuss the various laws which inform the use of entrapment to ascertain whether there is a need for a dedicated entrapment law in Uganda.

3.1 The Constitution

The Constitution does not provide expressly for the use of entrapment. However, it contains a Bill of Rights which acts as a working framework to ensure that the rights of accused persons are upheld. Article 28(3)(a) of the Constitution provides that:

> Every person who is charged with a criminal offence shall be presumed to be innocent until proved guilty or until that person has pleaded guilty.

This presumption runs from the time that the person is charged until the court makes a decision.[31] It extends to pre-trial proceedings when the law enforcement officer engages in the collection of evidence before the suspect has been charged.[32] This indicates that in cases where the police or the investigative officers seek to obtain evidence, they ought to do so in a manner that does not violate the presumption of innocence. The presumption well may not be tampered with in investigations involving the use of entrapment. However, the point is that entrapments ought to be used in a manner that promotes accountability by the investigating and prosecuting organs. This is not apparent from Article 28(3)(a).

The Constitution also provides for the right to privacy. This right is contained in Article 27, which declares that:

> No person shall be subjected to —
> (a) unlawful search of the person, home or other property of that person; or
> (b) unlawful entry by others of the premises of that person.

30 See *Ekungu* generally.

31 Article 28(3)(a) of the Constitution.

32 Ashworth A (2006) "Four Threats to the Presumption of Innocence" 10 *International Journal of Evidence & Proof* 241-279 at 249.

So, a lawful search would permit a violation of the right to privacy as a justified limitation. The lawfulness or unlawfulness of a search in an entrapment case would be evident from the procedure that the law enforcement officer uses. The officer usually prepares a search certificate after carrying out the search.[33] There is a practice of admitting evidence on search certificates as procured by police in the course of collecting evidence.[34] It is expected that persons who sign the search certificates should do so with due regard for the rights of the accused person. If the liberty of an individual is to be limited it should be only in justified instances. According to the Police Act (see §3.2 below), a police officer should have a search warrant for a search to be lawful. However, the practical realities of police work indicate that a police officer may conduct a search without a warrant, provided he is in possession of a warrant card.[35] This presents an issue that is not considered by either the Constitution or the Police Act and points to the need for a formal mode of dealing with entrapments as covert processes.

3.2 The Police Act

The Police Act[36] is silent on both the use and the regulation of entrapment. However, it regulates searches as a way of upholding or limiting the right to privacy. In this regard, the Police Act allows a police officer at or above the level of a Sergeant to conduct a search if he has reason to suspect that a crime may be or has been committed.[37] The bounds of this discretion are not provided. It must be noted that the police officer should be in possession of a search warrant issued by a Magistrates' Court, whether an arrest has been made or not.[38] The Act also says nothing about how the police officer may sift the evidence to establish whether there are grounds for a search. This is a challenge where the police officer places reliance solely on the story of the potential victim.[39] The impropriety arises when the police officer gives or acts on wrong

33 See *Ekungu* generally

34 *Boonyo v Uganda* High Court Criminal Appeal 23 of 2015. See also *Uganda v Jighar* High Court Criminal Case 19 of 2010.

35 A police officer is expected to produce his warrant card upon request by any person. See http://humanrightsinitiative.org/programs/aj/police/intl/docs/ea/101_THINGS_YOU_WANTED_TO_KNOW.pdf (visited 17 August 2018).

36 Police Act, Chapter 303, Laws of Uganda.

37 Section 27 of the Police Act.

38 Section 69 of the Magistrates Courts Act, Chapter 16 Laws of Uganda. See also Section 27 of the Police Act.

39 This danger is considered in the case of *Cheptuke* in §5 below.

information and obtains a search warrant,[40] or where the conduct of preparing the search warrant involves forcing persons who are not present at the search to append their names and signatures.[41] The Court often will admit the search warrants if the officer followed the correct procedure.[42] This poses the challenge of admitting entrapments into evidence on the basis of procedural irregularities, besides the human rights implications.

3.3 The Inspectorate of Government Act

The Inspectorate of Government Act of 2002 (IGG Act) does not provide for the regulation of entrapment. However, it does offer a procedure for the recording and handling of complaints to their logical conclusion. In terms of section 18(1) of the IGG Act:

> The Inspectorate may, by statutory instrument signed by the Inspector-General prescribe rules of procedure generally for the conduct of investigations and for any matter that is necessary for the efficient performance of the functions of the Inspectorate under this Act.

While this provision creates an opportunity to put in place bounds on the use of entrapment, it has not been used for this purpose. However, there is an *Operational Manual* that prescribes the standard guidelines and procedures to be followed in the operations and procedures of the Inspectorate of Government (IGG).[43] With regard to traps, it provides that:

> There are situations where the potential receiver of a bribe or any other form of gratification demands for such bribes and the potential giver (complainant) feels that such matter should be reported to the IGG's office. In such a situation the complainant has to co-operate with the officers of the IGG who then lay traps so as to arrest the person involved in the extortion.[44]

This Guideline is instructive in dealing with entrapment. It should be noted that it presupposes that once an individual has made a complaint to the IGG's office concerning the request for a bribe, two scenarios follow: firstly, co-operation between

40 Section 7(a)-(c) of the Regulation of Interception of Communications Act 18 of 2010.
41 See *Ekungu* generally.
42 See *Akbar Godi v Uganda* Court of Appeal Criminal Appeal 62 of 2011. See also *Uganda v Kato Kajubi* High Court Criminal Case 28 of 2012.
43 Inspectorate of Government (2004) *Operational Manual*.
44 IGG (2004) Guideline 3.5.

the complainant and the IGG's office; secondly, the arrest of the prospective receiver of the bribe. As earlier mentioned, besides the facts relating to the request for the gratification, the Guideline is mute on occurrences before the complaint is lodged.

With regard to the procedure after the complaint has been lodged, the Operational Manual provides for steps to be taken in the laying of the trap.[45] These include interviewing the complainant,[46] registering the statement,[47] recording the statements of relevant witnesses,[48] recording the serial numbers of the money to be used in the trap,[49] and handing over the money to the complainant.[50] The investigating officer is mandated to witness the complainant passing on the money to the suspect.[51] This is followed by a search of the body of the suspect and his arrest.[52] Whether the process involves malice against the suspect is dependent on how the interviewing officer records and analyses a complainant's statement.[53]

Where malice is not discovered, the procedure does not protect the suspect, because the investigating officer's purpose in witnessing the hand-over of the money to the suspect is to ensure that the exhibit is not lost.[54] In addition, the sole purpose of commencing the process of entrapment ideally is to arrest the suspect and not to collect evidence for prosecution.[55] The procedure that follows the arrest of the suspect includes a comparison of the serialised money exhibit with the list of serial numbers of the cash recovered[56] and the forensic examination of the money for anthracene.[57] It does not identify steps to ensure that the investigating officer does not provide more than an opportunity for the commission of the offence. Instances of over-insistence by the investigating officer to ensure that the suspect succumbs to the trap are not covered in the Guidelines. Be that as it may, in the absence of malice, the *Operational Manual* is a worthwhile tool for fighting corruption.

---

45 IGG (2004) Guideline 3.5, Matrix D.
46 IGG (2004) Guideline 3.5, Matrix D, step 1.
47 IGG (2004) Guideline 3.5, Matrix D, step 2.
48 IGG (2004) Guideline 3.5, Matrix D, step 3.
49 IGG (2004) Guideline 3.5, Matrix D, step 4.
50 IGG (2004) Guideline 3.5, Matrix D, step 5.
51 IGG (2004) Guideline 3.5, Matrix D, step 6. This is used in conjunction with treating the money with athracene to corroborate the evidence.
52 IGG (2004) Guideline 3.5, Matrix D, step 7.
53 IGG (2004) Guideline 3.5, Matrix D, step 1.
54 IGG (2004) Guideline 3.5, Matrix D, step 6.
55 See discussion of *Ekungu* and *Muwonge* in §5 below.
56 IGG (2004) Guideline 3.5, Matrix E, step 1.
57 IGG (2004) Guideline 3.5, Matrix E, step 2. See steps 2-8 in Guideline 3.5.

The IGG Act poses at least two challenges for balancing the use of entrapment and the rights of an accused person. Firstly, section 21 provides that investigations by the Inspectorate "shall not be held null and void by reason only of informality or irregularity in the procedure".[58] In addition, they "shall not be liable to be challenged, reviewed, quashed or called in question in any court of law".[59] While a critical engagement with this section is beyond the scope of this article, it evidently covers unethical conduct by investigating officers. Thus, if the entrapment is tainted with malice or other overtones of injustice, the current legal dispensation allows the use of this evidence with its irregularities, even if to the detriment of the accused. The legal protection and use of this evidence under section 21 of the IGG Act promotes resort to dubious ways of ensuring the prosecution and possible conviction of an accused. This provision may not pass constitutional muster were it to be challenged on account of its effect on the rights of an accused person. The fact that the procedural informality or irregularity of an investigation cannot be challenged, reviewed, quashed or questioned by a court, undermines the fair trial rights of an accused. The problem is exacerbated by the fact that Uganda's Constitution does not provide for the rights of an arrested, detained and accused person.[60] It merely confers upon an accused person the right to appear before court in person or be represented, at his expense, by a lawyer of his choice.[61] If the effect of dodgy entrapment evidence on the trial of an accused is not scrutinised before it is admitted, then the right to a fair trial is violated.[62] It is submitted that the Guidelines in the *Operational Manual* do not bind the court, and some courts, in the exercise of their discretion, may assess the admissibility of such evidence.

Secondly, the IGG, the Deputy IGG, an officer or any other agent of the Inspectorate is immune from civil or criminal prosecution "for anything done in good faith and in the course of the performance of his or her duties".[63] One may argue that this immunity creates consistency in the performance of their duties by officials who do not risk criminal or civil liability. However, good faith is not defined in the IGG Act, and therefore its application in an area that creates immunity but lacks guidelines

58 Section 21 of the IGG Act.
59 Section 21 of the IGG Act.
60 Compare Article 28 of the Constitution of Uganda and Section 35(1)-(3) of the Constitution of South Africa.
61 Article 28(3)(d) of the Constitution.
62 See generally Nanima RD (2016) "The Legal Status of Evidence Obtained through Human Rights Violations in Uganda" 19 *PELJ* 1-34. See also Article 28(3)(a) & (d) of the Constitution.
63 Section 22(1) of the IGG Act.

potentially is damaging to an accused. This immunity needs to be qualified in relation to the use of entrapment. Unqualified, it may lead to an abuse of an accused's rights. A persuasive South African provision on entrapment reads:

> (a) An official … who sets or participates in a trap or an undercover operation … shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.
> (b) No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.[64]

The point of departure in this provision is that the officer may be prosecuted if his conduct in the course of the entrapment does not exhibit good faith. The South African Criminal Procedure Act requires the court to look at the type of inducement used, the degree of deceit, trickery**,** misrepresentation or reward,[65] and the timing of the conduct, in particular, whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity.[66] Since the IGG uses entrapment, the IGG Act ought to provide appropriate guidelines for its law enforcement officers to use, instead of offering them blanket immunity for irregularities and informalities.

3.4 The Director of Public Prosecutions

Article 120(1) of the Ugandan Constitution provides that:

> There shall be a Director of Public Prosecutions appointed by the President on the recommendation of the Public Service Commission and with the approval of Parliament.

This provision allows for a person to occupy the office of the Director of Public Prosecutions, but does establish a Directorate of Public Prosecutions as an institution. However, it should be noted that the *de jure* Director of Public Prosecutions (already referred to as the DPP) operates as a *de facto* Directorate of Public Prosecutions. This may be deduced from the subsequent paragraphs of Article 120 which allow the DPP to function through officers duly instructed by him.[67] In practice, the DPP exercises his

64 Section 252A(5) of the Criminal Procedure Act 55 of 1977.
65 Section 252A(2)(f) of the Criminal Procedure Act.
66 Section 252A(2)(g) of the Criminal Procedure Act.
67 Article 120(4)(a) of the Constitution.

functions through officers who are appointed by the Public Service Commission to serve as prosecutors at various ranks.[68]

Technically, the DPP does not have the constitutional credentials to offer directions regarding the administration of justice. This means that, from a constitutional perspective, the DPP cannot prepare guidelines on the use of evidence derived from entrapment, since it may be argued that the content of the guidelines would not illuminate the constitutional functions of the DPP set out in Article 120(3) of the Constitution. The author is inclined to agree with the view that the issuance of such guidelines can occur only after Article 120 has been amended to provide for a Directorate of Public Prosecutions. Thereafter, an enabling law for the Directorate could be enacted to regulate the operations of the DPP.[69] Such regulation could assist with the admission of evidence obtained through entrapment, and must be considered against the backdrop that courts already have shown distaste for the informal use entrapment in the criminal justice system.[70]

4 INSTITUTIONAL FRAMEWORK GOVERNING ENTRAPMENTS

Entrapment is entrenched informally and institutionally in Uganda's Justice, Law and Order Sector (JLOS), despite the lack of statutory regulation. The JLOS is a sectoral approach used by the Government to engage institutions which are mandated to administer justice, maintain law and order, support human rights, and formulate strategy and unified objectives.[71] The institutions which constitute the JLOS include the Ministry of Justice and Constitutional Affairs, the Ministry of Internal Affairs, the Uganda Police Force, the Judiciary, and the Director of Public Prosecutions.[72] It is instructive to note that the Inspectorate of Government is not a member of the JLOS, despite its being at the forefront of the fight against corruption in Uganda. This rather risky omission is remedied in part by the Inter-Agency Forum, which encompasses 19

68 This information was obtained from a consultation with State Attorneys of the DPP in January 2017.

69 Nanima RD (2017) "The Need for a Review of Plea Bargaining in Uganda: A Reflection on the Experiences under Common Law and in South Africa" 1 *Journal of Comparative Law in Africa* 24-44 at 32.

70 See *Ekungu* at 9.

71 The Justice, Law and Order Sector: Our History, available at http://www.jlos.go.ug/index.php/about-jlos/our-history (visited 17 August 2018).

72 The Justice, Law and Order Sector: Our History, available at http://www.jlos.go.ug/index.php/about-jlos/our-history (visited 17 August 2018).

agencies, including the Inspectorate, in the execution of Uganda's anti-corruption strategy.[73]

4.1 The Uganda Police

The police use entrapment externally and internally. Internally, its Professional Standards Unit (PSU)[74] investigates instances of misconduct by the police and recommends appropriate action, which includes prosecution.[75] The activities of the PSU are premised on the Police Act which requires investigation of complaints of human rights violations and unprofessional conduct by police officers.[76] These complaints may be made by any member of the public against a police officer for bribery, corruption, oppression or intimidation and for neglect or non-performance of his duties.[77] The external use of entrapment is conducted in collaboration with either the IGG or the DPP.

4.2 The Inspectorate of Government

The Inspectorate of Government was established in 1986 as a Unit in the Office of the President to help construct a culture of accountability, transparency, integrity and good governance. Its mandate at that time was fourfold: protecting human rights, promoting the rule of law, eliminating corruption and abuse of office, and prescribing regulatory and administrative reforms to the legislature.[78] In 1995, the Inspectorate became a constitutional body that derived its functions and powers from Chapter 13 of the Constitution. Its activities are streamlined by the IGG Act, with its being mandated

---

73 They are the Directorate of Ethics & Integrity, the Inspectorate of Government, the Office of the President, the Directorate of Public Prosecutions, the Office of the Auditor General, the Ministry of Internal Affairs, the Inspectorate of Courts, the Local Government Finance Commission, the Uganda Revenue Authority, the Criminal Investigations Directorate, the Public Procurement & Disposal of Public Assets Authority, the Public Service Commission, the Ministry of Public Service, the Ministry of Finance, Planning and Economic Development, the Ministry of Public Service, the Ministry of Local Government, the Education Service Commission, the Health Service Commission and the Judicial Services Commission.

74 See "Complaint(s) against a Police Officer (Police Form 105)", available at http://www.upf.go.ug/complaints/ (visited 17 August 2018).

75 *Malambala Gasta and Kanyigule Malik v Uganda* Anti-Corruption Division of the High Court Criminal Case 0027/2015 at 3, available at http://www.ulii.org/ (visited 17 August 2018).

76 See section 70 of the Police Act.

77 "Complaint(s) against a Police Officer (Police Form 105)", available http://www.upf.go.ug/complaints/ (visited 17 August 2018).

78 See http://www.newvision.co.ug/newvision_cms/newsimages/file/igg.pdf (visited 17 August 2018).

to eliminate corruption, promote and foster the rule of law and principles of natural justice in public office, and enforce the Leadership Code of Conduct.[79]

The Inspectorate uses entrapment in its covert operations and prosecution of corruption-related offences. In practice, a complaint is received and registered by the Inspectorate and forwarded to the IGG or designated officer to sanction the case.[80] The solicitation that has to be recorded includes a phone call by the complainant to the person demanding the bribe. A brief is then prepared to note the amount being demanded in the solicitation and a request is made for the sum demanded to be provided. Once the money has been made available, the investigating officer records the serial numbers of the money on a form and attaches photocopies of the notes to the form. The complainant then is given the bait. He is fitted with an audio or visual recording gadget and accompanied by IGG detectives who monitor the engagement. As intimated above, the IGG has developed internal competencies to conduct these operations. Police officers may offer backup where the suspect resists or is expected to resist arrest. Once the bribe is passed to the suspect, the detectives swiftly move in, arrest the suspect and conduct a search for the money on the person of the suspect. When the money has been retrieved, a search form is completed and the recovered money is attached thereto as an exhibit. The search is expected to be done in the presence of the arrested person, the detectives, and other independent parties. Where a civil servant is the suspect, his superior or sometimes a police officer from the nearest police station (or police post) is asked to witness. The suspect then is apprehended and a charge and caution statement is recorded. Before the charges are preferred, the file is forwarded to the Directorate of Legal Affairs for perusal and advice on the sufficiency of the evidence for prosecution.[81] More often than not, further investigations are recommended, such as retrieval of telephone call print-outs, and translation and transcription of recordings if they have been made.[82]

It is usually after the investigations have advanced to a satisfactory minimum that the trap is laid to effect the arrest. This process exhibits a degree of professionalism on the part of the Office of the IGG. It fails, however, to show how instances of malice may be avoided systematically. The person who lodges the

79 Section 8(1)(a)-(j) of the IGG Act.

80 See http://www.igg.go.ug/complaints/ (visited 17 August 2018). The procedure was explained to the author by an employee in the IGG's office, 21 August 2017.

81 Author's interview with an Investigative Officer from the office of the IGG, 14 December 2017.

82 Author's interview with an Investigative Officer from the office of the IGG, 14 December 2017.

complaint with the IGG may offer gratification maliciously to the suspect and allege corrupt solicitation of a bribe. Such a complaint may be supported even by telephonic printouts indicating conversations between the suspect and the complainant.

It appears that while the use of entrapment by the IGG involves attempts to conclude an investigation before prosecution is initiated, the procedure is flawed where a complaint is malicious.[83] It should be recalled also that, as discussed in §3.3 above, investigating officers themselves can introduce malice into an entrapment operation. The point is that the process is open to abuse by officers or victims seeking to settle scores with suspects. This is a *lacuna* which is the direct result, more or less, of the lack of a statutory provision on entrapment.

The *Operational Manual* of the IGG does not provide a list of criteria that can be used to gauge the conduct of and adherence to good faith by an officer, or the court's role in evaluating the cogency of evidence obtained through entrapment.[84] This is problematic insofar as there is no engagement with the question of whether a reasonable person in the position of an accused or a suspect would have been induced to break the law.[85] No consideration is given to the degree of persistence and number of attempts made by the officer or the agent before the accused commits the offence.[86] These flaws make possible abuse of the accused person's right to a fair trial. In the absence of malice, the use of the *Operational Manual* to respect the sanctity of entrapment and the fair trial rights of an accused depends on the ethical constitution of the investigating officer.

4.3 The Director of Public Prosecutions

The DPP uses evidence obtained from entrapment to corroborate other evidence that points to the commission of a crime by an accused person.[87] This evidence is tested against the general rules of criminal procedure[88] and the admission of evidence.[89] Where the procedure of arrest, search and exhibition of the recovered money is done, the evidence so obtained may be admissible, unless there is a deliberate and conscious

83 From the author's interactions with the IGG's Office it appears that instances of malice are rare.
84 See IGG (2004) Guideline 3.5 generally.
85 Section 252A(2)(d) of the Criminal Procedure Act.
86 Section 252A(2)(e) of the Criminal Procedure Act.
87 This applies also to the IGG.
88 The general rules of criminal procedure are provided by the Criminal Procedure Code Act.
89 The general rules on admission of evidence are contained in the Evidence Act, Chapter 100, Laws of Uganda.

effort to question its impact on the rights of the accused. The role of the DPP in securing the admission of evidence derived from entrapment needs to be tested against other benchmarks to ensure that the process does not lead to a violation of the accused's rights.[90] These rights include the right to remain silent and the right to be presumed innocent.[91]

5 EMERGING JURISPRUDENCE

This section is concerned with the use of traps in Uganda as corroborative evidence. It seeks to establish whether they have been used to protect or to abuse the rights of the accused. It considers seven cases to ascertain how the courts have dealt with evidence derived from entrapment. These cases have been identified through a search on Uganda's online portal for decisions.[92] Two keywords were used: "corruption" and "bribe". The search returned 11 cases,[93] of which seven are relevant for the purposes of this article.

In *Uganda v Odoch Ensio,*[94] the Chief Magistrates' Court acquitted the respondent on grounds that the state had failed to prove that the money had been received corruptly. The state appealed and the question to be determined was whether the respondent corruptly received the money. The High Court quashed the lower court's decision and stated that it was inconceivable for a police officer to visit a suspect whose case had not been completed.[95] Further, the respondent's admission to receiving "money for lunch" portrayed him as a dishonest, unethical civil servant who readily succumbs to bribery. Thus, the confirmation of the conviction was based on the strength of the circumstantial evidence as evaluated by the appellate court.[96]

The High Court assessed the conduct of the accused and determined that he had made up his mind to commit the offence by asking for and receiving the bribe. This case indicates that a process-oriented approach to entrapment may be used to fight corruption in instances where the public servant is not maligned or unfairly accused. In addition, it encourages protection of society from wanton acts of

90 Again, this caution applies equally to the role of the IGG.
91 Article 28(3)(a) of the Constitution.
92 Available at https://www.ulii.org/ (visited 17 August 2018).
93 Results as at August 2017 available at https://www.ulii.org/search/ulii/corruption%2C%20bribe?page=5 (visited 17 August 2018).
94 High Court Criminal Appeal 28 of 2004, available at http://www.ulii.org/ (visited 17 August 2018).
95 *Odoch* at 6.
96 *Odoch* at 4-10.

corruption by civil servants, whose rights are not abused as long as they are subjected to due process before a guilty verdict is returned. Although the appellate court adequately re-evaluated the evidence, it did not comment on the use of traps by police and their impact on the rights of an accused person.

In *Uganda v Muwonge Emmanuel*,[97] the accused was indicted on two counts of corruption as a public officer under the Prevention of Corruption Act of 1970. The state sought to have the accused prosecuted despite inconsistencies in its evidence. The court noted that the overwhelming evidence of malice could not be used against the accused.[98] It pointed out that if the accused had received the money, squeezed it and thrown it out of the window, fingerprints ought to have been lifted off the money. Here the court was utilising the procedural rules as handmaids of justice. The court also held that the evidence that a police officer climbed a tree to witness what was happening in the accused's office was ridiculous and fell short of *prima facie* proof.[99] This case indicates that the courts are unlikely to bow to the pressures of overzealous prosecutors to have an accused convicted on the evidence of entrapment actuated by malice.

The decisions in *Muwonge* and *Odoch* express the court's protective role. In *Muwonge*, the court shielded the accused from over-zealous and malicious prosecutors. In *Odoch*, the court acted to defend society against corrupt public servants. These judgments also show the wisdom of using a process-oriented approach in fighting corruption, as opposed to a result-oriented approach which seeks to ensure that the enforcement agents obtain a conviction at all costs. The two cases suggest that the courts will go to great lengths to ensure that an accused and society are protected. The point of intersection between the two cases is the court's ability to balance the rights of an accused and the policies that underpin the fight against corruption.

In *Uganda v Cheptuke David Kaye*,[100] the accused was charged with two counts of corruptly receiving a bribe and one count of corruptly soliciting a bribe. The court noted that the accused solicited the bribe and, after receiving the complaint, the IGG went ahead to prepare a trap that led to his arrest.[101] The accused was acquitted on

97 High Court Criminal Case 738/2009 (3 September 2009).
98 *Muwonge* at 1.
99 *Muwonge* at 1.
100 High Court Anti-Corruption Division, Criminal Case 121 of 2010.
101 *Cheptuke* at 4-6.

the third count because of inconsistency as regards the act of soliciting a bribe. The court was left puzzled as to whether the solicitation was a payment of a previous loan by the victim to the witness or for admitting a prisoner to bail.[102] However, it scrutinised the setting of traps by the IGG on two occasions to aid its arrest of accused persons. These two instances pointed to a continued insistence by an enforcement officer to ensure that the accused commits an offence. While this was not the position in *Cheptuke*, there was a need to have a yardstick for courts to follow in evaluating the use of entrapment against an accused. *Cheptuke* points to potential abuse of an accused's right to a fair trial where there is evidence of a strained relationship between the person procuring the entrapment and the victim.[103] In *Muwonge*, the Court declined outright to rely on evidence obtained through malice. It may be said that in *Cheptuke*, the evidence from the entrapment was not as inconsistent as in *Muwonge*. The court's failure to evaluate this evidence of malice is a radical departure from *Muwonge* and it creates a platform for violation of the rights of an accused. This is exacerbated by the fact that the court did not confront the above-mentioned strained relationship in handing down its decision. The use of malice in entrapment connotes an abuse of the legal process where the courts, as custodians of justice, fail to consider all the available evidence to rule out the use of entrapment as a mode of settling scores with an accused. The case of *Cheptuke* shows that the court was pre-occupied with satisfying itself that the prosecutorial process was followed, without investigating the inconsistencies, the presence of malice, and the need to develop rules of entrapment. The right to a fair trial requires a substantive evaluation of the evidence, beyond procedural concerns.[104] The failure to balance the substantive and procedural considerations may lead to an infringement of the rights of an accused.

In *Uganda v Ekungu Simon*,[105] the colleagues of the accused were coerced by the law enforcement officer to sign search certificates as witnesses to the entrapment.[106] This happened despite their being absent from the room when the search was carried out.[107] The issue before the court was whether the search certificates could be used in evidence against the accused.[108] The court took issue with

102 *Cheptuke* at 5.
103 *Cheptuke* at 3.
104 See generally *S v Borgaads* 2013 (1) SACR 1 (CC).
105 Anti-Corruption Division High Court Criminal Appeal 19/2011.
106 *Ekungu* at 9.
107 *Ekungu* at 9.
108 *Ekungu* at 9.

methods used in police traps and stated that the mode of arrest and the requirements of search certificates had to be re-examined.[109] This was an indication that the court comprehended entrapment in terms of its overall effect on the admission of evidence obtained through human rights violations. The case raised concerns with regard to the possible violation of the right to human dignity of suspects,[110] as was evident from the mode of arrest deployed by the enforcement officers. This, coupled with malicious undertones and over-zealous prosecutors, brings to the forefront human rights issues of equality, respect and dignity. These insights question the result-oriented approach which does not subject the use of entrapment to a rigorous judicial process.

Another question that arises is the judge's discretion to admit entrapment evidence and its resultant effect on the administration of justice. Here the court stated that it could rely on the evidence if the state proved that its officials did not create the idea of committing the crime;[111] and that the victim was ready and willing to commit the crime before the laying of the trap.[112] This approach implied a development of rules by the court to guide the use of entrapment. It was a response to the human rights issues presented by entrapment and the need to revisit its use in relation to the right to a fair trial.[113] The court's protective posture towards the accused lay in its questioning of the mode of arrests and how it undermined the dignity of the accused.[114] The hesitant attitude to admitting the evidence from entrapment in *Cheptuke* was confirmed in *Ekungu.* This concretised the process-oriented approach in *Muwonge.* In addition, it demonstrated a strong willingness by the courts to exercise caution in using entrapment evidence.

In *Uganda v Lilian Nandaula*,[115] the major issue on appeal was whether the respondent did receive money from the witness in the course of the entrapment. The court stated that where the prosecution case wholly depends on circumstantial evidence, the exculpatory facts against the appellant must be incompatible with the evidence of the appellant and incapable of any explanation other than that of guilt.[116] The circumstantial evidence in *Nandaula* included no facts which connoted guilt since

109 *Ekungu* at 9.
110 Article 24 of the Constitution.
111 *Ekungu* at 9.
112 *Ekungu* at 10.
113 *Ekungu* at 9-10.
114 On human dignity, see Article 34 of the Constitution.
115 Anti-Corruption Division High Court Criminal Appeal 25/2012.
116 *Nandaula* at 4. This principle was enunciated in *Kazibwe Kassim v Uganda* [2001–2005] HCB 11.

the absence of money on the person of the respondent could not serve as proof of receipt. It was not clear why the respondent did not take the bribe, but this ought to have been a point to consider in use of the entrapment. The court elected to use this evidence to explain the truthfulness of the respondent and her lack of motive for taking the bribe. This position followed the general trend established in the *Muwonge* and *Ekungu* cases to protect an accused as regards the admission and use of evidence obtained through human rights violations. However, the court did not spell out any guidelines on the use of entrapment, especially where there was evidence of malice.[117]

In *Ouma Adea v Uganda,*[118] the appellant received gratification from a mining company as an inducement to allow it survey land to mine gold. The main ground of the appeal was whether the inconsistencies about the source of the money used in the entrapment were fatal to the evidence of the prosecution. While one witness testified that the money was from the mining company, another stated that it was from the IGG. The court held that since the appellant received the gratification, the source of the money was of no consequence. With regard to the inconsistencies, it declared that where the contradictions raised by the appellant are minor and do not raise any doubt about the cogency of the evidence, it may hold that the appellant corruptly received the gratification as charged.[119] This declaration shows that the court did not venture into the issue of regulating entrapment and preferred to deal with the evidence where questions as to its admissibility arose. It was a departure from the emerging jurisprudence in *Muwonge, Ekungu* and *Nandaula* insofar as it qualified the use of evidence from entrapment. This was done through balancing the gravity of the inconsistencies and unproved facts. In the exercise of its discretion, the court used the facts to establish whether they presented a violation of the accused's rights.

The same trend of qualifying the inconsistencies and the unproved facts was used in *Mugizi Leonard v Uganda,*[120] where the accused solicited and received monetary gratification as an inducement to reduce tax liabilities for a company. The evidence led by the state confirmed that the appellant received the bribe as a result of a police trap to lure him into committing the offence. There were inconsistencies as to how the appellant received the money and discrepancies in its serial numbers. The

117 See *Cheptuke* generally.

118 Anti-Corruption High Court Division Criminal Appeal 12/2013. See also *Uganda v ImereDeo* Anti-Corruption High Court Criminal Session Case 72/2011; *Uganda v Ndyanabo Abdallah*, Anti-Corruption High Court Criminal Case 84/2013.

119 *Adea* at 10.

120 Anti-Corruption High Court Division Criminal Session Case 01/2014.

court found these to be minor inconsistencies on grounds that an investigator's shortcomings did not have to prejudice the pursuit of justice.[121] The court opted to uphold the deficiency of the investigation over the fair trial rights of the accused as long as the fairness of the trial or administration of justice was not affected substantially. This case posits a situation where an accused wanted to use minor inconsistencies to elude justice. The court rightly rejected this attempt in its evaluation of the evidence.

The foregoing discussion shows that the courts' use of evidence obtained through entrapment was informed by four different approaches. In *Ensio* and *Muwonge*, the court sought to protect society from corrupt public servants. In *Cheptuke*, there was a potential abuse of the rights of an accused from a human rights perspective. This is evident in the court's admission of the evidence obtained from entrapment without critically evaluating its inconsistencies. *Ekungu* and *Nandaula* are indicative of the courts' desire to protect the accused against abuse of entrapment. Here the courts strive to ensure that the evidence obtained through entrapment is evaluated before it is admitted. In *Adea* and *Mugizi* there is an attempt to balance the accused's right to a fair trial and the implementation of the government strategy in dealing with corruption. It should be noted, however, that the cumulative effect of this emerging jurisprudence is to question the use of entrapment by enforcement officers and to give preference to a process-oriented rather than a result-oriented approach to entrapment.

The trajectory of the emerging jurisprudence indicates that every case is dealt with on its merits and not against a specific yardstick encompassing the need for entrapment, issues of malice and guidelines for scrutinising complaints. As a result, until a case is examined adequately, there is room for abuse of the rights of an accused. There is a lack of proper accountability by the institutions using entrapment insofar as they do not have clear guidelines for the process. Entrapment affects the rights of individuals, and it is prudent that the proper guidelines for its use are formulated and made accessible to the public.

121 *Mugizi* at 9.

6 CONCLUSION

The lack of a statutory provision to deal with entrapment signifies a lack of accountability on the part of the criminal justice institutions. There is no generally accepted yardstick against which the practice of entrapment can be measured. The *Operational Manual* of the IGG is not adequate for demarcating the bounds of the conduct of an investigating officer, especially where corruption is present. This inadequacy leads to mixed actions of both abuse and protection of the accused and of society at large. It is desirable that rules are enacted to deal with the entire process of entrapment. The ongoing proposals to amend the Criminal Procedure Code Act should include the use entrapment as a statutory tool to fight corruption.

In absence of a statutory rule, there are two models of entrapment which are used by the courts. The subjective model of entrapment focuses on the actions of the accused, particularly the predisposition of the accused to commit the type of crime charged.[122] This model is aligned to the result-oriented strategy on corruption in Uganda. The objective model of entrapment focuses on the actions of the law enforcement officer and bars his over-involvement in inciting criminal activity.[123] The application of these two models has resulted in divergent judgments dealing with entrapment. This jurisprudential inconsistency is due in large part to the lack of a statutory standard against which entrapment and evidence derived from it may be adjudged. In a word, there ought to be a law on entrapment, clearly identifying the enforcement officers, indicating the conduct expected from them, and requiring that the offices of the IGG and the DPP develop guidelines for the use of entrapment. Such a law will usher in accountability by the victims, the accused, the investigators, the prosecutors and the courts, thereby upholding the Bill of Rights in the Constitution.

While the IGG should be applauded for having an internal mechanism for the use of entrapment, more studies ought to done to improve the functioning of all the institutions which deal with corruption, so that institutional support and capacity are available manage the practical challenges arising from the use of entrapment. In addition, since the Inspectorate of Government has plans to adopt strategic approaches that promote its investigative efficiency, economy and effectiveness, it should improve its internal regulation of the use of entrapment to avoid violating the

122 Colquitt JA (2004) "Rethinking Entrapment" 41(4) *American Law Review* 1389-1438 at 1389. See also *Ensio* and *Mugizi*, where the objective was to create an opportunity for the commission of the offence. However, the accused had purposed to commit the offences.

123 Colquitt (2004) at 1389. See also *Nandaula*, *Ekungu*, *Cheptuke* and *Muwonge,* where the object was to ensure that the accused committed the crime.

human rights of the accused. Any proposals to Parliament to legislate for entrapment should be made after studying the experiences of other jurisdictions. Such study will inform the decision whether to regulate entrapment in a statute or whether to recognise it as a defence.