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The Constitutional Implications of Abuse of Entrapment in the Workplace: The Law in Lesotho from an American and South African Comparative Perspective

By Thakane Sello [201100323]

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Supervised by: Dr. Phoka Masoebe

Professor Evance Kalula

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Standard Wording for LL.M Mini Dissertation Declaration:

I Thakane Sello, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

Name: Thakane Sello

Signature: T.S

Date: 26th May 2025

Place: Maseru, Lesotho

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CONTENTS

Abstract

This research is aimed at scrutinizing the legal ramifications of civil entrapment in the context of Lesotho's legal landscape, utilising South Africa and United States jurisprudence as reference points. By undertaking an in-depth investigation of entrapment practices, the study pinpoints the lacuna in Lesotho's legal landscape: both the *Labour Act 2024* and its predecessor the *Labour Code Order 2000* as well as the *Criminal Procedure and Evidence Act 1981* are silent on the issue of civil entrapment. Shifting gazes to South Africa as the first reference point, it has the legal framework which pronounces itself more clearly in terms of *section 252A of its Criminal Procedure Act* and relevant case law, and the U.S.A on the other hand, opts a subjective predisposition test rooted in constitutional protections, Lesotho lacks any formal structure to regulate such practices. This legal vacuum places both stakeholders at risk of falling prey to vulnerable to coercive investigative methods and employers uncertain about evidentiary standards and due process requirements. The study closes the research by recommending appropriate legislative reforms, including amendments to the *Labour Act 2024* and *the Criminal Procedure and Evidence Act 1981*. These reforms are meant to act as the bridge that fills the legislative void by providing procedural safeguards, clarifying the boundaries of lawful surveillance, and seeing to it that any evidence emanating from entrapment is gathered and utilized in a constitutional manner.

The research commences by laying out the conceptual foundations of workplace entrapment, shining light on its double pronged nature as both a potential weapon for exposing misconduct and a risk for violating individual rights. Entrapment, when utilized in a mala fide way, it can result in manipulation, emotional bullying, and self-created crime. The inherent danger that attaches to employees in a jurisdiction where relevant legislation is silent on this issue, there is potential for it to be abused by employers. Considering this, this research views entrapment not just as a procedural issue but as a constitutional issue that could give rise to a number of issues which have a bearing on privacy, dignity, and unfair labour practices.

By embarking on the comparative analysis, the research shines light on the manner that South African courts have attempted to strike a balance *intersee* the interests of employers with the rights of employees. Landmark cases such as *Cape Town City Council v SAMWU* and *Caji v Africa Personnel Services* paint a clear picture on the canvas on the manner South African courts treat entrapment and they err on the side of caution, in instances where there is existence

of proof of inducement or manipulation. In both cases, courts reiterated the necessity of procedural fairness and tossed aside evidence gathered via emotionally coercive methods.

Unlike in South Africa, the United Stated jurisprudence on entrapment reveals that the main enquiry in any case where entrapment is involved is whether the entrapped person had predisposition. Analysis of cases of *Jacobson v United States* and *Sorrells v United States* is to the effect that the courts' focus is the latitude to which government agents may instigate criminal behaviour. It is true that this benchmark, places focus on the defendant's mindset than the investigator's conduct, however it acts as an indispensable constitutional safeguard against abuse of power.

The research further pinpoints the fact that Lesotho's Constitution provides a strong foundation for regulating workplace entrapment, despite the absence of a specific legislative instrument to that effect. Rights to privacy, and freedom from arbitrary action are already contained in Lesotho's legal system. Nonetheless, without enabling legislation to operationalize these rights in workplace investigations, constitutional protections remain theoretical. For that reason, this research presents a hybrid legal model for Lesotho: one that blends South Africa's procedural safeguards with the U.S. emphasis on individual predisposition to come up with a strong legal framework that is the best of both worlds and best regulate workplace entrapment.

To round off, the research puts forth the recommendation that is aimed at amending both the *Labour Act 2024* and *the Criminal Procedure and Evidence Act 1981* to incorporate sections that unambiguously deal with entrapment. Proposed amendments include but are not limited to the following: defining workplace entrapment, barring the use of emotionally manipulative tactics, and requiring prior authorization for covert operations. The creation of a tribunal mechanism, such as a role for the Directorate of Dispute Prevention and Resolution (DDPR), is also suggested to provide an avenue for employees to challenge the legality of entrapment-based evidence in disciplinary proceedings. These recommendations are meant to nurture the principles of fairness and legality while ensuring that employers retain the ability to investigate genuine misconduct in an ethical and legally compliant manner.

CHAPTER 1. INTRODUCTION AND BACKGROUND

1. INTRODUCTION

In a world where abuse of power prevails, it is of utmost importance to have laws or regulations as basis of referral point where a group of people work together. To mitigate tyranny, democracies adopted written constitutions with certain inviolable core features that must be respected and promoted in every sphere of social, economic, and political influence.[1] In the democratic dispensations with a constitution embracing constitutionalism, there are certain values that form part of the basic structure of the constitution.[2] In our case, one such basic structure is the supremacy of the constitution, it cannot be amended or abrogated by parliaments. The resultant constitutionalism, created by the written constitution, silently incorporates values in a sacred inviolable document. These are values, and predispositions that are enforced through the supremacy clause.[3]

Thus, modern democratic systems embracing constitutionalism do not only bind public authorities but private entities as well.[4] The obligations arising out of the rights and freedoms do not only bind government but juristic and private persons.[5] One such obligation is to behave reasonably, on the other hand, is a requirement placed on entities in order to prohibit them from behaving in an unfair or discriminatory manner.[6] Individual freedoms occupy the centre stage and every action that seeks to encroach or limit them should be demonstrably justifiable in a democratic society.[7]

In the workplace, these values on fairness derived from constitutional morality become essential when victims of abuse of power defend themselves against arbitrary acts.[8]

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[1] Law Society of Lesotho v Ramodibedi NO and Others (Constitutional Case No. 1 of 2003) [2003] LSHC 89 (15 August 2003) per Maqutu J., at para. 8. Also see Charles de Secondat, Baron de Montesquieu, The Spirit of the Law

[2] Richard Albert, Constitutional Amendments: Making, Breaking and Changing Constitutions (Oxford: Oxford University Press, 2019)

[3] Section 2 of the Constitution states that "this constitution is the supreme law of Lesotho and if any other law is inconsistent with this constitution, that other law, to the extent of the inconsistency, be void.

[4] Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, 102 MICH. L. REV. 387 (2003). p. 388

[5] Ibid

[6] Lesotho Highlands Development Authority v Malata (LCREV 87 of 13) 2015 LSLC 42 (8 October 2015) (unreported), para 11

[7] The test to determine whether any law infringes the constitutionally entrenched rights, and freedoms famously known as the Oakes test applied in R v Oakes 1986 1 S.C.R at 503 and was adopted by the Court of Appeal of Lesotho in Attorney General of Lesotho v Mopa LAC(2000-2004)

[8] Conradie M. Constitutional right to fair labour practices, a Consideration of the Influence and Continued Importance of the Historical Regulation of (un)fair Labour Practices pre-1977. Volume 22. Number 2; 2016 pp 163-204

In the workplace, ordinarily, when an act of misconduct is alleged to have taken place, an employer can charge the employee that is responsible and bring them before a disciplinary hearing. However, the cases are not always clear cut, hence identifying the culprit can be difficult. In these circumstances, there are several investigative techniques that the employer can use, one good but controversial method is the use of entrapment.[9]

What is entrapment? Entrapment is a situation where a person is enticed, incited, or encouraged into committing an offence that he would not have otherwise committed and being prosecuted for it.[10] Entrapment involves two main parties: the entrapping party and the party that the entrapping party intends to entrap. The first is referred to as the "agent" and the second the "target". The agent being a law enforcement officer or a governmental official or anyone acting on behalf of the said parties, and the target being a person or group of people suspected of a certain crime, but no evidence found to prosecute. [11] One would loosely say, entrapment is therefore being used *inter alia*, as one of the investigative tools by law enforcement.

The use of entrapment as an investigative method to apprehend and prosecute individuals is controversial, and has been widely criticised by the courts as well as academics.[12] Despite these criticisms, it is generally accepted that entrapment, fairly applied, is an effective and proactive investigative technique to detect, investigate and gather evidence.[13] This evidence would be in respect to offences which would otherwise go unpunished should conventional investigative methods be applied.[14]

While entrapment is commonly used in law enforcement, its usefulness has found its way in the employment context. [15] Employers are sometimes faced with improper conduct by employees where it is difficult to identify the culprit or to gather sufficient evidence against an employee that is suspected of such conduct hence entrapment becomes useful.[16] Underlying the concept of entrapment is the premise that, a person is lured into committing a crime for the

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[9] Murdoch, W. "Some Comments on Entrapment" (2010) Journal of South African Law at 835.

[10] Daniel J.Hill "The concept of entrapment" https://philarchive.org/archive/HILTCO-29

[11] Ibid

[12] comments by Hannah J in *S v De Bruyn* 1992 (2) SACR 574 (Nm) at 580-581 where the judge said "In my opinion, any reasonable, fair-minded person would immediately recognize the intrinsic unfairness involved in a government official deliberately enticing or inducing someone, not otherwise predisposed to commit an offence, to commit one, and then, having done so, to turn around and instigate a prosecution against such person. Certainly, such conduct would deeply offend my sense of fair play and I am prepared to assume, without deciding the question, that such conduct is so unfair that evidence gathered in such a way should be excluded on the ground that to admit it would prejudice the right of an accused to a fair trial".

[13] Park, R . Entrapment Controversy. *Minnesota Law Review* Volume: 60 Issue: 2 (1976) 163-274

[14] S v De Bruyn at 579.

[15] Adriette Dekker, "Traps in the Context of Labour Law" (2003) *Juta's Business Law* at 151; *Lawrence v I Kuper (Pty) Ltd t/a Kuper* (1994) 15 ILJ 1140 (IC) at 1146.

[16] Ibid

specific purpose of securing a conviction against that person.[17] However, entrapment oscillates between legitimate detection of wrongdoing in the workplace, and victimisation of individuals by abuse of power. In this case, law abiding individuals are lured into committing offences they would ordinarily not commit.

1.1 Constitutional implications of Entrapment

Largely, the adoption or admissibility of entrapment evidence can be viewed as giving the agents the fruits of their own actions. As Justice Roberts recognized;[18] There is common agreement that where a law enforcement officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the con- summation of so revolting a plan ought not to be permitted by any self-respecting tribunal.

While in Lesotho the practice of entrapment by law enforcers and employers is not governed by any legislation, it is a concept fairly used by both the law enforcement and the employers. The Lesotho Labour Act has recently been amended and the said concept has not been touched on, it would be imperative then, to say our law is silent on the issue. This poses a huge possibility of abuse of power by employers. The issues arising from the said abuse being discrimination as a constitutional freedom, right to fair trial, as well as equal protection of the law. This paper seeks to investigate whether there are any constitutional implications resulting from the use of entrapment.

1.2 Statement of the Problem

The use of entrapment is not limited to law enforcement but applies equally in the employment context. The main criticisms of entrapment in criminal law are also relevant in employment matters. Employees who would otherwise not engage in improper conduct may be induced by an entrapment to commit some misconduct. In entrapment, a criminal intent may be implanted in an otherwise innocent individual (an employee in this case), where an employer seeks to achieve vindictive and self-serving intentions to dismiss the said employee.

The use of entrapment in the employment context is not regulated by any statute or codes of good practice, either in Lesotho or in South Africa. This means that there are no clear

[17] Cape Town City Council v. South African Municipal Workers Union and 2 others CASE NO: C367/98 (unreported), p.22

[18] Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provacateurs, 60 YALE L.J. 1091, 1100-01 (1951); Note. The Serpent Beguiled Me and I Did Eat: The Constitutional Basis of the Entrapment Defense, 74 YALE L.J. 942, 943-44 (1965).

guidelines. Without proper regulation of entrapment, innocent individuals may be victimised by being targets of unscrupulous employers and thereby induced to commit a transgression which may lead to a dismissal. Also, without clear guidelines, the lines are blurred between what constitutes entrapment and the employer merely providing an employee with the opportunity or the means to commit an offense in the workplace.

The duty to act fairly, which forms part of Lesotho's constitutional morality, finds its footing in fair labour practices. Unfair and abuse of entrapment does not only violate fair labour practices but encroaches on sacrosanct constitutional values that underlie fairness. Without proper procedural guidelines, entrapment could be abused under pretext to undermine constitutional values of a typical argument centred around equal protection of the law, and non-discrimination on a targeted individual/employee.

Again, while an entrapment may also be abused to achieve nefarious motives of the employer, it is the same way selective prosecution operates in criminal law. Where there was a group, singling out employees while others who were engaged in virtually the same conduct have somehow escaped the employer's wrath is unfair. Mere selectivity in identification creates a constitutional problem, as the employer is under duty to act fairly considering equality before the law and non-discrimination in the workplace. This guarantees unfair targeting of individuals without any form of suspicion by the employer. In the process, the right to privacy is breached by the employer.

Significance of the study

a. The objective of this study is to provide a constitutional analysis on the issue of abuse of entrapment and whether Lesotho labour statutes sufficiently deal with it. This study oscillates between the need to prevent and detect wrongdoing and the promotion of constitutional morality values like fair labour processes, equality, and non-discrimination. Further, this study argues that an entrapment which is aimed at victimising and sometimes forcing resignation, constitutes unfairness.
b. By analysing constitutional implications on entrapment in the workplace, this study intends to show that entrapment may exceed the boundaries of the nation's constitutional morality. This entails that the current labour reforms do not cater for entrapment.

1.3 Research Questions

a. Are there limits to entrapment in the workplace?
b. Can entrapment be regarded as unfair labour practice?

c. Does misuse and abuse of entrapment go against core constitutional morality values?
d. How best can entrapment be regulated in a manner that strikes a balance between the rights of the employee and the interest of the employer?

1.4 PRELIMINARY LITERATURE STUDY

Literature is available on entrapment in law enforcement in criminal law but there is not much literature on entrapment in the workplace and its intersection with abuse of power undermining values that underlie constitutional morality. However, literature from law enforcement shall be of importance as the dynamics in entrapment are the same.

Daniel J. Hill et al in "The Concept of Entrapment" (2019) explore what constitutes entrapment and draw a standard distinction between legal entrapment, which is carried out by parties acting in their capacities as law-enforcement agents, and civil entrapment, which is not. The authors provide a definition of entrapment that covers both legal entrapment and civil entrapment. They extend the definitions to provide a more general definition of entrapment, encompassing both civil and legal cases. They further highlight some problems with the extensional correctness of these definitions and propose a new definition that resolves these problems. However, the study does not settle questions of permissibility and culpability.

Andrew Ashworth "What is wrong with Entrapment?" (1999) the aim of this article is to consider what amounts to entrapment, and under what circumstances (if any) such conduct should be regarded as permissible. The focus of the article is upon the arguments for and against allowing entrapment, although there is also consideration of the ways in which the criminal justice system (including the courts) ought to respond to cases of entrapment. The study does not identify any constitutional limitation in the enforcement of entrapment.

Liat Levanon in "The Law of Police Entrapment: Critical Evaluation and Policy Analysis" (2016) provides a critical analysis of the law of police entrapment and proposes a new foundation for this law. The article shows that the shift of scene' assumption underlies existing and proposed legal tests for the legitimacy of entrapment. The article further critically analyses instances where entrapment is morally and economically insignificant and offers an evaluation to justify entrapment on grounds of justice or on economy. The article then proposes a different basis for the analysis of entrapment, building on the idea of reallocation of burdens: where the

defendant creates particularly heavy burdens that go beyond the offence's harm expectancy, it is justified to increase his punishment expectancy through entrapment.

Heydon, J. D. "The Problems of Entrapment" (2009) raises several relatively un-discussed problems which fall into two groups, one centring on the trapper, the other on the entrapped accused. The first group comprises such issues as: Is the trapper criminally responsible? Does the rule relating to the corroboration of accomplice evidence apply to him? If not, should there be any warning about his testimony? Does his conduct sometimes require the exclusion of his testimony as being unfairly obtained? Secondly, has the accused a defence? Has he grounds for pleading in mitigation of sentence? Before looking at these issues, we shall examine the purposes and dangers of entrapment, and we shall see how the practice sometimes prevents either trapper or accused being criminally responsible for certain offences.

Joseph A. Colquitt in Rethinking Entrapment (2004) provides two traditional approaches to entrapment: the subjective and objective tests. The majority position, subjective entrapment, focuses on the actions of the accused, particularly the predisposition of that accused to engage in the type of crime charged. A minority of jurisdictions, by way of contrast, employs the objective model of entrapment, which focuses on the actions of law enforcement and bars over-involvement in inciting criminal activity.

Vincent Chiao in "Policing Entrapment" has been a prominent, if rarely successful, defence in terrorism prosecutions. The author sketches an egalitarian case for entrapment. On this account, the primary moral significance of entrapment is to prevent the police from generating crimes that would not otherwise have been perpetrated. In a context in which most people are, as Richard McAdams puts it, "probabilistic offenders," the power of the authorities to control the nature, frequency, and timing of an inducement to crime is the power to make criminals out of ordinary, but fallible, people. The article further makes a case for regulating undercover investigations through legislation. The article did not address the how part and the kind of regulations that are needed.

Gage G. Hodgen in "Resuscitating the Entrapment Defence: A Statutory Approach" (2021) proposes a statutory resuscitation of the entrapment defence to make the defence more suitable to the modern policing system. The author further examines the traditional variants of the entrapment defence as it developed in the common law of the United States as either a subjective test of the predisposition of the defendant or an objective test of the government's

conduct. Despite an interesting proposition for statutory resuscitation, there is a need to locate fair labour values in the Constitution.

Andrew Choo in "A defence of Entrapment" (1990) offers a simplistic substantive approach to determining entrapment for juristic persons and the government. Simply put, the test in theory, is whether a defendant is to be found not guilty if he would not have committed the offence in question but for the impugned governmental conduct. However, the author captures the downside of the approach thus: consequences of applying this test are (implicitly) recognised as being undesirable, and in practice the focus of the inquiry is upon the defendant's general intent ('predisposition') to commit crimes of the kind in question. Of importance, the study holds that it is apparent that the courts do not require that this 'predisposition' be adequately proved.

1.5 RESEARCH METHODOLOGY

This is desk and library-based research. As such, it will seek reliance from both published and unpublished material. Internet sources are also widely referred to. The study will also analyse primary sources of data such as constitutions, common law, and case law. As such, this will mainly be a library and internet-based study. The study will, however, also rely on informal interviews with experts on constitutional law, law of evidence and constitutional remaking and constitutional architecture.

1.6 STRUCTURE OF DISSERTATION/THESIS

Chapter one will basically introduce the study as was enumerated in the proposal (will not necessarily be a replication of the proposal).

Chapter two will give a theoretical rationale for undercover and entrapment at work. This chapter will also lay opposing theoretical frameworks on whether entrapment practices in the workplace align with the tenets of Lesotho's constitutional democracy. By using case studies, this chapter will also highlight the constitutional and common law underpinnings of the principles governing entrapment.

Chapter three is a comparative chapter wherein different jurisdictions will be examined as to how entrapment features in their jurisdiction. This chapter will use the Republic of South Africa, European Union, and the United States of America as comparable jurisdictions.

Chapter four concludes and offers recommendations on entrapment to obtain evidence in the workplace.

CHAPTER 2: THEORETICAL RATIONALE FOR ENTRAPMENT IN THE WORPLACE

2. INTRODUCTION.

chapter two will critically examine the theoretical foundations of entrapment and undercover operations in the workplace. Through a careful analysis, we will explore whether these practices align with the tenets of Lesotho's constitutional democracy, particularly regarding workers' rights. We will navigate the complex terrain of constitutional and common law, using case law to support and challenge the principles governing entrapment. The chapter will also draw insights from comparative legal frameworks, such as those of the United States and South Africa, to highlight the wide implications of entrapment and workplace surveillance.

2.1. Defining Entrapment and Undercover Practices in the Workplace

Before delving into the theoretical nuances, it's essential to establish a clear understanding of what entrapment and undercover operations entail, especially within the workplace setting. At its core, entrapment takes place when the employer 'agents' to conclude to conclude 'deals' with employees involving illicit transactions.[19] Entrapment entails cooperating with an employee in the commission of an offence.[20] While traditionally a concept grounded in criminal law, entrapment has increasingly found its place in employment law, particularly when employers or government agencies deploy undercover tactics to investigate and uncover illicit activities, such as fraud, theft, or corruption within the workplace.

To draw a parallel, consider the story of Eve in the Garden of Eden. As she famously stated, "The serpent beguiled me, and I ate" (Genesis 3:13). This narrative echoes the essence of entrapment in the workplace, where individuals may be subtly coaxed or even manipulated into engaging in behaviour they would not have otherwise contemplated. In the context of undercover operations whether conducted by an employer or a law enforcement agency the question persists: when does an investigation move from a lawful inquiry into an unconstitutional act of coercion? This is the heart of the entrapment debate, both in criminal and labour law.

[19] John Grogan, 'Workplace Law' (2009) Tenth Edition, *Juta,* pg. 235.
[20] *Ibid.*

When employers uncover misconduct but cannot after proper investigation identify the culprits, they may be tempted to resort to "trapping".[21] This entails appointing people, often outside 'agents' whose job is to try to conclude 'deals with employees, usually as purported receivers of stolen goods'[22] It is submitted that this tactic involves appointing individuals, whose job is to engage employees typically under false pretences. According to Dekker entrapment occurs when a person is lured into committing a crime for the specific purpose of securing a conviction against that person.[23]

However, the concept of entrapment is further elaborated upon by Hill, who offers a more detailed framework. Hill explains:

> Entrapment involves two main parties: the entrapping party and the party that the entrapping party intends to entrap. We call the first the ''agent'' and the second the ''target''. When the agent is responsible for law enforcement, or (as in the case of an informer asked by the police to entrap) acting on behalf of someone who is, and is acting (permissibly or otherwise) in the agent's capacity as a law-enforcement agent or as the deputy of a law-enforcement agent, we are dealing with legal entrapment. When the agent is neither acting for, nor acting as, a law-enforcement officer, we are dealing with civil entrapment. Civil entrapment is carried out by someone who is either not a law-enforcement officer, or the deputy of such an officer, at all, or who is but is not acting (permissibly or otherwise) in that official capacity.[24]

What is apparent from the above is that civil entrapment is especially pertinent in the context of workplace investigations. In such cases, the "agent" is typically not a law enforcement officer or acting as one, but instead an employer or an employer's representative. Private entrapment most commonly occurs within the framework of the employment relationship,

[21] Christoffel Pieters, "The Application of Criminal Investigations Methodology and Guidelines in Modern Day Labour Related Investigations", (2010) Master's Dissertation, *North-West University,* pg. 19
[22] John Grogan, Dismissal, discrimination & unfair labour practice, (2007) *Juta,* pg. 327.
[23] Adriette Dekker, 'Traps in the context of labour law: The Principles Explained' (2003) 2 (3), *Juta's Law Review,* pg. 151.
[24] Daniel Hill et al. "The Concept of Entrapment" (2018) 12 (4) *International Journal for Philosophy of Crime, Criminal Law and Punishment, Springer,* pg. 539-540.

where an employer seeks to gather evidence of employee misconduct, often by employing undercover tactics to induce actions that would otherwise remain hidden.[25]

It is the view of the author that the critical distinction here lies in the intent and the agents involved. While legal entrapment typically involves government agents acting in an official capacity to enforce the law, civil entrapment in the workplace is orchestrated by private individuals usually employers seeking to uncover illegal activities within their own organizations. This private form of entrapment is an important focus, as it raises unique legal and ethical questions that are distinct from those associated with law enforcement-led investigations.

Entrapment arises when an individual is lured into committing a crime with the specific intent of securing a conviction against that person. Yet, as the debate expands beyond traditional criminal law, it becomes increasingly apparent that workplace entrapment requires careful consideration of legal and ethical boundaries, particularly when employers or third-party investigators deploy these undercover tactics.

In this expanded context, it is critical to examine the legal principles that guide both criminal and civil entrapment. While the concept is most discussed in criminal law, it applies to workplace investigations, where employers often without the same legal constraints as law enforcement might seek to obtain evidence of criminal or unethical behaviour. This viewpoint is backed by Monyakane who states:

> Amongst others, the employer uses entrapments, such as tapping employee's communication without the employee's knowledge. Such information would include emails, telephone communications, faxes and many others that the employer can privately access. In so doing, the employer exposes the employee to self-incrimination and breaks the employee's rights to privacy and silence while the employer pays no regard to the lawful processes regarding criminal case related access to information.[26]

[25] Darren Subramanien, Nicci Whitear-Nel 'The Exclusion of Evidence Obtained by Entrapment: An Update', (2011) *Obiter,* pg. 636.

[26] 'Mampolokeng 'Mathuso Mary-Elizabeth Monyanakane,'The Constitutionality of Employers' Investigative Procedures and Disciplinary Hearings Processes with Specific Reference to Dismissal Of Employees On the Basis of Criminal Misconduct in South Africa' (2020) *University of South Africa,* pg. 210.

Courts have argued that entrapment occurs when an individual is induced to commit a crime that they would not have committed otherwise,[27] and this principle becomes equally important when considering whether employers have overstepped their authority in an effort to gather evidence.

A key legal distinction must also be made between legal entrapment, which involves state actors such as police officers, and civil entrapment, which occurs when non-governmental agents, like employers, attempt to induce or lure an individual into unlawful conduct. The former is well established in case law, often hinging on whether the individual was predisposed to commit the crime. The latter, however, is still developing, especially in terms of its ethical and legal implications within private employment.

To understand where the line between lawful investigation and entrapment lies, we need to assess the concept of predisposition. In criminal law, a defendant's predisposition to commit a crime plays a central role in determining whether they were entrapped.[28] If a person was already inclined to commit the crime, then law enforcement's actions in inducing the crime would typically not qualify as entrapment.[29] The same principle can be applied in workplace settings. For instance, if an employee was already engaging in misconduct or had a history of dishonest behaviour, an undercover operation might not be considered entrapment. However, if the employer orchestrates a situation in which the employee is coerced or manipulated into committing an unlawful act, then entrapment may be a valid concern.

The line between permissible investigative tactics and coercion can become blurred, particularly when employers use undercover methods to uncover employee misconduct. In the workplace, undercover operations often occur in the form of "trap" scenarios, where an employer or third-party investigator poses as a fellow employee, customer, or supplier to see if an employee will engage in illegal activities such as theft, fraud, or corruption. The legal and ethical issues arise when such investigations create pressure that goes beyond acceptable investigative techniques and could be seen as an inducement.

Employers, while empowered to protect their businesses, must balance investigative interests with employees' rights to privacy and fairness. This balance is especially critical when undercover operations are in play. In cases where these operations are seen as excessive or

[27] *Ibid,*
[28] *Hill* (n6) pg.553.
[29] *Ibid.*

coercive, courts may deem them as unlawful. It is in these situations that the concept of entrapment as applied to the workplace becomes an essential discussion, particularly when the line between maintaining company integrity and violating employee rights is so fine.

Entrapment arises when an individual is lured into committing a crime with the specific intent of securing a conviction against that person.[30] Yet, as the debate expands beyond traditional criminal law, it becomes increasingly apparent that workplace entrapment requires careful consideration of legal and ethical boundaries, particularly when employers or third-party investigators deploy these undercover tactics.

2.2 COMMON LAW ON ENTRAPMENT.

To provide a comprehensive analysis, case law will be examined to determine the circumstances under which entrapment has been deemed legally permissible and instances where it has been ruled unlawful. By reviewing judicial interpretations, the discussion will highlight the legal boundaries of entrapment in both criminal and employment settings.

The first case under consideration is *Lachman v S,*[31] which provides a foundational perspective on how courts have approached the issue of entrapment and its legal implications. In this matter, the appellant appealed a conviction on the basis that the police operation amounted to an unlawful trap, arguing that the evidence obtained should be inadmissible. At the trial, the appellant's defence counsel asserted that the police had failed to comply with the requirements under section 252A of the Criminal Procedure Act, which governs the admissibility of evidence obtained from police traps. The defence's position was that the police, by soliciting the bribe and orchestrating the trap, had essentially created an opportunity for the appellant to commit the offense, thereby undermining the fairness of the proceedings.[32]

The Supreme Court of Appeal, however, rejected this argument, agreeing with the lower courts that the operation did not constitute a trap as defined in law. A "trap," as described by the court in earlier cases, involves police officers inducing an individual to commit a crime they would not have committed otherwise. However, in this case, the series of SMS messages originating from an anonymous source led the appellant to engage in the corrupt transaction with Mokoena, not the police themselves.[33] The court found that the police's role was merely to facilitate the

[30] *S v Malinga* 1963 1 SA 692 (A) 693F-G; *S v Tsochlas* 1974 1 SA 565 (A) 574B.
[31] *Lachman v S* 2010 (2) SACR 52 SCA.
[32] *Ibid,* para 32.
[33] *Ibid,* para 37.

opportunity for the transaction to take place, but they did not create the criminal intent or behaviour. The police merely observed and participated in a "controlled delivery" to apprehend the suspect once the offense was about to be committed.[34] Therefore, the argument that the police operation amounted to a trap was deemed unmeritorious.

The appellant also contended that the search conducted by the police, which led to the seizure of a cell phone, was unlawful, as it occurred without a warrant. The argument was based on section 22 of the Criminal Procedure Act, which governs searches without warrants, contending that the appellant had not been properly informed of his rights or that he could object to the search. [35]However, the court found that the appellant had consented to the search, and even if he had not, the outcome would have likely been the same, as the police had reasonable grounds to conduct the search. Therefore, the evidence obtained through the search was deemed admissible.

In terms of the substantive case against the appellant, the court found that the circumstantial evidence overwhelmingly pointed to his guilt. The appellant's defence that the cell phone was planted on his desk was considered implausible, as no evidence supported such a claim. Witness testimony and physical evidence connected the appellant directly to the incriminating cell phone, thus establishing beyond a reasonable doubt that he had engaged in the corrupt transaction. Even if the cell phone had not been found, the remaining circumstantial evidence was sufficient to support the conviction. [36]

Thus, the court upheld the conviction, rejecting the appellant's arguments regarding the unlawful trap, unlawful search, and insufficiency of the evidence. The findings of both the trial court and the High Court were deemed correct, and the evidence was admitted without any violation of the appellant's rights.

The use of entrapment or undercover tactics in law enforcement operations, as illustrated in this case, is governed by strict guidelines that aim to preserve the integrity of the judicial process. The court's decision reinforces that police conduct should not induce or coerce an individual into committing a crime they would not have otherwise committed. In this instance, the police merely facilitated the opportunity for the offense to take place without creating the

[34] *Ibid,* para 39.
[35] *Ibid,* para 42.
[36] *Ibid,* para 54 – 58.

offense itself.[37] The distinction between facilitating a crime and entrapment is critical: entrapment occurs when law enforcement officials actively encourage or incite an individual to commit an offense, which was not the case here. The court emphasized that the mere provision of an opportunity for the crime to occur does not, by itself, amount to entrapment, and this ensures that such undercover operations remain within the bounds of the law while still being effective in preventing and prosecuting criminal activity.[38]

This careful balance is crucial, as it prevents the abuse of power by authorities while ensuring that law enforcement can still employ strategies that deter crime. The case demonstrates that entrapment defences should only succeed where there is a clear demonstration that the police crossed the line into improper conduct.

With this ruling in mind, the next case of *S v Dube* offers a contrasting perspective on the application of undercover tactics and their impact on criminal responsibility. In this case Toyota South Africa Manufacturing (Toyota) was experiencing a tremendous amount of theft, mainly of parts off the assembly line, from its plant in Durban.[39] When the efforts of its own security staff to find out who the culprits were had been unsuccessful, Toyota enlisted the services of one S, a 'loss control consultant' who worked for corporate organisations looking at losses through theft and fraud. S assembled a team of people and set about the investigations at Toyota, working under cover. Purporting to be involved in a vehicle and parts syndicate interested in buying stolen goods, S was put in contact with the appellant as someone who was interested in supplying stolen goods.

The appellant informed S that he had a contact person (X) at Toyota who was involved in supplying new vehicles and parts. The appellant set up a meeting between S and X. S arranged for photographs to be taken of the meeting and tape recorded the conversation he had had with the appellant and X, in which X agreed to supply him with a stolen vehicle. With the help of the appellant, X and others, S managed to buy two vehicles which had been stolen from the Toyota plant. Toyota did nothing to prevent the removal of the vehicles from the plant and it also furnished the money that S used to pay for the vehicles. It appeared that members of Toyota's own security staff were involved in the thefts. As a result of S's investigations, the

[37] *Supra* (n14).
[38] *Ibid,* para 41.
[39] *S v Dube* 2000 (2) 583.

appellant, X, and two others were charged in a regional court with two counts of theft of motor vehicles. S was the main State witness.

During his evidence S introduced the photographs taken of his meetings with the appellant and transcripts of the recordings of their conversations, which were found to be admissible. The court found that, based on S's evidence, as corroborated by the photographs and the transcripts, the State had established beyond reasonable doubt that the appellant vehicles from Toyota's plant and that the appellant had at all times known that he was doing something unlawful.

The appellant and two of the other accused were convicted on both counts of theft. The appellant appealed to a Provincial Division against the convictions and sentences on both counts. It was submitted on his behalf that, if the theft of the two motor vehicles had occurred, they were in consequence of a trap or undercover operation conducted by S and his assistants and that the magistrate ought not to have allowed the evidence of the entrapment (a) having regard to the provisions of s 252A of the Criminal Procedure Act 51 of 1977 (Act 51 of 1977), alternatively (b) having regard to the common law regarding entrapment; alternatively (c) because to do so would infringe on the constitutional rights of the appellant to a fair trial. [40]Section 252A of Act 51 of 1977 only came into operation on 29 November 1996 and the thefts in question occurred on 20 and 23 October 1995. It was submitted that, since s 252A was procedural in effect, it operated with retrospective effect and therefore applied to the trap under consideration.

In the alternative it was argued that, even if S's evidence were admissible, the magistrate had erred in allowing the evidence relating to the tape recordings and the photographs to be admitted in that (a) the recording was an infringement of the provisions of s 2(1)(b) of the Interception and Monitoring Prohibition Act 127 of 1992 and of the appellant's right to privacy and consequently invaded his right to a fair trial in terms of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution); (b) if the magistrate had a discretion to admit such evidence, there were no criteria present in the present case which justified such discretion being exercised in favour of the State; (c) the obtaining of the photographic evidence without the knowledge and consent of the appellant also invaded his right to privacy and his right to a fair trial; and (d) the evidence of S standing alone and without the tape recordings and photographs was insufficient in itself to prove the appellant's guilt beyond a reasonable doubt.[41]

[40] *Ibid,* p585.
[41] *Ibid,* p586.

The central issue in this case was whether the appellant's involvement in the theft of vehicles was a result of entrapment through an undercover operation conducted by S, a loss control consultant employed by Toyota. The appellant argued that the thefts were induced by the operation set up by S and that the evidence obtained from the operation, including photographs and tape recordings, should be excluded due to violations of his constitutional rights specifically the right to privacy and a fair trial.

The court held that, despite the appellant's claims of entrapment, the evidence collected by S was admissible. The court emphasized that while Section 252A of the Criminal Procedure Act 51 of 1977 does not specifically define a "trap" or "undercover operation," the operation in question did indeed provide the appellant with the opportunity to commit the offense, which constitutes a "trap" under the section. However, the court ruled that Section 252A did not apply retroactively because it came into effect after the events in question. Moreover, it was clear that Section 252A only applies to law enforcement officers or their agents, not to private individuals like S.

The court further held that, while there was no substantive defence of entrapment in South African law, evidence of entrapment could be excluded if it rendered the trial unfair. In this case, the court found that Toyota, as the victim of the thefts, had a legitimate interest in protecting its property and preventing further theft. The appellant was found to have willingly participated in the thefts and had several opportunities to withdraw from the operation but chose not to. Therefore, the court concluded that the undercover operation did not unfairly induce the appellant to commit the crime. Regarding the appellant's right to privacy, the court found that the evidence collected such as the photographs and tape recordings was crucial in establishing his guilt and did not violate his constitutional rights. In conclusion, the court dismissed the appeal, upholding the appellant's conviction and finding that the trial was fair and that the evidence obtained through the undercover operation was admissible.

It is the view of the author that this ruling has significant implications for the use of entrapment defences in South African law. It reaffirms that there is no substantive defence of entrapment in the legal system, but it also clarifies that evidence obtained through entrapment may be excluded if it leads to an unfair trial. In this case, the court found that the undercover operation, though involving some level of inducement, did not result in an unfair trial. The appellant's voluntary participation in the thefts played a key role in justifying the operation.

This case also clarifies that undercover operations initiated by private individuals, such as Toyota in this case, are not governed by the same statutory restrictions that apply to law enforcement officers. The decision highlights the importance of context if the victim (in this case, Toyota) has a legitimate reason to protect its interests, and the accused had ample opportunity to withdraw, then the use of entrapment evidence can be considered fair. The court's ruling further solidifies the view that the fairness of the trial depends on the specific circumstances of each case, particularly the conduct of the accused and the role of the victim in the undercover operation.

Building on these principles, the next *Cape Town City Council v SAMWU and Others* further explores the boundaries of entrapment and undercover operations.[42] In this matter, two employees of the Cape Town City Council Beukes and Dollie were dismissed after being induced by investigators to sell electric cabling. The City Council had hired a firm of investigators to probe into suspected cable theft by employees. The investigators approached a group of employees at a substation, claiming they needed cable to supply electricity to a house for underprivileged children. Over a period of time, the investigators approached two of the employees Beukes and Dollie multiple times before the transaction finally took place.

The central issue in this case was whether the entrapment of employees by law agents could justify the dismissal of these employees, and whether evidence obtained through such entrapment could be used against them. The employees contended that entrapment, in all its forms, had no legal standing in an employment context.

The court held that the use of entrapment by agents and law enforcement officials could be permissible, provided that it was scrutinized and appropriately constrained. It emphasized that law enforcement would face significant barriers if evidence obtained from entrapment situations were automatically excluded.[43] However, the court found that the investigators' conduct exceeded the boundaries allowed under section 252A of the Criminal Procedure Act. The two investigators Fisher and Albertus had actively encouraged Beukes and Dollie to commit the offense by using tactics such as emotional appeals and multiple attempts to convince them to sell the cable.[44] As a result, the court ruled that the evidence could not be

[42] *Cape Town City Council v SAMWU and Others* (2000) 21 ILJ 2409 LC.
[43] *Ibid,* para 60.
[44] *Ibid,* para 65.

used against the employees, and that entrapment could not be justified under these circumstances.

The court's judgment rested on several factors, including: The investigators' repeated efforts to persuade the employees to commit the offense, which went beyond merely providing an opportunity; the emotional appeal made by the investigators, who claimed that the cable was needed for underprivileged children; the fact that the employees were not suspected of any prior criminal activity,[45] and the investigation was initiated by the agency based on unverified information about employee theft; the court emphasized that entrapment is inherently repugnant when officials actively encourage criminal acts, especially when the inducement is persistent and manipulative. The court also clarified that entrapment is acceptable only if there is no active encouragement by the investigator and if the trap is conducted in a fair manner. In such cases, evidence obtained may be admissible, provided the employer can prove that the entrapment was conducted properly.

The court outlined a two-stage enquiry process to evaluate the fairness of entrapment. First, it assessed whether the conduct of the trap exceeded the mere provision of an opportunity to commit the offense.[46] Factors such as the nature of the offense, the availability of alternative investigative methods, the degree of inducement, and the potential exploitation of vulnerabilities were considered. Second, it balanced public and private interests, including the seriousness of the offense, the necessity of using entrapment, and the proportionality of the means used to the crime committed.

It is the view of the author that the ruling significantly impacts the understanding of entrapment in both employment and criminal law contexts. The court's emphasis on the potential harm caused by entrapment practices reaffirms the necessity for a thorough review of such methods. By highlighting that entrapment is permissible only under strict conditions and when used as a last resort, the ruling ensures that law enforcement and employers cannot exploit vulnerable individuals or manipulate them into criminal behavior. This case also clarifies that entrapment should not be viewed as a tool to simply create opportunities for crime, but rather a means to uncover criminal activity that otherwise might be difficult to detect.

Moreover, the decision highlights the responsibility of employers to create ethical and reasonable investigative procedures, rather than relying on manipulative tactics that could

[45] *Ibid,* para 64.
[46] *Dekker* (n5)

tarnish the legitimacy of the evidence and result in unjust consequences. The court's ruling serves as a protective measure for employees, ensuring that they are not subjected to undue pressure or coercion by employers or law enforcement officials, which could undermine their rights and lead to wrongful convictions.

The cases discussed above drive home the notion that entrapment, while a tool of law enforcement, must be carefully inspected to ensure fairness. The court's decision sets out key parameters within which entrapment can be justified, marking the boundaries between acceptable law enforcement practices and undue manipulation. These cases law have played a hand in shaping current decisions regarding entrapment, serving as a precedent for balancing the needs of justice with the protection of individuals' rights. As we move forward, it is essential to examine how these principles are applied in real-world law enforcement practices, and how they intersect with constitutional safeguards, especially in the context of undercover operations. The following part will delve into this intersection, focusing on the impact of entrapment and undercover work on Lesotho's constitutional democracy.

2.3 Intersection of Entrapment and Undercover Operations with Lesotho's Constitutional Democracy

The concept of entrapment and the use of undercover operations in the workplace present a significant tension between law enforcement objectives and the protection of individual rights. In Lesotho, the Constitution guarantees fundamental rights, including the right to privacy, personal freedom, and protection from arbitrary actions. These rights are central when considering workplace surveillance and the potential use of undercover tactics by employers or law enforcement agencies. This part of the research will explore how entrapment and undercover operations in the workplace intersect with Lesotho's constitutional democracy, with a focus on balancing constitutional protections with investigative needs.

The Constitution of Lesotho, as the supreme law of the country,[47] provides a comprehensive framework of fundamental human rights that are directly relevant when assessing workplace surveillance and undercover operations. Notable sections of the Constitution that protect workers from potential abuses in the workplace include freedom from discrimination.[48] If an employer or an organization deliberately creates circumstances that unfairly target or discriminate against certain employees based on their race, colour, sex, language, religion, or

[47] *Constitution of Lesotho* 1993 section 2.
[48] *Ibid,* section 18.

any other status listed in the Constitution,[49] then the act of entrapment could be seen as a form of discriminatory practice.

In the context of entrapment, an employee who is suspected of misconduct or who is targeted due to the perceived likelihood of committing an offense may argue that this status of being a 'suspect' or facing heightened scrutiny due to suspicion amounts to an unfair distinction. This suspicion, and the subsequent entrapment, can lead to discrimination, particularly if it stems from an unjust or discriminatory basis. Much like in *Fuma v The Commander LDF*,[50] where an employee's health status (HIV) was the basis for his claim of discrimination, in this case, the 'status of being a suspect' could also be argued as a form of unconstitutional discrimination under Section 18 of the Constitution. This is because such an employee, having been singled out based on suspicion, faces unequal treatment compared to others who are not subjected to the same treatment. This action could impose unfair restrictions or punishments, creating an inequality between employees who are not subjected to such actions. As such, this kind of practice would likely violate the constitutional protection against discrimination, as it results in unequal treatment and disadvantages one group of people based on their attributes.

Drawing from the wide interpretation of 'other status' in Fuma, where the court recognized health conditions as a ground for discrimination, it can be argued that an employee's status as a 'suspect' a person who is targeted or perceived to have a propensity for misconduct can also be considered under the same category. The suspicion or presumption of guilt, especially when manipulated or coerced into a situation of entrapment, becomes a status that deserves constitutional protection against discrimination. The idea that being a suspect or targeted for entrapment could be discriminatory is grounded in the concept that, like any other status, it affects how an individual is treated in comparison to others in the same situation.

The determination of whether such discrimination has occurred should consider several factors, as laid out in the case of *Attorney General of Lesotho v'Mopa*, where the court emphasized that a limitation of a constitutional right is justified only if it is reasonable and demonstrably justified in a free and democratic society.[51] These criteria also apply when deciding whether suspicion or targeting an employee as a 'suspect' is justifiable or discriminatory. The Mopa

[49] *Ibid,* (3).
[50] *Thabo Fuma v The Commander LDF and Others* CONST/08/2013 para 12.
[51] *Attorney General of Lesotho v 'Mopa* 2002 BCLR 645 (LAC).

judgment sets out a wide test for justifying limitations on rights, one that asks whether the limitation (in this case, being targeted or entrapped) is reasonable and proportionate.

On the other hand, one could argue against the idea that entrapment inherently violates this section of the Constitution if the entrapment does not target specific attributes protected by the Constitution. If the entrapment is a neutral strategy based solely on behavior unrelated to any of the protected categories (like race, religion, or sex), and it applies uniformly to all employees regardless of these characteristics, then it might not necessarily constitute discrimination as defined in the Constitution. In such a case, it would be a matter of ensuring that any enforcement mechanisms are equally applied and not used to disproportionately target any specific group of people based on their protected status. The court in *Molefi Ts'epe v Independent Election Commission* similarly stressed that discrimination must be justifiable based on the context and objective,[52] suggesting that the treatment of a 'suspect' employee should be carefully scrutinized to determine whether the suspicion or targeting is justified or whether it unfairly discriminates against the individual. Ultimately, whether entrapment in the workplace violates Section 18 depends on the context and intent behind the practice, particularly whether it is used to disadvantage employees based on any of the protected categories.

Under Section 6(1) of the Labour Act,[53] the act of entrapment in the workplace could indeed violate this provision if it leads to unfair discrimination based on any of the grounds listed in the section. The section explicitly prohibits making distinctions or exclusions in the workplace based on specific characteristics such as race, color, gender, disability, sexual orientation, pregnancy, marital status, or any other ground that impairs equality of opportunity or treatment in employment.[54]

If an employer uses entrapment to unfairly target employees based on any of these protected grounds, then it would clearly constitute unfair discrimination. For example, if an employer deliberately sets up an employee based on their gender or race in a manner that leads to their disadvantage, it would directly violate this section of the Labour Act, as it creates inequality and unequal treatment.

[52] *Molefi Ts'epe v Independent Election commission and others* (2005) AHRLR 136 para 40.
[53] *Labour Act No. 3 of 2024,* section 6(1)
[54] *Ibid.*

Furthermore, the "any other ground" provision in the Labour Act adds a wide layer of protection,[55] meaning that even if the entrapment does not target any of the specifically listed characteristics (such as gender or race), it could still be considered as unfair discrimination if it results in impaired equality of opportunity or treatment in employment. For instance, if an employee is unfairly set up due to their social status, political views, or other personal circumstances, and this leads to discriminatory treatment that impedes their career prospects or fairness in the workplace, then the act of entrapment would likely violate the Labour Act's provisions on unfair discrimination.

Workplace entrapment has the potential to violate the right to privacy envisaged under section 11 of the Constitution.[56] According to Monyakane:

> Amongst others, the employer uses entrapments, such as tapping employee's communication without the employee's knowledge. Such information would include emails, telephone communications, faxes and many others that the employer can privately access. In so doing, the employer exposes the employee to self-incrimination and breaks the employee's rights to privacy and silence while the employer pays no regard to the lawful processes regarding criminal case related access to information.[57]

This right may be violated where an employer taps the employee's communication without the employee's knowledge gaining access to private info, they otherwise would not have had it not been for the tapping. In light of this, there will be a clear violation of section 11 of the Constitution which means that this practice would violate section 2 of the Constitution 2 and therefore unconstitutional.

Entrapment can infringe upon the right to freedom of choice and autonomy. Employees are entitled to make decisions based on their free will, without undue influence or coercion from others. Entrapment undermines this right by creating a scenario in which an employee is coerced, manipulated, or pressured into doing something they may not have otherwise chosen to do. For example, an employer might set up a situation where an employee is forced into an unethical decision or an action that violates company policies, all for the purpose of testing their behavior or creating a false scenario. This kind of manipulation takes away the employee's

[55] *Ibid,* 6(1) (n).
[56] *Ibid,* section 11.
[57] *Monyakane* (n8).

autonomy and subjects them to a form of psychological coercion, which could have long-term consequences for their decision-making and their sense of personal integrity.

It must be noted that the Constitution of Lesotho does not cater for freedom of choice and it is the view of the author of this research that in the absence of a specific "freedom of choice" provision in the Constitution of Lesotho, the closest provision that can be linked to this right would likely be Section 14, which deals with "Freedom of Expression".[58] While freedom of expression primarily focuses on the ability to express one's opinions and ideas,[59] it also underpins the wide concept of individual autonomy, including the freedom to make personal and moral choices without interference.[60]

Section 14 of the Constitution includes limitation clauses (14(2) and 14(3)) that allow for restrictions on freedom of expression in certain circumstances. These restrictions are justified only in cases where the restriction is necessary for the public good, such as in the interests of defence, public safety, public order, public morality, or public health.[61] The limitation clause thus provides a balance between individual freedoms and societal interests.

However, the question arises: does workplace entrapment serve any of the interests outlined in the limitation clause? The answer, in this case, seems to be no. Workplace entrapment does not serve any of the justifiable purposes listed under Section 14(2). It is not conducted in the interest of national defence, public safety, public order, public morality, or public health. Instead, it typically serves the narrow interest of an employer or authority seeking to gather evidence or create a cause for disciplinary action, often at the expense of the employee's dignity and autonomy.

Moreover, the limitation clause (14(3)) requires that any restriction on freedom of expression must not exceed what is necessary in a democratic society. The principles of a democratic society, which are rooted in the protection of individual freedoms and rights, do not support practices that involve manipulating or coercing individuals into compromising their autonomy. As such, it is difficult to argue that workplace entrapment is justified under the limitation clause, as it does not align with the public purposes for which freedom of expression may be restricted, nor does it pass the proportionality test required under Section 14(3).

[58] *Supra* (n 29) section 14(1).
[59] *Ibid.*
[60] *S v Turrell* 1973 1 SA 248 (C), para 256.
[61] *Supra* (n 29) section 14(2) & (3).

Considering the above analysis, it can be concluded that workplace entrapment, as a practice, is likely unconstitutional under the Constitution of Lesotho. The Constitution guarantees individuals the right to freedom of expression, which implicitly includes the right to personal autonomy and the freedom to make choices without undue interference. Workplace entrapment, by its nature, infringes upon these rights, as it coerces employees into actions they would not otherwise undertake, undermining their autonomy and dignity. Furthermore, the limitation clauses in Section 14 do not provide a valid justification for such interference, as workplace entrapment does not serve any of the public interests outlined in the Constitution.

Moving on, one of the primary rights that entrapment may violate is the right to dignity and respect. In *S v Makwanyane and Another* it was noted that "respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."[62] The Constitution of Lesotho does not explicitly mention the right to dignity. However, Section 8 of the Constitution guarantees the freedom from inhumane and degrading treatment. Stemming authority from the Makwanyane case it is submitted that section 8 provides a potential basis for addressing issues related to autonomy and dignity in cases like workplace entrapment.

Section 8 of the Constitution of Lesotho guarantees that "no person shall be subjected to torture or to inhuman or degrading treatment or punishment".[63] While this provision specifically prohibits certain forms of mistreatment, its scope is wider than just physical abuse. The language of "inhumane or degrading treatment" casts a wider net for understanding of treatment that may harm an individual's mental or emotional well-being, particularly if it undermines their human dignity, personal autonomy, or personal integrity.

Although the Constitution does not provide an explicit right to dignity, the freedom from inhumane and degrading treatment in Section 8 can serve as a safeguard for dignity. In practice, courts often interpret freedom from inhumane or degrading treatment as being closely related to the protection of human dignity as seen in the Makwanyane case. Thus, while dignity may not be explicitly mentioned, the principles underlying inhumane and degrading treatment align with the values of personal dignity, integrity, and respect for individual autonomy.

[62] *S v Makwanyane & Another* Case No. CCT/3/94, 1995, para 59.
[63] *Supra* (n 29) section 8.

Now, turning to workplace entrapment, it involves actions where an employer or authority deliberately manipulates or induces an employee into engaging in illegal or unethical activities, often without the employee's prior intent or awareness. The key issue here is whether such manipulation or coercion can be considered inhumane or degrading treatment under Section 8.

Workplace entrapment may be considered degrading because it exploits an individual's vulnerabilities, autonomy, and judgment. If an employer uses deceit or psychological manipulation to trick an employee into committing misconduct, this could undermine the employee's dignity by forcing them into a situation where they have little or no control over their actions. In such cases, the employee's freedom of choice and ability to act in a manner consistent with their personal values are compromised. The humiliation, coercion, and manipulation involved in workplace entrapment may cause emotional distress, anxiety, and a sense of personal degradation, which could fall within the scope of inhumane or degrading treatment.

If we accept that workplace entrapment can violate an individual's dignity by subjecting them to degrading or manipulative treatment, it may indeed be unconstitutional under Section 8 of the Constitution. Workplace entrapment would involve the employer coercing or deceiving an employee into conduct that violates their moral or legal standards, thus depriving the employee of their autonomy and dignity in a manipulative and degrading manner.

The principles of Section 8 would be violated if the treatment is sufficiently degrading or inhumane to the point that it undermines the employee's emotional well-being or human dignity. In this context, workplace entrapment would likely qualify as inhumane or degrading treatment, as it could create an environment where employees are subjected to psychological harm, manipulation, and coercion.

Given the framework of Section 8 of the Lesotho Constitution, it is plausible to argue that workplace entrapment could constitute inhumane or degrading treatment. By coercing or manipulating employees into committing acts they would not have otherwise engaged in, the employer infringes upon the employee's autonomy, dignity, and personal integrity. Such actions can be seen as psychologically abusive and degrading, and thus, they could be regarded as unconstitutional.

In conclusion, workplace entrapment is likely unconstitutional under Section 8 of the Constitution of Lesotho, as it violates the freedom from inhumane or degrading treatment by

subjecting employees to coercive, manipulative, and degrading conditions that undermine their dignity and autonomy. Therefore, workplace entrapment could be challenged on the grounds of constitutional protection against degrading treatment, providing a legal basis to protect individuals from such exploitative practices.

Section 7(2) of the Labour Act prohibits unfair labour practices. This section prohibits various forms of violence and harassment, which include: Intimidation; threats; coercion; sexual exploitation; bullying; stalking; arbitrary deprivation of liberty.[64] These actions are all prohibited when they cause physical, sexual, psychological, or economic harm in the workplace. The employer is held responsible for taking appropriate steps to prevent such misconduct to the extent that it is reasonably practicable.

Entrapment could potentially involve actions such as intimidation, threats, coercion, or bullying, all of which are explicitly mentioned in Section 7(2). If an employer, or someone in the workplace, were to orchestrate or encourage situations that cause an employee to engage in misconduct (including illegal acts or actions that fall under violence and harassment), it could constitute an unfair labour practice.

For example, if an employer were to use an entrapment strategy to provoke or coerce an employee into committing harassment or discriminatory acts, the resulting actions would likely be considered misconduct under this law. This misconduct would be treated as unfair labour practice if the employer failed to take appropriate steps to prevent such behaviour, or if the employer played an active role in creating such an environment.

Entrapment can lead to harassment and violence: By manipulating or coercing an employee into certain actions, the employer could be indirectly or directly facilitating the conditions under which violence or harassment takes place. This directly contravenes the intent of the Labour Act to prevent such behaviour. There is responsibility placed on the employer: Section 7(2) places the onus on the employer to ensure that violence, harassment, or coercion does not take place. If entrapment is allowed in the workplace, it undermines this responsibility. The employer could be seen as failing to prevent an unfair practice if they either tolerate or instigate entrapment scenarios. Added to this, the act of entrapment can cause psychological harm to an employee, particularly if they are manipulated into committing actions they later regret or feel

[64] *Supra* (n32) section 7(2).

morally conflicted about. This type of harm is directly referenced in Section 7(2) as something the employer should prevent.

Entrapment could indeed be considered an unfair labour practice under the Labour Act, especially when it leads to or is linked with prohibited acts such as violence, harassment, coercion, or psychological harm in the workplace. If an employer facilitates or allows entrapment to occur, they would likely be failing in their duty to take reasonable steps to prevent such misconduct, making it an unfair labour practice under Section 7(2). Therefore, it is fair to conclude that entrapment should be treated as an unfair labour practice, especially if it results in harm to employees or creates an environment where misconduct is tolerated or induced.

2.4 GLOBAL PERSPECTIVES: UNITED STATES.

The concept of entrapment in criminal law refers to situations where law enforcement officials induce a person to commit a crime that they otherwise would not have committed. Over time, U.S. courts have developed standards and criteria to evaluate entrapment claims. The evaluation of such claims often hinges on whether the defendant was predisposed to commit the crime or whether they were induced or coerced into doing so by government agents. This legal defence has been explored in various landmark cases, each shaping the understanding of entrapment and its application in the U.S. legal system. Three notable cases—Sorrells v. United States (1932), Schaffer v. U.S. Postal Service (1988), and Jacobson v. Hollingsworth (27 F.3d 1200)—illustrate how U.S. courts have handled entrapment and its implications on criminal justice.

Sorrells v. United States is a landmark U.S. Supreme Court decision that helped shape the concept of entrapment in American criminal law.[65] The case is significant for its development of the legal defence of entrapment, which prevents individuals from being convicted of crimes they were induced to commit by law enforcement officers. The case also marks a critical moment in understanding how the criminal justice system should balance law enforcement tactics with protections against government overreach.

The facts of the case are straightforward but pivotal. The petitioner, Sorrells, was accused of violating the National Prohibition Act, which prohibited the sale, transportation, and manufacture of alcoholic beverages. The incident involved an undercover federal agent who,

[65] *Sorrells v United States,* 287 U.S. 435 (1932).

while on assignment, repeatedly requested Sorrells to sell him alcohol. Initially, Sorrells refused, indicating that he did not want to engage in any illegal activity. However, after the agent's persistent requests, Sorrells agreed to sell him a bottle of whiskey.

After the sale took place, Sorrells was arrested, charged, and convicted for violating the Prohibition Act. Sorrells' defence, which would later become the key issue of the case, was that he had been entrapped by the agent's repeated inducements. The case was ultimately appealed to the Supreme Court, where the central legal question was whether the defendant's actions were the result of government entrapment, or if the defendant had the predisposition to commit the offense on his own.

The legal doctrine of entrapment is a defence in which a defendant argues that law enforcement officers induced or coerced them into committing a crime they would not have otherwise committed. Traditionally, the question of whether a defendant had been entrapped involved evaluating whether the defendant had a prior inclination to commit the offense. In this case, Sorrells did not dispute that he sold alcohol to an undercover agent, but his defence was based on the assertion that he was entrapped into doing so by the agent's persistence.

Before *Sorrells v. United States*, the courts often viewed entrapment in an objective manner, focusing on whether the defendant had the predisposition to commit the crime before the agent's involvement. However, this case became a crucial moment in refining the entrapment defence, specifically regarding how much influence law enforcement officers could have in inducing criminal behaviour.

In Sorrells' defence, he argued that he was not inclined to violate the law; instead, he claimed that the agent had essentially forced him into committing the illegal act. Sorrells contended that the undercover agent had been particularly persistent, repeatedly requesting alcohol, and that his willingness to make the illegal sale was not the result of his own predisposition to commit the crime, but rather due to the agent's insistence.

The Supreme Court, in a 5-4 decision, reversed the conviction. Writing for the majority, Justice Roberts emphasized that the actions of the government agent were an example of entrapment. The Court ruled that the government had impermissibly induced the crime by pushing Sorrells into an act he would not have committed without the persistent urgings of the agent. The Court focused on the fact that the agent did not merely offer Sorrells the opportunity to commit a

crime, but instead actively induced him to do so, making it clear that the law could not tolerate such manipulation by law enforcement.

The majority's decision stated that although law enforcement officers could create opportunities to catch criminals, they should not engage in conduct that pushes an otherwise innocent person into committing an offense. The decision placed limits on how far the government could go in using undercover operations to induce individuals to commit crimes.

Justice Roberts stressed that Sorrells' conduct was not a result of any pre-existing criminal intent, but instead arose from the repeated, persistent requests by the undercover agent. This decision in Sorrells v. United States thus marked a shift in the application of the entrapment defence, emphasizing that the government should not be allowed to engage in tactics that manipulate otherwise law-abiding individuals into committing illegal acts.

Not all the justices agreed with the majority opinion in Sorrells v. United States. The dissenting justices, led by Justice McReynolds, believed that the decision undermined effective law enforcement practices. They argued that the majority's ruling was too lenient and created an opportunity for defendants to escape conviction under the guise of entrapment.

The dissent expressed concerns that the decision could allow individuals to avoid criminal liability simply by asserting that they were induced by law enforcement to commit the crime. The dissenters pointed out that law enforcement's role was to catch criminals, and that the government should not be restricted from employing tactics, including undercover operations, that were necessary for enforcing the law.

The dissenting opinion argued that the behaviour of the agent did not amount to entrapment because Sorrells ultimately had the free will to refuse the agent's requests. In their view, the mere persistence of the agent did not constitute unlawful inducement, as the defendant still retained the agency to reject the offer and avoid committing the crime.

The majority decision in Sorrells v. United States fundamentally shaped the way courts approach the entrapment defence. The ruling made clear that law enforcement's conduct could be subject to scrutiny if it was found to be overly coercive. As a result, the case became a foundational precedent in establishing the principles of entrapment law in the United States.

In future cases, courts began to more carefully examine whether law enforcement officers' conduct was unduly aggressive or manipulative, and whether it was likely to lead a person to

commit a crime they would not have otherwise committed. The key legal principle that emerged from Sorrells is that the defence of entrapment could be successful if it was shown that the government's conduct effectively created the crime by manipulating the defendant into committing it.

The case was particularly important in clarifying the standard for evaluating entrapment claims. Previously, some courts focused primarily on whether the defendant was predisposed to commit the crime. After Sorrells, courts began to assess the conduct of law enforcement more carefully, not just the defendant's predisposition. This shift represented a more balanced approach to protecting defendants' rights while still allowing law enforcement to perform its duties.

Several decades later, *Schaffer v. U.S. Postal Service* added another dimension to the discussion of entrapment, particularly in the context of workplace conduct and administrative actions. In this case, a mail handler employed by the U.S. Postal Service was accused of drug-related misconduct, including smoking marijuana on agency premises. The mail handler's misconduct was complicated by the fact that one of his friends, who was a confidential informant, had repeatedly pressed him to engage in illegal drug activities. This scenario raised the question of whether the mail handler's actions could be considered entrapment or if he was merely an unwilling participant who had been pushed into illegal conduct.

In the Schaffer case, the Merit Systems Protection Board (MSPB) considered the influence of the informant on the employee's actions, noting that the employee had not previously engaged in such illegal behaviour. The Board found that the repeated solicitations from the informant played a significant role in the employee's decision to violate agency policies. Although the mail handler had committed the violations, the Board ultimately reduced his penalty, concluding that the external influence exerted by the informant diminished the severity of the misconduct.

The Schaffer case is crucial because it underscores that entrapment is not limited to traditional criminal acts but can also apply in situations involving administrative misconduct, particularly when an external party induces an employee to act against their usual behaviour. The decision reflected a growing understanding of the complexities surrounding the concept of entrapment in non-criminal settings, suggesting that external pressures can significantly influence a person's actions, even in professional environments.

As the discussion continues to explore the concept of entrapment, attention now turns to another important case *United States v. Hollingsworth*.[66] In this case, the defendants, William Pickard (an orthodontist) and Arnold Hollingsworth (a farmer and businessman), were involved in a failing business venture. They created a Virgin Islands corporation and obtained foreign banking licenses to engage in international finance. However, they struggled to attract customers and began losing money. In desperation, Pickard placed an ad in USA Today, advertising the sale of one of their banking licenses. This ad was noticed by J. Thomas Rothrock, a U.S. Customs agent attending a seminar on money laundering. Rothrock, posing as a criminal smuggler of guns to South Africa, contacted Pickard, and through a series of interactions, the defendants agreed to launder $200,000 in exchange for a fee. Hollingsworth provided some minor assistance in these dealings.

The issue in this case was whether the defendants, Pickard and Hollingsworth, were predisposed to engage in money laundering, or if they were induced by the government's sting operation. This brought into question the validity of their entrapment defence. The central question was whether the defendants were already willing to commit the crime before the government intervened.

The Seventh Circuit, led by Chief Judge Posner, ultimately ruled that the defendants were not predisposed to commit money laundering and were entitled to an acquittal. The court concluded that the government's sting operation was the primary reason the defendants were involved in the crime. Posner detailed that the defendants lacked the necessary criminal assets and expertise to commit money laundering on their own: "To get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. Pickard and Hollingsworth had none."[67]

Posner went on to argue that the defendants were financially distressed, inexperienced, and lacking the resources to carry out a money-laundering scheme without the help of law enforcement. He emphasized that without the government's intervention, Pickard and Hollingsworth would have folded their financial venture. Their solicitations had yielded no customers, and they were running out of money. Therefore, the court found it was "highly unlikely" that they would have committed money laundering if left to their own devices.[68]

[66] *United States v. Hollingsworth*, 23 F.3d 1196 (7th Cir. 1993)
[67] *Ibid,* para 1203.
[68] *Ibid.*

Posner further concluded that the government's involvement in the scheme was essential for the crime to occur: "Whatever it takes to become an international money launderer, they did not have it."[69] Judge Posner's ruling focused on the principle that while willingness to commit a crime is relevant, predisposition requires more than just a willingness, it requires the capacity or position to commit the crime. Since the defendants lacked both, their actions were seen as a direct result of government inducement.

It is the view of this author that Posner's judgment in Hollingsworth laid a strong foundation for understanding entrapment in terms of both the defendant's willingness and ability to commit the crime. He set the bar higher for proving predisposition—requiring that the defendant must have the capacity to commit the crime, not just the will to do so. This is significant because it helps safeguard individuals from being ensnared by overly aggressive law enforcement tactics.

In contrast, Judge Coffey dissented, arguing that even though Pickard and Hollingsworth may not have had the "position" to commit money laundering without the government's help, they were still willing to engage in criminal activity. Coffey pointed out evidence such as Pickard's use of false passports and his willingness to engage in the illegal transaction: "Pickard arguably encouraged Rothrock to structure his banking deposits illegally... he was carrying false passports issued to the mythical 'Dominion of Melchizedek.'"[70] However, Coffey did not believe this evidence proved that Pickard and Hollingsworth were predisposed in the legal sense of the term, as he believed that the key issue was their inability to act without government inducement.

The last case to be afforded scrutiny in a bid to discover how US courts have finalised this issue is the case of *United States v. Jacobson.*[71] In this case, federal agents targeted a Nebraska farmer, Jacobson, who had previously purchased legal child pornography before the passage of the Child Protection Act of 1984, which made such materials illegal. After the law changed, the government launched an undercover operation. Over the span of two years, agents corresponded with Jacobson through various fictitious organizations, encouraging him to purchase child pornography. After 26 months of this correspondence, Jacobson responded by

[69] *Ibid.*
[70] *Ibid.*
[71] *United States v. Jacobson* 503 U.S 540 (1992).

placing an order for a magazine featuring minors. When the package arrived, Jacobson was arrested.

The issue in Jacobson was whether Jacobson was predisposed to commit the crime of purchasing child pornography, or if he had been induced by the government's long-running sting operation. The defence argued that Jacobson had no intention of committing the crime until he was repeatedly encouraged and manipulated by federal agents.

In a 5-4 decision, the Supreme Court ruled in favour of Jacobson, overturning his conviction. Justice White, writing for the majority, stated that the government had failed to meet its burden of proving Jacobson's predisposition to commit the crime prior to being approached by the agents. The Court emphasized that Jacobson's previous legal purchase of child pornography did not demonstrate a predisposition to commit an illegal act after the law changed: "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal."[72]

The majority also pointed out that Jacobson's response to the government's solicitations although willing was not sufficient evidence of predisposition. The critical point, Justice White explained, was that the government had induced Jacobson to commit the offense after 26 months of persistent communication, which created the risk that an otherwise law-abiding citizen would be pushed into criminal behaviour. "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."[73]

The ruling in Jacobson reinforced the Court's stance on entrapment, emphasizing the importance of the government proving that a defendant was predisposed to commit a crime before agents engaged with them. The Court was particularly concerned that the lengthy and repeated efforts to induce Jacobson into committing the crime might have caused him to act in ways he would not have otherwise done. Justice White's opinion underscored that mere willingness to commit a crime, after being induced by law enforcement, is not sufficient to convict; the government must prove the defendant had a pre-existing disposition toward the criminal act.

[72] *Ibid,* para 551.
[73] *Ibid,* para 550.

The dissent in Jacobson raised concerns that this decision would set too high a bar for entrapment cases, making it harder for the government to pursue convictions. Justices O'Connor, Rehnquist, and Kennedy feared that lower courts might misinterpret the ruling, making it more difficult to prosecute individuals who were actually predisposed to commit the crime but had been encouraged by law enforcement.[74] Justice O'Connor's dissent warned that this ruling could hamper efforts to prevent crimes like child exploitation: "It is unlikely that the majority's rule would be helpful to criminal investigators in real-world cases involving similar offenses."[75] Despite these concerns, the majority's ruling remains significant for its focus on protecting individuals from government overreach in criminal investigations.

Conclusively, in both Hollingsworth and Jacobson, the courts highlighted the critical distinction between mere willingness to commit a crime and actual predisposition. These rulings have had a profound impact on how entrapment defences are treated, especially when government agents take an active role in encouraging criminal behaviour. The key takeaway is that while law enforcement can offer opportunities to commit a crime, it is not permissible to induce someone into committing a crime they would not have otherwise committed. These cases set important precedents in safeguarding against excessive government involvement in criminal activity.

2.5 CONCLUSION.

Chapter 2 provides an in-depth exploration of the intersection between entrapment, undercover operations, and constitutional rights, particularly within the context of both American and South African case law. It highlights the delicate balance between law enforcement's need for investigative tools like undercover operations and the protection of constitutional rights, such as privacy, the right to a fair trial, and protection from unfair treatment.

In the South African context, *S v. Dube* illustrates the application of entrapment principles. The court ruled that despite the appellant's claims of entrapment, evidence obtained through an undercover operation, including photographs and tapes, was admissible. The court emphasized that the appellant had voluntarily participated in the crime, despite the operation providing the opportunity to commit the offense. This case is significant in South African law because it highlights the importance of distinguishing between entrapment as a defence (which does not exist under South African law) and entrapment as a potential reason to exclude evidence if it

[74] *Ibid* para 557.
[75] *Ibid,* para 558.

results in an unfair trial. The court found that, despite the operation being set up by a private individual, Toyota, the appellant's participation was voluntary, and the evidence was crucial in establishing guilt, thus reinforcing that the fairness of the trial is paramount.

In *Cape Town City Council v. SAMWU and Others*, the court provided a detailed examination of entrapment in an employment law context. The case involved investigators hired by the City Council to catch employees engaged in criminal activity. The court ruled that while undercover operations could be used to investigate misconduct, the investigators' tactics went beyond mere opportunity creation and into the realm of coercion. The court found that the investigators' repeated inducement of employees, including emotional appeals, amounted to improper entrapment, and thus the evidence obtained could not be used. This case is particularly relevant in employment law as it stresses that entrapment, particularly when involving manipulative tactics, can infringe upon individual rights and lead to unfair consequences in disciplinary proceedings.

On the American side, the case of *Jacobson v. United States* serves as a critical example. The United States Supreme Court emphasized that while law enforcement has the authority to use undercover operations, the government cannot induce a person to commit a crime they would not otherwise have committed. The Court found that the defendant, Jacobson, had been subjected to an impermissible level of inducement by law enforcement officials. In this case, the Court ruled that the government's conduct amounted to entrapment, thus reinforcing the principle that entrapment occurs when the government creates the crime that the defendant subsequently commits. This case underlines the importance of ensuring that law enforcement does not cross the line into manipulative or coercive behaviour that deprives an individual of their autonomy and fairness in the legal process.

Similarly, the case of *Sorrells v. United States* presents another instance where the Court acknowledged the dangers of government overreach in undercover operations. In Sorrells, the Court ruled that a federal agent had enticed the defendant to sell alcohol, which was illegal at the time, and found that this amounted to entrapment. The decision in Sorrells reinforced the notion that while undercover operations are permissible, they should not be used as a tool to induce criminal behaviour that would not have occurred absent governmental involvement. This case significantly shapes the understanding of entrapment in American law, asserting that the role of law enforcement is not to manufacture crime but to investigate pre-existing criminal activity.

Together, these cases establish a framework in which entrapment and undercover operations are permissible but must be carefully controlled to avoid constitutional violations. Both American and South African jurisprudence underline that entrapment is acceptable only when it does not cross the line into coercion or manipulation. The defendant's or employee's autonomy and free will are crucial factors in determining whether entrapment has occurred. Whether in a criminal trial or the workplace, the constitutional protections against unfair inducement and discrimination must be preserved.

In the context of Lesotho's constitutional democracy, the chapter underscores the need to balance law enforcement and investigative needs with the protection of individual rights, particularly the right to privacy, autonomy, and freedom from unfair discrimination. The constitutional safeguards enshrined in Lesotho's Constitution provide a framework for protecting individuals from undue influence in both criminal and employment contexts. The analysis of entrapment and undercover operations in South Africa and the United States provides valuable insights into how Lesotho might navigate the use of these investigative tools while ensuring that constitutional rights are not violated.

In conclusion, while both American and South African cases recognize the utility of undercover operations in law enforcement, they also highlight the inherent dangers of these tactics when they overstep constitutional boundaries. Entrapment is a serious concern in both criminal and employment law contexts, and its use must be strictly scrutinized to ensure fairness and protect individual rights. The cases reviewed in this chapter emphasize that the fairness of the trial, as well as the autonomy and dignity of individuals, should be safeguarded in any legal system, including that of Lesotho, when undercover operations are employed. The legal precedents from both jurisdictions provide crucial lessons for navigating the balance between investigative effectiveness and constitutional protection.

CHAPTER 3: COMPARATIVE ANALYSIS: SOUTH AFRICA, AND USA

3. INTRODUCTION.

This chapter will embark on a journey of exploring the practice of workplace entrapment in two key jurisdictions namely, South Africa, and the USA. By comparing the dynamics of workplace entrapment in South Africa, and the USA, this chapter seeks to bring to light the commonalities and disparities in how employees may be subjected to coercion, exploitation in the work environment. Based on this comparative analysis, the chapter will shed light on the differing legal frameworks, institutional practices, and social norms that weave workplace dynamics and shed light on the likely solutions for mitigating entrapment.

3.1. SOUTH AFRICA.

In the Republic of South Africa workplace entrapment is a practice which is not a novel phenomenon. It traces its roots to its counterpart being criminal entrapment which is governed by section 252A (2) of the Criminal Procedure Act 51 of 1977.[76] Grogan notes that at its core, entrapment takes place when the employer 'agents' conspire to conclude 'deals' with employees involving illicit transactions.[77] Entrapment entails cooperating with an employee in the commission of an offence.[78] This research contends that in South Africa this is traditionally a concept grounded in criminal law as it is contained in the Criminal Procedure Act. This backed by Pieters who notes "when employers uncover misconduct but cannot after proper investigation identify the culprits, they may be tempted to resort to "trapping".[79] This entails appointing people, often outside 'agents' whose job is to try to conclude 'deals with employees, usually as purported receivers of stolen goods'[80] It is submitted that this tactic involves appointing individuals, whose job is to engage employees typically under false pretences.

Entrapment has found refuge in employment law. Stemming authority from Dekker who notes "as regards labour law, it was the judgment of Stelzner AJ in Cape Town City Council v SA Municipal Workers Union & others (2000) 21 ILJ 2409 (LC) that first clearly set the parameters

[76] *Criminal Procedure Act*, No. 51 1977, section 252A (2).
[77] John Grogan, 'Workplace Law' (2009) Tenth Edition, *Juta,* pg. 235.
[78] *Ibid.*
[79] Christoffel Pieters, "The Application of Criminal Investigations Methodology and Guidelines in Modern Day Labour Related Investigations", (2010) master's
Dissertation, *North-West University,* pg. 19
[80] John Grogan, Dismissal, discrimination & unfair labour practice, (2007) *Juta,* pg. 327.

for using entrapment in the context of the employment relationship."[81] To further cement the notion that entrapment has infiltrated the employment relationship further authority is drawn from Monyakane who points out that:

> Amongst others, the employer uses entrapments, such as tapping employee's communication without the employee's knowledge. Such information would include emails, telephone communications, faxes, and many others that the employer can privately access. In so doing, the employer exposes the employee to self-incrimination and breaks the employee's rights to privacy and silence while the employer pays no regard to the lawful processes regarding criminal case related access to information.[82]

Courts have argued that entrapment occurs when an individual is induced to commit a crime that they would not have committed otherwise,[83] and this principle becomes equally important when considering whether employers have overstepped their authority to gather evidence.

Having established that entrapment equally applies in workplace settings, it is indispensable for this research to define entrapment in a manner that resonates which the workplace dynamics. According to Ndlovu, "entrapment is a technique used with the intention of identifying an employee who is committing misconduct in the workplace, where for instance, there is an apparent shortage of stock. It entails cooperating with an employee in the commission of an offence."[84]

Given the application of entrapment in workplace setting, it is necessary to investigate the reasons behind usage of entrapment practices by the employer. Ndlovu captures the reasons as follows:

> It is important that an employer has a reason for requiring a trap before it uses that trap. An employer cannot simply require a trap in the absence of a

[81] Adriette Dekker, 'Traps in the context of labour law: The Principles Explained' (2003) 2 (3), *Juta's Law Review,* pg. 151.

[82] 'Mampolokeng 'Mathuso Mary-Elizabeth Monyanakane,'The Constitutionality of Employers' Investigative Procedures and Disciplinary Hearings Processes with Specific Reference to Dismissal of Employees on the Basis of Criminal Misconduct in South Africa' (2020) *University of South Africa,* pg. 210.

[83] *Ibid,*

[84] Nduduzo A. Ndlovu, 'The admission of hearsay evidence, evidence obtained from entrapment and the interception and monitoring of communications in arbitration proceedings conducted in terms of the Labour Relations Act, 1995' (2014) *University of Kwazulu-Natal, Master of Laws Thesis,* pg. 36.

> legitimate reason because for an employer to establish and win a case, it has to show a valid reason for entrapping an employee. The evidence obtained from a trap should be supported by other evidence against the trapped employee(s), which could be the reason for undertaking the entrapment exercise.[85]

The above, is to the effect that an employer must demonstrate a clear and valid justification before using entrapment methods, ensuring that such tactics are not arbitrary or unnecessary. The evidence obtained through entrapment should be corroborated by additional facts to establish a credible case. Without this, the fairness and legitimacy of the entrapment could be questioned, potentially undermining the case against the employee.

Having laid the foundation in terms of the evolution of entrapment from its early criminal law days to its transition to workplace settings, necessity arises to look into the legal framework that governs entrapment in South Africa.

3.1.1 Constitution of South Africa 1996.

The starting point in any quest of ascertaining whether a piece of legislation and/or conduct is constitutional is the Constitution as it is the supreme law of the land, and such law or conduct should conform with the values enshrined in it to avoid invalidity.[86]

Since entrapment likely violates an employee's right to privacy it is necessary to scrutinize this provision as enshrined in the Constitution. Section 14 of the South African Constitution protects the right to privacy, which safeguards individuals from unnecessary intrusions into their personal life.[87] This right incorporates several forms of privacy, including protection against searches of one's person or home, the seizure of property, and the infringement on private communications.[88] Applying this to workplace entrapment, this section assumes outmost importance. Entrapment takes the form of covert surveillance, manipulation, or inducing an employee into unlawful behaviour. If the employer carries out such surveillance or monitoring without the employee's consent or knowledge, it could result in an infringement of the employee's right to privacy. Workplace entrapment, when it involves secretive surveillance or manipulation, infringes on the right to privacy by creating an environment

[85] *Ibid,* pg.37.
[86] *Constitution of the Republic of South Africa,* 1996, section 2.
[87] *Ibid,* section 14(1).
[88] *Ibid,* section 14(1) (a)-(d).

where the employee's actions, communications, or personal space are overly scrutinized or interfered with.

The above contention is backed by who Monyakane opines that “amongst others, the employer uses entrapments, such as tapping employee’s communication without the employee’s knowledge. Such information would include emails, telephone communications, faxes, and many others that the employer can privately access.”[89] This without a doubt illustrates an employee’s right to privacy being trampled upon. In instances where an employer resorts to deceptive tactics, including the use of "traps" or “undercover” methods to induce unlawful acts, the question arises whether such tactics are proportionate and justifiable within the bounds of privacy protections. Even if this research played the devil’s advocate entrapment violates the right to privacy and should be unconstitutional.

Section 9 is to the effect that everyone is equal before the law and entitled to equal protection and benefit of the law. It also prohibits unfair discrimination, which includes unequal treatment based on race, gender, disability, or other specified grounds.[90] As soon as entrapment is used disproportionately or manipulatively, it tramples upon the employee's right to equality. The act of selectively targeting certain employees or categories of workers because of their economic background or their standing in the workplace could lead to unfair discrimination. Even if the entrapment is not explicitly discriminatory, its disproportionate application to specific groups may lead to unequal treatment and create an unjust imbalance in the workplace. This violates Section 9 of the Constitution, which guarantees that all individuals should be treated equally and be afforded equal protection under the law.

Moreover, entrapment could disproportionately affect certain individuals, making them more susceptible to manipulation or coercion. Such practices would not only be unethical but could also undermine the principle of equality, leading to unequal treatment within the workplace, thereby infringing upon their constitutional rights.

Section 10 of the Constitution emphasizes the inherent dignity of every individual and their right to have that dignity respected and protected.[91] Entrapment tactics, by nature, can have degrading consequences for an individual. If an employee is induced to act in a manner that is

[89] *Monyakane* (n7).
[90] *Supra* (n 11) section 9.
[91] *Ibid,* section 10.

contrary to their values or best interests, it could lead to a loss of self-respect, emotional harm, and public humiliation. Such manipulation can severely compromise the dignity of an individual in the workplace, as they may be subject to humiliation or disparagement because of actions, they were coerced into taking.

Workplace entrapment that leads to public or private degradation such as an employee being trapped into committing misconduct could be viewed as a direct violation of this constitutional right. As a result, this conduct would not only be an infringement of an individual's dignity but also detrimental to the integrity of the employment relationship, which is founded on mutual respect.

These rights discussed above are not absolute and they are subject to a certain degree of limitation. In this regard section 36 of the Constitution assumes utmost importance. It is to the effect that any limitation on rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[92] It demands that any limitation of rights be necessary for a legitimate purpose and that the limitation is proportionate to the intended goal. In the case of entrapment, the question that lingers on the researcher's mind is whether such actions can be justified as a reasonable limitation of the employee's rights.

Although employers may argue that entrapment is necessary to maintain a lawful and productive workplace, the proportionality and fairness of this action must be critically assessed. In a bid to illustrate circumstances where entrapment is necessary the case of *Mbuli v Spartan Winemakers CC,* [93] shall be briefly looked into. In this case, the applicant had been collaborating with another employee to illegally remove company property and sell it at a lower price. The applicant had been reported by other employees for illegally removing company property and selling it. The employer had a legitimate reason for opting to entrap the applicant. Other measures had been taken by the employer prior to resorting to the use of a trap.

These measures encompassed the employer replacing its own security staff with an external security company to control access gates and reinforce the perimeter fencing. The employer had also introduced regular morning security checks outside the perimeter fence to find company products, which might have been thrown over the fence during the night for collection by the culprits at a later stage. The employer had invited employees to provide information

[92] *Ibid,* section 36(1).
[93] *Mbuli v Spartan Winemakers CC* 98 (2004) 5 ILJ 1128 (BCA).

about the theft and offered a reward for that information. The trap had merely provided an opportunity for the applicant to commit the offense and did not induce the applicant into committing the offense. The only inducement used by the trap was financial reward which the applicant had been obtaining through his normal conduct of selling the company's property. The financial reward was therefore one of the measures used by the trap to uncover whether the applicant had in fact been one of the employees responsible for the stock shortage. The evidence of entrapment was thus admissible.

This case unequivocally brings to light the fact that where an employer has a legitimate reason to entrap an employee such would be permitted, and any evidence obtained will be admissible in court. In this case, the employer had taken other precautions to guard against theft that had been crippling the company. Thus, in circumstances where entrapment goes beyond providing an opportunity for misconduct by inducing, manipulating, or coercing an employee into committing an offense it would likely fail to meet the requirements of reasonableness or proportionality outlined in Section 36. For entrapment to be justifiable under Section 36, it would need to be shown that it serves a legitimate and pressing purpose, and that no less restrictive measures could achieve the same result. However, given the harmful consequences entrapment has on employees' rights to privacy, dignity, and equality, it is unlikely that it could be deemed justifiable in most cases.

3.1.2 Labour Relations Act 1995 (LRA).

As the primary labour legislation in the Republic, necessity arises to dissect the LRA to ascertain if it pronounces itself on the issue of workplace entrapment. To this end, provisions of the LRA which might shed some light on this issue will be afforded sufficient scrutiny.

The LRA is uncompromising and unequivocal in the protection it affords employees, and this protection extends to workers in their relationship with employers. It terms of section 185 "every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice."[94] This means that an employer should not conduct their business in a manner which is likely to subject employees under their employ to unfair labour practice and in a manner, which leads to their dismissal in an unfair manner. It is against these safeguards of the employee's rights that the LRA will be examined.

[94] *Labour Relations Act,* 1995, section 185.

Section 186(2) defines unfair labour practices and covers a range of employer actions that adversely affect employees.[95] This includes unfair disciplinary measures, failure to reinstate or re-employ, and occupational detriment resulting from actions such as the manipulation of an employee into breaching company policies. This section shines the light on critical areas where workplace entrapment becomes problematic. When an employer deliberately creates conditions that lead to an employee breaching company rules or policies (for example, by setting unrealistic performance expectations, failing to provide the necessary resources, or provoking misconduct), such actions can lead to unfair disciplinary measures that violate the principle of fairness inherent in employment law. An employee subjected to disciplinary actions that are based on a manipulated situation—for instance, one deliberately engineered by the employer—faces an unfair disadvantage, making the disciplinary action unjust.

Furthermore, the manipulative tactics leading to constructive dismissal or forced resignation also implicate Section 186(2), which refers to the failure to re-employ or reinstate an employee. If an employee is forced into resignation because of employer-created circumstances such as being subjected to entrapment they may seek reinstatement. It must be borne in mind that constructive dismissal occurs when the employment relationship is terminated by the employee (normally by resignation) because the employer has made continued employment intolerable for that employee.[96] Furthermore, Du Toit *et al,* notes "[t]he circumstances [for constructive dismissal are so infinitely various that there can be, and, is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal."[97]

In such cases, failure to re-employ or reinstate the employee would be deemed an unfair labour practice, particularly if the resignation was not voluntary but induced by unfair treatment. If the employer's conduct culminated directly to the employee's resignation, any refusal to rehire them would worsen the unfairness, bringing to light the fact that the employer has avoided their obligations under the Labour Relations Act by intentionally manipulating the situation to induce the resignation.

In addition to the provisions under Section 186(2), the unfair dismissal provisions under Section 188(1) further reinforce the argument against workplace entrapment. This section

[95] *Ibid,* section 186(2).
[96] Jordan *et al, '*Understanding the Labour Relations Act' (2009) *Juta,* pg. 156.
[97] Du Toit *et al,* 'Labour Relations Law: A Comprehensive Guide' (LexisNexis, Butterworths, 4th Edition, 2004), pg. 370.; *Jooste v Transnet t/a South African Airways* 1995 16 ILJ 629 (LAC).

stipulates that a dismissal is considered unfair if the employer cannot prove that the reason for the dismissal is fair, whether related to the employee's conduct or capacity, or the employer's operational requirements.[98] It also requires that the dismissal procedure must follow a fair process. If an employee is entrapped such an employee may be influenced into committing misconduct, not due to their own actions but because of deliberate employer interference. When the dismissal is birthed by such entrapment, the reason for dismissal becomes inherently unfair. It is based on a situation manipulated by the employer, rather than any legitimate shortcoming or failure on the part of the employee. As such, this dismissal would not meet the requirements of substantive fairness and would therefore violate Section 188(1).

Moreover, Section 188(2) instructs that when determining the fairness of a dismissal, any relevant code of good practice must be considered. These codes provide further guidance on how dismissals should be handled in a manner that ensures fairness, transparency, and accountability. In the case of workplace entrapment, it would be clear that the procedure followed in dismissing the employee was not fair, as the employer's actions would have been designed to create circumstances in which the employee was destined to fail, thus distorting any normal procedure for dismissal. The intentional manipulation of the employee's environment violates the expectations outlined in these codes and the procedural fairness demanded by the LRA.

Given the nature of workplace entrapment, the employer's behaviour could be seen as a deliberate attempt to provoke a justified dismissal without adhering to the necessary processes outlined in the Labour Relations Act. This approach undermines both the substantive fairness of the dismissal and the procedural fairness that the Act requires. If the employer cannot prove that the dismissal was based on a valid reason, and that the proper procedure was followed, it is likely to be deemed unfair. In such cases, workplace entrapment becomes a clear violation of the employee's rights under the Act, as it prevents them from being treated with fairness and respect in their employment relationship.

[98] *LRA* (n 19) section 188(1).

3.2 Public Policy Argument Against Workplace Entrapment

At the heart of public policy lies the fundamental principle of ensuring that employees are treated fairly and with dignity in the workplace. The LRA, by providing protections against unfair dismissal and unfair labour practices, is designed to promote a work environment where equitable treatment, transparency, and accountability are upheld. The very purpose of this legislative framework is to balance the power dynamics between employers and employees, particularly in a corporate setting where employee rights are often vulnerable to employer manipulation.[99]

This research contends that workplace entrapment directly weakens this public policy goal. By deliberately creating an environment where employees are coerced or manipulated into breaching company rules, or ultimately resigning, employers abuse their power, thus, compromising fairness in employment relationships. Such tactics are inherently against public policy because they promote an atmosphere of mistrust, fear, and vulnerability within the workplace, part for employees with less power or knowledge of their legal rights.

When employers engage in entrapment, they by-pass the due process outlined in the LRA, which is designed to ensure legitimate reasons for dismissal and fair procedures for handling disputes. Instead, they create situations in which an employee's failure or resignation is the product of a manipulated environment, not their own fault. This situation creates unnecessary instability in the labour market, leading to an overall erosion of job security.

Moreover, if employers are permitted to partake in entrapment without consequence, it sends the message that employees are disposable and can be manipulated or discarded at will. This is at odds with the societal goal of promoting a workplace culture based on respect and mutual understanding. Public policy supports the idea that both employers and employees must operate in good faith, and entrapment directly conflicts with this principle by encouraging unethical conduct from employers.

3.3 The Criminal Procedure Act No. 51 1977 (CPA).

Section 252A of the CPA regulates the authority to resort to traps and sting operations aimed at detecting, looking into, or uncovering the commission of crimes.[100] By virtue of this section

[99] *Ibid,* Preamble.
[100] *Criminal Procedure Act,* No. 51 1977, section 252A (1).

emphasis is placed on the admissibility of evidence gathered through such methods, while balancing public interests with the rights of the accused. Linking this to workplace entrapment, the section will be put under the scrutiny in a bid to ascertain how similar methods of manipulation and inducement by employers may be at odds with the principles of fairness in the employment relationship as envisaged in the LRA.

Under the section law enforcement and other authorized agents, are empowered to partake in traps or sting operations to uncover or prevent criminal offenses.[101] Nonetheless, it stresses that the conduct in question should not go beyond merely providing an opportunity for the commission of an offense.[102] Linking this to workplace entrapment, employers may resort to indirect tactics that serve as breeding ground aimed at pushing employees toward breaching rules or misconduct. The point of departure is that while law enforcement must operate within strict boundaries, some employers might go the extra distance by actively manipulating employees into situations where failure is inevitable or expected. This overreach echoes the type of behaviour that is specifically examined in Section 252, where too much inducement may render evidence inadmissible due to the unfairness of the methods used.

Section 252A (2) lists several factors that a court must have regard to when ascertaining whether the conduct in an undercover operation or trap has exceeded providing just an opportunity to commit an offense. By virtue of section 252A (2) (a) necessity arises for approval from the Attorney-General before using traps.[103] Likewise, in the workplace, employers ought to conform to fair and transparent processes when managing employees. If an employer deploys tactics that purposely provoke misconduct, without clear guidelines or justification, this may amount to unfair inducement, much like an unsanctioned trap in criminal investigations.

In addition, the gravity of the offence being investigated is an important factor to be considered in terms of section 252A(2)(b)(iii).[104]Prior to engaging in entrapment an employer ought to have regard to the seriousness of the employee's alleged misconduct. This means that an employer should not deploy entrapment in circumstances where trivial violations are involved, this is aimed at avoiding blowing matters out of proportion. Therefore, this research submits

[101] *Ibid.*
[102] *Ibid.*
[103] *Ibid,* section 252A(2)(a).
[104] *Ibid,* section 252A(2)(b)(iii).

that just as law enforcement has to air on the side of caution and assess if the offence in question demands usage of entrapment methods, employers should engage in a similar exercise to avoid arbitrary usage of such in trivial offences.

Subsection 2(C) demands that law police officers and law enforcement at large should assess must if other investigative techniques lie at their disposal before setting a trap,[105] in the same vein this research submits that employers should consider whether there are alternative ways to address behaviour issues before resorting to manipulative or coercive tactics that could lead to an unfair dismissal or forced resignation.

At the heart of section 252A (2) is the question of whether an accused would have committed the offense but for the conduct of law enforcement officers.[106] The same principle is equally applicable in workplace entrapment. This means that employers who relentlessly force employees into breaking rules are in the same way encouraging misconduct, which violates the employee's right to fair treatment. If an employee succumbs to the induced situation, their actions may not reflect their true intent but rather the outcome of manipulative tactics by the employer.

Section 252A(3)(b) demands that courts evaluate the public interest against the personal interests of the accused when determining whether evidence obtained by way of sting operations should be admissible.[107] What is this means is that employers must balance their operational needs against the personal rights of the employee, including job security, fair treatment, and dignity. If the conduct of the employer disproportionately affects the employee's livelihood, it could be seen as a disproportionate response, akin to the overly aggressive use of undercover operations or traps that the CPA seeks to regulate and keep at a minimum.

The most applaudable section is 252A (3) it permits courts to decline evidence attained by way of sting operations if it is ascertained that the act in question surpassed providing an opportunity for a crime, making it improper or unfair.[108] It becomes increasingly clear that if an employer's tactics tend to be improper or unfair, such as intentionally setting up employees to commit misconduct, it could be reasoned that such actions should not be allowed to stand as valid grounds for dismissal or disciplinary action. The unfairness of such tactics would weaken the

[105] *Ibid,* section 252A (2) (C).
[106] *Ibid,* section 252A (2) (e).
[107] *Ibid,* section 252A(3)(b).
[108] *Ibid,* section 252A (3).

legitimacy of any evidence or justification for termination in the same way that unfairly obtained evidence is excluded in criminal cases.

The provisions of Section 252A of the CPA serve as a valuable comparison to workplace entrapment. Just as law enforcement is prohibited from over-inducing individuals into committing crimes through unlawful traps, employers should be held to similar standards of conduct when dealing with employees.

3.4 COMMON LAW.

In addition to statutory provisions, common law principles also play a crucial role in bringing to light how entrapment in the workplace has been dealt. South African courts have recognized that entrapment in the workplace environment ought to adhere to the principles of fairness and not violate constitutional provisions. This part of the research will be devoted to shedding light on the stance taken by South African courts.

The landmark case in workplace in South Africa is the case of *Cape Town City Council v SAMWU and Others*.[109] In this matter, two employees of the Cape Town City Council Beukes and Dollie were dismissed after being induced by investigators to sell electric cabling. The City Council had hired a firm of investigators to probe into suspected cable theft by employees. The investigators approached a group of employees at a substation, claiming they needed cable to supply electricity to a house for underprivileged children. Over a period, the investigators approached two of the employees Beukes and Dollie multiple times before the transaction finally took place.

The central issue in this case was whether the entrapment of employees by law agents could justify the dismissal of these employees, and whether evidence obtained through such entrapment could be used against them. The employees contended that entrapment, in all its forms, had no legal standing in an employment context.

The court held that the use of entrapment by agents and law enforcement officials could be permissible if it was scrutinized and appropriately constrained. It emphasized that law enforcement would face significant barriers if evidence obtained from entrapment situations were automatically excluded.[110] However, the court found that the investigators' conduct

[109] *Cape Town City Council v SAMWU and Others* (2000) 21 ILJ 2409 LC.
[110] *Ibid,* para 60.

exceeded the boundaries allowed under section 252A of the Criminal Procedure Act. The two investigators Fisher and Albertus had actively encouraged Beukes and Dollie to commit the offense by using tactics such as emotional appeals and multiple attempts to convince them to sell the cable.[111] As a result, the court ruled that the evidence could not be used against the employees, and that entrapment could not be justified under these circumstances.

The court's judgment rested on several factors, including: The investigators' repeated efforts to persuade the employees to commit the offense, which went beyond merely providing an opportunity; the emotional appeal made by the investigators, who claimed that the cable was needed for underprivileged children; the fact that the employees were not suspected of any prior criminal activity,[112] and the investigation was initiated by the agency based on unverified information about employee theft; the court emphasized that entrapment is inherently repugnant when officials actively encourage criminal acts, especially when the inducement is persistent and manipulative. The court also clarified that entrapment is acceptable only if there is no active encouragement by the investigator and if the trap is conducted in a fair manner. In such cases, evidence obtained may be admissible, provided the employer can prove that the entrapment was conducted properly.

The court outlined a two-stage enquiry process to evaluate the fairness of entrapment. First, it assessed whether the conduct of the trap exceeded the mere provision of an opportunity to commit the offense.[113] Factors such as the nature of the offense, the availability of alternative investigative methods, the degree of inducement, and the potential exploitation of vulnerabilities were considered. Second, it balanced public and private interests, including the seriousness of the offense, the necessity of using entrapment, and the proportionality of the means used to the crime committed.

It is the view of the author that the ruling significantly impacts the understanding of entrapment in both employment and criminal law contexts. The court's emphasis on the potential harm caused by entrapment practices reaffirms the necessity for a thorough review of such methods. By highlighting that entrapment is permissible only under strict conditions and when used as a last resort, the ruling ensures that law enforcement and employers cannot exploit vulnerable individuals or manipulate them into criminal behaviour. This case also clarifies that entrapment

[111] *Ibid,* para 65.
[112] *Ibid,* para 64.
[113] *Dekker* (n6).

should not be viewed as a tool to simply create opportunities for crime, but rather a means to uncover criminal activity that otherwise might be difficult to detect.

Moreover, the decision highlights the responsibility of employers to create ethical and reasonable investigative procedures, rather than relying on manipulative tactics that could tarnish the legitimacy of the evidence and result in unjust consequences. The court's ruling serves as a protective measure for employees, ensuring that they are not subjected to undue pressure or coercion by employers or law enforcement officials, which could undermine their rights and lead to wrongful convictions.

Another case that merits attention is ***Caji v Africa Personnel Services Pty (Ltd)***,[114]where the applicant was laid-off after being filmed taking company property without permission. An investigator from a nearby company set up a trap for the applicant, allegedly convincing him to sell buckets and a pool filter. As stated by the investigator, the applicant agreed to sell the items and took them from the workplace by climbing over a perimeter fence, with the investigator present. After loading the items into the investigator's car, the applicant was paid a sum of money. This entire incident was captured on video, which was later sold to the owner of the items, leading to the applicant's dismissal. The case was referred to the CCMA for arbitration. In the arbitration, the applicant presented a different account of the events, in relation to the night the items were taken. He claimed that the investigator had pressured him to remove the items, even though the investigator had previously tried to persuade him and another employee to acquire and sell the items at a lower price.

The arbitrator ruled that in situations where conflicting testimonies exist, the employer has the burden of proving that the employee was not forced into committing the offense and that the employee was only given an opportunity, not induced, to do so. The investigator failed to give a proper account of the events leading up to the night in question, weakening his credibility, especially given his experience as a professional investigator. He could have recorded phone calls or taken other steps to show that he had not played a more active role in encouraging the offense. The absence of such evidence meant that the applicant was entitled to some leniency, as the employer had not met its burden of proof.

Moreover, the investigator had requested a fee of R5000 for the video footage and another R5000 for providing testimony, which indicated a potential conflict of interest and cast doubt

[114]*Caji and Africa Personnel Services Pty (Ltd),* (2005) 26 ILJ 150 (CCMA).

on the respondent's credibility. Prior to this incident, the employer had not had any reason to suspect the applicant of theft, which made it unnecessary to set up a trap. Considering this, the investigator's testimony was deemed unreliable and not allowed to stand.

The last case worth considering is the case of Sugreen v Standard Bank of SA.[115] The applicant was dismissed for being implicated in bribery. The evidence implicating the applicant was a tape recording produced by a Mr Singh, the owner of one of the security companies providing security services to the bank. Mr Singh's company was responsible for protecting houses repossessed by the bank. However, it allowed people to occupy the houses while charging the bank for its services. This constituted a breach of contract between Mr Singh's company and the bank. The applicant was employed as the manager of the credit control department for the home loan division. She had the authority to terminate any contract with any of the bank's service providers if they were no longer providing sound security. Mr Singh and the applicant had several meetings regarding how the contract between the company and the bank can be maintained.

It was established that the meetings were mainly concerned with monetary payment to the applicant for her to not terminate the contract. The applicant was allegedly paid but could not meet her end of the agreement. Mr Singh ultimately recorded a conversation between the applicant and himself on his home phone. The contents of that recording formed the basis of the applicant's dismissal as it pointed to her engagement in misconduct. Although the respondent had not been willing to be involved in entrapping its employees, it relied on the evidence procured through entrapment. The evidence was also admissible in the arbitration proceedings because the commissioner found that the use of an employer's email and telephone are of interest to the employer where the employee is suspected of misconduct.

In admitting the tape-recorded evidence, among other factors, the commissioner took into account that the recording was not intended at entrapping the applicant into the commission of a crime; the recording was not conducted by the employer and it was made during business hours using the employer's telephone. It thus seemed fair to admit the evidence. It should be noted that the admission of evidence does not automatically render it credible. On evaluating

[115] *Sugreen v Standard Bank of SA,* (2002) 23 ILJ 1319 (CCMA

the evidence, the commissioner found the applicant guilty of the charges against her. The tape recording was found to be legitimate, against the applicant's objection to its admissibility and credibility. The commissioner found it improbable that Mr Singh could have concocted the tape recording as argued by the applicant. Since Sugreen had not been suspected of any misconduct related to the reason for her dismissal, the nature of her misconduct justified dismissal because it severely prejudiced her employer against fairness with respect to a reciprocal employment relationship where the employee is expected to perform its duties and the employer fulfils its duties by remunerating the employee. It was thus a sound decision to admit the evidence, in the circumstances. The court quoted with approval the *obiter dicta* of Stelzner AJ stated in the Cape Town City Council case: "I would be reluctant if not unlikely to hold that a system of trapping (obviously properly constrained) may never be fair in the employment context". This means that the court echoed the realisation he was driving home which was that the pursuit of justice through law enforcement would not be realized if evidence procured by entrapment would be excluded, in a situation where entrapment is properly constrained.

The cases discussed above drive home the notion that entrapment, while a tool of law enforcement, must be carefully inspected to ensure fairness. The court's decision sets out key parameters within which entrapment can be justified, marking the boundaries between acceptable law enforcement practices and undue manipulation. These cases law have played a hand in shaping current decisions regarding entrapment, serving as a precedent for balancing the needs of justice with the protection of individuals' rights.

3.5 UNITED STATES OF AMERICA.

Backtracking a little bit under section 3.0 of this research, the study contemplated examining workplace entrapment in the USA and this would include a fully-fledged examination which would cover both the Federal legal framework and case law. To this end, a hurdle in relation to entrapment codification has emerged and it is best captured by McAdams who notes "although many states have codified entrapment and its defence, Congress has not."[116] This points to the variation in the codification of entrapment law throughout different states in the USA. Thus, although some states have passed their own statutes to define and regulate entrapment and its defence, congress has not yet enacted a federal statute on entrapment.

[116] Richard H. McAdams, "Reforming Entrapment Doctrine in United States v. Hollingsworth" (2007), *John M. Olin Program in Law and Economics Working Paper No. 362*, pg.3.

It is therefore submitted by this research that the issue of entrapment is largely left to be governed by case law and judicial interpretation rather than by statutory law at the federal level. Focus will turn to case law analysis, instead of the discussion of each individual State because the position of the law to be reflected in such a discussion, will not hold true for the entire USA. Again, it is not technically feasible to discuss the position in each of the 26 States that have codified entrapment. Additionally, the study will look into intersection of entrapment and racial discrimination and profiling in crime.

The notion of entrapment in criminal law denotes circumstances where law enforcement officials induce a person to commit a crime that they otherwise would not have committed.[117] Another less focused on area as indicated above is the intersection of entrapment and racial profiling. The FBI has been criticised for the racial discrimination in profilimng, scholars indicating that the said discrimination is often made based on race, ethnicity, religion or national origin instead of a pattern in suspicious behaviour or evidence resulting in reasonable suspicion.[118]

Sarah Hinger, who wo works with the American Civil Liberties Union's racial justice program as an attorney, commented in a case where a claim agaisnt racial profiling was upheld and damages issued[119]. She emphasized that the court dicision will remain a strong message that students should not be criminalised because of their skin colour. The racial justice Act[120] is a statute that offers death row inmates a chance to prove beyong reasonable doubt that their sentencing was centered on racial discrimination. In the North Carolina case[121], Judge Weeks ruled in favour of the inmates and acknowledged that race discrimination hinders the creation of a system of Justice that is free from pernicious influence of race.

Reference made to With passage of time, U.S. courts have innovated standards and criteria to gauge entrapment claims. The evaluation of such claims often hinges on whether the defendant was predisposed to commit the crime or whether they were induced or coerced into doing so by government agents. This legal defence has been explored in various landmark cases, each influencing the understanding of entrapment and the manner it applies in the U.S. legal system. Three distinguished cases: *Sorrells v. United States (1932)*, *Schaffer v. U.S. Postal Service*

[117] *Dekker* (n 6)..
[118] Illusion of Justice: Human Rights abuses in US Terrorism prosecutions.2014. page 14
[119] Windston v Salt Lake City Police Department et.al 42 U.S.C 1983
[120] The US Racial Justice Act Passed in 2009 and enacted in 2012
[121] North Carolina v Tilmon, Golphine, Christina Walters, and Quintel Augustine. No. 441A98

(1988), and *Jacobson v. Hollingsworth (27 F.3d 1200)* paint the best picture of the manner U.S. courts have tackled entrapment and its implications on criminal justice.

Sorrells v. United States is a landmark U.S. Supreme Court decision that helped shape the concept of entrapment in American criminal law.[122] The case is significant for its development of the legal defence of entrapment, which prevents individuals from being convicted of crimes they were induced to commit by law enforcement officers. The case also marks a critical moment in understanding how the criminal justice system should balance law enforcement tactics with protections against government overreach.

The facts of the case are straightforward but pivotal. The petitioner, Sorrells, was accused of violating the National Prohibition Act, which prohibited the sale, transportation, and manufacture of alcoholic beverages. The incident involved an undercover federal agent who, while on assignment, repeatedly requested Sorrells to sell him alcohol. Initially, Sorrells refused, indicating that he did not want to engage in any illegal activity. However, after the agent's persistent requests, Sorrells agreed to sell him a bottle of whiskey.

After the sale took place, Sorrells was arrested, charged, and convicted for violating the Prohibition Act. Sorrells' defence, which would later become the key issue of the case, was that he had been entrapped by the agent's repeated inducements. The case was ultimately appealed to the Supreme Court, where the central legal question was whether the defendant's actions were the result of government entrapment, or if the defendant had the predisposition to commit the offense on his own.

The legal doctrine of entrapment is a defence in which a defendant argues that law enforcement officers induced or coerced them into committing a crime they would not have otherwise committed. Traditionally, the question of whether a defendant had been entrapped involved evaluating whether the defendant had a prior inclination to commit the offense. In this case, Sorrells did not dispute that he sold alcohol to an undercover agent, but his defence was based on the assertion that he was entrapped into doing so by the agent's persistence.

Before *Sorrells v. United States*, the courts often viewed entrapment in an objective manner, focusing on whether the defendant had the predisposition to commit the crime before the agent's involvement. However, this case became a crucial moment in refining the entrapment

[122] *Sorrells v United States,* 287 U.S. 435 (1932).

defence, specifically regarding how much influence law enforcement officers could have in inducing criminal behaviour.

In Sorrells' defence, he argued that he was not inclined to violate the law; instead, he claimed that the agent had essentially forced him into committing the illegal act. Sorrells contended that the undercover agent had been particularly persistent, repeatedly requesting alcohol, and that his willingness to make the illegal sale was not the result of his own predisposition to commit the crime, but rather due to the agent's insistence.

The Supreme Court, in a 5-4 decision, reversed the conviction. Writing for the majority, Justice Roberts emphasized that the actions of the government agent were an example of entrapment. The Court ruled that the government had impermissibly induced the crime by pushing Sorrells into an act he would not have committed without the persistent urgings of the agent. The Court focused on the fact that the agent did not merely offer Sorrells the opportunity to commit a crime, but instead actively induced him to do so, making it clear that the law could not tolerate such manipulation by law enforcement.

The majority's decision stated that although law enforcement officers could create opportunities to catch criminals, they should not engage in conduct that pushes an otherwise innocent person into committing an offense. The decision placed limits on how far the government could go in using undercover operations to induce individuals to commit crimes.

Justice Roberts stressed that Sorrells' conduct was not a result of any pre-existing criminal intent, but instead arose from the repeated, persistent requests by the undercover agent. This decision in Sorrells v. United States thus marked a shift in the application of the entrapment defence, emphasizing that the government should not be allowed to engage in tactics that manipulate otherwise law-abiding individuals into committing illegal acts.

Not all the justices agreed with the majority opinion in Sorrells v. United States. The dissenting justices, led by Justice McReynolds, believed that the decision weakened effective law enforcement practices. They argued that the majority’s ruling was too lenient and created an opportunity for defendants to escape conviction under the guise of entrapment.

The dissent expressed concerns that the decision could allow individuals to avoid criminal liability simply by asserting that they were induced by law enforcement to commit the crime. The dissenters pointed out that law enforcement's role was to catch criminals, and that the

government should not be restricted from employing tactics, including undercover operations, that were necessary for enforcing the law.

The dissenting opinion contended that the behaviour of the agent did not led to entrapment because Sorrells ultimately had the free will to refuse the agent's requests. In their view, the mere persistence of the agent did not constitute unlawful inducement, as the defendant still retained the agency to reject the offer and avoid committing the crime.

The majority decision in Sorrells v. United States fundamentally shaped the way courts approach the entrapment defence. The ruling made clear that law enforcement's conduct could be subject to scrutiny if it was found to be overly coercive. As a result, the case became a foundational precedent in establishing the principles of entrapment law in the United States.

In future cases, courts began to more carefully examine whether law enforcement officers' conduct was unduly aggressive or manipulative, and whether it was likely to lead a person to commit a crime they would not have otherwise committed. The key legal principle that emerged from Sorrells is that the defence of entrapment could be successful if it was shown that the government's conduct effectively created the crime by manipulating the defendant into committing it.

The case was particularly important in clarifying the standard for evaluating entrapment claims. Previously, some courts focused primarily on whether the defendant was predisposed to commit the crime. After Sorrells, courts began to assess the conduct of law enforcement more carefully, not just the defendant's predisposition. This shift represented a more balanced approach to protecting defendants' rights while still allowing law enforcement to perform its duties.

Several decades later, *Schaffer v. U.S. Postal Service* added another dimension to the discussion of entrapment, particularly in the context of workplace conduct and administrative actions. In this case, a mail handler employed by the U.S. Postal Service was accused of drug-related misconduct, including smoking marijuana on agency premises. The mail handler's misconduct was complicated by the fact that one of his friends, who was a confidential informant, had repeatedly pressed him to engage in illegal drug activities. This scenario raised the question of whether the mail handler's actions could be considered entrapment or if he was merely an unwilling participant who had been pushed into illegal conduct.

In the Schaffer case, the Merit Systems Protection Board (MSPB) considered the influence of the informant on the employee's actions, noting that the employee had not previously engaged in such illegal behaviour. The Board found that the repeated solicitations from the informant played a significant role in the employee's decision to violate agency policies. Although the mail handler had committed the violations, the Board ultimately reduced his penalty, concluding that the external influence exerted by the informant diminished the severity of the misconduct.

The Schaffer case is crucial because it brings to light to the fact that entrapment is not restricted to traditional criminal acts but can also apply in situations involving administrative misconduct, particularly when an external party induces an employee to act against their usual behaviour. The decision reflected a growing understanding of the complexities surrounding the concept of entrapment in non-criminal settings, suggesting that external pressures can significantly influence a person's actions, even in professional environments.

As the discussion continues to explore the concept of entrapment, attention now turns to another important case *United States v. Hollingsworth*.[123] In this case, the defendants, William Pickard (an orthodontist) and Arnold Hollingsworth (a farmer and businessman), were involved in a failing business venture. They created a Virgin Islands corporation and obtained foreign banking licenses to engage in international finance. However, they struggled to attract customers and began losing money. In desperation, Pickard placed an ad in USA Today, advertising the sale of one of their banking licenses. This ad was noticed by J. Thomas Rothrock, a U.S. Customs agent attending a seminar on money laundering. Rothrock, posing as a criminal smuggler of guns to South Africa, contacted Pickard, and through a series of interactions, the defendants agreed to launder $200,000 in exchange for a fee. Hollingsworth provided some minor assistance in these dealings.

The issue in this case was whether the defendants, Pickard, and Hollingsworth, were predisposed to engage in money laundering, or if they were induced by the government's sting operation. This brought into question the validity of their entrapment defence. The central question was whether the defendants were already willing to commit the crime before the government intervened.

[123] *United States v. Hollingsworth*, 23 F.3d 1196 (7th Cir. 1993)

The Seventh Circuit, led by Chief Judge Posner, ultimately ruled that the defendants were not predisposed to commit money laundering and were entitled to an acquittal. The court concluded that the government's sting operation was the primary reason the defendants were involved in the crime. Posner detailed that the defendants lacked the necessary criminal assets and expertise to commit money laundering on their own: "To get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. Pickard and Hollingsworth had none."[124]

Posner went on to argue that the defendants were financially distressed, inexperienced, and lacking the resources to carry out a money-laundering scheme without the help of law enforcement. He emphasized that without the government's intervention, Pickard and Hollingsworth would have folded their financial venture. Their solicitations had yielded no customers, and they were running out of money. Therefore, the court found it was "highly unlikely" that they would have committed money laundering if left to their own devices.[125]

Posner further concluded that the government's involvement in the scheme was essential for the crime to occur: "Whatever it takes to become an international money launderer, they did not have it."[126] Judge Posner's ruling focused on the principle that while willingness to commit a crime is relevant, predisposition requires more than just a willingness, it requires the capacity or position to commit the crime. Since the defendants lacked both, their actions were seen as a direct result of government inducement.

It is the view of this author that Posner's judgment in Hollingsworth laid a strong foundation for understanding entrapment in terms of both the defendant's willingness and ability to commit the crime. He set the bar higher for proving predisposition, requiring that the defendant must have the capacity to commit the crime, not just the will to do so. This is significant because it helps protect individuals from being lured by overly aggressive law enforcement tactics.

In contrast, Judge Coffey dissented, arguing that even though Pickard and Hollingsworth may not have had the "position" to commit money laundering without the government's help, they were still willing to engage in criminal activity. Coffey pointed out evidence such as Pickard's use of false passports and his willingness to engage in the illegal transaction: "Pickard arguably encouraged Rothrock to structure his banking deposits illegally... he was carrying false

[124] *Ibid,* para 1203.
[125] *Ibid.*
[126] *Ibid.*

passports issued to the mythical 'Dominion of Melchizedek.'"[127] However, Coffey did not believe this evidence proved that Pickard and Hollingsworth were predisposed in the legal sense of the term, as he believed that the key issue was their inability to act without government inducement.

The last case to be afforded scrutiny in a bid to discover how US courts have finalized this issue is the case of *United States v. Jacobson.*[128] In this case, federal agents targeted a Nebraska farmer, Jacobson, who had previously purchased legal child pornography before the passage of the Child Protection Act of 1984, which made such materials illegal. After the law changed, the government launched an undercover operation. Over the span of two years, agents corresponded with Jacobson through various fictitious organizations, encouraging him to purchase child pornography. After 26 months of this correspondence, Jacobson responded by placing an order for a magazine featuring minors. When the package arrived, Jacobson was arrested.

The issue in Jacobson was whether Jacobson was predisposed to commit the crime of purchasing child pornography, or if he had been induced by the government's long-running sting operation. The defence argued that Jacobson had no intention of committing the crime until he was repeatedly encouraged and manipulated by federal agents.

In a 5-4 decision, the Supreme Court ruled in favour of Jacobson, overturning his conviction. Justice White, writing for the majority, stated that the government had failed to meet its burden of proving Jacobson's predisposition to commit the crime prior to being approached by the agents. The Court emphasized that Jacobson's previous legal purchase of child pornography did not demonstrate a predisposition to commit an illegal act after the law changed: "Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal."[129]

The majority also signalled that Jacobson's response to the government's solicitations although willing was not sufficient evidence of predisposition. The critical point, Justice White explained, was that the government had induced Jacobson to commit the offense after 26 months of persistent communication, which created the risk that an otherwise law-abiding citizen would be pushed into criminal behaviour. "When the Government's quest for

[127] *Ibid.*
[128] *United States v. Jacobson* 503 U.S 540 (1992).
[129] *Ibid,* para 551.

convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene."[130]

The ruling in Jacobson reinforced the Court's stance on entrapment, emphasizing the importance of the government proving that a defendant was predisposed to commit a crime before agents engaged with them. The Court was particularly concerned that the lengthy and repeated efforts to induce Jacobson into committing the crime might have caused him to act in ways he would not have otherwise done. Justice White's opinion underscored that mere willingness to commit a crime, after being induced by law enforcement, is not sufficient to convict; the government must prove the defendant had a pre-existing disposition toward the criminal act.

The dissent in Jacobson raised concerns that this decision would set too high a bar for entrapment cases, making it harder for the government to pursue convictions. Justices O'Connor, Rehnquist, and Kennedy feared that lower courts might misinterpret the ruling, making it more difficult to prosecute individuals who were actually inclined to commit the crime but had been encouraged by law enforcement.[131] Justice O'Connor's dissent warned that this ruling could hamper efforts to prevent crimes like child exploitation: "It is unlikely that the majority's rule would be helpful to criminal investigators in real-world cases involving similar offenses."[132] Despite these concerns, the majority's ruling remains significant for its focus on protecting individuals from government overreach in criminal investigations.

3.6 COMPARATIVE ANALYSIS

Just to recap, in the Republic of South Africa, the legal framework regulating entrapment in employment situations has been established by way of various judicial decisions and is largely guided by the Criminal Procedure Act, in terms of section 252A, which sanctions entrapment under in certain circumstances. Nevertheless, similarly it stresses that entrapment cannot be used in a manner that induces an individual to commit a crime they otherwise would not have. This principle was best witnessed in the landmark case of *Cape Town City Council v SAMWU and Others*.

To crisply recapitulate, two employees of the Cape Town City Council, Beukes and Dollie, were laid off in the wake of being induced by investigators to sell electric cabling. The

[130] *Ibid,* para 550.
[131] *Ibid* para 557.
[132] *Ibid,* para 558.

investigators, who were employed by the city council, had at first come up to the employees, claiming they needed the cable to supply electricity to underprivileged children. Subsequently, they relentlessly encouraged the employees to partake in the crime, this served as a catalyst that triggered the eventual transaction. The key issue in the case was whether the entrapment by the investigators was justifiable, and whether evidence which emanated from such entrapment could be used to the detriment of the employees.

It was the court's holding that although entrapment could be permitted in principle, it could only be resorted to on condition that the law enforcement officials did not actively induce the crime. The court reiterated that the investigators' conduct blurred the line between providing the opportunity for the employees to commit the crime and inducing them. The relentless efforts to sway the employees, accompanied by the emotional appeal deployed by the investigators, were seen as unwarranted and coercive. Therefore, the court ruled that the evidence obtained could not be used against the employees because the investigators' conduct surpassed what was permissible under the law. This case reiterates the principle that entrapment, when it involves active inducement, is unacceptable in South African law.

Another case which reinforces the same principle is the case of *Caji v Africa Personnel Services Pty Ltd*. In this matter, an investigator set-up a trap for an employee who was suspected of theft. The employee was captured on tape taking company property and subsequently laid off. During the arbitration procession, the testimonies of the employee and the investigator were at odds. The arbitrator held that the investigator had fell short of proving that the employee was not forced into committing the offense. In this matter, the employer failed to satisfy the standard of proof needed to demonstrate that the worker was only given an opportunity and not induced to commit the theft. The case highlights the importance of the employer proving that the employee was not manipulated into committing a crime. It also draws attention to the importance of presenting solid evidence to substantiate claims of entrapment.

Sugreen v Standard Bank of SA further sheds light on workplace entrapment. In this case, a worker's employment was terminated as a result of accepting a bribe. The applicant was allegedly paid but could not keep her end of the bargain. Mr Singh ultimately recorded a conversation between the applicant and himself on his home phone. The contents of that recording formed the basis of the applicant's dismissal as it pointed to her engagement in misconduct. Although the respondent had not been willing to be involved in entrapping its employees, it relied on the evidence procured through entrapment. The evidence was also

admissible in the arbitration proceedings because the commissioner found that the use of an employer's email and telephone are of interest to the employer where the employee is suspected of misconduct.

The landmark case on entrapment in the US is the case of *Sorrells v. United States*, where the court stated that entrapment manifests itself as soon as a government agent induces an individual to commit a crime that they would not have otherwise committed. The entrapment defence in the USA hinges on two key elements: inducement by law enforcement and the defendant's lack of predisposition to commit the crime. If law enforcement induces the crime and the defendant is not predisposed to committing it, the defence of entrapment can succeed and such a defendant will walk away scot-free.

Although the US legal system recognizes entrapment as a complete defence, it is more concerned with the predisposition of the individual. This principle is best seen in *Jacobson v. United States*, where the Supreme Court held that an individual could successfully claim entrapment if they were induced to commit a crime they were not predisposed to. This contrasts somewhat with South Africa, where the focus is less on the predisposition of the employee and more on the conduct of the investigators or employers who set up the entrapment.

It is clear that both South Africa and the USA recognize the notion of entrapment in the workplace, there are key differences in how these legal systems tackle its application. In South Africa, the legal framework regulating entrapment is more clearly set out, this is seen in terms of procedural safeguards and the burden of proof placed on employers. For instance, the *Cape Town City Council case and the Caji v Africa Personnel Services* case shines light on the importance of ensuring that evidence attained by way of entrapment is not tainted by undue inducement or coercion. The South African courts are unequivocal in holding that evidence obtained from entrapment can be used only if it was obtained under fair conditions and without active encouragement from law enforcement or employers.

In contrast, the USA legal system places emphasis on the predisposition of the defendant, as witnessed in cases like *Sorrells v. United States and Jacobson v. United States*. The principal inquiry in the USA is whether the defendant was inclined to commit the crime or whether they were unduly induced by government agents. While there is recognition of entrapment in the workplace, the emphasis is on the defendant's readiness to commit the offense without the intervention of the law enforcement officer or employer.

One key difference is that South African law clearly sets outs the conditions under which entrapment may be used through section 252A of the Criminal Procedure Act and makes it clear that entrapment cannot involve active inducement. In the USA, however, the legal principles regarding entrapment are more generalized, and the emphasis tends to be on the issue of predisposition as opposed to the fairness of the methods utilized to induce the crime.

Both jurisdictions, however, share the principle that evidence obtained through improper or excessive inducement should be excluded, protecting employees from coercion or manipulation in the workplace. In both systems, it is important that investigators or employers do not use entrapment as a tool for unfairly setting up an employee.

3.7 Conclusion

In conclusion, while both the South African and USA legal systems acknowledge the concept of entrapment, they differ in their approach and focus. South Africa places more emphasis on the fairness and proportionality of the entrapment itself, ensuring that the actions of investigators or employers are closely scrutinized to prevent undue inducement.

The USA, on the other hand, focuses on whether the individual was predisposed to commit the crime, with the inducement by law enforcement being a central factor in determining whether entrapment occurred.With the USA, we have also seen how the racial context comes in to shift the law enforcers from criminal profiling to racial profiling, and hence, violating essential human rights. Despite these differences, both legal systems share the goal of protecting individuals from manipulation and ensuring that evidence obtained through entrapment is used only when it meets strict criteria of fairness and legality.

CHAPTER 4. CONCLUSIONS AND RECOMMENDATIONS

4. INTRODUCTION

This chapter serves to conclude the study by summarising the main conclusions and put forth appropriate recommendations for Lesotho. Chapter three was centred on undertaking a comparative analysis of workplace entrapment practices in both South Africa and the United State. To this end, the chapter discovered that on one hand: The South African legal framework in terms of section 252A of the *Criminal Procedure Act*, as well as fragmented provisions of

the *Labour Relations Act*,[133] provides clear guidance on the use and limits of entrapment. The United States, on the other hand, makes usage of a more subjective test hinged on the predisposition of the individual. These two approaches served as a benchmark for assessing Lesotho's position, which is marked by a concerning legal vacuum. This chapter now builds on those findings by identifying specific legislative reforms Lesotho should undertake in order to regulate workplace entrapment fairly and effectively.

4.1. PURPOSE OF THE STUDY

This research embarked on a journey of evaluating the legal implications of workplace entrapment and ascertaining whether Lesotho's legal system has adequate safeguards in place for both employees and employers. The Labour Act 2024 is silent on the issue, and the Criminal Procedure and Evidence Act lacks any provision that governs how law enforcement or employers may have resort to covert investigations to expose workplace misconduct. This occasions a legal vacuum which reduces employees to sitting ducks who are at risk of being unfairly tempted to partake in and/or commit criminal conduct or disciplinary breaches without the benefit of legal protection. This equally applies to employers who are left in a limbo in relation to steps and rules to be adhered to when using entrapment to ensure that evidence obtained through covert means is admissible.

4.2. RESEARCH FINDINGS

Chapter one of this research being introductory set the tone of this entire research by laying down the key legal issue(s): the legal implications of workplace entrapment and ascertaining whether Lesotho's legal system has adequate safeguards in place for both employees and employers. The research was guided by the following research questions: a) are there limits to entrapment in the workplace; b) can entrapment be regarded as unfair labour practice; c) does misuse and abuse of entrapment go against core constitutional morality d) how best can entrapment be regulated in a manner that strikes a balance between the rights of the employee and the interest of the employer?

In pursuit of addressing these questions the chapter examined the constitutional implications of workplace entrapment in Lesotho. It explored the concept of entrapment, its potential for abuse by employers, and its alignment with constitutional principles such as fairness, equality, and non-discrimination. The chapter highlighted the constitutional duty of employers to act

[133] *Labour Relations Act,* 1995, Preamble; section 185; section 186(2); and section 188(1).

fairly and avoid discriminatory practices, discussing how entrapment may lead to wrongful targeting of employees and violations of their rights. The significance of the study was emphasized, focusing on the lack of regulatory frameworks for entrapment in Lesotho and South Africa. The chapter also outlined the research objectives, including assessing the fairness of entrapment in employment, its impact on constitutional values, and the need for regulation to prevent misuse. By way of a literature review, it examined existing discourse on entrapment in law enforcement and its potential parallels in the workplace, ultimately proposing a study of its constitutional implications within the context of fair labour practices. The chapter concluded with a breakdown of the chapters, setting out how each subsequent chapter would shape the rest of the research.

Chapter two scrutinized how entrapment, undercover operations, and constitutional rights intertwine with each other and sought to shed light on how these issues are handled in South African and United States legal systems and how Lesotho can best learn from them. To this end, the chapter commenced by establishing that undercover operations have become essential tools in law enforcement, when attempting to expose covert criminal conduct such as corruption, drug trafficking, and sexual exploitation. However, it warned that the usage of these tactics can bring up serious constitutional questions when they result in manipulation, coercion, or the manufacturing of crime. The analysis throughout the chapter revolves around the need to strike a careful balance between facilitating criminal investigations and upholding the individual's right to a fair trial, privacy, and protection from unfair treatment.

The chapter briefly drew lessons from South African's judicial jurisprudence by looking at the case of *S v. Dube* which served as reference point.[134] Here, the court considered whether an undercover operation, initiated not by the state but by Toyota (a private entity), amounted to entrapment. Despite the appellant's claims that he had been tricked into committing the crime, the court admitted the evidence gathered through the operation. It reasoned that the appellant had voluntarily participated in the transaction, indicating that there was no undue influence on his part. The stance of the South African legal position was revealed through the case, and it is to the effect that while entrapment is not recognized as a standalone defence, evidence obtained through such means may still be admitted so long as it does not taint the fairness of the trial.

[134] *S v Dube* 2000 (2) 583.

The case of *Cape Town City Council v. SAMWU and Others*,[135] helped put more light on the issue. Investigators hired by the City Council pretended to be colleagues and repeatedly pressured employees into committing acts of misconduct. The court decided that the investigators had not merely created an opportunity to commit a crime but had gone further to proactively induce and emotionally manipulate the employees into acting unlawfully. Because of this the court found that the evidence obtained through such coercive means was inadmissible.

Turning to the United States, the chapter investigated the legal test for entrapment, which hinges on whether the government merely provided an opportunity for the crime or actively induced someone who was not predisposed to commit the offense. In *Sorrells v. United States*,[136] the U.S. Supreme Court held that the federal agent had wrongfully persuaded the defendant to violate Prohibition laws, finding this to be entrapment. The lesson driven home by the case is that the onus is on the government to establish that the defendant was already predisposed to commit the crime before government involvement. The court reiterated that law enforcement is not permitted to create crime but rather to detect criminal activity already in existence.

The complexity of predisposition is further analysed in the case of *United States v. Hollingsworth*.[137] In this case, Judge Coffey, writing in dissent, scrutinized whether the defendants, Pickard, and Hollingsworth, had been improperly enticed by government agents or were already inclined to engage in criminal behaviour. Coffey acknowledged that Pickard had used false passports and may have encouraged a co-conspirator to structure illegal bank transactions, but he maintained that such evidence did not sufficiently establish legal predisposition. His main concern was that without government inducement, the crime might not have taken place, highlighting how the line between opportunity and manipulation can become dangerously blurred.

The case of *United States v. Jacobson* brought to light how the court confronts issues of excessive government involvement.[138] In this case, federal agents targeted a man who had previously purchased child pornography before the law changed to criminalize such conduct.

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[135] *Cape Town City Council v SAMWU and Others* (2000) 21 ILJ 2409 LC.
[136] *Sorrells v United States,* 287 U.S. 435 (1932).
[137] *United States v. Hollingsworth*, 23 F.3d 1196 (7th Cir. 1993)

[138] *United States v. Jacobson* 503 U.S 540 (1992).

Over a period of 26 months, the agents pretending to be members of non-existent organizations relentlessly corresponded with Jacobson, encouraging him to order illegal material. Ultimately, he fell prey to this, and was arrested. However, the Supreme Court ruled in a 5-4 decision that Jacobson had been entrapped. Writing for the majority, Justice White found that Jacobson's eventual willingness to commit the crime was the result of government persistence, not pre-existing criminal intent.[139] The ruling is to the effect that simply proving that someone was willing to commit a crime after being induced by the government is not enough; predisposition must exist prior to the government's involvement. Jacobson's earlier lawful purchase could not be used to show predisposition to commit an illegal act after the law changed. The Court was especially concerned with protecting individuals from being pushed into criminal behaviour by excessive law enforcement tactics.

These judicial jurisprudence shines the light on how the doctrine of entrapment acts as a constitutional safeguard against government overreach. The courts draw a firm line between providing an opportunity and inducing a crime. Notably, these decisions indicate that while it is legitimate for law enforcement to use undercover tactics, such tactics cannot be allowed to undermine individual autonomy, violate due process, or manufacture criminal conduct where none would have existed.

The chapter drew parallels in a bid to assess how best Lesotho can incorporate these safeguards to its legal framework. To this end, the chapter stressed that while Lesotho's legal system has a legal vacuum in relation to entrapment, its Constitution as the supreme law protects rights such as privacy, and freedom from unfair discrimination: rights which are directly implicated when undercover operations and entrapment are used in investigations. The lessons from both South African and U.S. jurisprudence is clear: investigative tools must be constrained by constitutional principles. Undercover operations must not be used to create criminal behaviour, nor should they rely on manipulation or coercion that would compromise the fairness of legal proceedings.

Ultimately, Chapter 2 reinforces the position that while undercover operations are necessary for uncovering concealed criminal activity, their use must be scrutinized to ensure that they do not cross constitutional boundaries. The chapter argues for a jurisprudential framework in Lesotho that permits the use of such operations only when they respect individual rights and

[139] *Ibid,* para 551.

ensure the integrity of the justice system. The comparative case law discussed throughout the chapter provides a compelling foundation for shaping such a framework, one that aligns with Lesotho's constitutional commitment to justice, fairness, and the rule of law.

Chapter 3 undertook a journey of conducting an in-depth analysis of workplace entrapment, beginning with South Africa, and then shifting focus to the United States. The chapter revealed that South African legal position, presents a far more structured and principled approach to entrapment. Entrapment is clearly catered for and regulated under section 252A of the Criminal Procedure Act,[140] which permits it only under strict conditions. The section makes it clear that while law enforcement or employers may create opportunities for an individual to commit a crime, they are not permitted to induce or encourage the commission of that crime.[141] This principle was strongly reiterated in the *Cape Town City Council v SAMWU* case,[142] where the court found that investigators had crossed the line by emotionally pressuring and relentlessly persuading employees to sell electric cabling. Their conduct was thought to be coercive and therefore reduced the resulting evidence inadmissible. This case stressed the principle that entrapment must not involve proactive inducement, and that investigators must refrain from manipulating individuals into committing crimes they would otherwise not commit.

Further support for this view was found in the *Caji v Africa Personnel Services* case,[143] in this case the employer fell short of establishing that the employee had not been forced into committing theft during a staged operation. The arbitrator held that the onus was on the employer to establish that the employee had been merely given an opportunity and not unduly influenced. The case is thus a cautionary tale for employers who overlook the importance of procedural fairness and evidentiary standards when dealing with cases of entrapment in the workplace. It laid the precedent that employers must present solid, uncontaminated evidence, and must not resort to tactics that could be deemed as manipulation or coercion to avoid inadmissibility.

The discussion also examined the case of *Sugreen v Standard Bank of SA*,[144] where even though the employer was not directly involved in setting up the entrapment, it relied on a recording obtained by a third party to validate the dismissal. The court upheld the admissibility of the

[140] *Criminal Procedure Act*, No. 51 1977, section 252A (2).
[141] *Ibid.*
[142] *Cape Town City Council v SAMWU and Others* (n 2).
[143] *Caji and Africa Personnel Services Pty (Ltd)*, (2005) 26 ILJ 150 (CCMA).

[144] *Sugreen v Standard Bank of SA,* (2002) 23 ILJ 1319 (CCMA).

evidence, largely because the employee was suspected of serious misconduct and because the means of surveillance fell within the reasonable interest of the employer. Thus, through this case it is seen that South African law allows for flexibility in dealing with entrapment but still upholds the requirement that such tactics must not exceed ethical and legal boundaries.

The chapter then explored the American approach to entrapment, starting from the foundational case of *Sorrells v United States*,[145] where the court introduced the idea that entrapment exists when government agents induce a person to commit a crime they were not predisposed to commit. This stance was adopted and developed further in *Jacobson v United States*,[146] where the Supreme Court emphasized that prolonged government efforts to induce a person to commit a crime can invalidate a prosecution if it is found that the individual had no initial intention or inclination to commit the act. What sets apart the U.S. approach is its emphasis on the mental predisposition of the accused. In the American system, the primary question is not whether the law enforcement agent's conduct was fair, but rather whether the defendant was already inclined to commit the crime.

This runs parallel to the South African legal position, which places emphasis on the actions of the agent or employer and whether that conduct falls squarely within the bounds of fairness and legality. In South Africa, the fairness of the process and the absence of undue pressure are important factors to consider. In the United States, however, even if law enforcement uses aggressive or deceptive tactics, a claim of entrapment will not be successful if the defendant was predisposed to commit the offense, nonetheless.

Despite these differences, the legal frameworks in both countries share the fundamental principle that evidence obtained through improper or excessive inducement should not be admissible. Both jurisdictions acknowledge the potential dangers of entrapment when it becomes a tool of manipulation rather than a legitimate investigative technique. The mutual aim is to protect employees in relation to workplace entrapment, from being coerced or tricked into committing offenses they would not have otherwise contemplated.

The findings of this chapter expose the legal vacuum and thus, the urgent need for Lesotho to establish a legal framework regulating entrapment in the workplace. The comparative analysis signals that the absence of regulation leaves employees exposed to potentially abusive practices and undermines the rule of law. By putting clear procedural safeguards that mirror those in

[145] *Sorrells v United States* (n 3)
[146] *Jacobson v United States* (n 5).

existence in South Africa and by considering the importance of individual predisposition as stressed in the U.S., Lesotho could develop a fair and balanced legal approach to workplace entrapment.

4.3. RECOMMENDATIONS

Based on the conclusions and findings outlined above this research makes the following recommendations.

4.4. Amend the Labour Act 2024: First, this research tables the recommendation that the *Labour Act 2024* as the primary labour legislation,[147] should be amended to include a dedicated provision addressing workplace entrapment. To this end, the new provision must set out the responsibilities of employers and private investigators and set a clear line demarcation between lawful monitoring and unlawful inducement. The Labour Act should clearly stipulate that employers must not use deceptive tactics or emotional manipulation to induce an employee into committing misconduct. Over and above, the provision should also create a mechanism for employees to challenge the fairness of any disciplinary action emanating from evidence gathered by way entrapment. A tribunal, such as the DDPR whose mandate is to resolve labour disputes and unfair labour disputes through conciliation or arbitration,[148] should be tasked with reviewing whether the evidence was collected fairly, and whether the conduct of the employer or investigator amounted to improper inducement.

Practically, the amendments to the Labour Act could take the form of amendment of the interpretation section[149] to include a definition of "workplace entrapment," including examples of what amounts to coercion or inducement. Coupled with this, Part VI of the Act dealing with "the employment relationship and termination" should be amended to include the following: a prohibition against entrapment methods that exploit the emotional, financial, or psychological vulnerability of employees; a requirement for employers to demonstrate that the employee was given a genuine opportunity to act lawfully and was not unduly pressured or manipulated; Procedural safeguards that allow employees to raise entrapment as a defence in disciplinary hearings, with the burden of proof resting on the employer to show that the conduct did not amount to unlawful inducement; and Clear guidance on the admissibility of secretly obtained

[147] *Labour Act,* No.3 2024, Preamble; section 2.
[148] *Ibid,* section 34(a).
[149] *Ibid,* section 4.

recordings, ensuring that the use of surveillance tools is within the realm of both privacy rights and due process.

4.4.1. Amendment of the Criminal Procedure and Evidence Act: Second, this research recommends that the *Criminal Procedure and Evidence Act 1981* should be amended: The research has established that entrapment is rooted in criminal investigations and as such it is only fitting that the CP & E be amended to include a provision that mirrors section *252A of South Africa's Criminal Procedure Act.* This new section should clearly define what constitutes entrapment, establish limits on its use, and provide criteria for the admissibility of evidence gathered through entrapment operations. Specifically, the law should state that any evidence obtained through entrapment will only be admissible if it was gathered without coercion, manipulation, or undue inducement. It should further require that any such operation be authorised in advance by a senior officer or magistrate, and that the accused or affected employee be given an opportunity to challenge the legality of the operation before any tribunal or court relies on the evidence.

By adopting these two reforms: one in the *Criminal Procedure and Evidence Act 1981* and another in the *Labour Act 2024* Lesotho will begin to close the legal gap that currently allows entrapment to go unregulated. These reforms will not only promote constitutional values such as the right to a fair hearing and protection against arbitrary dismissal but will also create a balanced system where employers can detect and address misconduct without resorting to unethical practices.

4.5. CONCLUDING REMARKS.

In conclusion, while both South Africa and the United States have developed different approaches to regulating entrapment, their experiences offer valuable lessons for Lesotho. South Africa's emphasis on fair investigative methods and the prohibition of active inducement provides a useful model for structuring statutory reforms. The American focus on predisposition further highlights the need to protect individuals who may be unfairly manipulated into wrongdoing. Lesotho should draw on these principles to build a legal framework that is both constitutionally sound and practically effective. The proposed amendments to the Criminal Procedure and Evidence Act and the Labour Act 2024 would go

a long way in safeguarding employee rights, enhancing employer accountability, and promoting trust and transparency in the workplace.

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