Waiver of the right to judicial impartiality: Comparative analysis of South African and Commonwealth jurisprudence

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Abstract

This paper investigates whether judicial independence and impartiality entrenched in written constitutions and recognised by the common law as fundamental requirements of fair administration of justice can be subjected to the private law principles of waiver, estoppel or acquiescence. In an attempt to answer this question, the paper suggests that the starting point should be the interrogation of whether the right alleged to be waived emanates from the constitution or administrative law. At common law, a right can be waived, insofar as the party involved had knowledge of the right and failed to assert it. Similarly, a party who had represented a state of affairs upon which the other relied to his detriment is, in equity, estopped from going back on that understanding. However, the problem is that a waiver of a constitutional right is not easily presumed nor is the defence of estoppel readily permissible. Obviously, the individual's prerogative is limited if the right in question is in the interest of the public because an individual cannot waive a right entrenched in the Constitution or statute for the protection of the public. This paper considers the jurisprudence dealing with this limitation that emanates from several commonwealth jurisdictions. In conclusion, it posits the question whether the introduction of the concept of 'interest of justice' by the South African Constitutional Court in *Bernert v ABSA Bank Ltd* 2011 3 SA 92 (CC) is the saving grace, and whether, as a stand-alone concept, it can effectively substitute for waiver, estoppel or acquiescence in either the constitutional or administrative law context.

1 Introduction

The common law attaches much value to the twin principles of judicial independence and impartiality. Similarly, modern Constitutions accord these

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precepts pre-eminent space.[1] Again, these values are recognised in international human rights instruments, and modern human rights legislation, as essential conditions precedent to the fair administration of justice.[2] The question with which this article grapples, is whether a right so universally revered and constitutionally guaranteed can possibly be waived either expressly or by the conduct of the party seeking to enforce the right? In effect: to what extent, if any, should waiver, acquiescence or estoppel, being private law principles,[3] apply in public adjudication? Or, are they exceptions to the apprehension of bias rule?[4] In negative terms, if the issue of impartiality of a judge is foundational to the system of justice administered in our courts, then, why should the adverse issues of waiver,[5] acquiescence or estoppel arise in the event of a breach of a constitutional or administrative justice right? Put another way, would it be in the interest of justice for a party who ought to take advantage of the fundamental right vested in him/her be estopped from claiming that right because of procedural or practical reason(s) arising out of apparent silence or tardiness?

One line of reasoning is that since 'bias' is a species of 'jurisdictional error' which can be raised at any stage in the proceedings, waiver, therefore, can have no application.[6] For instance, whether the improper constitution of a court is

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[1] See, eg, ss 33(3)(a), 34 and 165(2), Constitution of the Republic of South Africa 1996; s 12(8), Constitution of the Kingdom of Lesotho 1993; art 12(1)(a), Constitution of the Republic of Namibia 1990. In *Zondi v MEC for Traditional and Local Government* 2005 3 SA 589 (CC) para 61, the Constitutional Court held that s 34 is an express constitutional recognition of the importance of fair resolution of social conflict by impartial and independent institutions. See also *Islamic Unity Convention v Minister of Communications* 2008 3 SA 383 (CC) para 51; *Berstein v Bester NNO* 1996 2 SA 751 (CC) para 105.

[2] See, eg, art 6(1), European Convention for the Protection of Human Rights and Freedoms 1950; s 6(1), United Kingdom Human Rights Act 1998.

[3] See generally, Rabie and Sonnekus *The law of estoppel in South Africa* (2000); Visser and Potgieter, Estoppel: *Cases and materials* (1994). See also Pretorius 'Deliberate third party conduct and the creation of obligations (2): Contract and estoppel' (2011) 74 *THRHR* 182 para 6.1.

[4] In Australia, necessity, waiver and special circumstances are considered as exceptions – *British American Tobacco Australia Services Ltd v Laurie* (2011) ALR 429 para 146; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 88-89, 96-98 and 102; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 para 4.

[5] In *Road Accident Fund v Mothupi* 2000 4 SA 38 (SCA) para 15, one of the issues was whether the Road Accident Fund, a statutory body, had by its conduct, waived its right to rely on prescription, a statutory provision specifically accorded to the Fund to avert claims which were filed out of time. The Court of Appeal held that a statutory provision enacted for the special benefit of any individual or body might be waived by the individual or body provided that no public interests are involved. It made no difference that the provision was couched in peremptory terms. See also *SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 (A) at 49G-H.

[6] *Devries v Canada (National Parole Board)* (1993) 12 Admin LR (2d) 309 (BCSC); *Milne v Joint Chiropractic Professional Review Committee* (1992) 97 Sask R 299 at 303, 90 DLR (4th) 634 (CA). *Brand v College of Physicians and Surgeons (Sask)* (1990) 86 Sask. R 18, 72 DLR (4th) 446 (CA). See also Toy-Cronin, 'Waiver of the rule against bias' (2000-2003) 9 *Auckland Univ LR* 850.

raised earlier or after judgment has been rendered, such a judgment remains void for all purposes. This approach has not been sustained because there is the contrasting school of thought that waiver has become 'an accepted feature of the administrative law landscape'.[7] Assuming that hypothesis to be correct, what about waiver of a constitutional right? Can waiver or estoppel be raised as a defence to an allegation of judicial partiality or bias in a constitutional context? In attempting to answer these questions, we begin by exploring the role waiver and other operational doctrines play at common law and, in particular, in public law.

2 Waiver, acquiescence and estoppel generally

It is generally accepted that a person, being aware of a state of affairs and who does nothing to show uneasiness or unwillingness to proceed with the irregularity, is taken to have acquiesced in that state of affairs, or is said to have waived the right to object to the irregularity and therefore is estopped from raising the issue later or in future litigation.[8] As Baxter explains, acquiescence refers to a situation where someone agrees to be treated in a particular way whereas waiver is a situation where, although an individual has not agreed to the treatment in question, he does nothing about it.[9] If the treatment is challenged in the former instance, the individual's acquiescence will be raised in defence by way of estoppel.[10] Added to these three private law defences is the fourth, which is, whether the doctrine of contracting out of a binding obligation can be pleaded against a public authority under a statutory power or duty to act.[11] Although all four principles are related to each other and discussed in the present context, the focus however is on waiver and the evidential doctrine of estoppel.

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[7] Per Robertson JA in *Rothesay Residents Association v Rothesay Heritage Preservation* (2006) 269 DLR (4th) 127 (NBCA) paras 25, 26 and 27.

[8] See, eg, *Robertson v Higson* 2006 SC (PC) 22 where the use of temporary sheriffs in the Scottish Judiciary was found to have satisfied the requirement of art 6(1) of the European Convention of an 'independent and impartial tribunal'. The Lord Advocate of Scotland accepted in Robertson, having regard to the earlier decisions of the court on the matter, that the Procurator Fiscal had no power to proceed with the prosecution of the appellant before a temporary sheriff. But, it was contended that the appellants had acquiesced in their trials before the temporary sheriffs and so could not secure relief. Their Lordships were unanimous in accepting the plea of acquiescence. The argument that since the conviction and sentence constituted a 'fundamental nullity', so as to render the suggested argument of waiver inapplicable, was therefore rejected.

[9] Acquiescence like waiver is a voluntary surrender, abandonment or relinquishment of right or privilege: *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52 at 54; *Snyman v Liquor Licensing Court, Windhoek* 1963 1 SA 460 (SWA) at 465; *S v Herbst* 1980 3 SA 1026 at 1035.

[10] Baxter *Administrative law* (1984) 361.

[11] See, eg, *President of South Africa v SARFU* (3) 2000 1 SA 1 (CC) para 198, (the Constitutional Court of South Africa holding that a public authority cannot enter into a contract which is wholly incompatible with the discretion vested upon it by law).

2.1 Waiver and estoppel

The term 'waiver' when used in the sense of election as where a person decides between two mutually exclusive rights is the intentional and voluntary surrender or relinquishment of a known right or privilege.[12] Toohey J in *Vakauta v Kelly*[13] described it as involving 'a decision by the party against whom bias is shown to raise no objection ... The situation is one in which the law prevents a party to litigation from taking up two inconsistent positions: he is held to his election.'[14] It implies a dispensation or abandonment by the waiving party of a right or privilege upon which the party, at his/her option, could have insisted.[15] The concept of waiver presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefit, or where there is a choice of two rights, he/she decides to take one but not both.[16] For instance, a person who is entitled to the benefit of a statutory provision may waive it and allow the transaction to proceed as though the provision did not exist. So, once the person has voluntarily relinquished his right, he could not be heard to complain afterwards that he has been denied the enjoyment of such a right.[17] Such a person would be held to have waived the right and consequently estopped from raising the issue in subsequent proceeding.[18] Because no-one is ever presumed to waive his rights,[19] the onus of proving waiver is strictly on the party

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[12]Per Lord Wright in *Smyth (Ross T) and Co Ltd v Bailey, Sons and Co* [1940] 3 All ER 60 at 67.
[13]1989 167 CLR 568.
[14]*Id* 588.
[15]Per Idigbe JSC, *Ariori v Elemo* (1984) 5 NCLR 1 at 18.
[16]*Aro v Fabolude* (1983) 1 SCNLR 58.
[17]As Lord Phillips CJ held in *Smith v Kvaerner Cementation Foundation Ltd* [2007] 1 WLR 370 at 378 that as a basic principle of waiver, the person who is said to have waived 'has acted fairly and in full knowledge of the facts'. See also per Lord Browne Wilkinson, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)* [1999] 1 All ER 577 (HL).
[18]Paraphrasing 1 *LAWSA* (Re-issue) para 210, Navsa JA spoke in *SABC v Coop* 2006 2 SA 217 (SCA) paras 63 and 64 of the plaintiffs' reliance on estoppel, 'otherwise described as ostensible authority', as where a person who has not authorised another to conclude a juristic act on his or her behalf may in appropriate circumstances be estopped from denying that he or she had authorised the other so to act. The effect of a successful reliance on estoppel is that the person who has been estopped is liable as though he or she had authorised the other to act. Again, citing para 211 of the same *LAWSA*, it was held that the essential elements of estoppel are where: 'The person relying on estoppel will have to show that he or she was misled by the person whom it is sought to hold liable as principal to believe that the person who acted on the latter's behalf had authority to conclude the act, that the belief was reasonable and that the representee acted on that belief to his or her prejudice'. See also: *NBS Bank Ltd v Cape Produce Co (Pty)* Ltd 2002 1 SA 396 (SCA) para 26; Mason, 'The place of estoppel in public law' in Groves (ed) *Law and government in Australia* (2005) 160; Bradley and Ewing *Constitutional and administrative law* (2007) 756; Hoexter *Administrative law* (2007) 38; Wade and Forsyth *Administrative law* (2009) (10th ed) 199.
[19]*Road Accident Fund v Mothupi* 2000 4 SA 38 (SCA) para 19. *Ellis v Laubscher* 1956 4 SA 692 (A) 692 at 702E-F.

alleging it.[20] Similarly, clear proof is required of an intention to do so.[21] The party alleging must show that the other had full knowledge of the right but failed to raise the issue at the first opportune moment[22] or decided to abandon it whether expressly or by conduct which must be clearly inconsistent with an intention to enforce the right.[23]

It is important that the elements of knowledge and volition must be present. The latter must emanate from the party against whom the doctrine is raised for 'it is this knowledge and acquiescence that make it unjust and inequitable that [the party] should turn to resile from the situation'.[24] In the context of fair hearing, waiver would entail a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection open to that party.[25] For instance, in the circumstances of *Starrs v Procurator Fiscal*,[26] and *Millar v Dickson*,[27] such a party should not object to his being tried by an independent and impartial tribunal composed by the respective temporary sheriffs whose appointments did not fit into the description of 'independent and impartial tribunal' in article 6(1) of the European Convention on the Protection of Human Rights and Freedoms 1950. Or, as in *Lawal v Northern Spirit Ltd*,[28] to the arrangement where Queen's Counsel who sit as part-time Judges with wing-members in the Employment

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[20] *Rothesay Residents Association v Rothesay Heritage Preservation* (2006) 269 DLR (4th) 127 (NBCA) para 29; *Saint John Shipbuilding Ltd v Bow Valley Husky (Bermuda) Ltd* (2002) 251 NBR (2d) 102 (CA) para 71.

[21] *Hepner v Roodepoort-Maraisburg Town Council* 1962 4 SA 772 (A) at 778D-779A; *Borstlap v Spangenberg* 1974 3 SA 695 (A) at 704F-H.

[22] *Rothesay Residents Association v Rothesay Heritage Preservation* (2006) 269 DLR (4th) 127 (NBCA) paras 27 and 30; *Lurette v New Brunswick (Minister of Education)* (2003) 265 NBR (2d) 260; *Eckervogt v British Columbia (Minister of Employment and Investment)* (2004) 241 DLR (4th) 685 (CA). See also De Smith *Judicial review of administrative action in Canada* (1995) (5th ed) 542; Brown and Evans *Judicial review of administrative action in Canada* (1998) 11:5500; Lester 'Bias: How and when to raise objection' (1997) 3 *AAP* 49 at 50; Mullan and Boyle 'Raising and dealing with issues of bias and disclosure' (2005) 18 *CJALP* 37 at 48.

[23] *Collen v Rietfontein Engineering Works* 1948 1 SA 413 at 436 per Centlivres JA. See also *Laws v Rutherford* 1921 AD 261; *Montesse Township and Investment Corporation (Pty) Ltd v Gouws* 1965 4 SA 373 (A); *Makhoza v Lesotho Liquor Distributors* LAC (1995-1999) 192. It was thus held in *Commander of the Lesotho Defence Force v Masokela* LAC (2000-2004) 1013 by the Lesotho Court of Appeal that the respondent who bore the onus to prove waiver, had failed to show that the appellant had deliberately decided to abandon the defence of prescription. Bearing in mind that waiver being contractual in nature, the intention to waive must be communicated to or brought to the other party. In any event, the delay in raising the defence of prescription could not create any right of action on the respondent's part in circumstances where action was taken when it had already prescribed. See also *Traub v Barclays National Bank* 1983 3 SA 619 (A).

[24] *Ariori v Elemo* (1984) 5 NCLR 1 at 21. See also *Brikom Investment Ltd v Carr* [1979] 2 All ER 753.

[25] Per Lord Bingham, *Millar v Dickson* [2002] 1 LRC 457 (PC) para 31.

[26] [2000] 1 LRC 718.

[27] [2002] 1 LRC 457 (PC).

[28] [2003] IRLR 538 (HL).

Appeal Tribunal,[29] should appear as counsel before the same wing-members as a tribunal not meeting the requirements of article 6(1) of the European Convention.

The South African Supreme Court of Appeal held in *Road Accident Fund v Mothupi*[30] that waiver was first and foremost a matter of intention. Whether it was the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point must be the will of the party said to have waived the right. The test to determine intention to waive is an objective one.[31] That means, firstly, that the intention to waive, like intention generally, must be adjudged by its outward manifestations.[32] Secondly, mental reservations, if not communicated, would be of no legal consequence.[33] Thirdly, the outward manifestations of intention must be adjudged from the perspective of the other party concerned, that is, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.[34] The outward manifestations of intention could consist of words (ie, express waiver) or of some other form of conduct from which the intention to waive would be inferred, or even of inaction or silence where a duty to act or speak existed, that is, tacit or inferred waiver.[35] The conduct from which waiver was inferred had to be unequivocal, that is to say, consistent with no other hypothesis.[36]

On the facts of *Mothupi*, it was held that the submission that the Fund had by its conduct of not disputing the negligence of the insured driver, tacitly waived its right to rely on prescription, had to fail. The question was whether the Fund's conduct was consistent only with an intention not to raise or rely on prescription, should the occasion for doing so otherwise arise.[37] By not disputing negligence the Fund did not concede liability in *toto*. The question of *quantum* remained open and the possibility of litigation could therefore not be excluded, even if the negligence of the insured driver was no longer in dispute. By not actively disputing the merits,

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[29]Judges, part-time or otherwise, are normally assisted by two lay members: one from a panel drawn from employers and one from a panel drawn from employees (ss 22(2) and 25, Employment Tribunal Act 1996). These are persons experienced in labour relations matters; they are never lawyers and have no legal training but 'their standing is high: it is currently the highest judicial appointment open to a person who holds no legal qualification'. *Lawal v Northern Spirit Ltd* [2003] IRLR 538 at 540 para 13.

[30]2000 4 SA 38 (SCA) (*Mothupi*).

[31]*Palmer v Poulter* 1983 4 SA 11 (T) 20C-21A; *Multilateral Motor Vehicle Accidents Fund Meyerowitz* 1995 1 SA 23 (C) at 26H-27G; *Bekazaku v Properties (Pty) Ltd* 1996 2 SA 537 (C) 543A-544D.

[32]*Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 3 SA 619 (A) 634H-635D; *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) at 792B-E.

[33]*Mutual Life Insurance Co of New York v Ingle* 1910 TS 540 at 550.

[34]*Mothupi* 2000 4 SA 38 (SCA) para 16.

[35]*Id* para 18.

[36]*Id* para 19.

[37]*Id* para 20.

V at most conveyed the impression that the Fund was not going to rely on the defence that the insured driver was not negligent; non constant that it could reasonably be understood to have conveyed that the Fund abandoned any other defences that might be open to it, should the parties not reach a satisfactory settlement. V's conduct was not inconsistent with the hypothesis that prescription might yet be raised if circumstances so required and tacit waiver of the Fund's right to rely on prescription had accordingly not been established.[38]

Again, it was held in *Mothupi*[39] that the estoppel response sought to be introduced by the respondent on appeal, presupposed that an actual intention to waive had not been established, but that the Fund had nevertheless created the impression that it intended to do so, on the strength of which the respondent acted to her prejudice by not issuing summons before 3 August 1996. The very first requirement for estoppel by representation was a representation made by the party against whom the estoppel was raised. The test for such a representation was the impression created by the conduct of the Fund on the mind of the respondent's notional alter ego, the reasonable person standing in her shoes, which, as it happened, was the same test that applied to determine tacit waiver. Thus, for the same reasons V's conduct was not capable of creating the reasonable impression required for estoppel. In any event, a party would not be permitted to raise a new point on appeal, a point not fully canvassed in the court below. Therefore, the amendment by which the respondent sought to introduce the estoppel response on appeal must fail.

2.2 The 'interest of justice' approach

Whether the court should be concerned with the waiver of right or what is in the interest of justice is the latest jurisprudential addition to this subject. It must therefore be asked whether: it is in the interest of justice to permit a party who had been lethargic about claiming his/her rights to later fall back on what he had previously abandoned? The term 'interest of justice' is not a novel concept at common law. What is new is the role it is meant to play which is designed to do away with waiver in the present context. Credit for this innovation goes to Judge Ngcobo, the former Chief Justice of South Africa. His intervention came about in the celebrated but valedictory judgment on the issue of adjudicative impartiality in *Bernert v ABSA Bank Ltd*.[40] After considering the argument of the respondent framed in the traditional waiver mode, Ngcobo CJ introduced the interest of justice dimension to the on-going debate on the subject. To him, it was not a question of waiver but whether it was in the interest of justice to permit the applicant to raise a complaint of bias in circumstances where he had the relevant information but took

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[38] *Id* paras 23 and 24.
[39] *Id* paras 27, 28, 29 and 30.
[40] 2011 3 SA 92 (CC) (*Bernert*).

no action. ABSA Bank had argued that the applicant was barred from raising bias based on the shareholding of Cachalia JA in the respondent bank. His attorney had knowledge of the circumstances giving rise to the judge's shareholding immediately before the appeal was argued and the applicant himself knew of this fact after the hearing and some weeks prior to judgment. Thus the conduct of the applicant amounted to an unequivocal election not to ask for the recusal of the judge and this was a clear and unequivocal decision to abandon the right to raise the issue.[41] Without expressly saying so, the bank was, in effect, arguing that the applicant had waived his right to object to Cachalia JA's non-recusal of himself. At least, the cases cited in support were Australian and English cases framed on waiver.[42]

Ngcobo CJ held that the rationale for not allowing the party to raise the issue of recusal so late in the day was not because the right to object is waived which could only occur where the litigant 'has acted freely and in full knowledge of the facts' whereas, it is difficult to 'see how the concept of waiver could be imposed on the facts of this case'.[43] Rather, it was not in the interests of justice to permit the applicant to raise a complaint of bias based on shareholding by Cachalia JA, at a later stage. The applicant therefore failed to make a case for the judge's recusal on that account.[44] According to the Chief Justice, whether a litigant should be allowed to raise the issue of recusal at a later stage, despite an earlier opportunity to do so, implicates the interests of justice not waiver. Framing the principle, the Chief Justice reasoned:

> The question is whether it is in the interests of justice to permit a litigant, having knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Here five appellate judges pondered the judgment for 39 days before deciding the matter and expended public resources in doing so. Cachalia JA was never afforded the opportunity to withdraw from the matter before judgment was delivered. In addition, the interests of justice demand that the interests of other litigants be considered. Absa Bank invested both time and money in seeking a final outcome to the dispute, and it is entitled to one.[45]

Emphatically laying the interest of justice as the rationale for refusing the applicant's case in place of waiver, Ngcobo CJ held, further, that in South African law, 'the controlling principle is the interests of justice'. Thus, it is not in the interests of justice to permit a litigant, where that litigant had knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. 'It is undesirable', therefore, 'to cause parties to litigation to live with the

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[41] *Bernert* para 43.
[42] Eg, *Vakauta v Kelly* (1989) 167 CLR 568 (HCA); *Locabail (UK) Ltd v Bayfield Properties* Ltd [2000] 1 All ER 65 (CA).
[43] *Bernert* para 73.
[44] *Id* paras 76-77.
[45] *Id* para 75.

uncertainty that after the outcome of the case is known, there is a possibility that litigation may be commenced afresh because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.'[46]

It is too early to speculate at this stage whether the 'interest of justice' will, as against waiver, dominate future discussion of this problem in the same manner as the objective test for establishing bias overshadowed the discussion at common law for decades. On the other hand, there is the possibility that courts might find that not much difference can be distilled from this new approach as opposed to the traditional waiver discussion which, in any event, has never been conducted outside the framework of what is in the interest of justice. It is likely that the courts and academic commentators might consider it a matter of semantics, and thus invoking no issue of substance. In any event, the rhetorical question may be asked: what is the purpose of the application of the private law of waiver, if it is not in the interest of justice?

3 In the context of a constitutional right

The application of the equitable doctrine of estoppel to constitutional adjudication and waiver of fundamental rights have both been considered by the United States Supreme Court. In the celebrated case of *Ashwander v Tennessee Valley Authority*,[47] it was urged on the Supreme Court to hold that one who accepts the benefits of a statute cannot be heard to question its constitutionality on the ground that, by retaining its benefit, he is deemed to have waived his right to challenge its validity. Rejecting this argument, the court held that the principle of equitable estoppel was inapplicable since the doctrine rests on substantial grounds of prejudice or change of position and not mere technicalities. However, it was in *South Ottawa v Perkins*[48] that Bradley J made a strong statement rejecting the application of the doctrine of estoppel in constitutional adjudication when he emphatically stated that:

> There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law tomorrow; a law in one place, and not a law in another and in the same State. And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.[49]

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[46] *Id* para 76.
[47] 297 US 288, 296 (1936).
[48] 94 US 260, 24 L Ed 154.
[49] 24 L Ed 154 at 157.

The Supreme Court of the United States has time and again urged that courts should indulge every reasonable presumption against waiver and should not presume acquiescence on the loss of fundamental rights.[50] It must, however, be pointed out that these courts have tended to draw a distinction between the fundamental right enacted for public good, which could not be waived by the individual, as opposed to purely personal rights which an individual could waive.[51] State courts incline to the view that a person could waive his/her right to a speedy trial while, but on the other hand, an individual cannot waive those rights that pertain to the administration of public justice since an individual cannot compromise public rights.

A brief study of the United States and Indian decisions on the question of waiver of fundamental rights would show that the Indian Supreme Court takes a sterner view of the facts of a citizen being said to have waived his fundamental rights, whereas State courts in the United States have tended to incline to the view that a person could waive his fundamental right to a speedy trial. Again, the United States courts have drawn a distinction between those rights that are solely personal in nature and those that are of interest to the public. They have held that the right that is peculiar to a litigant alone can be waived by him, but that which concerns the administration of public justice cannot be waived by an individual as this could compromise public rights. But the Indian Supreme Court is firmly of the view that there can be no question of waiver of the fundamental rights that are sacredly guaranteed in the Indian Constitution and absolutely meant to be protected by the Supreme Court.[52] In other words, fundamental rights are put in the Constitution as a matter of public and constitutional policy in which the contractual doctrine of waiver can have no application. [53]

In Canada where the question of waiver of fundamental rights has arisen more than anywhere in the Commonwealth, the debate has not been whether a right in the Charter can be waived, rather, the controversy seems to revolve around the test for valid waiver of the Charter right.[54] The principle relating to a valid waiver of a statutory right which is equally applicable to waiver of Charter rights was earlier stated in *Korponay v Attorney General of Canada*[55] as depending 'upon it being clear and unequivocal that the person is waiving the

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[50] *Baker v Wingo* 407 US 514 (1972); *Aetna Insurance Co v Kennedy* 389 US 393.
[51] The *State v Test* 64 Mont 134 (1922); *Beavers v Haubert* 198 US 77 (1905); *State v Lester* 161 Wash 277.
[52] See, eg, Basheshar Nath v Commissioner of Income Tax (1959) AIR (SC) 149.
[53] *Behran* Khurshid v Bombay State (1955) AIR 123; *Pesikata v State of Bombay* (1955) 1 SCR 613.
[54] See, eg, *R v LTH* 2008 SCC 49, [2008] 2 SCR 739 (where the Supreme Court reaffirmed that the test for a valid waiver of the right to counsel was very high). See also *R v Prosper* [1994] 3 SCR 236; *Clarkson v The Queen* [1986] 1 SCR 383; *R v Manninen* [1987] 1 SCR 1233; *R v Evans* [1991] 1 SCR 869; *R v Bartle* [1994] 3 SCR 173.
[55] [1982] 1 SCR 41.

procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process'.[56] While approving the *Korponay* principle in respect of waiver of Charter right, Wilson J also observed that 'any voluntary waiver in order to be effective must be premised on a true appreciation of the consequences of giving up the right'.[57] Again, as the majority explained in *R v LTH*,[58] a clear and unequivocal waiver is thus essential but not sufficient as it must be accompanied by a proper understanding of the purpose the right was meant to serve and an appreciation of the consequences of declining protection. On waiver requirement, the minority led by Rothstein J disagreed that the standard of proof for a valid waiver was not proof beyond reasonable doubt as stated by the majority.[59] Rothstein J held that in the context of Charter-based rights, there was no authority that equated the term 'high' with a standard of proof beyond a reasonable doubt. Rather, reference to a high standard refers to the requirement of clarity of explanation of the rights being waived, not a high burden of proof [citing *Korponay* and *Clarkson*]. In effect, the use of the term 'high' and 'clear and unequivocal' does not mean proof beyond a reasonable doubt. Rothstein J further held that in the context of a Charter right, the well-established standard is proof on a balance of probabilities.[60]

3.1 Nigeria

Three cases illustrate the attitude of the Supreme Court of Nigeria towards waiver and estoppel in the constitutional context. The first concerns the constitutionality of legislation in which, like the US Supreme Court, the Supreme Court of Nigeria rejected the application of any of these equitable doctrines.[61] The second arose in a claim for the right to a fair trial in which the tension between individual and public rights have been highlighted.[62] The third involved practice and procedure in an election petition where the court upheld the legal quality of parties' agreement on matters of procedure. [63]

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[56] *Id* 49.
[57] *Id* 394-396.
[58] *R v LTH* 2008 SCC 49.
[59] *Id* paras 97-98.
[60] See, eg, *R v Askov* [1990] 2 SCR 1199 at 1229; *R v Tran* [1994] 2 SCR 951 at 998; *R v Wills* (1992) 70 CCC 529 (3d) (Ont CA) 546; *R v Young* (1997) 116 CCC (3d) 350 (Ont CA) para 11. See further *Kamara v Canada (Citizenship and Immigration)* 2011 FC 243 (waiver of s 14); *Mohamed Neheid v Canada (Citizenship and Immigration)* 2011 FC 846 (waiver in respect of right to an interpreter).
[61] *See Attorney General of Bendel State v Attorney General of the Federation* (1982) 3 NCLR 1 (SCN) (*AG, Bendel*).
[62] *Ariori v Elemo* (1983) 1 SCNLR 1, (1984) 5 NCLR 1 (SCN) (*Ariori v Elemo*).
[63] *Amaechi v Independent National Election* [2008] 5 NWLR 227 (SCN) (*Amaechi*).

3.1.1 Challenging legislation

The question of whether a party has waived his right and is consequently estopped from raising it in subsequent proceedings was first deliberated upon by the Supreme Court of Nigeria in *AG, Bendel*[64] where the constitutionality of a federal legislation on the allocation of federal revenue was challenged. The court was urged to rule that the plaintiff, Bendel State, having largely received payments from the Federation Account which was based on the Allocation of Revenue (Federation Account etc) Act 1981, it could not challenge the validity of the Act. Alternatively, it was argued that the plaintiff having received payments of money allocated to it in terms of the impugned Act was estopped from pursuing the claims in the proceedings. Although the Supreme Court was unanimous in rejecting the submissions of counsel, their reasons for doing so were varied. Fatayi-Williams CJN held that as neither the individual nor Government (or State) could contract out of the provisions of the Constitution there can be no estoppels, therefore, in the way of ascertaining the existence of a law. Again, no one whether Government or State could waive a constitutional requirement, condition or provision.[65] He advanced two reasons for so holding. First, there was no evidence before the court that Bendel State, which must have received its 1980 allocation by virtue of the transitional provisions of section 272 of the 1979 Constitution, had full knowledge of the fact that it received its 1981 allocation by virtue of the 1981 Act, particularly as the sum which it received monthly between April and December 1980 was exactly the same monthly sum which was paid to it from the beginning of 1981. Secondly, a contract to do something that could not otherwise be done without violating a law is void. Therefore, an illegality such as passing a law in violation of constitutional procedure as in this case was a valid answer to a plea of *estoppel in pais*.[66]

Building upon the reasoning in *Re Mahmoud and Ispahani*,[67] Idigbe JSC held that no estoppel would be allowed which precludes the party against whom it was sought from asserting and bringing to the notice of the court, the statutory illegality of such actions which were sought to be validated by acceptance of the estoppel pleaded. Further, as the provisions of the Constitution were alleged to have been breached by the impugned Act which were made for the proper exercise of the legislative powers of the National Assembly, it was not open to the plaintiff to waive the right to challenge the validity of the Allocation of Revenue (Federation Account etc) Bill.[68] On his part, Obaseki JSC found absent not only the essential elements or representation to support the plea of estoppel; he was also of the opinion that an

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[64] *AG, Bendel* (1982) 3 NCLR 1 (SCN).
[65] *Id* 41-42.
[66] *Id* 41-42.
[67] [1921] 2 KB 716 at 732.
[68] *AG, Bendel* 67.

estoppel could not be set up to prevent the performance of constitutional or statutory duties. Similarly, it must fail if its establishment must result in illegality.[69] In any event, Obaseki JSC concluded, that there could be no estoppel against the assertion of the supremacy of the Constitution.[70]

To uphold the defence of estoppel raised by the Attorney General for the Federation would, in Justice Eso's view, 'destroy the whole doctrine of *ultra vires* or unconstitutionality for a donee of constitutional power to extend to his power or even diminish it in any form by relying on the doctrine of estoppel'.[71] In other words, no estoppel will operate to negate the operation of a statute or the provisions of the Constitution nor could the plaintiff waive constitutional provisions in favour of the whole country.[72] For Nnamani JSC, Bendel State could not waive the right to come to court to challenge the constitutionality of the Act nor could estoppel be pleaded to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty.[73] Uwais JSC could find no evidence of the Federal Government having caused made Bendel State to believe that the Act was constitutionally valid, neither did the Federal Government make payment to the plaintiff because the plaintiff made it believe that the Act was valid to warrant the plea of estoppel.[74] However, the judge based his rejection of the argument on waiver mainly on the absence of the requirement that the plaintiff must be put to his election. He observed:

> For the doctrine of waiver to apply the plaintiff must be put to his election. The election urged upon us would appear to be that the plaintiff should have refused revenue from the Federal Government paid from the Federation Account since it intended to challenge the constitutionality of the 1981 Act. It is a matter of common knowledge that the bulk of the revenue of the States comes from the Federation Account. The effect therefore of the plaintiff electing not to receive such revenue would result in the machinery of its Government grinding to a halt. Undoubtedly, if this step had been taken it would not have been in the best interest of the people of Bendel State. So that of necessity the plaintiff was compelled to accept the revenue. It is manifest that the plaintiff's choice, not being optional, was no choice at all. An election must amount to a clear demonstration of a choice between two alternatives, one being chosen to the necessary exclusion of the other.[75]

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[69] *Id* 90.
[70] *Id* 90.
[71] *AG, Bendel* 103. See also *Ministry of Agriculture v Mathews* [1949] 2 All ER 724 at 729; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314; *Chapman v Michaelson* [1968] 2 Ch 612 at 621; *Spencer Bower's Estoppel by representation* (3rd ed) 139 para 141.
[72] *AG, Bendel* 103.
[73] *Id* 128.
[74] *Id* 149.
[75] *Id* 150.

3.1.2 The right to a fair trial

In *Ariori v Elemo*,[76] the Supreme Court of Nigeria, considering whether the right to a fair hearing guaranteed by the Nigerian Constitution could be waived by a citizen, found it necessary to enquire into whether the right alleged to have been waived was 'exclusively within one's control for it is common sense that one could not compromise a public right, even though he can compromise his own right'.[77] Having found that the United States courts had put the matter 'a bit too loose', and rejecting outright the Indian Supreme Court opinion to the effect that it is absolutely not open to a citizen to waive a fundamental right, the Supreme Court classified fundamental rights into three broad groups:[78]

- First, where a right has been entrenched for the benefit of the individual,[79] he can waive it subject to the duty of the courts to safeguard the fundamental rights of the individual whence they must scrutinize every case of waiver of fundamental rights to ensure that it falls within this category.[80]
- Secondly, there are fundamental rights that are for the benefit of both the individual and the public. In this instance, an individual cannot waive such a right which may be contrary to public policy since it is against public policy to compromise illegality whether manifest or latent.
- Thirdly, there is the situation as in the instant case, where the question of waiver relates to a right within the control of the State or, in the sole control of the court, there will be nothing for a party to waive since it is not within his competence to waive anything.[81]

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[76] *Ariori v Elemo* (1983) 1 SCNLR 1.

[77] *Id* 16.

[78] *Id* 19.

[79] On the question as to whether a party can waive a legal right of members of the public *see Okonkwo v Co-operative and Commerce Bank (Nig) Plc* [2003] FWLR (154) 457 (SCN); whether a person can waive a right belonging to himself and other private persons – *Olowofoyeku v Governor of Oyo State of Nigeria* [1990] 2 NWLR (132) 369 (CA).

[80] The Court of Appeal held in *Emaphil Ltd v Odili (Trading as CN Odili and Sons)* (1987) 4 NWLR (67) 915 that as the appellants through their counsel had requested adjournments at several occasions leading to delay in the hearing and conclusion of the case, they could not complain of the delay and that if there were any such delay, they were taken to have waived their right to a speedy trial. See also *Egbo v Laguma* (1988) 3 NWLR (80) 109 at 128 (CA).

[81] In *Fawehinmi v Nigerian Bar Association* (No 2) (1989) 2 NWLR (105) 558 at 624-625, the Supreme Court held that as the objection to the appearance of three Senior Advocates of Nigeria in a professional disciplinary inquiry on the conduct of the appellant was founded on the Rules of Professional Conduct in the Legal Profession, it was a right not only for the benefit of the litigant but also of the public. The Rules relate to a matter of public policy which has to do with the administration of justice in that lawyers being officers of the court are enjoined not to commit professional misconduct. It therefore follows that the right was not capable of being waived by the plaintiff. It was also held in *Umenwa v Umenwa* (1987) 4 NWLR (65) 407 at 418 that the right to an impartial tribunal could not be waived since it is in the interest of the generality of the public as of the parties themselves that public confidence in the courts not be rocked.

The reasoning of the court was encapsulated in the judgment of Eso JSC:

> Having regard to the nascence of our Constitution, the comparative educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily have to be placed, as a result of this background on the courts, and finally, the general atmosphere in the country, I think the Supreme Court has a duty to safeguard the fundamental rights in this country which, from its age and problems that are bound to associate with it, is still having an experiment in democracy.[82]

In agreeing with Justice Eso's lead judgment, Idigbe JSC also added that more important to the reasoning of the court is the fact that the right to a fair trial is much more than a personal right of the subject; public policy demands that every subject is entitled to a 'fair trial' and that trials in court must conform to settled principles of justice. So that although the right to a 'speedy trial' which, really is an aspect of 'fair trial', inures primarily for the benefit of a party to a suit in court, the courts ought not to hold that such a party has waived that right where such a waiver results in a miscarriage of justice, i.e. trial according to accepted principles of the law.[83]

Justice Obaseki who also agreed with Eso JSC, was of the view that the fundamental rights entrenched in the Nigerian Constitution are 'out of reach of the operation of the law of waiver' especially when 'our oath of office to protect and defend the Constitution and the supremacy of the Constitution over all other laws ensures this'. Furthermore, 'the right to life, right to personal liberty, right to freedom of expression, thought, conscience and religion, right to lawful assembly and association which are vital to the human existence and democracy in this nation cannot in my view, be waived'.[84] Similarly, an adjournment to enable a party to call witnesses or on medical grounds or to enable a party to prepare his case does not amount to a waiver of the right to a fair hearing within a reasonable time. For Irikefe JSC, the right to a fair hearing under the Constitution 'is not negotiable, and waiver thereof in any circumstance, would be an infraction of the Constitution itself, capable of rendering the hearing invalid'.[85]

3.1.3 Procedure adopted by parties to an election petition

At least two Justices of the Supreme Court of Nigeria made pronouncements upon procedure adopted by the parties as to the tendering of certain documents by consent in the proceedings involving one of the many controversial gubernatorial election petitions and impeachment proceedings[86] in Nigeria's third

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[82] *Ariori v Elemo* 18.
[83] *Id* 23.
[84] *Ibid*.
[85] *Id* 22.
[86] See, eg, *Dapianlong v Dariye* [2007] 8 NWLR (1036) 239 (CA), 332 (SCN).

Republic, *Amaechi v Independent National Election.*[87] It was proved as a matter of fact that all the parties including INEC had agreed that certain documents be put in evidence by consent. Further, that the judgment of the trial judge was based on these documents not on the admissions made by any of the parties. That being so, Ogundare JSC held that since the parties had chosen to follow a procedure which was not the usual practice but which nevertheless satisfied the requirements of fair hearing, none of them could resile from that agreement.[88]

Aderemi JSC made a far-reaching pronouncement in this regard. The Supreme Court Justice held that where, as in the instant case, a person in dealing with another is confronted with two alternatives and mutually exclusive procedure, in dealing with the case, between which he can make his election and he has, by that conduct, led the other to believe that he was voluntarily adopting that particular line of approach, he cannot, in law and equity, afterwards resort to the cause which he has voluntarily declared his intention of rejecting. This is a typical case for the application of the principle of waiver. The right as to how to start his case is conferred solely for the benefit of any of the parties to litigation. Each party or litigant is *sui generis*; none of them is under any legal disability to forgo or waive any of the two procedures open to them in the instant case. Having made an election, a party cannot later set to revert to the other. That principle is to the effect that where an action was commenced by any irregular procedure and a defendant took steps to participate in the proceedings, as in the present case, he cannot later be heard to complain of the irregularity as a person will not be allowed to complain against an irregularity which he himself has accepted, waived or acquiesced.[89]

3.2 South Africa

In South Africa, as in jurisdictions where there are written Constitutions with justiciable Bills of Rights, there is no doubt that an individual can, of their own volition, refrain from exercising a right knowing it to belong to him or her.[90] De

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[87][2008] 5 NWLR 227 (SCN).

[88]*Amaechi* 313B-C.

[89]*Amaechi* 448H-449D. See also *United Calabar Co v Elder Dempster Lines Ltd* (1972) 1 All NLR (Pt 2) 244; *Ariori v Elemo* (1983) 1 SCNLR 1.

[90]In his concurring judgment in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) paras 45-48, Olivier JA accepted counsel's submission that as a general rule, the rights set out in the Bill of Rights cannot be waived. According to him, the correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of s 36(1) of the Constitution. In effect, a waiver of a right is subject to the limitations in that section. Accordingly, one must be careful not to allow all forms of waiver, estoppel, acquiescence, and similar such civil law principles, to undermine the fundamental rights guaranteed in the Bill of Rights. Adopting a strict interpretation of s 36(1) of the Constitution, the case for waiver has not been made out since it has not been demonstrated that the waiver relied upon was warranted by a law of general application. In his article: 'Constitutional rights and the question of waiver: How fundamental are fundamental rights?' (2001) 16 *SAPR/PL* 122 at 124, Hopkins submits that the foregoing opinion of Olivier JA was an

Waal and Currie suggest that while certain freedoms (eg, assembly, religion) can be waived, owing to their nature, certain rights, such as the right to human dignity and the right not to be discriminated against or the right to a fair trial, cannot be waived.[91] The courts have equally insisted that the right to consult a legal practitioner before answering questions in a police custodial interrogation can only be waived if the arrested person was fully and properly informed of that right, but, nonetheless, decides to go along with police questioning.[92] Thus, the statement that an 'inalienable right' cannot be waived[93] may have over-stated the matter.[94]

3.2.1 Challenging the constitutionality of legislation

The Constitutional Court held in *Van der Merwe v Road Accident Fund*[95] that the constitutional validity of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which, in section 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid. Several other provisions of the Constitution buttress this foundational injunction in the democratic state. For instance:

- Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of State including the Judiciary.
- Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.
- Section 172(1) makes plain that, when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

'oversimplification of what is in reality an extremely complicated issue'.

[91] De Waal and Currie *Bill of Rights handbook* (2001) (4th ed) 43-44.

[92] *S v Melani* 1996 1 SACR 335 (E) 348i.

[93] *S v Shaba* 1998 2 BCLR 220 (T) 222H.

[94] In *S v Khoza* 2010 2 SACR 207 (SCA) paras 42 and 43, the Supreme Court of Appeal, per Mhlantla JA, held that during the trial, a number of purported irregularities were raised and most of them were not upheld. However, the trial judge had invited counsel to bring an application for his recusal if his clients were dissatisfied with his conduct of the trial, but counsel declined to do so. Such an election might be regarded as dispositive of the right to rely thereafter on the said irregularities. However, in a long trial, for the commencement of which the accused had waited for many years, a court should be slow to find that a decision to pursue the trial to its conclusion in the face of harassment or other unfair conduct by the court, without applying for recusal, was consistent only with waiver of the rights of the accused to raise such irregularities later. Otherwise, the effect would be to allow unfairness to prevail in the face of a clear constitutional right. Moreover, if an irregularity were such as to render a trial unfair, it would be against public policy to uphold an election as amounting to a waiver of an accused's right to rely on such unfairness. The trial judge ought to have looked beyond the refusal to apply for his recusal as a ground to refuse the application for noting of special entries.

[95] 2006 4 SA 230 (CC) 261B-F para 61; Yacoob J dissenting, paras 80-81.

In the light of these and other relevant provisions of the Constitution, it follows that the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on, and cannot be frustrated by, the conduct of litigants or holders of the rights in issue. Consequently, a submission that a waiver would, in the context of a case, confer validity to a law that otherwise lacks a legitimate purpose, has no merit.

3.2.2 Estoppel against an organ of State

The latest authority on the application of the doctrine of estoppel in the context of constitutional law in South Africa is *City of Tshwane Metro Municipality v RPM Bricks (Pty) Ltd*.[96] Ponnan JA for the Supreme Court of Appeal drew a distinction between two scenarios for the purposes of determining whether the doctrine of estoppel may be raised against a statutory body. The first is where the act of the authority is beyond or in excess of the legal powers of the public authority. The failure of a statutory authority to comply with provisions which the legislature has prescribed for the validity of a specified transaction falls within this category and cannot be remedied by estoppel because that would give rise to a transaction which is unlawful and therefore *ultra vires.*[97]

The second is where the failure of the body to comply with all the relevant internal arrangements and formalities, which falls within this category and in respect of which estoppel, may be successfully invoked. Here, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have indeed been complied with.[98] Such persons may then rely only on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.

The authority of the municipality in the South African context emanates from both the Constitution and statute. For instance, section 217 of the 1996 Constitution requires contracts for services or goods by an organ of State such as the municipality, to accord with a system that is fair, transparent, competitive and cost-effective. Again, the essence of section 38 of the Gauteng Rationalisation of Local Government Affairs Act 10 of 1998 is to eliminate nepotism or patronage and to entrust the council with the sole power to be exercised independently so as to achieve both the constitutional and statutory ends. It follows that: 'If the conclusion of contracts were to be permitted without any reference to the defendant's council

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[96] 2008 3 SA 1 (SCA) paras 11-13 (*Tshwane Metro*).

[97] See also *Strydom v Die Land-en Landboubank van Suid-Afrika* 1972 1 SA 801 (A); *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W); *Hauptfleisch v Caledon Divisional Council* 1963 4 SA 53 (C).

[98] *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A); *Potchefstroom se Stradsraad v Kotze* 1960 3 SA 616 (A).

and without any sanction of invalidity, the very mischief which the legislation seeks to combat could be perpetuated'.[99]

Ponnan JA, with whom the other four members of the Supreme Court of Appeal concurred, found 'formidable obstacles' on the plaintiff's reliance on the 'doctrinal device of estoppel'.[100] Assuming that all of the requirements for its successful invocation have been established, the court advanced four reasons why this case is not one in which estoppel can be allowed to operate. First, it is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel[101] for to do so would be to compel the defendant to do something which the statute does not allow it to do. In effect, it would be compelled to commit an illegality.[102] Secondly, the amending of the supply contract was at the instance of the defendant's employees who were plainly not authorised to do so. In that regard, the defendant had in fact not acted at all such that no amendment of the supply contract had occurred. To allow estoppel to operate would have the effect of breathing 'life into that which has yet to come into being'. The application of the doctrine of estoppel in such circumstances would preclude the defendant from exercising powers specifically vested upon it for the protection of the public interest.[103] Thirdly, the fact that the plaintiff was misled into believing that the defendant's employees were authorised to vary an agreement that had earlier been lawfully concluded with it can hardly operate to deprive the defendant of that power which had been bestowed upon it by the legislature. To do so would deprive the *ultra vires* doctrine of any meaningful effect.[104]

Finally, Ponnan JA rejected the earlier approach of Boruchwitz J in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*[105] where the latter had observed that the proper approach which was consistent with the injunction in section 39(2) of the Constitution was 'that the court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case'.[106] The Justice of Appeal found this approach 'fallacious' because estoppel cannot be used in such a way as to give effect to 'what is not permitted or recognised by law. Invalidity

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[99] Per Ponnan JA, *Tshwane Metro* para 15.
[100] *Tshwane Metro* para 16 per Ponnan JA.
[101] *Trust* Bank van Afrika Bpk v Eksteen 1964 3 SA 402 (A) 411H-412B.
[102] *Hoisain v Town Clerk, Wynberg* 1916 AD 236.
[103] *Tshwane Metro* para 17.
[104] *Id* para 18.
[105] 2001 4 SA 661 (W) para 40.
[106] Boruchwitz J had relied on the dictum of Lord Denning MR who held in *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182 (CA) at 194e-f that the Crown could be estopped when it is not exercising its powers properly and it causes injustice or unfairness to the individual without any countervailing benefit for the public. The Denning dictum has however been overruled by the House of Lords in *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd; Reprotech (Pebsham) Ltd v East Sussex County Council* [2002] 4 All ER 58 para 35.

must therefore follow uniformly as the consequence. That consequence cannot vary from case to case'.[107] This ultimately flows from the views expressed by Marais JA who held in *Eastern Cape Provincial Government v Contraprops 25 (Pty) Ltd*[108] that: 'Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in a particular case'.[109] Furthermore, the postulations of the judge run counter to the section 173 injunction which mandates the courts to develop the common law in the interests of justice. To endorse such an approach 'would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the *ultra vires* doctrine nugatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality.'[110]

4 Conclusion

There is no formula discernible from available case law that conclusively answers the questions we posed at the beginning of this article.[111] The most that can be said is that where the right sought to be waived emanates from the Constitution, the problem of waiver becomes more acute since it is generally accepted that a constitutional right can only be waived where the individual has absolute control over the right. On the other hand, the courts are reluctant to endorse reliance on waiver or resort to estoppel where a constitutional right is for the protection of the public or the administration of public justice. It is evident from this discussion that the Nigerian courts have upheld this approach. However, as we have also shown, there is a problem peculiar to South African public law where the borderline between constitutional and administrative law is blurred by the fact, among others, that the right to just administrative action[112] and the right to be given reason(s) for an administrative decision[113] are all entrenched fundamental rights. For that reason, there is no strict separation of the issues of waiver, acquiescence or estoppel in the South African cases with regard to those that arise from the

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[107] *Tshwane Metro* para 23.
[108] 2001 4 SA 142 (SCA).
[109] *Id* para 9.
[110] *Tshwane Metro* para 24.
[111] For instance, Zelling J doubted in *Ward and Kelly, Haldane and Trans Executive Airlines Pty Ltd v Chegwidden* (1986) 41 SASR 546 at 549 whether waiver was 'ever possible with a matter going to jurisdiction like bias. In any event the requirements of waiver cannot be less in a criminal case than they are in a civil case and when one reads the very stringent conditions of waiver in what is usually regarded as the *locus classicus* on the point, it is obvious that even if waiver does exist in relation to a criminal offence, the circumstances will be rare in which such a waiver will be inferred.'
[112] Constitution of South Africa, 1996 s 33(1).
[113] *Id* s 32.

constitutional source as against those falling within purely administrative law classification (as is the case in the other jurisdictions where the distinction is maintained even if not with perfect accuracy). In South Africa, therefore, all the circumstances, including those that ordinarily fall within the contractual side of public bodies, have therefore been contested under the Constitution. And even if one were to seek support of the administrative law approach from a decision such as *Eedenprop (Pty) Ltd v Kouga Municipality*[114] where it was held that in signing the agreement, the municipality waived the conditions of subdivision and re-zoning imposed pursuant to municipal regulations was strictly an administrative law decision, the approach still fails because the respondents' case was predicated on the provisions of sections 151, 156, 217 and 229 of the 1996 Constitution coupled with a whole set of national legislation made pursuant to the constitutional injunction which define the powers, functions and duties of municipalities in relation to the sphere of local government.[115]

[114]2011 ZASCA 92.

[115]See also *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 3 1 (SCA); *Municipal Manager: Qaukeni Local Municipality v FV General Tracking* CC 2010 1 SA 356 (SCA); *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA); *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA).