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“Common Law Doctrine of Estoppel and Brazilian Constitutional Principle of Administrative Morality”

INTRODUCTION

This work compares common law doctrine of estoppel with Brazilian constitutional principle of ‘administrative morality’¹. I argue that both ideas have reliance as a staple, and my aim is to find the overtone they bring into the legal system and to find the role they play in law.

This is not, in the two first parts (I and II), a critical paper, at least to the extent that a legal essay can be neutral. The reason for that uncritical explanation is that, as a foreign lawyer, I lack a strong understanding of the American Administrative Law as a whole. Taken this reality for granted, I’ve chosen the safer path: I made use of the classic books and treatises, which, for having been quoting by both courts and scholars as many times as the issue is dealt with, made my effort much more pleasurable and considerably much easier.

The first part focuses on a broad view on the role of American Agencies and on the American Administrative Law. The goal here is clarify some main differences

¹ Brazilian Constitution, article 37: “The direct or indirect public administration of any of the powers of the Union, the states, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, *morality*, publicity, efficiency and also the following: ...” – italic added.

between the United States and Brazilian administrative law systems, although the latter is roughly overlooked and quoted just in few footnotes². The second part is the core of what I called ‘uncritical parts’. There I give a more accurate, although not totally complete, view about the estoppel doctrine in the common law, in order to provide a background for understanding the third part. In this last part, by doing a comparison between common law and continental law theories, I argue that the principle of ‘administrative morality’ of the Brazilian Constitution authorizes the estoppel against the government in Brazil.

PART 1: THE ROLE OF AMERICAN AGENCIES

A) AMERICAN AGENCIES AND ADMINISTRATIVE LAW

According to the leader authority Bernard Schwartz, the primary purpose of Administrative Law is to keep government powers within their legal bounds and to protect individuals against the abuse of such powers³. Once the administrative power, in the U. S., is performed mostly by *administrative agencies*, it is also useful to define administrative law, as Professor Kenneth Culp Davis does, as being the law concerning

² What it will be said about the American administrative law in the First Part might be subjected, to a deeper analysis and to a demanding critic, for further considerations. There’s no space here for this concern.

³ SCHWARTZ, Bernard. *Administrative Law*. Third Edition, Little, Brown and Company, 1991 (hereinafter *Administrative Law*), at 1. The author notes that “[t]he term ‘administrative law’ itself did not come into general use until well into the present century”, but he also adverts that “that did not prevent the development of legal principles to control the operations of the burgeoning administrative process”, and, quoting Elihu Root’s mentioning in 1916, says: “There is no field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law.” (at 29-30).

the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action⁴.

As Schwartz also notes, Administrative law in the U.S. is more narrowly conceived than it is in a Continental one like France⁵. The Continental concept of administrative law, he continues, is much broader than it is in America, and covers not only administrative powers, their exercise and remedies, but also such subjects as the various forms of administrative agencies; the exercise of and limitations upon regulatory power; the law of the civil service; the acquisition and management of government property; public works; and administrative obligations. These are, in the U.S., matters for public administration, not for administrative law, which is limited to powers and remedies and answers the following questions: (1) what powers may be vested in administrative agencies? (2) What are the limits of those powers? (3) What are the ways in which agencies are kept within those limits?⁶

Therefore, American administrative law deals with *administrative agency power, its limits, and its forms of controlling*. Despite this narrower field of studying,

⁴ DAVIS, Kenneth Culp. *Administrative Law and Government*. Second Edition, St. Paul: West Publishing Co., 1975, at 6.

⁵ Or, I add, like Brazil, where administrative law was strongly influenced by French administrative law. It is common sense the administrative law is more developed in civil law than it is in common. It's once again Schwartz's words, quoting Dicey's view, in 1885: "[in] England, and in the countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown." Schwartz points out that administrative law received the *jure status* as a recognized rubric of law just in 1947, with its inclusion as a little in the Fifth Decennial Digest of the West Key Reported System. – SCHWARTZ, *Administrative Law*, at 30.

⁶ SCHWARTZ, *Administrative Law*, at 2. In order to answer these questions, continuous Schwartz, administrative law deals with the delegation of powers to administrative agencies; the manner in which administrative powers must be exercised; and judicial review of administrative action (at 3). The history of administrative law as an independent branch of law in the U.S. is, says, quite recent, but in fact it existed, as Davis and Pierce, describe, long before the term 'administrative law' came into use. See, for a history of administrative agencies, generally, DAVIS, Kenneth Culp, & PIERCE, Jr., Richard. *Administrative Law Treatise*. Volume I. Little, Brown and Company, 1994 (hereinafter, *I Treatise*), at 7-30.

compared with the Continental one, administrative law is a vast field that applies to hundreds of federal agencies. As noted by Kenneth Culp Davis and Richard Pierce, federal agencies adjudicate far more disputes involving individual rights than the federal courts do and create more binding rules of conduct than Congress does. They also ‘administer’ in the broadest sense of this word: investigate, enforce, cajole, publicize, spend, hire, fire, contract, collect and disseminate information⁷.

An agency is defined by Federal Administrative Procedure Act – APA – by the following words: “ ‘agency’ means each authority ... of the Government of United States other than Congress, the courts ...”, which is to say, as Bernard Schwartz notes, that under law, every government organ outside of the legislature and courts is an administrative agency⁸.

Administrative agencies are created when Congress passes enabling legislation specifying the name, composition, and powers of the agency. In fact, the power that the agency may have is always delegated by Congress. This is the obvious resulting of higher principle, written in article I of the U. S. Constitution, which allocates to Congress the responsibility to make the policy decisions (enact legislation). Therefore, once again quoting Schwartz’s words, an agency is “a creature of legislature”, and “bears the same relationship to its enabling statute that a corporation does to its charter”⁹.

⁷ DAVIS & PIERCE, *I Treatise*, at 2.

⁸ SCHWARTZ, *Administrative Law*, at 4.

⁹ SCHWARTZ, *Administrative Law*, at 10. The author notes there are two principal kinds of agencies: (1) regulatory agencies, which are vested with authority to prescribe generally what shall or shall not be done in a given situation; to determine whether the law has been violated in particular cases and to proceed against the violators; to admit people to privileges not otherwise open to members of the public; and even to impose fines and render what amount to money judgments (its prototype is the Interstate Commerce Commission, the first of entirely new family of government bodies); and (2) those vested with authority to

B) LEGISLATIVE AND JUDICIAL POWERS OF AGENCIES:
SEPARATION OF POWERS AND JUDICIAL REVIEW

The influence of American administrative agencies, according to Justice Robert A. Jackson, is the following:

“The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all of the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights ... They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three dimensional thinking”¹⁰.

In fact, agencies may be seen as a ‘fourth branch’ in the U. S. legal system, and their decisions affects many – if not everybody – people. As Professor Davis points out:

“The average person is much more directly affected by the administrative process than by the judicial process. The ordinary person probably regards the judicial process as somewhat remote from his own problems; large portion of all people go through life without ever being a party to a lawsuit. But the administrative process affects nearly everyone in many ways nearly every day. The pervasiveness of the effects of administrative process on the average person can quickly be appreciated by running over a few samples of what the administrative process tries to protect against: excessive price of electricity, gas, telephone, and other utility services; unreasonableness in rates, schedules, and services airlines, railroads, street cars, and buses; disregard for the public

dispense benefits for promoting social and economic welfare, such as pensions, liability, disability and welfare grants, and government insurance (examples are Social Security Administration, Health Care Financing Administration, Department of Veterans Affairs, Department of Labor) – at 5.

¹⁰ *FTC v. Ruberoid Co.*, 343 U.S. 470 (U.S. Sup. Ct. 1952), quoted by MALLOR, Jane P. *et all. Business Law and the Regulatory Environment: Concepts and Cases*. New York: McGraw-Hill/Irvin, 2001, at 1036. In reality, as Davis and Pierce note, agencies make most major policy decisions, rules, and adjudicates most disputes than any other branch

interest in radio and television and chaotic conditions for broadcasting; unwholesome meat and poultry; adulteration in food; fraud or inadequate disclosure in sale of securities; physically unsafe locomotives, ships, airplanes, bridges, elevators; unfair labor practices by either employers or unions; false advertiser and other unfair or deceptive practices; inadequate safety appliances; uncompensated injuries related to employment; cessation of income during temporary unemployment; subminimum wages; poverty in old age; industrial plants in residential areas, loss of bank deposits; and (perhaps) undue inflation or deflation. Probably the list could be extended to a thousand more that we are accustomed to take for granted.”¹¹

As a matter of fact, the agencies have both legislative and judicial power, and this possession “is the hallmark of the agency”, powers that are both “concentrated in them”. The agencies have authority to issue rules and regulations that have force of law (power that is legislative in nature), and authority to decide cases (power that is judicial in nature)¹².

Nonetheless, and despite the fact that the first federal agency was established by the Act of July 31, 1789, to “estimate the duties payable” on imports and to perform other related duties¹³, the number of federal agencies and their involvement in private markets grew dramatically during President Roosevelt’s first term, as the government sought to spur the government out of the depression and to address the urgent needs of the unemployed and displaced¹⁴.

The 1980s and early 1990s, note Davis and Pierce, were an exciting period in administrative law. During a time of the renewed questions about the legitimacy of the

¹¹ DAVIS, *Administrative Law and Government*, at 7-8.

¹² SCHWARTZ, *Administrative Law*, at 9.

¹³ DAVIS & PIERCE, *I Treatise*, at 7. According Schwartz: “Administrative law and administrative agencies are as old as American government themselves.” – SCHWARTZ, *Administrative Law*, at 28.

¹⁴ PIERCE, Richard, SHAPIRO, Sidney A., and VERKUIL, Paul R. *Administrative Law and Process*. Third Edition, New York: Foundation Press, 1999, at 32.

administrative state, the Supreme Court addressed a series of major structural issues, as the possibility of Congress to delegate to agencies the power to promulgate legislative rules that resolve fundamental policy issues, or establish agencies that are directly dependent on the legislative branch, or that are independent of the President, or that perform adjudicatory functions traditionally performed by article III courts, or even the possibility of multi-function agencies exist consistent with separations of power¹⁵.

Critics of the administrative process frequently challenge the constitutional legitimacy of a high proportion of agency actions as violator of separation of powers. From this principle, critics note that agencies cannot resolve major policy disputes, issue-binding rules of conduct, adjudicate dispute involving private rights, or adjudicate disputes among private individuals¹⁶. Notwithstanding the critics, the point is, as Schwartz properly notes, “[t]o private individuals and the bar that advises them, rulemaking and adjudication are *the* substantive weapons in the administrative armory.”¹⁷

1. The legislative power of agencies – Rulemaking power

As it was already noted, agencies, as “creatures of legislature”, do not have any original legislative power, since “any power delegated by the legislature is necessarily a subordinate power, limiting by the terms of the delegating statute.”¹⁸

¹⁵ DAVIS & PIERCE, *I Treatise*, at 23.

¹⁶ See DAVIS & PIERCE, *I Treatise*, at 33-34. Nevertheless, the legitimacy of agency government did not become an issue until the last part of the nineteenth century, when the ‘laissez-faire’ atmosphere permitted economic abuses and government corruption which resulted in a demand for significant regulatory initiatives, as pointed out by PIERCE, & SHAPIRO & VERKUIL, *Administrative Law and Process*, at 30.

¹⁷ SCHWARTZ, *Administrative Law*, at 10.

¹⁸ SCHWARTZ, *Administrative Law*, at 10: “The legislature may be said to exercise the primary legislative function, the administrative agencies a secondary one.”

The legislative power of agencies is called *rulemaking*, defined by APA § 551 (7) as “agency process for formulating, amending, or repealing a rule.” APA § 551 (4) defines “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ...”, definitions criticized for being too broad and unhelpful¹⁹.

There are two main types of rules made by agencies: legislative and nonlegislative rules. The theoretical difference between them is clear, as is noted by Michael Asimow: A legislative rule is essentially an administrative statute – an exercise of previously delegated power, new law that completes an incomplete legislative design – and they frequently prescribe, modify, or abolish duties, rights, or exemptions. In contrast, nonlegislative rules do not exercise delegated lawmaking power and thus are not administrative statutes. Instead, they provide guides to the public and to agency staff and decisionmakers and, unlike the legislative rules, they are not legally binding on members of the public²⁰. Furthermore, nonlegislative rules include interpretative rules and policy statements, and they serve distinct functions. An interpretative rule clarifies or explains the meaning of words used in a statute, a previous agency rule, or a judicial or agency adjudicated decision. On the other hand, a policy statement indicates how an agency

¹⁹ See DAVIS & PIERCE, *1 Treatise*, at 226. Professors Davis and Pierce note that despite no one has yet proposed a definition of “rule” that is entirely satisfactory, there is one, proposed by Fuchs, which is well acceptable: Rulemaking is “the issuance of regulation or the making of determination which are addressed to indicated but unnamed or unspecified persons or situations” (at 228-229).

²⁰ See generally ASIMOW, Michael. Nonlegislative Rulemaking and regulatory reform. *1985 Duke Law Journal*, 381, at 383.

hopes or intends to exercise discretionary power in the course of performing some other administrative function²¹.

Legislative rules have the same binding effect as a statute, and, besides members of the public, they bind even the courts, in the sense that courts must affirm a legislative rule as long it represents a valid exercise of agency authority. Since they have such a power, APA § 553 requires agencies to use notice and comment procedures in adopting legislative rules, and an agency has the power to issue binding legislative rules only if and to the extent that Congress has authorized it to do so; but, once having this authorization, a legislative rule can impose distinct obligations on members of the public in addition to those imposed by statute, as long as the rule is within the scope or rulemaking authority conferred on the agency by statute²².

By contrast, interpretative rules are not binding on courts or on members of the public, and are not judicially enforceable against agencies. A court may choose to give binding effect of law through its process of statutory interpretation, the agency's interpretative rule serves only the function of potentially persuading the court that the agency's interpretation is correct; interpretative rules are specially exempt from notice and comment procedures, but any agency has the inherent power to issue interpretative rules. Since interpretative rules have no power to bind members of the public, but only the potential power to persuade a court, and since their issuance provides helpful guidance to the public, courts routinely conclude that agencies have the power to issue interpretative rules when Congress says nothing about such power. In addition, an

²¹ ASIMOW, *Nonlegislative Rulemaking and regulatory reform*, at 383.

²² *See generally* DAVIS & PIERCE, *I Treatise*, at 233-34.

interpretative rule cannot impose obligations on citizens that exceed those fairly attributable to Congress through the process of statutory interpretation²³.

The main problem faced by the agency's rulemaking function is that article I of the U.S. Constitution provides that "[a]ll legislative powers shall be vested in the Congress of the United States."²⁴ It prohibits Congress from delegating its legislative powers to any other institution. Such prohibition is called *nondelegation doctrine*, which "raises the issue whether broad and vague delegations constitute the unconstitutional delegation of legislative powers to administrative agencies."²⁵

2. The Judicial power of agencies – adjudicatory power.

As already broadly mentioned, agencies have adjudicatory power, which has been exercised analytically similar to that exercised by courts. In fact, an agency is not a court, but rather an administrative body. Despite this, the legislature may assign to agencies functions historically performed by judges²⁶. "[T]here is no requirement that, in order to maintain the essential attributes of judicial power, all determinations of fact ... shall be made by judges", said the Supreme Court in *Crowell v. Benson*, in 1932.

²³ See generally DAVIS & PIERCE, *I Treatise*, at 234. The authors alert, though: "The label 'interpretative rule' is sometimes a source of confusion in attempting to distinguish between legislative rules and interpretative rules. Many legislative rules 'interpret' statutory language, in the sense that they announce the agency's construction of a statute it has responsibility to administer. A rule that performs that interpretative function is a legislative rule rather than interpretative rule if the agency has the statutory authority to promulgate a legislative rule and the agency exercises that power. Some legislative rules impose new obligations through exercise of legislative authority delegated by statute." (at 234-35).

²⁴ See *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power ... is a principle universally recognized ..."), quoted by PIERCE, & SHAPIRO & VERKUIL, *Administrative Law and Process*, at 50; and also see *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("That legislative power of Congress cannot be delegated is, of course, clear."), quoted by DAVIS & PIERCE, *I Treatise*, at 66.

²⁵ PIERCE, & SHAPIRO & VERKUIL, *Administrative Law and Process*, at 50.

²⁶ SCHWARTZ, *Administrative Law*, at 11.

Adjudication of rights may be committed to agencies, as long as provision is made for judicial review, concludes Schwartz²⁷.

Despite this, there is, clarifies the author latter quoted, a crucial difference between a court and an administrative agency vested with judicial-type authority: “[T]he adjudicative function of administrative agencies ... do not embrace or constitute the exercise of judicial authority. Rather, administrative adjudication constitutes a form of judicial mimicry.”²⁸ The most significant difference between an agency exercising judicial-type authority and a court is the following: “In a major proportion of administrative law cases, the agency is itself one of the parties to the dispute that is empowered to resolve.”²⁹

3. The separation of powers and Judicial Review.

By taking these latter basic notions for granted, it is easily noticeable that administrative law is also, as Richard Pierce noted, inseparable from constitutional and political theory. According to Professor Pierce, the “entire power of agencies to act has its genesis in an interpretation of article I (of U.S. Constitution) that must be reevaluated

²⁷ SCHWARTZ, *Administrative Law*, at 11.

²⁸ SCHWARTZ, *Administrative Law*, at 13, quoting *Hackensack v. Winner*, 410 A.2d 1146, 1159 (N.J. 1980).

²⁹ SCHWARTZ, *Administrative Law*, at 13. That does not signify there is no case in which the agency acts just as a ‘judge’. As a matter of fact, as Schwartz notes, there are two types of cases in the administrative process: (1) The agency may, like a court, be in the position of a judge between two outside parties; or (2) the case to be decided may be one in which the agency itself is a party. But the latter one is more significant than the former.

constantly to ensure that administrative law remains true to the allocation of powers reflected in articles I, II, and III³⁰.

The nondelegation doctrine is clearly rooted in the principle of separation of powers, which was remarked by Blackstone in the 18th century: “In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty”³¹. This principle, however, is just implicit in the U.S. Constitution³², which contains no specific provision that the three kinds of powers shall be kept separate³³.

The issue of separation of powers also raises the problem of the judicial review of agency action, once the governmental power wielded by administrative agencies is been subjected to judicial scrutiny under the separation of powers doctrine³⁴.

³⁰ PIERCE, Jr., Richard. The Role of Constitutional and Political Theory in Administrative Law. *64 Texas Law Review* 469 (1985) (hereinafter, *Political Theory*), at 470.

³¹ 1 Blackstone, Commentaries, on the Laws of England 146 (7th ed. 1775), quoted by DAVIS, *Administrative Law and Government*, at 35. As noted by DAVIS & PIERCE, *I Treatise*, at 33-34: “The separation of powers theory has deep impressive historical roots. Aristotle, Plato, Polybius, Cicero, Machiavelli, Harrington, Locke, and Montesquieu, all of whom shared the well-supported belief that combining all government power in a single person or group of people leads to tyranny.”

³² As noted by E.P. KRAUSS. Unchecked Powers: Supreme Court and Administrative Law. *75 Marquette Law Review* 797 (1992) (hereinafter, *Unchecked Powers*), at 798: “Implicit in the United States Constitution is the notion of limited government.”

³³ DAVIS, *Administrative Law and Government*, at 35. In reality, the U.S. Constitution “goes no further than to provide separately for each of the three branches of the government: ‘All legislative power herein granted shall be vested in Congress ...’ Art. I, § 1. ‘The executive power shall be vested in a President ...’ Art. II, § 1. ‘The judicial power shall be vested in one Supreme Court and in ... inferior courts ...’ Art. III, § 1.” In KRAUSS’ words: “The document gives no clue as to the essential nature of these powers. It merely prescribes the method of operation for each branch.” (*Unchecked Powers*, at 798). And it’s noteworthy remember DAVIS & PIERCE words, *I Treatise*, at 35: “The separation of powers is not at all what Supreme Court has often said it is.”

³⁴ KRAUSS, *Unchecked Powers*, at 789.

Nevertheless, concerning to both rulemaking and adjudicatory authority, it has been seemed by scholars as impossible, in our increasingly complex society, to uphold the nondelegation doctrine or the strict separation of powers; and, in fact, such approaches have been bypassed by the need for administrative agencies to exercise rulemaking and adjudicatory authority³⁵. Professor Davis is emphatic:

“The original objective of preventing the delegation of legislative power and the later objective of requiring every delegation to be accompanied by meaningful statutory standards had to fail, should have failed, and did fail. ... Of course, today’s governmental undertakings are much more complex and the need for delegated power without meaningful standards is much more compelling. A modern regulatory agency would probably be an impossibility if power could not be delegated with vague standards.”³⁶

Effectively, the Supreme Court has been refusing to enforce the *nondelegation doctrine*, to the extent that “Congress routinely delegates to agencies the power to make major policy decisions in the form of rules of conduct that bind all citizens.”³⁷

³⁵ According to SCHWARTZ, *Administrative Law*, at 44.

³⁶ DAVIS, *Administrative Law and Government*, at 42-43.

³⁷ DAVIS & PIERCE, *I Treatise*, at 67. Nevertheless, it’s noteworthy that in *Panama Co. v. Ryan*, the Court declared unconstitutional a provision of the National Industrial recovery Act (NIRA) that authorized the President “to prohibit ... the transportation in interstate ... commerce of petroleum ... produced or withdrawn from storage in excess of the amount permitted ... by state law ...” 293 U.S. 388 (1935), because, in Court’s interpretation, the President had been given “an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit” – according to PIERCE & SHAPIRO & VERKUIL, *Administrative Law and Process*, at 51. Four months later its *Panama* decision, notes SCHWARTZ, *Administrative Law*, at 48, the Supreme Court again struck down a congressional delegation in *Schechter Poultry v. United States*, being at the issue the § 3 of the ‘National Industrial Recovery Act’, which authorized the President to approve “codes of fair competition” for the governance of trades and industries; when a code was approved, its provisions were to be the “standards of fair competition” for the trade or industry concerned, and any violation was punishable penalty. The Court ruled unanimously that the delegation was invalid, founding it too broad. But *Panama* and *Schechter* were the only cases in which delegations were invalidated by the Supreme Court. According to PIERCE & SHAPIRO & VERKUIL: “Since the New Deal, the Court has approved all the legislation it has reviewed under nondelegation clause.” (at 53). It is also important to point out, as made by the same later cited Professors, that some members of Supreme Court have signaled their willingness strictly to enforce the

In addition, as Schwartz notes, “[t]he history of the developing system of administrative law was one of constant expansion of administrative authority accompanied by a correlative restriction of judicial power.”³⁸

The most important case in this issue – and even in the U.S. administrative law³⁹ – is *Chevron v. Natural Resources Defense Council*, ruled in 1984.

It was already noted that it’s impossible nowadays to ‘govern’ without broad delegation. As pointed out by Davis and Pierce, every agency decision must be anchored in the language of one or more statutes the agency is charged to implement. Every agency-administered statute contains ambiguities. The Supreme Court’s understanding about concerning interpretations of agency-administered statutes before

nondelegation provision, opinion that has been seconded by some scholars, although others disagree. It’s true, therefore, that the majority of the today’s Justices has rejected the idea of reinvigoration of the nondelegation doctrine (at 56), and, as Schwartz notes, “[w]holesale delegation became the rule rather than the exception; the broad grants made during the late New Deal, World War II, and the Cold War period were all sustained by the courts.” – SCHWARTZ, *Administrative Law*, at 31. As Professor Pierce noted elsewhere, since the Congress, which is the power that has the responsibility to make the policy decisions, has been choosing delegating these decisions to agencies, rather than to make policy decisions itself, agencies will and should act as political entities. The link between politicization of administrative law and standardlles delegation of policy decisions is direct and unavoidable. – PIERCE, *Political Theory*, at 472-73.

³⁸ SCHWARTZ, *Administrative Law*, at 32. DAVIS & PIERCE, *Treatise*, at 281, give a clear explanation, including quoting a Supreme Court’s view: “The Supreme Court in 1945 laid down the fundamentals about judicial interpretation of rules, and its statement has been the unquestioned law ever since: ‘Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the word is in doubt. The intention of Congress of the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation ... In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.’ *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945).”

³⁹ Professor Pierce considers *Chevron* “one of the most important constitutional law decisions in history, even though the opinion does not cite any provision of the Constitution.” – PIERCE, Jr. Richard. *Reconciling Chevron and Stare Decisis*. 85 *Georgetown Law Journal* 2225 (1997), at 2227. In fact, *Chevron* is still extremely discussed, as one can see in a recent article by HASEN, David M. *The Ambiguous Basis of Judicial Deference to Administrative Rules*. 17 *Yale Law Journal on Reg.* 327 (2000).

1984 was too flexible⁴⁰. In *Chevron*, the Court created a new two-step test to be applied to all attempts by agencies to give meaning to the statutes they administer: when a Court reviews an agency's construction of the statute it administer, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the courts does not simply imposes its own construction on the statute, as would be necessary in absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute⁴¹.

The question⁴² raised in *Chevron* was whether, and to what extent, the statutory term 'stationary source' in the Clean Air Act incorporates the 'bubble concept', which allows aggregating facilities into a single source for the purpose of measuring net emissions. This is arguably a policy determination of the kind that Congress intended to leave to the discretion of the Environmental Protection Agency. Because it rested on what was essentially a matter of statutory interpretation, the court of appeals independently re-examined the matter and concluded that the agency had employed the bubble concept

⁴⁰ DAVIS & PIERCE, *I Treatise*, at 107-109.

⁴¹ DAVIS & PIERCE, *I Treatise*, at 109-110. The Professors noted, in 1994, that *Chevron* "[h]as been cited and applied over 1,000 cases in last decade", and PIERCE, & SHAPIRO & VERKUIL stressed, in the preface to the third edition of their book, in 1999 (*Administrative Law and Process*, at vi), that "[t]he hegemony of the *Chevron* case over the field of judicial review of administrative action ... is now complete."

⁴² I borrow the resume from KRAUSS, *Unchecked Powers*, at 817-818.

incorrectly. Supreme Court reversed, holding that when Congress has not spoken to the precise question, or has done so ambiguously, reviewing courts are required to defer to an agency's permissible construction of the governing statute. In other words, the court is not free to substitute its interpretation for that of the agency.

The *Chevron* Court did not criticize, note Davis and Pierce, judicial policymaking through the common law decisionmaking process or through the process of judicial construction of judicially administered statutes. Federal courts are obligated to resolve all 'cases or controversies' that come before them. When no statute applies or when the applicable judicially administered statute does not resolve a dispute properly before a court, judges must make the policy decisions necessary to resolve the dispute. What the Court did criticize – continuous the authors – however, and held unlawful, substitution of judicial policy preferences for agency policy preferences where Congress intended to delegate policymaking to an agency⁴³.

⁴³ DAVIS & PIERCE, *I Treatise*, at 114. The authors note: "When Congress enacts a statute to be administered by an agency, it has delegated to the agency resolution of all policy disputes that arise under that statute that Congress did not itself resolve. The Court's reasoning in support of this institutional allocation of policymaking authority is based on political accountability – a value central to the concept of democratic government". And quotes the Court's words: "Judges ... are not part of either political branch of government. ... In contrast, an agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices ...". In definitive KRAUSS' words, *Unchecked Powers*, at 820: "The *Chevron* doctrine has vested agencies with considerable power to interpret the legislative standards that are supposed to confine their policy-making discretion. Additionally, after *Chevron*, agencies have wide latitude to make final determinations about who comes within the coverage of a statute, what the statute requires of those who are subject to regulation, and the timing and method of agency enforcement. *Chevron turns the non-delegation doctrine on its head.*" (italic added by me).

As being so important decision, maybe the most important in the U.S. Administrative law, *Chevron* is still being discussed⁴⁴. Again according Davis and Pierce, *Chevron* has reduced, however, significantly the problem of inconsistent interpretations of agency-administered national statutes. Its effect is to preclude judges from second-guessing agency policy decisions by mischaracterizing those decisions as resolutions of issues of law. After *Chevron*, judges cannot attribute to Congress decisions Congress never made. If Congress did not resolve a policy dispute, it remains a policy dispute to be resolved by an agency, rather than by judges with differing policies perspectives⁴⁵.

In this both quick and broad view over administrative law and agencies in the U.S., I stressed just the points that seem to me important to better understand the second part of the paper, which focus on the estoppel doctrine against the government and on the good faith reliance on American agencies, in order, once again, to make a comparative analysis between the estoppel doctrine and the principle of ‘administrative morality’, written in the Brazilian’s Constitution.

⁴⁴ See HASEN, *The Ambiguous Basis*. (By quoting and commenting the Judicial Deference before and after *Chevron*, and *Chevron* itself, the author makes a deep analysis through the various theoretical justifications of *Chevron*, which – he says – resolve themselves into three basic positions: (1) Congressional Delegation to Agencies of Final Interpretative Power; (2) Implied Statutory Delegation to Agencies of Quasi-Legislative Rulemaking Authority; and (3) *Chevron* as a doctrine of independent Judicial Deference to Agencies. David Hasen concludes that “[t]he *Chevron* inquiry is misplaced ... because interpretation in the long-gap-filing case is by its nature a judicial activity, regardless of whether Congress and the agency have satisfied the procedural requirements for delegation and legislative rulemaking, respectively.”).

⁴⁵ DAVIS & PIERCE, *I Treatise*, at 117.

PART 2: THE COMMON LAW DOCTRINE OF ESTOPPEL

A) GENERAL VIEW.

In a recent book, Elisabeth Cooke emphasizes that the story of estoppel is complex. A number of branches or categories of estoppel, with different origins and inconsistent rules, have been developed over the years to meet changing human and commercial needs. The result, she concludes, has not been tidy⁴⁶.

There's no doubt, however, the estoppel doctrine comes from private law. In the US, Melville Marvin Bigelow, in the beginning of his classic treatise⁴⁷, presents the existence of three ways of estoppel: estoppel 'by record', estoppel 'by deed', and estoppel by 'facts in pais'⁴⁸. Just the latter, also known as *equitable estoppel*, is important for the purpose of this paper⁴⁹. The estoppel by 'facts in pais' is subdivided in (1) facts fixed by or in virtue of contract, (2) acts or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged⁵⁰.

⁴⁶ COOKE, Elisabeth. *The modern law of estoppel*. Oxford University Press: 2000, at 16.

⁴⁷ BIGELLOW, Melville Marvin. *A treatise in the Law of Estoppel*. 5th edition, Boston: Little, Brown, and Company, 1890.

⁴⁸ BIGELLOW, *A treatise in the Law of Estoppel*, at 3.

⁴⁹ According to COOKE, *The modern law of estoppel*, at 6, Sir Edward Coke, writing in 1628, explained that there were "three kinde of estoppels, viz. by matter of record, by matter in writing, and by matter *in pais*." Cooke tells us that "What Coke calls 'estoppel by matter of record' is often now called estoppel *per rem judicatam*, which can be roughly translated as 'estoppel because the court has already decided'. It is the rule that when a question has once been litigated, the parties cannot bring it back to court for another try." Bigelow notes that the term 'record' signifies (1) the legislature roll, (2) the judgment roll of a court of competent jurisdiction; and clarify that 'deed' means "a contract under seal, and especially a conveyance of land or some interest therein;" – BIGELLOW, *A treatise in the Law of Estoppel*, at 3.

⁵⁰ BIGELLOW, *A treatise in the Law of Estoppel*, at 3.

In England, in addition of the estoppel *in pais*, Cooke also mentions the existence of the proprietary estoppel and the promissory estoppel (or principles in *High Trees*)⁵¹. Proprietary estoppel is described as the principle that one (A) is encouraged to act to his detriment by the representation or encouragement of another (O) so that it would be unconscionable for (O) to insist in his strict legal rights. Promissory estoppel is described as follows: where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and, before it is withdrawn, the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it⁵².

In Australia, the doctrine of equitable estoppel is the equivalent of promissory estoppel in the U.S., protecting reliance on assumptions related to the future conduct of a representor⁵³.

One can observe from this quick view there's no consensus on this subject. Cooke notes there have been a number of judicial expressions of impatience with the idea of a law of estoppel comprising many distinct categories. Perhaps the most radical claim in this issue has been made by Mason in Australia:

“... it should be accepted that is but one doctrine of estoppel, which provides that court of common law or equity may do what is required, but no more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs) which assumption the party estopped has induced him

⁵¹ See Cooke, *The Modern Law of Estoppel*, at 16-53.

⁵² COOKE, *The Modern Law of Estoppel*, at 55.

⁵³ See ROBERTON, Andrew. Situating Equitable Estoppel Within the Law of Obligations. *19 Sydney Law Review* 32 (1997) (hereinafter *Situating Equitable Estoppel*), at 42, footnote 78.

to hold, from suffering detriment in reliance upon its assumption as a result of the denial of its correctness.”

Therefore, there's not only one approach of the estoppel doctrine. Moreover, estoppel seems to have received more attention in the U.S. than in England, and far more than in Australia. It is, however, far beyond this article purpose to deal with them all.

I argue that the main function of Brazilian constitutional principle of administrative morality is to bring to the 'Public Law' the 'Private Law' doctrine of objective good-faith. Once this articles' goal is to verify if the private law doctrine of estoppel is consistent with the Brazilian constitutional law principle of 'administrative morality', the question raised deals with the possibility of private law theories being used in public law context. In order to make this comparison, among all 'branches' or 'theories' of estoppel, I made use of and emphasized more the theory of equitable estoppel against the government, not because it is the unique estoppel doctrine which can provide a useful comparison with the principle of good-faith (or administrative morality, in public law), but because the objections that particularly U.S. doctrine has been made to apply the estoppel doctrine against the government over the years are the same objections that in the continental law system one could made to avoid in public law the private law principle of objective good faith.

B) EQUITABLE ESTOPPEL DOCTRINE

The *Equitable estoppel* consists – says Bigelow – in holding for truth a representation acted upon when the person who made it or his privies seek to deny its truth and to deprive the party who was acted upon it of the benefit obtained. The origin, focuses the author, of the estoppel is probably to be found in the doctrine of equity that if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew of was bound to know it to be false. Lord Eldon would have spoken of this as ‘a very old head of equity’. But the principle had been fully adopted at law as ground for an action of deceit several years before this remark was made, and though still called ‘equitable estoppel’, the estoppel is a fully available at law as in equity⁵⁴.

In fact, as noted by Howard Shelton Schwartz⁵⁵, the doctrine of estoppel had existed prior to and during the time of Sir Edward Coke, and is found in the earliest collection of the English Law. Sir Coke defined the term estoppel as coming from the French, “estoupe, from whence the English work ‘stopped’; and it is called an estoppel, or conclusion, because a man’s own act or acceptance stoopeth or closeth up his mouth to allege or plead the truth”. He considered it to the highest degree of justice that a solemn mode of declaration should be provided by the law for the purpose of enabling men to

⁵⁴ See BIGELLOW, *A treatise in the Law of Estoppel*, at 557. For a accurate analysis of the development of estoppel, see COOKE, *The modern law of estoppel*, at 16-53. Cooke also notes the problem of the label: equitable estoppel, or estoppel *in pais*, is also known as estoppel ‘by representation’ or estoppel ‘by conduct’ (at 18).

⁵⁵ SHELTON SCHWARTZ, Howard. *The conceptualization of estoppel in government contracts*. Thesis prepared for Professor Gilbert J. Ginsburg, in partial satisfaction toward the degree of master of laws in Government Procurement, Washington-DC, Sept. 1971, George Washington University School of Law. (unpublished) (hereinafter *The conceptualization*).

bind themselves to the good faith and truth of representations on which other persons are to act⁵⁶.

Although frequently invoked in litigation between private parties⁵⁷, considerable judicial ink, as noted once, has been spilled over the question of whether the doctrine of equitable estoppel applies to the government⁵⁸.

⁵⁶ In her book, COOKE, *The modern law of estoppel*, at 1-2, despite saying that framing a definition of estoppel is not easy, at least in the sense of a neat formula that would tell us whether or not a given set of fact is an instance of estoppel, quotes the words of Lord Denning, by all means similar to the Bigelow's definition. Lord Denning would have said: "Estoppel ... is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

⁵⁷ See PITOU, Michael Cameron. *Equitable Estoppel: Its Genesis, Development, and Application in Government Contracting*. Thesis submitted to the Faculty of the National Law Center of the George Washington University, september 30, 1988 (unpublished) (hereinafter, *Thesis*), at 32.

⁵⁸ Comment, NEVER TRUST A BUREAUCRAT: Estoppel Against the Government. 42 *Southern California Law Review*, 391 (1969), at 391. It's useful, as PITOU does, *Thesis*, at 9-13, to point out that there are two other legal principles used to bind the Government, which are sometimes confused with equitable estoppel: ratification and finality. Ratification – says Pitou – is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized. The principle of ratification is commonly used to bind private parties. The government, however, can also be bound through ratification. Some Courts and boards have relied on regulatory authority to bind the government through ratification, while other decisions have considered the authority to ratify as an essential component of an agent's authority without regard to statutory or regulator coverage. Ratification can be an extremely powerful and useful tool in government contracting because commitments made by government employees without actual authority can subsequently be made binding through ratification. Ratification injects a measure of flexibility into government contracting. This flexibility is needed given the enormous size and activity of many government-contracting activities. One seeking to bind the government through ratification must prove two essential elements. First, that the ratifying official had the authority to authorize the unauthorized act. Secondly, that the ratifying official had knowledge, actual or constructive, of the unauthorized act. Ratification requires actual authority to bind the Government just like the equitable estoppel. The main difference is that under ratification this authority is exercised by a governmental official after an unauthorized act has already taken place. Moreover, the Government cannot be bound by ratification unless it knows or should know about the unauthorized act, which took place. Finally, the ratifying official normally expressly ratifies the unauthorized conduct although his silence can lead to a ratification of an unauthorized government employee conduct. On the other hand, the term finality has been used to describe the binding effect government employees contractual actions have on government. As with equitable estoppel, the principle of finality will only bind the government when it's employees have acted within the scope of their authority. As noted - continuous Pitou – by two commentators: "[T]he finality of contractual acts may attach as a result of either the application or a provision of the contract, which is interpreted as defining when finality attaches, or the operating of a legal rule." Accordingly, the principle of finality is distinct from equitable estoppel. Specifically, under finality, the Government binds itself pursuant to contract provisions and legal principles. On the other hand, justice and fair dealing support binding the government through the application of equitable estoppel. Moreover, finality does not require detrimental reliance and the other basic elements associated with equitable estoppel. Unfortunately, numerous courts

But can Government be estopped? If yes, under which conditions it can happen? If no, why? Does the government have not to submit itself to this ‘very old head of equity’ or to ‘the highest degree of justice’? Or there are other principles that have to be taken into account when Government takes part in this issue?

In order to answer these questions, it’s helpful to point out that the equitable estoppel doctrine has, if fact, a vast field of application. Nevertheless, two of them seem to be more common: (1) advice given by the government officials⁵⁹, and (2) contracts of the government, mostly in the pre-contractual phase, as I’ll note shortly afterward. This second type is also known as promissory estoppel⁶⁰. First, it’s necessary to form a pre-comprehension about the estoppel doctrine.

and boards have needlessly relied upon equitable estoppel to bind the Government in situations where the principle of finality should have been used. The principle of finality is implicated in numerous contractual clauses. One such clause states in part: Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in contract. Another pertinent clause is the Disputes Clause, which says in part: the contracting officer’s decision shall be final unless the Contractor appeals or files a suit as provided in the Act. Many times, however, a contract provision does not address the government employee’s actions. In many of these cases it is the operation of a legal rule, which binds the Government. *See* also, for the differences between estoppel and finality, and also ratification, CIBINIC, Jr., John & NASH, Jr., Ralph C. *Administration of Government Contracts*. 3rd edition, Washington-DC: George Washington University, 1995, at 47-60, 64-71. What is important to note, as Cibinic and Nash do, is that estoppel accomplish the same results as finality and because of this the two concepts are often confused. The authors note, however, two important differences: (1) estoppel requires detrimental reliance by the party who seeks to invoke it, while reliance is not an element of finality; (2) the statement or action leading to finality is by its very nature contractually binding upon Government through the operation of legal principles such as offer and acceptance, acceptance of goods, etc. The Government, continue the authors, is held bound by estoppel, however, because it would be unfair not to do so even though the statement, action or inaction would not be contractually binding. Thus, they conclude, the Government has been estopped through its course of conduct as well as through its verbal representations (at 71).

⁵⁹ There is a vast doctrine in this field, quoted in the following lines down. There’s a classic book, however, by ASIMOW, Michael. *Advice to the public from federal administrative agencies*. New York: Matthew Bender, 1973. Asimow introduces his book posing it’s “a study of the advice-giving function of the federal government: the work of the agencies in furnishing answers to the questions from the public which minimizes the risks of prospective transactions. Will this transaction be taxable or this expenditure deductible? Will this import qualify for a favorable tariff classification? Must this employee receive the minimum wage? Will I need a certificate to transport this kind of product? Does my grant permit me to spend money on this item? Will this kind of advertising be considered misleading?” (at v).

⁶⁰ In Australia, however, it is called equitable estoppel, as noted above.

1. Supreme Court Cases: *Federal Crop Insurance Corp. v. Merrill* (1947), and *Schweiker v. Hansen* (1981).

The seminal U.S. Supreme Court case about estoppel against the government is *Federal Crop Insurance Corp. v. Merrill*, ruled in 1947⁶¹.

In this case⁶², defendant was a government-owned corporation to insure producers of wheat against crop losses due to unavoidable causes, including drought. It promulgated a regulation, published in the Federal Register, specifying the conditions upon which it would insure wheat crops, including a provision making “spring wheat which has been reseeded on winter wheat acreage” ineligible for insurance. Without actual knowledge of this provision, plaintiff wheat farmers applied to defendant corporation’s local agent for insurance on their crop, informing the local agent that most of it was spring wheat been reseeded on winter wheat acreage. The agent advised plaintiffs that the entire crop was insurable, and the corporation accepted plaintiffs’ application for insurance. Two months later, plaintiffs’ crop was destroyed by drought, but the corporation refused to pay the loss when it learned that the destroyed acreage had been reseeded.

⁶¹ It is worth emphasizing, however, that the earliest Supreme Court decision dealing with the application of the doctrine of estoppel against the Government was *Lee v. Munroe*, 11 U.S. (7 Cranch) 366 (1813), quoted by BRAUNSTEIN, Michael. In Defense of a Traditional Immunity – Toward an Economic Rationale for Not Estopping the Government. *14 Rutgers Law Journal 1* (1982) (hereinafter, *In Defense*), at 28.

⁶² I borrow the resume from SCHWARTZ, *Administrative Law*, at 150-151.

In plaintiffs' suit to recover on the crop-insurance policy, the corporation contended that it was not in any way bound by the representation of its local agent that the crop was insurable. The Court agreed, holding that plaintiffs were bound by the provision in defendant's regulation, even without actual knowledge. Publication in the regulation in the Federal Register gives legal notice of their contents. The regulation was binding regardless of lack of knowledge or hardship resulting from ignorance. "If the Federal Crop Insurance Act – said the Court – had by explicit language prohibited the insurance of spring wheat which is reseeded on winter acreage, the ignorance of such a restriction ... would be immaterial and recovery could not be had."

If the action had been brought against a private insurance company, remarks both clearly and directly Schwartz, recovery would have been allowed on an estoppel theory⁶³. But the same was not true, in the Court's ruling, of a government corporation in the insurance field. "It is too late – said the Court – in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business." And the Court's added: "Man must turn square corners when they deal with the Government".⁶⁴

This Court's decision provoked a number of reactions among scholars⁶⁵. Despite having never been directly reversed, *Merril* has not been followed by a

⁶³ SCHWARTZ, *Administrative Law*, at 151.

⁶⁴ The two latter paragraphs of the Court's words were quoted by SCHWARTZ, *Administrative Law*, at 151.

⁶⁵ An uncompleted list of articles criticizing this *Merril* approach would include: BERGER, Raul. Estoppel Against the Government. *21 University of Chicago Law Review* 680 (1954) (hereinafter, *Estoppel*); NEWMAN, Frank C. Should Official Advice be reliable? – Proposals as to estoppel and related doctrines in Administrative law. *53 Columbia Law Review* 374 (1953) (hereinafter, *Proposals*); THOMPSON, David. Equitable Estoppel of the Government. *79 Columbia Law Review* 551 (1979) (hereinafter *Equitable*

considerable sort of lower Federal Courts, which have estopped the Government in a number of cases⁶⁶.

In *Scheiker v. Hansen*, ruled in 1981, the U.S. Supreme Court reaffirmed the *Merrill* approach. In that case⁶⁷, a Social Security agent erroneously advised Mrs. Hansen of her ineligibility for benefits and, in violation of the agency's nonlegislative Claims Manual, failed to advise her to file a written application. When the agency subsequently denied her claim for retroactive benefits, citing a legislative regulation requiring written application, she argued that it was estopped by its agent's representations and by his violation of agency law. The Court declined to retreat from *Merrill*, expressing concern that an estoppel would undermine the legislative regulation in thousands of cases and emphasizing once again its duty to observe conditions on private access to the public fisc. It reinforced these objections to estoppel of the government with several practical policy objections, implying that imposing estoppel could discourage the agency from the salutary practice of issuing informal internal guidelines for its agents and would allow an employee's omission of a procedural detail to undercut the purpose of the substantive regulation requiring written applications.

Estoppel); EISEN, Deborah. Recent Development – *Schweiker v. Hansen*: Equitable Estoppel Against the Government. 67 *Cornell Law Review* 609 (1982) (hereinafter, *Schweiker v. Hansen*); WALRATH, Deborah. Recent Developments in Administrative Law: Liability of Administrative Agencies and Officials: Estopping the Federal Government: Still Waiting for the right case. 53 *George Washington Law Review* 191 (1985) (hereinafter, *Recent Developments*); ANSELL, Fred. Comment: Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government. 53 *University of Chicago Law Review* 1026 (1986) (hereinafter, *Unauthorized Conduct*); RAVEN-HANSEN, Peter. Regulatory Estoppel: When Agencies Break Their Own “Laws”. 64 *Texas Law Review* 1 (1985) (hereinafter, *Regulatory Estoppel*); CONWAY, John. Equitable estoppel of the federal government: an application of the proprietary function exception to the traditional rule. 55 *Fordham Law Review* 707 (1987) (hereinafter *Equitable estoppel*); but see also BRAUNSTEIN, (*In Defense*, note 56 *infra*), in favor, generally speaking, of the non-estoppel doctrine.

⁶⁶ See, just to name a few, the cases quoted by RAVEN-HANSEN, *Regulatory Estoppel*, notes 167-174.

⁶⁷ I borrow the resume from RAVEN-HANSEN, *Regulatory Estoppel*, at 30.

There are some reasons commonly alleged for not estopping the government. It's time to know them, and the respective replies by critics.

2. Arguments for not estopping the Government in the U.S.

a) Governmental Immunity Doctrine – Sovereign theory – Proprietary/sovereign distinction.

Maybe the oldest justification that has been offered for this traditional view of not estopping the government is its alleged immunity from estoppel, which is, in Berger's words, "an offshoot of sovereign immunity"⁶⁸, based on an argument that estoppel of government claims and defenses would result in the impermissible forfeiture of federal rights without sovereign consent⁶⁹. As a matter of fact, the idea that supports the sovereign immunity is the traditional English view that "the King cannot be estopped, for it cannot be presumed the King would do wrong to any person ..."⁷⁰.

As Shelton Schwartz notes, judicial decisions involving sovereign immunity "customarily rest on authority, the authority rests on history, and the history rests on medievalisms about monarch." As an institutional descendant of the Crown, the

⁶⁸ BERGER, *Estoppel*, at 683.

⁶⁹ THOMPSON, *Equitable Estoppel*, at 554.

⁷⁰ 16 HALSBURY'S LAWS OF ENGLAND ¶ 1695 n. 8 (4th ed. 1976), quoted by EISEN, *Schweiker v. Hansen*, at 610, footnote 11. Nevertheless, the doctrine of sovereign immunity has already eroded, as we will see *infra*, item '3.a'. Yet in 1958, remember Eisen (at 611, footnote 13), Professor Davis cleared up that sovereign immunity had been largely crumbling, and, in 1976, he commented that the question was no longer whether the estoppel could be applied against the government, but rather when it should be applied.

authority that makes the law possesses all legal rights against which no private remedy can stand.⁷¹

According to Carol Harlow, in a comparative analysis of government tort between England and France, in his Ph.D. thesis in the University of London, in 1980, the familiar maxim “the king can do no wrong” really has its basis in mediaeval times in a simple procedural rule whereby a feudal lord could not be sued in his own court; effectively, the king being a feudal lord could not be sued⁷².

It’s also important remember what Thompson called “the most widely applied technique for limiting the no-estoppel rule”: a distinction between ‘sovereign’ (or governmental) and ‘proprietary’ (or nongovernmental) function of federal agencies. In short, and quoting his words, the meaning of this distinction is the following: “government activities undertaken solely for the profit or benefit of the government or an individual agency might provide a suitable basis for estoppel, while ‘sovereign’ acts involving the exercise of powers reserved exclusively to government would not.”⁷³ A clearer explanation is made by Pitou: “Under this analytical model, the Government can be estopped from asserting a claim or defense when it acts in its proprietary or commercial capacity but not when it functions in its sovereign capacity.”⁷⁴

⁷¹ SHELTON SCHWARTZ, *The conceptualization*, at 14.

⁷² HARLOW, Carol. *Compensation and Government Torts*. London: Sweet & Maxwell, 1982, at 17. The author says that England legal historians gave to the students the following example, quoting Maitland (*Constitutional History of England*, p.482), “English law does not provide any means whereby the king can be punished or compelled to make redress.”

⁷³ THOMPSON, *Equitable Estoppel*, at 555.

⁷⁴ PITOU, *Thesis*, 32.

It's easily notable that the sovereign/proprietary approach steams from the notion that the government should be treated like a private party when it enters the commercial domain⁷⁵. This approach has been used by many courts and boards to allow the government to be estopped from asserting a claim or defense when it acts in its 'proprietary' capacity⁷⁶. And such approach has, according to Thompson, a common sense realism that helps explain its durability⁷⁷.

b) Separation of Powers

In addition, there are other reasons invoked for non-estoppel justification. One is – once again – an alleged interference of estoppel with the separation of powers. Since the power to legislate may only be exercised by Congress, remembers Shelton Schwartz, authority of Executive administrators taken from or limited by legislation must be done so as delineated by such legislation. If this power cannot be exercised by an administrator, then it may be argued that he should not be able to effect change in Congressional statutes by making mistaken interpretation. Neither may estoppel be invoked against the sovereign to create power in an officer who purported to act on behalf of the public without authority, nor may his power be enlarged by estoppel⁷⁸.

If the government, notes John Conway, were estopped to deny a representation made by an agent or official that is contrary to congressional legislation,

⁷⁵ See PITOU, *Thesis*, at 32. This distinction (sovereign/property), and the result that comes from it, is, in the continental administrative law, a common sense.

⁷⁶ See cases quoted by THOMPSON, *Equitable Estoppel*, at 556, and PITOU, *Thesis*, at 33.

⁷⁷ THOMPSON, *Equitable Estoppel*, at 556.

⁷⁸ SHELTON SCHWARTZ, *The conceptualization*, at 15.

then the judiciary would be usurping the legislative function by deciding that an act of the agent or official shall be the law rather than an act of Congress⁷⁹.

In short, repeating Schwartz words, estoppel could be used to give *de facto* validity to *ultra vires* administrative acts⁸⁰. As the U.S. Supreme Court said once, in 1884: “[Government officers] are but servants of the law, and, if they depart from its requirements, the government is not bound. There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it.”⁸¹ And as it repeated in 1984: “When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.”⁸²

c) Protection of Public Treasury

Another argument used is the concerning for the protection of the public fisc. The U.S. Constitution, article I, § 9, cl. 7 imposes the requirement that “No money shall be drawn from the Treasury, but in consequence of Appropriation made by Law ...”.

In *Merill*, this concern was expressed by Justice Frankfurter. The courts must strictly observe “the condition defined by Congress for charging the public

⁷⁹ CONWAY, *Equitable estoppel*, at 710-11. (quoting cases in which this theory was applied).

⁸⁰ SCHWARTZ, *Administrative Law*, at 152.

⁸¹ *Moffat v. United States*, 112 U. S. 24, 31 (1884), quoted by SCHWARTZ, *Administrative Law*, at 152.

⁸² *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984), quoted by SCHWARTZ, *Administrative Law*, at 152.

treasury.”⁸³ Effectively, as Shelton Schwartz pointed out, the resources of the Treasury should not suffer from the self-interest motivation of its citizens, negligent indifference toward responsibility of its agents or improper collusion between the two. The fear that the agent would ‘ruin the principal’ has led the Government to repudiate the action its officials, and generally, because of these fears, estoppel will not work against unauthorized conduct of an agent to whom no administrative authority has been delegated⁸⁴.

d) General considerations.

Schwartz remarks, by quoting a recent decision, that *Merrill* indicates estoppel will not be used to protect an individual who has changed position in reliance on administrative advice: “From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as against private litigants.”⁸⁵ That because there would be more than a private interest at stake in the *Merrill*-type case: a public interest⁸⁶ in insuring that administrative officials do not act beyond the bounds of their authority would exist.

Davis and Pierce explain that the reluctance of the Court in estopping the government is understandable. The federal government implements hundreds of extraordinarily complicated regulatory and benefit programs. Millions of civil servants

⁸³ Quoted by BRAUNSTEIN, *In Defense*, at 29.

⁸⁴ SHELTON SCHWARTZ, *The conceptualization*, at 16.

⁸⁵ *OPM v. Richmond*, - U.S. - (1990), quoted by SCHWARTZ, *Administrative Law*, at 151. Effectively, as one remembered in NEVER TRUST A BUROCRAT, at 394, footnote 17, by quoting Davis, there was, back in the early twenties in 19th century, a case in which Chief Justice Marshall had said: “The universally received opinion is, that no suit can be commenced or prosecuted against the United States ...” - *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) -.

⁸⁶ This ‘public interest’ will be the gist of the separation of public and private law.

give advice to citizens daily concerning their rights and duties under these programs. Erroneous advice is both inevitable and commonplace. Estopping the government based on the misrepresentation of its agents, say the Professors, would have a series of adverse effects. The most immediate result would be a financial loss of some magnitude to the government. If the government began to lose much money as a result of estoppel cases, agencies would respond by limiting severely the availability of information and advice from government employees. That, in turn, would cause extreme harm to the public for four reasons: (1) All citizens need advice concerning a variety of complicated government programs; (2) most of the advice provided by government employees is accurate and helpful; (3) advice from government employees is free; and (4) advice from alternative sources that may be more reliable is often very expensive⁸⁷.

The strongest supporter of the non-estoppel government view among scholars seems to be Michael Braunstein. He argues that everyone would agree that the government advice should be reliable, but the problem – he poses – is how much are we willing to pay to make it more reliable, and who should pay. Braunstein advocates the position that the private law doctrine of equitable estoppel was formed in response to specific economic pressures and that different economic forces, mandating different liability rules, are at work when the Government is to be estopped⁸⁸.

⁸⁷ DAVIS, Kenneth Culp, & PIERCE, Richard. *II Treatise*, at 229-30. The Professors give a clear example: “The International Revenue Service (IRS) is a good example. It is one of the Federal agencies that is most respected for its competence. Yet, each year the General Accounting Office (GAO) conducts a study of the taxpayers advice provided by IRS, and each year that study shows that IRS gives erroneous advice in somewhere between 10 and 20 percent of all cases. Some taxpayers are injured by reliance on IRS’s advice, but millions of taxpayers are benefited by its availability.”

⁸⁸ BRAUNSTEIN, *In Defense*, at 1-2.

According to Braunstein's view, what is required is an analysis of the likely result of a rule that would freely estop the Government. Furthermore, he argues that the argument based on the erosion of the doctrine of sovereign immunity, which is frequently addressed by both the lower courts and scholars who support the idea of estopping the government, misses the mark, once the Supreme Court has not based its estoppel decisions on considerations of sovereign immunity. These decisions, says Braunstein, reflect a recognition not that the Sovereign can do no wrong, but that the Sovereign can do no better⁸⁹. Professor Braunstein also notes both economic reasons and data in order to prove that a general rule permitting an estoppel of the Government would have a tendency to reduce the availability of that advice, and that the likely result of such a rule would be to increase transaction costs⁹⁰.

⁸⁹ BRAUNSTEIN, *In Defense*, at 9-10. The author ends the first part of his work with these noteworthy words: "In sum, the conflict between the Supreme Court and those lower courts evincing a willingness to estop the Government is great. The basis of the conflict is not so much doctrinal as political. The Supreme Court has been reluctant to open a floodgate of potential claims against the United States, the number of which cannot be predicted and which, in the aggregate, could significantly disrupt the efficient administration of government. A number of lower courts, while recognizing this concern, seem to be irresistibly drawn by considerations of morals and conscience, to estop the Government when necessary to do justice in the particular case." (at 15).

⁹⁰ BRAUNSTEIN, *In Defense*, at 27-39. He states, at 37: "Thus, although it is not contended that judicial expansion of the public law doctrine of equitable estoppel would cause an immediate reduction in the amount of information provided by the Government, such a reduction would occur over time, with a consequent increase in transactions costs." And there would be an additional cost, which "would be to place a disproportionately large burden on the poor. The reasons for this are quite simple. First, the wealthier members of society have access to alternative sources of information to which the poorer members do not. If the Government reduces the flow of information available concerning its programs, the benefits it provides and the penalties it inflicts, the wealthy may turn to accountants, lawyers and other professionals for this information. The poor do not have this options." By contrast, it's worthy to note the opinion exposed by one in NEVER TRUST A BUROCRAT, at 403: "If the plea of estoppel is available against the government, agencies will expend more effort to give correct advice and thus individuals relying on that advice will not do acts prohibited by statutes."

3. Reasons for estopping the Government

a) The erosion of Sovereign Immunity doctrine.

Concerning to the sovereign immunity argument for not estopping the Government, scholars have been arguing its erosion⁹¹, usually quoting an early article, dated from 1933, in which F. E. Farrer strongly sustain, basing his arguments on a historical analysis of England's law cases, that the general *dicta* "the Crown is not bound by estoppel" is a fallacy⁹².

"That the estoppel in certain cases binds the King is clear", says Farrer⁹³. By his conduct, the King can be estopped *in pais*, adds Farrer, quoting a case, ruled in the end of nineteenth century, in which it was decided that the Crown can be estopped from asserting its legal title, against the Equity, of the party, whom the Crown has knowingly allowed to incur expenditure on land, which the Crown at the time knows, in both its own, and is also by the party believed to be his own. "What that equity exactly is varies with the circumstances of each case", says Farrer, quoting the English court words, and concluding emphatically: "In fact, what is equity between subject is equity against the King."⁹⁴

⁹¹ See generally BERGER, *Estoppel*, at 680, footnote 5; According to PITOU, *Thesis*, at 34: "Fortunately, fewer courts rely on the doctrine of sovereign immunity today. In fact, sovereign immunity is nearly an anachronism in today's society and is best left for study by legal historians."

⁹² FARRER, F. E. A prerogative fallacy – 'That the Crown is not bound by estoppel.' 49 *The Law Quarterly Review* 511 (1933) (hereinafter, *A prerogative fallacy*).

⁹³ FARRER, *A prerogative fallacy*, at 511.

⁹⁴ FARRER, *A prerogative fallacy*, at 515. In the U.S., James G. Hamill pointed out a number of cases revealing a change on sovereign immunity concept. Hamill presented many cases ruled by Federal Courts in which the sovereign immunity was rejected. See HAMILL, James. The Changing Concept of Sovereign Immunity. 13 *Defense Law Journal* 13 (1964).

In Berger's opinion, equitable estoppel is based upon principles of morality and justice⁹⁵, and, according to him, the sovereign immunity doctrine, in the U.S., is in a current disfavor and offers uneasy support to doctrines that work hardship and injustice⁹⁶. By indirectly alluding to reliance, he argues⁹⁷ that a democratic and popular government should preserve confidence⁹⁸.

The sovereign/proprietary approach is also criticized. It poses a number of problems, as Thompson remarks, and in some decisions the Court has either left the issue open or rejected altogether any differentiation among types of federal activities. Even in *Merrill*, Justice Frankfurter dismissed the central concept that "Government is ... partly public or partly private, depending upon the governmental pedigree or the type of a particular activity or the manner in which the government conducts it."⁹⁹

In recent years, adds Thompson, some courts have moved away from the sovereign/proprietary limitation on the traditional rule and toward a more direct

⁹⁵ BERGER, *Estoppel*, at 680. The author quotes a early English decision: *Pawlett v. Attorney General*, Hardress *465, 469 (1667) (Baron Atkyns): "[I]t would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him."

⁹⁶ BERGER, *Estoppel*, at 683. THOMPSON, *Equitable Estoppel*, at 552, notes that "[e]stoppel is used with care and in the sound discretion of the court only when required 'to promote the ends of justice'".

⁹⁷ BERGER, *Estoppel*, at 684.

⁹⁸ As a matter of fact, there is no many reasons for keeping, nowadays, upholding the sovereign immunity doctrine, at least for those who based thoughts on English origin of it. If any time it was, after the 'Crown Proceedings Act' of 1947 was passed, there is, in England, under this statute, a provision that says the Crown should be liable for the torts of its servants (defined in the Act) as though is were "a private person of full age and capacity". The act provided also that the Crown should be liable for breach of the statutory duties imposed on the occupiers of property and on employers; and for breach of other statutory duties provided that the statute bound persons other than the Crown and its servants. See HARLOW, *Compensation and Government Torts*, specially at 17-35.

⁹⁹ THOMPSON, *Equitable Estoppel*, at 557. "Moreover – continuous Thompson – the distinction is sometimes difficult to apply. Even routine operational contracts for government agencies may be conditioned by a variety of special requirements imposed by Congress for the promotion of national political or social goals that add a 'sovereign' element to an otherwise purely commercial transaction. Finally, even if the distinction is accepted as no more than a convenient rule of thumb, its focus on categorization of federal action does not confront the basic constitutional, practical, and policy considerations that should govern the availability of estoppel in each case."

balancing test that looks to the circumstances of governmental action and private reliance in individual cases, regardless of conceptual categories. The author's example is *United States v. Lazy FC Ranch*, ruled in 1973, in which the Nine Circuit concluded that even when the conduct involved is 'sovereign' estoppel should be available "if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel."¹⁰⁰

b) The separation of powers theory – authorized and unauthorized conduct.

Another important alleged drawback for estopping the government is the separation of powers, as already noted¹⁰¹. This issue raises the question of 'authorized' or 'unauthorized' conduct, *id est*, court's estopping the government would, in some cases, allow an 'unauthorized' conduct of a agent, which has encroached upon his power. In a

¹⁰⁰ THOMPSON, *Equitable Estoppel*, at 557. But the author still criticizes the 'Lazy FC balancing inquiry' – which, in his view, has the advantage of permitting a more flexible examination of the specific facts of each case, in keeping with general principles of equity – by saying that, to some extent, the approach simply makes overt what courts did silently in distinguishing between sovereign and proprietary activities, and by arguing that even this approach does not provide any clearer guidance for determining what factors render an estoppel 'unduly damaging' to the public interest than the alternative techniques based on distinction between offensive and defensive use of estoppel, assertion and protection of title, substantive and formal rules, and affirmative misconduct and negligence.

¹⁰¹ In this respect, it's noteworthy the article by SCHWARTZ, Bernard. Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland. *65 Notre Dame Law Review* 587 (1990). The author, in a deep research about the early intentions of framers about the separation of powers principle (Schwartz notes, at 587-88: "Justice Holmes reminds us that the Montesquieu conception of the separation of powers doctrine was based upon a fiction: 'His England - the England of the threefold division of power into legislative, executive and judicial - was a fiction invented by him.' In Britain, with its virtual fusion of executive and legislative powers, the separation of powers was, despite Montesquieu, only a political theory."), and about Madison's concerning on it, reached the following conclusion: "The legislative history just summarized leads to the conclusion that a strict separation of powers, such as that in the Massachusetts Declaration of Rights of 1780, was deliberately rejected at the outset. Whatever separation of powers may be provided for, it does not compel a bright line separation between the departments, with each of them expressly prohibited from exercising any power appropriate to one of the others. That would have been the case under the Madison-proposed separation of powers amendment, modeled as it was after the Massachusetts provision. Its rejection indicates a more flexible approach to the separation of powers. Such indeed, we shall see, was the approach followed before the Burger Court decisions on the matter." (at 590).

nutshell, once agencies are creatures of legislature, and once they can act just under limits of legislation, there's no possibility of going beyond the framework conferred by the law: agent crossing the line is not a matter that can be validated by judiciary. "[T]he power to execute the laws starts and ends with the laws Congress has enacted", have said Justices Black and Frankfurter.¹⁰²

But how about cases where agent act within his authority and power? In this concern (when administrative action is *authorized* by Congress), Berger advocates the position that the doctrine of separation of powers has no play. "In such case the government should be and is estopped".¹⁰³ Fred Ansell has the same opinion:

"[s]eparation of powers analysis also makes clear that estoppel should be allowed where the official has acted in a capacity authorized by statute. An action that is properly authorized by the legislature cannot be seen as an encroachment by the executive branch upon the legislative branch. Thus, the separation of powers doctrine offers no obstacle to estopping the government in cases of authorized conduct."¹⁰⁴

Moreover, even concerning to the 'unauthorized' conduct – as happened in *Merrill* – Berger argues, by quoting the well known dissenting opinion by Justice Jackson, that (a federal insurance) agency should be held to "the same fundamental principles of fair dealing" that progressive states apply to private companies¹⁰⁵, and that "is well to remember that a 'constitution was made for the safety and protection of the people and not to be used as an instrument for their destruction' "¹⁰⁶.

¹⁰² Quoted by BERGER, *Estoppel*, at 686.

¹⁰³ BERGER, *Estoppel*, at 688.

¹⁰⁴ ANSELL, *Unauthorized Conduct*, at 1038.

¹⁰⁵ BERGER, *Estoppel*, at 685.

¹⁰⁶ BERGER, *Estoppel*, at 687, footnote 46, quoting *Kneeland v. Milwaukee*, 15 Wis. 454, 469-70 (1862) (Dixon, C.J.).

It's noteworthy Schwartz critic about *Merrill* Court's opinion, to the extent that his critic is related to authorized/unauthorized approach. In fact, remarks Schwartz, in *Merrill*, it was not a statute, but a regulation, which was violated by the advice given. Where it is the agency's own regulation, rather than a statute, which limits the authority of the officers concerned, that is no danger that the working of an estoppel will enable the agency to extend its own statutory authority. A regulation has the legal effect of a statute. But this does not mean that the regulation *is* a statute. The no-estoppel principle, continues Professor Schwartz, should be limited to cases where the acts performed in reliance are contrary to statute. In such cases, he concludes, the fact that government is involved is really not a determining factor, for no person can be estopped into a position contrary to the law¹⁰⁷.

c) Fiscal problem

Despite the capacity of an estoppel rule to affect the public fisc should not be underestimated, as Fred Ansell remembers, there are several reasons to doubt whether the public fisc rationale can explain the Court's estoppel decisions, once in many cases the plaintiff seeking estoppel would be statutorily entitled to the benefit but for the misconduct by a government official. *Schweiker* is a perfect example, once, remembering, the plaintiff would have been entitled to Social Security but for the official's negligence. In these cases, there is no danger of depleting the public fisc, upsetting the budget, or diverting funds from other sources¹⁰⁸.

¹⁰⁷ SCHWARTZ, *Administrative Law*, at 153.

¹⁰⁸ ANSELL, *Unauthorized Conduct*, at 1034.

In addition, estoppel presents little danger of bankrupting the public treasury, considered the vast resources that the government possesses today. Insofar as the no estoppel rule protects the public fisc by reducing the risk that the government will suffer financial losses from the misrepresentations of its agents, it does so at a high cost – innocent litigants are forced to bear that risk¹⁰⁹.

d) General considerations.

Schwartz criticizes *Merrill* approach and other similar decisions. The reasoning presented in cases such as *Moffat* and *Heckler*, says Schwartz, “has all the beauty of logic and all the ugliness of injustice.” And he quotes these words: “Something is wrong when citizen can recover for a dented fender caused by a postal employee at the wheel of a government truck and one cannot when he is booby-trapped by an Employee of Federal Crop Insurance.”¹¹⁰

According to Schwartz, *Hansen*, like *Merrill* itself, represents a backward step in basic thrust of American administrative law – to subject government to the same legal rules that bind private individuals. One can do no better, he notes, than quote the words of the Ninth Circuit in a case involving estoppel from erroneous advice: “To say to these appellants, ‘The joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.”¹¹¹ In these cases, concludes Schwartz, the public interest behind the no-estoppel rule should “be outweighed by the countervailing interest of citizens in

¹⁰⁹ ANSELL, *Unauthorized Conduct*, at 1035-36.

¹¹⁰ *McFarlin v. Federal Crop. Ins. Corp.*, 438 F.2d at 1237, quoted by SCHWARTZ, *Administrative Law*, at 152.

¹¹¹ *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970), quoted by SCHWARTZ, *Administrative Law*, at 154.

some minimum standard of decency, honor, and reliability in their dealings with their Government.”¹¹²

One has already quoted several reasons for extending the doctrine of estoppel against the government: (1) often other public policies would be implemented, (2) individuals will be given notice so that institutions can function according to the legislative purposes conceived from them, (3) the extension would promote the citizens conception that he is getting a ‘fair deal’ from the government, (4) more losses because of governmental mistake would be prevented, (5) those losses that do occur will be spread among a large number of individuals thus generally causing the smallest amount of personal and social dislocation, and (6) the costs to the government and to private parties of doing business together will be minimized¹¹³.

C) EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT –
PROPOSALS OF SOLUTION BY THE AMERICAN DOCTRINE AND RELATIONS
WITH THE GOOD FAITH RELIANCE.

As already noted, the Supreme Court has never held that equitable estoppel may lie against the government. On the other hand, the Court has been refused to lay down a flat rule that the equitable estoppel may not in any circumstances be asserted against the government. As noted by Conway, the absence of a clear guideline of the circumstances under which estoppel against the government may be appropriate has

¹¹² *Hecker v. Community Health Servs.*, 467 U.S. at 61, quoted by SCHWARTZ, *Administrative Law*, at 154.

¹¹³ Comment NEVER TRUST A BUROCRAT, at 406.

led to confusion in lower courts, which has been using different approaches to circumvent the strict ‘no-estoppel’ rule¹¹⁴.

Scholars have been proposing methods and conceptual frameworks to identify circumstances where equitable estoppel would be able to be applied against the government.

1. Newman’s good-faith-reliance legislative proposal of 1953, and other statutes.

In 1953, Franc C. Newman and other specialists in administrative law drafted a legislative proposal, which had the following text:

“(1) No person shall be liable to the United States Government for damages or penalties because of conduct not in conformity with any of the laws described in the next section, if he establishes that his conduct was in conformity with and in good faith reliance on a rule, order, opinion, or other written statement of an agency responsible for administering that law, and if such statement was promulgated to guide him or the class of persons to which he belonged. The statement similarly shall absolve him from liability to a third person for penalty damages. It shall absolve him from liability to a third person for actual damages only if he also establishes (A) that his conduct occurred after the third person had notice of his intent to rely on the statement, and (B) that the third person could reasonable have been expected to seek administrative or judicial review of the statement. If the statement relied on was later superseded, revoked, or invalidated, or modified so that his conduct was no longer in conformity with it, a person is excused only for the period prior to the time he should have known of and thus complied with the change.

“(2) The following laws are included: [to be inserted].

¹¹⁴ CONWAY, *Equitable estoppel*, at 707.

“(3) Consistently with the purposes of this Act, agencies may by rule identify the classes of officials who are authorized to issue written statements that may be relied on.

“(4) This Act may be cited as the ‘Good Faith Reliance Act.’ ”¹¹⁵

Congress did not, lamented Schwartz, take action, and interest in the matter has died down.¹¹⁶ In Newman’s considerations, the proposed statute would provide something more than sympathy for people who will in the future be misled¹¹⁷. And, as Schwartz notes, if men must turn square corners when they deal with government, as *Merrill* asserted, the government should be held to a like standard of rectangular rectitude when dealing with its citizens¹¹⁸.

On the other hand, there are some statutes in which, despite its specificity to addressed themes, it’s possible to see an implication of the good-faith reliance approach. In fact, the Portal-to-Portal Act of 1947¹¹⁹ provides that employers are not to

¹¹⁵ NEWMAN, *Proposals*, at 389-90. The author discusses what kind of problems have arisen in drafting this statute, which were, in his own words: “(1) If official advice is wrong, should the error be correctable? (2) What kind of advice should protect a person? (3) What should be demanded from him who seeks protection? (4) From what and whom should he be protected? (5) Which laws should be included?” (at 376).

¹¹⁶ SCHWARTZ, *Administrative Law*, at 157.

¹¹⁷ NEWMAN, *Proposals*, at 389.

¹¹⁸ SCHWARTZ, *Administrative Law*, at 157. It seems fitting here quoting Berger’s words, in the conclusion of his well known article: “The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. As such, it needs to be jealousy scrutinized at every step. Confidence in the fairness of the government cements our social institutions. No pinch-penny enrichment of the government can compensate for an impairment of that confidence, for the affront to morals and justice involved is the repudiation of a governmental representation.” – BERGER, *Estoppel*, at 707.

¹¹⁹ See generally, about this regard, TYSON, WILLIAM S. The Good Faith Clauses of the Portal-To-Portal act: and Attempt to Introduce Certainty in the Field of Administrative Law. *22 Temple Law Quarterly 1 (1948)* (hereinafter, *The Good Faith Clauses*). The author points out the ‘history’ of the good-faith clauses in the U.S. legislation; he states that there were good faith provisions in the Securities Act of 1933, the Securities Exchange Act of 1934 and the Public Utility Holding Company Act of 1935, as well as the substantially identical provision which was adopted by Senate in 1937 in the original version of the Fair Labor Standards Act but which was later rejected by the Conference Committee considering that bill (at 3-4). Nevertheless, he said, “The good faith clauses contained in the Portal Act, unlike the earlier ones, are in no way related to a general grant of rule-making power since the administrator has never been given this

be held liable for failure to pay the wages requires by specified statutes if the failure was based upon good-faith reliance upon rulings of designated Labor Department officials¹²⁰.

Even before this statute, an Amendment made in 1934 to Section 19 of the Securities Act of 1933 exempted from legal liability the citizen who has in good-faith acted in reliance on the Commission's Interpretations of the Act, even though the Commission may later alter its interpretation or some reviewing body may not uphold it¹²¹.

In this respect, it's noteworthy that other specific provisions enacted by Congress can be quoted: Truth-in-Lending Act, 15 U.S.C. § 1640(f) (1976); Color of Title Act, 43 U.S.C. § 1068 (1976); Model Penal Code § 2.04 (Proposed Official Draft 1962)¹²².

2. The court and scholars' framework. Affirmative misconduct and the four elements allegedly required.

Despite the Supreme Court has never held explicitly government could never be estopped, the Court seems to have suggested, in 1973, in *Immigration &*

power. Their uniqueness, however, is not confined to this. More unprecedented perhaps is the fact that the Portal Act clauses are not limited to cases of reliance upon rules, regulation or orders, but extend to administrative rulings, approvals, interpretations, practices and enforcement policies." (at 4).

¹²⁰ See SCHWARTZ, *Administrative Law*, at 156. The author also notes that some agencies themselves have provided for similar inroads upon 'no estoppel against the government' doctrine. "Thus – stresses Schwartz – the Office of Price Administration, set up to administer price control during the World War II, provided by regulation for nonliability where a violation of the law was based upon good faith reliance given by agency officials."

¹²¹ The Amendment has deserved the compliments by COOK, Walter Wheeler. Certainty in the Construction of the Law. *21 American Bar Association Journal 19 (1935)*. Cook noted that the significance of the Amendment would appear "when we recall the dilemma which normally confronts the citizen when faced with new and often complex legislation which imposes upon him new legal duties: he must at his peril the frequently ambiguous language of the new law, perhaps to be told later by some reviewing body, usually a court, that he has misinterpreted the law and thereby incurred a burdensome liability." (at 19).

¹²² I borrow the examples from BRAUNSTEIN, *In Defense*, at 2, footnote 6.

Naturalization Serv. V. Hibi, 414 U.S. 5 (1973) that estoppel might be permissible where government agents engaged in “affirmative misconduct”¹²³. But the point is that Court’s never presented the requirements to clarify what the “misconduct” means. As noted by Deborah Walrath in 1985: “The Supreme Court has not yet explained the relevance of affirmative misconduct as a requirement for imposing equitable estoppel against the government.”¹²⁴ This situation seems to persist until today, but it didn’t prevent lower courts of having engaged in some undefined degree of “affirmative misconduct”. And it is worthy to say that, notwithstanding this effort, the problem for courts to establish guidelines for determining which types of affirmative misconduct permit equitable estoppel against the government also persists¹²⁵.

It is also clear and well known the willingness of many Federal to depart from the no-estoppel rule¹²⁶, and one can observe that scholars have been enumerating four elements required for estopping the government¹²⁷. These elements were quoted in a number of decisions:

“(1) The party to be estopped (Government) must know the facts.

“(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended.

“(3) The latter must be ignorant of the true facts; and

¹²³ Quoted by THOMPSON, *Equitable Estoppel*, at 555 and footnote 36.

¹²⁴ WALRATH, *Recent Developments*, at 196. As noted by THOMPSON, *Equitable Estoppel*, at 560: “the Supreme Court affirmative misconduct suggestion must be seen as a modest step toward a liberalized rule – an attempt to provide a limited measure of relief in exceptionally sensitive cases without exposing the government to open-ended liability for merely negligent or improper actions and omissions by its agents.”

¹²⁵ See generally WALRATH, *Recent Developments*, at 196-97.

¹²⁶ See generally EISEN, *Schweiker v. Hansen*, at 609, quoting many decisions at 616, footnotes 46-47.

¹²⁷ See generally PITOU, *Thesis*, at 106, in the conclusion of his work, where he reaches the same “four basic elements”, which “to establish a prima facie case of equitable estoppel against the United States, a party must first prove”.

“(4) He must rely on the former’s conduct to his injury.”¹²⁸

It’s noteworthy that this requirements are totally similar to those classic elements that must be present in estoppel applied in private law, as was noted by Bigelow at the end of 19th century: 1. There must have been a false representation or a concealment of material facts; 2. The representation must have been made with knowledge, actual or virtual, of the facts; 3. The party to whom it was made must have been ignorant, actually and permissibly, of the truth of the matter; 4. It must have been made with the intention, actual or virtual, that the other party should act upon it; 5. The other party must have been induced to act upon it¹²⁹.

Also scholars have been offering guidelines for a theory of estoppel against the government. Once it’s impossible, within the limits of this paper, to quote all the proposals, I’ll remember some of them, in order to give a broad idea about the tendency of the doctrine.

Thompson says estoppel should be allowed when government agent, acting within the scope of his authority, has induced reasonable detrimental *reliance* by a private party. And, when authority is lacking – he continuous – courts must look more

¹²⁸ *United States v. Ruby Co.*, 588 F.2d 697, 702 (9th Cir. 1978). Quoted from EISEN, *Schweiker v. Hansen*, at 616, footnote 47. THOMPSON, *Equitable Estoppel*, at 559, footnote 55, quotes an earlier decision: *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir. 1960).

¹²⁹ BIGELLOW, *A treatise in the Law of Estoppel*, at 569-70. The similitude clearly indicates that the idea is to apply to government the same rules applied to private parties.

closely to the implications of allowing estoppel for the implementation of congressional policies and for the separation of governmental powers¹³⁰.

Despite not having said it directly, Schwartz's proposal seems to be quite simple: "The no-estoppel principle should be limited to cases where the acts performed in reliance are contrary to statute. In such cases the fact that the government is involved is really not a determining factor, for no person can be estopped into a position contrary to a law."¹³¹

John F. Conway's theory is more complex. He starts from the following structure: there would be "two different uses of equitable estoppel": (1) *substantive* estoppel (when the government is estopped from asserting a claim or defense that an individual is not substantively entitled to a benefit or service by statute. Here, claimants argue that their reliance on the government's misrepresentation justifies receipt of benefits notwithstanding that the misrepresentation is in no way the cause of their disentitlement. *Merrill* would be a typical case), and (2) *procedural* estoppel (when the government is estopped from asserting that a claimant is precluded from receiving a service or benefit because he failed to follow the required procedure, and he is

¹³⁰ THOMPSON, *Equitable Estoppel*, at 571. He stresses: "In some cases, most often involving contractual disputes of administrative action, the constitutional and policy obstacles to the use of estoppel may be relatively minor, in others, such as contests over title to federal lands or criminal prosecutions, the obstacles must be formidable." And he concludes: "Estoppel cannot be permitted to become an easy substitute for application of fundamental and carefully elaborated principles of due process. But where these principles do not provide solutions to problems involving threats of serious injustice, and where other remedies are powerless to prevent a wrong, there is a legitimate place for the careful and disciplined use of estoppel against the government."

¹³¹ SCHWARTZ, *Administrative Law*, at 153. RAVEN-HANSEN, *Regulatory Estoppel*, at 40-41, notes that this is a *statute/rule distinction*, and that some courts and academicians have made it, quoting a Seventh Circuit decision – *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982) – where was recognized the validity of the objection of separation of powers in cases where using estoppel to compel "adherence to government misinformation threatens to contravene an explicit statutory requirement".

substantively entitled to the benefits. The claimant would have received the benefits but for the misrepresentation); and there also would be “three different types of government activity”: (1) *Proprietary in fact* (when the government is providing precisely the same goods or services as are simultaneously provided by the private sector and is competing with private business for customers), (2) *Proprietary in form* (in which the type of business is ordinarily conducted by private corporations, but, because of certain economic realities, the particular goods or services the government provides are not simultaneously provided by the private sector; for instance: agencies providing flood or crop insurance), and (3) *Sovereign activity* (when the activity is unique, and without analogy in the private sector. Examples: social security administration, tax collection, imposition of import duties, granting citizenship and permits, and purchasing munitions¹³²).

Conway’s proposal is, shortly speaking, the following, and rests on two ideas: First, the more proprietary the government activity, the more equitable estoppel should be favored. Second, the more procedural the agent’s misrepresentation, the more equitable estoppel should be favored. Thus – notes the author – when the government activity is proprietary in fact, both substantive and procedural equitable estoppel should lie; when the government activity is proprietary in form, only procedural equitable estoppel should lie; when the government activity in issue is purely sovereign, neither procedural nor substantive equitable estoppel should lie. This framework – he concludes

¹³² See CONWAY, *Equitable estoppel*, at 717-722.

– “synthesizes the current state of the law on equitable estoppel of the federal government.”¹³³

D) PROMISSORY ESTOPPEL and REGULATORY ESTOPPEL

Writing about pre-contractual duties, Professor Nili Cohen notes that English law imposes some limitation of freedom of action in the bargaining process, one of them being the rule of promissory estoppel, which is, he says, a “hybrid creature”, comprising elements of contract (promise) and tort (reliance)¹³⁴.

In Australia, where the promissory estoppel has been more developed¹³⁵, Andrew Robertson remarks that the relations between estoppel, contract and tort law show that the law of obligations has not been neatly constructed¹³⁶, suggesting that the Australian doctrine has not reached a consensus about the issue.

In the U.S., Professor Eric Mills Holmes, writing in 1996, says, “promissory estoppel is supremely misunderstood.”¹³⁷

I cannot clear it up. It’s, however, noteworthy that, to some extent, promissory estoppel has been treated in common law under the lights of reliance. This is the point I have to stress. In Continental law, principle of good faith, addressed below, as

¹³³ CONWAY, *Equitable estoppel*, at 722.

¹³⁴ COHEN, Nili. Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate. In: *Good Faith and Fault in Contract Law*. Oxford: Clarendon Press, 1995 (hereinafter *Pre-contractual Duties*), at 29.

¹³⁵ COHEN, *Pre-contractual Duties*, at 29.

¹³⁶ ROBERTSON, *Situating Equitable Estoppel*, at 41.

¹³⁷ HOLMES, Eric Mills. The Four Phases of Promissory Estoppel. *20 Seattle University Law Review* 45 (1996), at 45.

well as common law doctrine of promissory estoppel, brings out the same idea of reliance, which seems to be the touchstone of the issue¹³⁸.

So far I have just described estoppel as a doctrine that is, or is not, able to be applied in cases where a previous conduct of someone may provoke an expectation in another, who thinks to be authorized acting in relying on that previous attitude.

There is, however, at least another type of estoppel which is also noteworthy and that can be focused: the regulatory estoppel. In this respect, the framework presented here is entirely taken from Professor Peter Raven-Hansen.

The comparison between equitable estoppel and regulatory estoppel is inevitable. While equitable estoppel – says Raven-Hansen – prevents of party from breaking its word under certain circumstances, regulatory estoppel prevents an agency from acting when it has broken his own law¹³⁹.

Raven-Hansen notes three principles of regulatory estoppel: the oldest one is the principle that agencies must follow their own rules, mostly because these rules have “the force and effect of law”¹⁴⁰. The second is that this “force and effect” theory is inapplicable when agency has violated its own nonlegislative laws¹⁴¹, and the third is that due process guaranteed by the fifth amendments may also require an agency to follow its

¹³⁸ But *see* BARNETT, Randy E. & BECKER, Mary E. Becker. Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations. *15 Hofstra Law Review* 443 (1987). “Were the issues properly focused, it would be obvious that reliance cannot be the touchstone of promissory estoppel liability. Although reliance often increases cost of underenforcement, a formal limit on liability is of little value if it holds only in the absence of reliance. Similarly, although there is no need for a remedy for misrepresentation in the absence of reliance, reliance alone cannot determine the standard of liability for misrepresentation.” (at 496-497)

¹³⁹ RAVEN-HANSEN, *Regulatory Estoppel*, at 28.

¹⁴⁰ RAVEN-HANSEN, *Regulatory Estoppel*, at 5.

¹⁴¹ RAVEN-HANSEN, *Regulatory Estoppel*, at 27.

own law¹⁴². These three approaches of regulatory estoppel operate in different spheres of agency law, but they have a common analytic core: under each theory, whether government will be estopped from acting when it has broken its own law depends on an equitable balancing of private and public interests, and this balancing is an *ad hoc* solution, which differs from case to case¹⁴³.

PART 3: ESTOPPEL: AN APPROACH ACCORDING TO BRAZILIAN CONSTITUTIONAL PRINCIPLE OF “ADMINISTRATIVE MORALITY”.

Up to here I have just broadly described what it seems to me as being the staples of common law concerning to the estoppel doctrine. The two previous descriptive parts, however, are suitable for permitting a better understanding about the article 37 of the Brazilian’s Constitution of 1988, once again noted: “The direct or indirect public administration of any of the powers of the Union, the states, the Federal District and the municipalities, as well as their foundations, shall obey the principles of lawfulness, impersonality, *morality*, publicity, efficiency and also the following: ...” Among the others, the only principle that is important here is the principle of “morality”, which allows, in my understanding, the estoppel against the government in the Brazilian administrative law.

¹⁴² RAVEN-HANSEN, *Regulatory Estoppel*, at 56. Each of these issues would certainly raise a vast field of discussion, and topics like separation of powers, misconduct, or “quantity” of reliance, among others, could be frankly discussed as much as they were in equitable estoppel subject. It is not, however, the purpose of this article to do so.

¹⁴³ RAVEN-HANSEN, *Regulatory Estoppel*, at 69-70. To some extent, equitable estoppel and regulatory estoppel merge. Professor Raven-Hansen starts from equitable estoppel to construct his purpose to regulatory estoppel. The touchstone of the subject is to balance the two interests that are at stake: the private, which is a reliance in having the government comply with its own law; and the public, which is an enforcement interest in the legislative policies that would be affected by the estoppel, sometimes reinforced by practical considerations of administrative efficiency.

In this regard, it's important to point out, even though briefly, some distinctions between American and Brazilian administrative law. In order to make reading easier and more understandable, I'll take advantage of the path I followed in the latter part II of this paper: I'll put the arguments presented for and against the estoppel against the government in a Brazilian constitutional approach.

A) THE COMMON REASONS ALLEGED, AND THE RELATIVE USELESSNESS IN THE BRAZILIAN ADMINISTRATIVE LAW SYSTEM.

As it was already noted, Brazilian administrative law had its most important influence by the "French system", which means that its concern is much broader than it is in the U.S. administrative law system¹⁴⁴.

Unlike in the U.S., in the continental law there's no place for the government immunity doctrine, which is streaked down by the article 37, § 6, of the Brazilian Constitution, which establishes that "Public legal entities and private legal entities rendering public services shall be liable for damages that any of their agents, acting as such, cause to third parties, ensuring the right of recourse against the liable agent in cases of malice or fault."¹⁴⁵

¹⁴⁴ The idea of 'administrative legality' (or lawfulness) is the major staple of Brazilian administrative law. A useful comparison between civil and common law, even though considering just French and England systems, was made by HARLOW, *Compensation and Government Torts*, at 51: "The idea of administrative legality is not one in which English administrative layers have shown much interest, though in reality it lies in the heart of administrative law." One doesn't see, in American administrative law doctrine, as one must necessarily see in all French – and Brazilian, by consequence – books, a concern about the idea (or principle) of administrative legality.

¹⁴⁵ This article establishes the main principles to tort liability in the Brazilian legal system. Despite the issue is not that clear, still existing many questions at stake, there's no doubt that some principles are already common sense among scholars. In the U.S., DAVIS & PIERCE, *III Treatise*, at 201, tell us about the unclearness of this problem in America: "Tort liability of Government and Their Employees is a field far too large for comprehensive treatment in a treatise on Administrative law. The field is a complicated

Maybe because of this clear constitutional rule, both the separation of powers¹⁴⁶ and the fiscal problems have never been raised. Despite this, the issue of estoppel against the government has never been seriously raised in Brazilian administrative doctrine. It can nevertheless be raised from the good-faith reliance doctrine.

1. Good-Faith doctrine in the continental law.

There's not enough space here to attempt an exhaustive explanation of the good-faith doctrine. It would probably take a treatise to be explained¹⁴⁷. Nevertheless, in order to understand the articles' goal, it's important to focus on the well-known distinction usually made in some continental law countries between *subjective* and *objective* good-faith¹⁴⁸. Broadly speaking, it could be said that subjective good-faith

amalgam of federal statutory law, judicial interpretations of those statutes, constitutional law, state tort law, federalism, administrative law, conflicts of law, sovereign immunity, the Eleventh Amendment's limitation on federal judicial power to entertain actions against States, the Fourteenth Amendment's grant of power to enforce that Amendment's substantive prohibitions, and the scope of immunity of judicial, legislative, administrative, and enforcement personnel."

¹⁴⁶ The separation of powers principle, in Brazil, is expressed in the article 2 of the Constitution: "The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the Powers of the Union." One can clearly see that the express words 'harmonious among themselves' may be able to avoid some discussions concerning about the issue.

¹⁴⁷ The best book in this field in portuguese is the classic thesis written by Professor MENEZES CORDEIRO, António Manuel da Rocha e. *Da Boa Fé no Direito Civil*. Coimbra: Livraria Almedina, 1997. The author has made a deep research in roman sources, as well as in all continental law countries. In Brazil, the best book about the issue was recently published: MARTINS-COSTA, Judith. *A Boa-Fé no Direito Privado*. São Paulo: RT, 2000.

¹⁴⁸ This distinction is best understandable if one pay attention on German law, which has even two words to explain the good-faith phenomena: *Treu und Glauben* (objective) e *guter Glauben* (subjective). In the U.S. administrative law, although one can find a mention to a type of subjective-objective distinction in TYSON'S article, *The Good Faith Clauses*, at 7 ("this phrase 'good faith' can, of course, mean a subjective state of mind in which honesty of purpose rather than reasonableness of conclusion will be the deciding factor. On the other hand, 'good faith' can be used in its objective sense denoting not only subjective honesty but also reasonable action."), the distinction is not common, and the scholars don't mention it frequently. In the courts, as we can see by taking a look on the current decisions, the most common usage

would have its opposite in the bad faith, which could be defined as a psychological state where a man acts under knowledge, or in a potential knowledge, his action is able to harm another. He acts without honesty, in a bad purpose, and the classical example is the good faith in the possession of land sphere of law. By contrast, objective good-faith is related to objective reliance that one party's action may cause in another party, which is legitimated to expect the consequences of this act¹⁴⁹.

Objective good-faith is what is important to our goal, because reliance fits exactly in it. Hereinafter, by 'good-faith reliance' I will mean what the vast part of continental doctrine would treat by 'objective good-faith'.

of good-faith doctrine is related to what in continental law one would call 'subjective' good-faith, but it is not to say that common law ignores the objective/subjective distinction. *See*, to confirm this assertion, the vast majority of cases cited in WORDS AND PHRASES: PERMANENT EDITION. Vol. 18A (Gone-Gyrotiller). St. Paul: Minn. West Publishing Co., at 83-130. It's also important to note the recent teaching by Roger Brownsword, saying that, in England, lawyers have long been familiar with the concept of *subjective* good-faith in the sense of honesty in fact or in clear conscience, but not with the *objective* idea of the good-faith, in the sense of an overriding (and objective) requirement for fair dealing, which has not been part of the lexicon of English contract law, at least for most of the twentieth century. But from the late 1980s onwards, says Brownsword, the picture has changed quite dramatically, and the concept of (objective) good-faith is no longer the unfamiliar idea it once was, although it would be wrong to assume that English lawyers now feel at ease with the idea of general doctrine of good faith. – BROWNSWORD, Roger. Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law. *In Good Faith in Contract: Concept and Context*. Edited by Roger Brownsword, Norma J. Hird and Geraint Howells. Aldershot: Dartmouth Publishing Company Limited, Brookfield: Ashgate Publishing Company, 1999 (hereinafter, *The Reception of Good Faith*), at 13-15.

¹⁴⁹ This is, of course, a rude resume. And it wouldn't be strange if one offered, in some extent, a disagreement to this distinction. In fact, the conclusion proposed in 1992 in Lousanne, Switzerland, during a meeting called 'Journée Louisianaises', pointed out that the *objective-subjective* distinction should be viewed more accurately, once the two methods influence each other mutually. *See LA BONNE FOI (journée louisianaises)*, Tome XLIII, Paris: Litec, 1992, at 13. In Italy, one author recently purposed a unitary treatment of the 'two good-faith', objective and subjective: *see* MANGANARO, Francesco. *Principio di Buona Fede e Attività Delle Amministrazioni Pubbliche*. Napoli: Edizioni Scientifiche Italiane, 1995 (hereinafter, *Principio*), at 37, quoting Allegretti, Bruns, and Bonfante. But I have to note that even so the subjective/objective distinction is at least didactically – if not substantially – useful.

a) Good-faith reliance in private law.

Good-faith reliance – or good-faith in its objective sense – unlike the *bona fide*, which has appeared since earlier times in law history¹⁵⁰, is a issue that has existed for no more than one century. It appeared in law through the German Civil Code of 1900 – Bürgerliches Gesetzbuch [hereinafter BGB] – which refers to good-faith reliance (Treu und Glauben) five times. The best know paragraphs are 242 and 157¹⁵¹.

Even though the role that these norms play nowadays in the legal system in Germany – and in fact in the continental legal world – is tremendous, it didn't come at once. The evolution of the good-faith reliance theory and its overtones have been growing slowly, and result from a strong effort taken by both doctrine and courts.

In fact, the framers of BGB didn't have in mind at all the enormous consequences of the rules they were posing¹⁵², and this is a common sense among scholars. As emphasized by Udo Reifner, the § 242 has neither in the deliberations for the BGB nor in the leading casebooks of the beginning of the 20th century played any significant role¹⁵³. Even more, this paragraph had not been part of the first draft of the

¹⁵⁰ See O'CONNOR, J.F. *Good Faith in International Law*. Brookfield: Dartmouth, 1991, at 5-13.

¹⁵¹ Art. 242: "The debtor is obliged to fulfill his or her obligation in accordance with the requirement of fidelity and good faith (Treu und Glauben) with respect to general habits."

Art. 157: "Contracts have to be interpreted in accordance with fidelity and good faith (Treu und Glauben) with respect to general habits."

¹⁵² See MENEZES CORDEIRO, *Da Boa Fé no Direito Civil*, at 331, when the author notes that it is still growing the influence of the good-faith reliance. See also WIEACKER, Franz. *El principio general de la buena fe*. 2^a ed., Madrid: Editorial Civitas, 1986, at 49.

¹⁵³ REIFNER, Udo. Good Faith: Interpretation or Limitation of Contracts? The Power of German Judges in Financial Services Law. *In Good Faith in Contract: Concept and Context*. Edited by Roger Brownsword, Norma J. Hird and Geraint Howells. Aldershot: Dartmouth Publishing Company Limited, Brookfield: Ashgate Publishing Company, 1999 (hereinafter, *Good Faith*), at 286.

Civil Code¹⁵⁴. Nonetheless, to the extent that time was passing, judges and scholars used the § 242 to, by lifting it up to a “General Principle of Law”, close some gaps in law. This conclusion becomes easy when one pays attention to a number of doctrines which, ones more directly than others, were developed from the paragraphs 242 and 157 cited: the positive breach of contract (positive Forderungsverletzung), *culpa in contrahendo*, *exceptio doli*, *venire contra factum proprium*, *supressio*, *surrectio*, *tu quoque* and so on¹⁵⁵.

All these themes belong, however, to the private law, and, by contrast, they don’t appear often in public law. This classic public/private distinction, much more common in continental than in common law, must be briefly analyzed, once it has been being, as we will see, the major objection for applying the estoppel doctrine (at least indirectly, in the U. S.) – or the good faith reliance (directly) – against the government.

b) Public and Private law distinction

The distinction about public and private law is more familiar to continental than it is to common lawyers. “When in England we talk – remarks Carol Harlow – about ‘public law’, we all know roughly what we are talking about and this is normally enough for us”¹⁵⁶. In continental law, by contrast, there always was such a distinction, which was more historical in the past, and became more scientific with the

¹⁵⁴ REIFNER, *Good Faith*, at 275.

¹⁵⁵ See MENEZES CORDEIRO, *Da Boa Fé no Direito Civil*, Chapter II of the ‘Institucional Part’ of his book, at 527-1.114. To analyze the classic ‘three functions’ of good-faith reliance, see MARTINS-COSTA, *A Boa-Fé no Direito Privado*, at 427-72, and also the classic of WIEACKER, *El principio general de la buena fe*, at 49-85.

¹⁵⁶ HARLOW, Carol. “Public” and “Private” Law: Definition without distinction. *43 Modern Law Review* 241 (1980), at 241.

modern state, created by the revolutions of the 18th century. Before the modern state was created, one could not find a public law system of rules, as Norberto Bobbio points out¹⁵⁷.

Nevertheless, this public/private approach, although existing, was never clear¹⁵⁸. What the Roman law used to consider as public law is by no means what the continental law considers it today. Moreover, nowadays, despite a formal distinction, it is still nebulous, despite some criteria have yet been being presented. A sufficient framework could be said as the following: private law would be concerned to private interests, would take care of the relations between individuals (equal parts), and would promote a ‘commutative justice’; by contrast, public law would concern to the ‘public interest’, to the relations between unequal parts (Estate among them), and would be able to promote a ‘distributive justice’.

Udo Reifner tells us briefly about this dualism in civil law countries, wherein – he notes – there are two totally separated legal orders with different principles, different courts and different professional habits: the private law and the public law (‘droit public’, ‘öffentliches Recht’, better translated, says the author, as ‘administrative’ law). “While administrative law is on the continent derived from the feudal system of orders wherein people have to ‘obey’, private law is the law of consent between equal persons.”¹⁵⁹

¹⁵⁷ BOBBIO, Norberto. *Estado, Governo, Sociedade: para uma teoria geral da política*. 4^a ed., São Paulo: Paz e Terra, 1992, at 22.

¹⁵⁸ In the U. S. doctrine, PIERCE, & SHAPIRO & VERKUIL, *Administrative Law and Process*, at 1, don’t miss the point: “The distinction between public and private law are not precise.”

¹⁵⁹ REIFNER, *Good Faith*, at 278.

As a matter of fact, among many criteria offered by scholars to solve the question, no one satisfies the real question, which is frequently missed: what is the utility of such a distinction?

Maybe the whole point would be the called ‘public interest’¹⁶⁰, which would appear stronger in public than it does in private law¹⁶¹, and would be able to overthrow and replace – this is the real touchstone – the force of autonomy of will, which has been being the main characteristic of private law, at least until the end of 19th century. Once the ‘public interest’ is present, the lawmaker (either being administrator or judge) should consider it as the major goal to pursue.

It is not, however, clear what exactly the ‘public interest’ means. Moreover, there is not a necessary opposite contrast between autonomy of will and public interest. In addition, private law moves itself little by little to what we could call ‘public interest’. The autonomy of will is a philosophic principal more related to the liberal state of 18th and 19th century, where the role of the state was much more narrow than it is nowadays. In short, in the 20th century, the ‘laissez-faire’ State doctrine has give ground to the ‘faire-elle-même’ State doctrine¹⁶².

¹⁶⁰ There is a common sense in the continental law that the ‘public interest’ is one of the staples of public law. Héctor Jorge Escola, a well know Argentinean Professor, wrote a book – maybe over evaluating the issue – in which he proposes the ‘public interest’ should become the center of administrative law. See ESCOLA, Héctor Jorge. *Él Interés Público como fundamento del Derecho Administrativo*. Buenos Aires: Depalma, 1989.

¹⁶¹ It seems to be a touchstone of the distinction. In the U.S., Professors PIERCE, & SHAPIRO & VERKUIL, *Administrative Law and Process*, at 3, focus on this point: “the public law, which generally is uncodified, exists to promote the ‘public interest’ ”.

¹⁶² I borrow the metaphor from Jorge Depois e Marie-José Guédon, quoted by ESTORNINHO, Maria João. *A Fuga para o Direito Privado – Contributo para o estudo da actividade de direito privado da Administração Pública*. Coimbra: Livraria Almedina 1999, at 36. It leads to a thought that the whole point would lie on the role of State in the modern society. Broadly speaking, the more the State acts in the relations between citizens, the more “public” the law would be. But this discussion would lead us beyond

As Ludwig Raiser explained in 1971, it's no longer correct to sustain the absolute independence of private law to the public law principles¹⁶³. They are in fact interconnected, existing interlaced spheres where one could find, depending on a given case, more weight to public than to private principles, or *vice versa*. Udo Reifner has stressed the same point by saying that the differences between public and private law are fading away presently with the development of more responsive administration as well as privatization on one hand producing a kind of consensus administrative law while in the other hand civil law incorporates more and more elements of public concern¹⁶⁴.

The relation between this approach and the estoppel against the Government is the following: good-faith reliance, while typical private law institute, can provoke in some – as in fact it did¹⁶⁵ – as many objections to be applied as equitable estoppel doctrine could (and in fact as it still can) have or has been having. This aversion to good-faith doctrine in public law is still present in Belgium, where, for instance, the Administrative law is completely dominated by the principle of legality, the notion of

our specific goal. What seems to me important is to point out that the major point would be consider neither which 'size' of State we should have, nor in what consists the State, but rather exactly what should be considered as being essentially belonged to the State.

¹⁶³ RAISER, Ludwig. *Il Futuro del Diritto Privato*. In: *IL COMPITO del Diritto Privato*. Milano: Giuffrè, 1990, at 223. In English Law, Carol Harlow criticizes those who have been purposing a distinction in public/private law. There's no better way than quoting his words: "The creators of the 'public/private' classification may feel that they are building bridges across the Channel. If so, this is surprising, as on other occasions, the same men have warned us to beware of harmonization for harmonization's sake. It is also unwise, because it may lead us to adopt an outmoded distinction at the very moment when our continental neighbors are questioning its validity and usefulness." – HARLOW, "Public" and "Private" Law: Definition without distinction, at 264-65.

¹⁶⁴ REIFNER, *Good Faith*, at 278.

¹⁶⁵ In the beginning of the 20th century, a great part of the both Italian and German doctrine considered the good-faith a irrelevant subject to public law. See MANGANARO, *Principio*, introduction. MENEZES CORDEIRO states that, against the usefulness of good-faith in public law, it would be considered the liberal view of non-intervention of State in the 'private life'. See MENEZES CORDEIRO, *Da Boa Fé no Direito Civil*, at 383.

good-faith having no role to play¹⁶⁶. In Belgium, an administrative act is legal or illegal, and the administrative judge, says Dominique Lagasse, doesn't overrule 'moral faults' or abuses of power¹⁶⁷.

In fact, in Belgium, the main objection for using good-faith doctrine in public law starts from the already noted distinction between private and administrative law: while the former is a law that aims to regulate relations between equal parties (and where the autonomy of will is the main principle), in the latter, the liberty of action doesn't mean a principle, once it can be exercised just by aiming the 'public interest' and to the extent that the law permits¹⁶⁸.

Nevertheless, the objections, in my opinion, don't resist to the further arguments¹⁶⁹. The autonomy of will objection is inconsistent with a theory of good-faith reliance (objective good-faith), where the subjective intention of the party who provoke reliance in the other plays no role. The alleged objection of relation between 'equal parties' (called relation of coordination), which would not permit good-faith reliance doctrine in public relations – in which there are unequal parties and where it would have always present the 'public interest' – lies on an old view of the liberal State of the latter two centuries, when the criteria of the public and private law separation had place.

As is well known, modern State has arisen to satisfy the interests of an emergent class, the bourgeoisie, which had struggled against the political absolutism of

¹⁶⁶ See VAN FRAEYENHOVEN, Guy. Rapports Belges. Droit Fiscal. In: *LA BONNE FOI*, at 385.

¹⁶⁷ LAGASSE, Dominique. Rapports Belges. Droit Administratif. In: *La BONNE FOI*, at 390.

¹⁶⁸ LAGASSE, *LA BONNE FOI*, at 392.

¹⁶⁹ In Spain, some scholars have been given the same opinion. See PÉREZ, Jesús Gonzáles. *El Principio General de la Buena Fe en el Derecho Administrativo*. 3.ed. Madrid: Civitas Ediciones, 1999, at 37-40.

the modern era. In the just eroded burgees philosophy, the less powerful the State, the better. There was a separation between society and State. Society wanted to have autonomy. The contract, at that time, was the classic instrument which represented this desire, and it was based on two principles: liberty and equality – bases that were, however, just formals. The State should stay away from the sacred principle of the autonomy of will, and had no place to role.

The erosion of the classic liberal State, caused by several reasons, brought to the new arena the ‘public law’. In fact, we have witnessed, mostly after the world war II, a strong change in the political scenario: the growing of the *Welfare State*, which seems to have been balancing some abuses of power committed under the ‘laissez-faire’ atmosphere. But, as one can observe, this change took more than a century to occur. In this new political picture, private law – and its principles – should also change. It turned the focus to the point where public law would have been always stayed, and it has started to be concern to the ‘social justice’, or, let me say, to the ‘public interest’. The force of the autonomy of will would be weakened, as well as the limits of public and private law.

Therefore, it seems that, at least theoretically speaking, there’s no reason, nowadays, in our legal scenario, to avoid the acceptance of good-faith reliance doctrine in public law. If one would like honestly evoking philosophical or historical principles in order to do that, it would to step back at least fifty years¹⁷⁰. In short, good-faith reliance cannot just able to be enforced by ‘private law’, but also by ‘public law’.

¹⁷⁰ In 1958, the German scholar Ernst Forsthoff, in commenting the possibility of taking advantage, in the administrative law, of the § 242 BGB, established that the German courts had been saying so. Those decisions, he pointed out, reflected a change in the relations between the Administration and the citizens

Moreover, it would not be risky to say that, nowadays, in the beginning of the 21st century, we can foresee a both bigger and growing necessity for applying good-faith reliance in public law – and specifically to the public administration. There’s little space to doubt that the modern States – Brazil particularly among them – have been still continuing changing its structure. In a nutshell, the Welfare State is giving back to the private sector, in form of privatization, some tasks it had taken after the two Big Wars. The touchstone of this change, however, will not make revive the autonomy of will in the sense that the parties will deal *without* the State (putting it aside) and despite its existence (hoping it could stay away). The new focus is and will be the people as a whole, which is and will be asked to choose, to vote, to participate in the political arena and to deal *with* the State, and not *against* it.

Effectively, the ‘soft administration’ is taking place, and, in modern days, the State has been dealing with private parties, and in name of them, as it has never done before. State and population must work together, and, in this new framework, good-faith reliance has an important role to play¹⁷¹. To some extent, it’s the proper concept of democracy that is at stake. In public law, people’s reliance on its govern is still more important than private person reliance on another fellow citizen is. It’s impossible having

that could not be ignored. It would be possible, noted the author, to consider the norms written in §§ 162, 242, 133, 157, and 138 of BGB as general rules, which were plainly enforceable in public law. See FORSTHOFF, Ernst. *Tratado de Derecho Administrativo*. Madrid: Instituto de Estudios Políticos, 1958, at 243-44.

¹⁷¹ The same conclusion was reached by MANGANARO, *Principio*, at 56.

a modern democracy – if it was possible at any time – without trusting in government behavior. It’s exactly here where the estoppel doctrine and good-faith reliance idea fit¹⁷².

2. The Brazilian Constitutional principle of administrative morality and good-faith reliance.

Article 37 of Brazilian Constitution, quoted above, asserts the principle of administrative morality. What exactly ‘administrative morality’ means is a question still unsolved by the Brazilian doctrine. The task of scholars is not simple, once this principle is not found in any other modern constitution.

My understanding is that this principle allows the use of good-faith reliance doctrine in Brazilian administrative law; in consequence, the estoppel against the government is permitted. Let me explain, although briefly, the relation between the themes.

The idea of ‘administrative morality’ comes from French law. Maurice Hauriou mentioned it for the first time in history, exactly in 1903, in a almost unknown article entitled *La Déclaration de Volonté das le Droit Administratif Français*, written with Guillaume de Bezin¹⁷³.

The article suggested and dealt with the idea which the recently, at that time (1900), BGB’s introduced “declaration of will” theory had its roots in administrative

¹⁷² The protection of reliance is, nowadays, a common sense in European public courts. *See* BLANCO, Federico A. Castillo. *La Protección de Confianza en Derecho Administrativo*. Madrid: Marcial Pons, 1998, at 107.

¹⁷³ HAURIOU, Maurice, & BEZIN, Guillaume. *La Déclaration de Volonté das le Droit Administratif Français*. *Revue Trimestrielle de Droit Civil*, 2^o Année, N^o 3, Juillet-Septembre 1903, p. 543-586 (hereinafter, *La Déclaration*).

French law¹⁷⁴. For our purposes, the liaison made by Hauriou between the German idea of “good-faith in the private relations” – which was expressed in the §§ 157 and 242, BGB – and the both “good administration” and “objective morality” – which were created by the “Conseil d’État” – is important. In a nutshell, this idea of “morality”, in administrative French law, could be used to play the same role that the rule of good-faith reliance would be able to play in the German private law system¹⁷⁵.

There is, therefore, in its origin, a strong link between the ideas of “administrative morality” (French law) and good-faith reliance (German law). Therefore, once being well known the influence that the §§ 242 and 157 had in the German law system, spreading its consequences to a vast field of law, and taking for granted the latter considerations about the private/public distinction, it seems to me there’s no reason for not taking advantage, by the Brazilian administrative law system, through the principle of ‘administrative morality’, of the good-faith reliance private law doctrine.

a) A recent decision ruled by the Superior Court of Justice in Brazil.

In November 14th, 1995, the Brazilian Superior Court of Justice decided a interesting case: the Brazilian Secretary of Economy had affirmed, in a ‘memorandum of understanding’, that the Government would stop foreclosing against the debtors who

¹⁷⁴ HAURIOU, *La Déclaration*, at 543: “La théorie de la déclaration de volonté, que les auteurs du nouveaou Code civil allemand ont introduite dans leurs ouvre, a des racines en droit administratif français.”

¹⁷⁵ HAURIOU, *La Déclaration*, at 576: “Quant à la question de savoir par rapport à quelle norme la cause de l’acte est déclarée fausse ou illicite, la jurisprudence du Conseil d’État répond très clairement que ces’t par rapport à la ‘bonne administration’. Qu’est-ce donc que ‘cette bonne administration’? C’est une notion purement objective qu’il est donné au juge administrative d’apprécier souverainement, d’après les circonstances, le milieu, le moment. Elle est l’équivalent de cette notion commune de la bonne foi dans le commerce juridique privé à laquelle se réfère le législateur allemand. Le Conseil d’État part de cette idée que l’administration est liée par une certe moralité objective; elle a une fonction à remplir et lorsque les motifs qui l’ont poussée ne sont pas conformes aux buts généraux de cette fonction, les Conseil d’État les declare illicites.”

went over government agency to renegotiate his/her debt. This government assertion, done by a ‘public promise’, has created in many people (all of those who had debts and were being foreclosed by government) a legitimate expectation – reliance – that, if one acted in that direction, the lawsuit against them would stop. The Court has said:

“The public compromise taken on by Government, through its Secretary of Economy, the leader of the economic policy in the country, and assisted by credit banks directly involved, is presumably enforceable. If in that document was stipulated that the judicial charging would be stopped for 90 days, since the debtor would be willing to deal with, it’s reasonable to expect this behavior from the creditor, for the simple reason that one shall trust a word written in a public document, which was given to the nation.

“In Civil Law, since Jhering, it’s possible to consider that a behavior adopted by a given part, before contract, can generate liability, producing the pre-contractual liability. The general principle of good-faith reliance has just highlighted this understanding, once human relations shall be guided by loyalty.

“What is valid for the private autonomy is even more valid for the public administration and for the firms which money is prevailingly public, in their relations with the citizens. It’s inconceivable that a Democratic State, which aims to achieve fairness, be founded under principle that a public compromise accepted by its main politicians has no value, no significance, and no efficacy. Specially when the Constitution consecrates the principle of administrative morality.”¹⁷⁶

This decision should, I hope, lead other Courts’ and scholars’ interpretation to the correct path¹⁷⁷.

¹⁷⁶ Recurso em Mandado de Segurança nº 6183-MG – 4ª Turma Cível – Judge Ruy Rosado de Aguiar Júnior wrote for the unanimous Court’s decision, ruled in November 14th, 1995. *Italic added.*

¹⁷⁷ In the U.S., a recent article by Frederick Claybrook sustains, based on U.S. Supreme Court, the idea that when the government enters the marketplace, it should be subject to the same contractual good faith duties as is a private party. *See* CLAYBROOK, Frederick W. Good Faith in the Termination and Formation of Federal Contracts. *56 Maryland Law Review* 555 (1997).

Moreover, some additional comments can be added, in order to put a common law perspective in the Brazilian continental approach concerning to this understanding about the meaning of the ‘administrative morality’ principle. One may see that the common law doctrine of promissory estoppel in government contracts is raised.

b) Good-Faith reliance and the pre-contractual liability. *Culpa in contrahendo*.

Ralph Lake remarks although in common law countries there are no laws that define *contract*, scholars in England and United States generally agree that contract is merely a ‘legally binding agreement’¹⁷⁸. The American Restatement of Contract contains a frequently cited definition: A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty [Re statement (Second) of contracts, paragraph 1 (1981)]¹⁷⁹.

Even though good-faith doctrine is important to the contract law¹⁸⁰, maybe its major contribution takes place in the pre-contractual liability. In this regard, as Lake

¹⁷⁸ LAKE, Ralph B. *Letters of Intent and Other Precontractual Documents: Comparative Analysis and Forms*. Second Edition, New Hampshire: Butterworth Legal publishers, 1994 (hereinafter, *Letters*), at 26.

¹⁷⁹ LAKE, *Letters*, at 27.

¹⁸⁰ As LAKE tells us, in *Letters*, at 177-78, like in English law, U. S. law imposes a duty to perform existing contracts in good faith. The Restatement (Second) of Contracts provides that “every Contracts imposes upon each party a duty of good faith and fair dealing in its performance and enforcement”. The Uniform Commercial Code provides that ‘Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement’. The words ‘or duty’ were inserted by the drafters of the code to ensure that the good-faith obligations of third parties were covered. The words, however, do not have a pre-contractual implication. The policy behind the code is to give effect to existing agreements. ‘Good faith’ is defined in two places in the code. The general definition, applicable to the code in its entirety, is, “ ‘Good faith means honesty in fact or transaction concerned” – U.C.C., paragraph 1-201 (19) (1978). In article 2, good faith as it relates to the sale of goods is defined: “ ‘Good faith’ in the case of merchants means honest in fact and the observance of reasonable commercial standards of fair dealing in the trades.”

notes, the extent and basis of liability differ under English, U. S., French, Italian, and German Law. Generally, English law does not recognize pre-contractual liability. United States courts have the doctrine of promissory estoppel at their disposal and may impose an obligation to negotiate in good faith. French law imposes liability in tort for actions prior to contractual execution. West German and Italian law use the doctrine of *culpa in contrahendo* to impose pre-contractual liability¹⁸¹. The latter is the most important for this article's goal, once it is entirely related to good-faith reliance doctrine¹⁸².

Friedrich Kessler and Edith Fine remember us that the doctrine of *culpa in contrahendo* goes back to a famous article by Jhering, published in 1861, entitled "*Culpa in Contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*". It advanced the thesis that damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its

– U.C.C. paragraph 2-103 (b) (1978). But a possible good-faith duty at the pre-contractual stage in transaction to which the Uniform Commercial Code applies is not addressed in the code. The infrequent applications of the good-faith standard in pre-contractual situations have two bases. First, courts sometimes find the obligation too vague to apply. Second, the determination of an appropriate remedy may be difficult (at 179-80). *See also* FARNSWORTH, E. Allan. Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations. *87 Columbia Law Review* 217 (1987). He says: "Americans courts ... have declined to find a general obligation that would preclude a party from breaking off negotiations, even when success was in prospect. They reluctance to do so is supported by the formulation of a general duty of good faith and fair dealing in both the Uniform Commercial Code and the Restatement (Second) of Contracts that, at least by negative implication, does not extend to negotiations." (at 239). The same author wrote, in 1990, that the precontractual negotiations and preliminary agreements was one of the "top ten" developments in contract law during the 80's - FARNSWORTH, E. Allan. Developments in Contract Law During the 1980's: The Top Ten. *41 Case Western Reserve Law Review* 203 (1990).

¹⁸¹ LAKE, *Letters*, at 171.

¹⁸² Udo REIFNER, *Good Faith*, at 276, notes clearly that, in German, the implementation of liability for misrepresentation in pre-contractual relations was solved by the principle of *culpa in contrahendo* out of § 242 BGB.

invalidity or prevented its perfection. And its impact, stress the authors, has reached beyond the German law of contracts¹⁸³.

A resume of the ‘fault in negotiation’ theory is given by Kessler and Fine as the following: Jhering has raised in a systematic fashion the question whether the ‘blameworthy’ party should not be held liable to the innocent party who had suffered damages relying on the validity of the contract. His answered affirmatively. He suggested that the careless promissory has only himself to blame when he has created for the other party the false appearance of a binding obligation¹⁸⁴. In the decades following the enactment of the German civil code (1900), *culpa in contrahendo* doctrine became anchored in the great principle of good faith and fair dealing which permeates the whole law of contracts, controlling, indeed, all legal transactions¹⁸⁵.

The whole point is that, in the civil law system, since Jhering’s influence, notions of the good faith in the form of *culpa in contrahendo* or otherwise have become firmly established¹⁸⁶. In Brazil it was not different. Notwithstanding the law is silent,

¹⁸³ KESSLER, Friedrich, & FINE, Edith. *Culpa in Contrahendo*, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study. 77 *Harvard Law Review* III, 401 (hereinafter *Culpa*), at 401.

¹⁸⁴ KESSLER & FINE, *Culpa*, at 402.

¹⁸⁵ KESSLER & FINE, *Culpa*, at 403-404. As the authors note, at 406-7, the impact of Jhering’s theory has not been confined to German law of contracts, but also affected Austrian, Swiss, and Italian law. In English law, as said by J. F. O’Connor (Good Faith in English Law 17-50, 1990, quoted by Lake, *Letters*, at 171), is clear that parties to an existing contract must perform it in good faith although English judges prefer concrete solutions and do not normally resort to the term ‘good faith’. On the other hand, still according to Lake, the United State Courts are much more willing to impose precontractual liability in general than are English courts.

¹⁸⁶ As Lake (*Letters*, at 178) notes, the existence of a general obligation to negotiate in good faith during the pre-contractual stage is more problematic in U.S. law. He quotes some decisions: [“The duty of good faith is weak in the formation stage of contact, if indeed it can be said to exist there at all.” *First Nat’l Bank of Chicago v. Atlantic Tele-Network*, 946 F.2d 516, 520 (7th Cir. 1991). “... this thesis (*culpa in contrahendo*) ... has never been accepted in Anglo-American jurisprudence.” *Racine & Laramie v. Dep’t of Parks*, 14 Cal Rptr.2d 335, 339 (Cal. App. 4 Dist. 1992)]. See also *Magna Bank v. Jameson*, 604 N.E.2d 541 (Ill. App. 5 Dist. 1992). Neither the Restatement (Second) of Contracts nor the Uniform Commercial

doctrine and courts have been applying the *culpa in contrahendo* doctrine, relying on the good faith theory.

Thus, and despite it was already noted above, one need just merging good-faith reliance, administrative morality and estoppel doctrine. The main focus will be the quoted decision ruled by the Brazilian Superior Court of Justice, in the sense that I'll try putting together the so far commented theories, in order to connect them to the Brazilian constitution.

c) Morality, Promises, and Contract Law: connection with estoppel doctrine and *culpa in contrahendo* doctrine.

“We are living in a New Dark age, an age of moral crisis in which morality and law are increasingly flouted, and age of selfishness, hedonism, dishonesty, and lack of concern for others. ... If we are to recreate a decent and civilized society, our legal institution must teach and enforce certain basic moral principles. Contract law must thus perform a moral education function.”¹⁸⁷

Henry Mather, writing about the contract law and morality, focusses the issue of the purposes of promise in the following terms: “Contract law governs transactions involving one or more promises. A promise is a commitment or assurance that something will (or will not) be done in the future. This commitment or assurance that something invites reliance by the promisee.” When a person makes a promise, he in effects tells a promisee, or, as Atiyah says, “You can count on me, you can trust me, you

Code deals with good-faith duties in the pre-contractual stage. The comment to section 205 of the Restatement (Second) of Contracts, however, indicates that bad faith in negotiation might be actionable.

¹⁸⁷ MATHER, Henry. *Contract Law and Morality*. Westport: Greenwood Press, 1999 (hereinafter, *Contract Law*), at x.

can rely on me.”¹⁸⁸ In fact, promises are given to induce reliance¹⁸⁹, and, by recognizing that society, or most people, normally keeps its promises, we can see a moral obligation in keeping our promises¹⁹⁰.

There’s no doubt about the liaison between morality and promises¹⁹¹, and, as a consequence, there’s no doubt between these concepts and those of good-faith reliance and estoppel doctrine.

Promises, to some extent, should be treated in the same way as the so-called ‘letters of intent’, once the existence of a letter of intent, even if its parties do not specifically undertake to negotiate, strengthens the case for a good-faith obligation in specific pre-contractual situations, exactly as promises does. The point will be the “weight” of reliance upon which one acts, caused by a positive fact committed by, in this case, the promising or whom sign the letter. In both cases, liability for action during the

¹⁸⁸ MATHER, *Contract Law*, at 1., quoting Atiyah.

¹⁸⁹ See MATHER, *Contract Law*, at 7.

¹⁹⁰ See MATHER, *Contract Law*, at 7. Mather says: “In the contractual context, this principle leads to the conclusion that legal enforcement of broken promises is justified only when detrimental reliance results in serious harm. The legal enforcement of promises thus seems to rest primarily on the need to protect reliance.” (at 10).

¹⁹¹ See the philosophical classic book by ATIYAH, P. S. *Promises, Morals, and Law*. Oxford: Clarendon Press, 1981. Hereinafter, *Promises*. For a deep analysis of the origins of common law contracts, see GORDLEY, James. *Natural Law Origins of the Common Law of Contract. Towards a General Law of Contract*. Berlin: Duncker & Humblot, 1990, 367-465. About the enforceability of promises, Gordley notes that even Grotius, in his great work *De iure belli ac pacis libri tres*, began his discussion “Of Promises” by taking sides in a late scholastic debate. Thomas Aquinas explained promise-keeping in just this way, remarkably enough, since he seems to have been using a corrupt Latin translation of the *Ethics* in which the reference to keepers of faith in agreements is replaced by a reference to tellers of truth in court. Thomas concluded, at any rate, that promises were binding as a matter of truth (*veritas*), faith (*fidelitas*) and honesty (*honestas*). Promise breaking was like lying although with a distinction: “One who promises something does not lie if he has the intention to do what he promises because he does not speak contrary to what he has in mind. If, however, he does not do what he promises, then he appears to act unfaithfully because his intention changes.” (*Summa theologiae* II – II, q. 110, a. 3 ad 5). The late scholastics agreed that the virtue of truth or fidelity obligated a person to keep his promises (at 370-74).

pre-contractual stage of a transaction may be based on the obligation to bargain and to negotiate in good faith.

The term ‘letters of intent’, however, may vary a lot, despite having similar effects and meanings. I accept the Lake’s book proposal: the term ‘letter of intent’ – which may be defined as a precontractual written instrument that reflects preliminary agreements or understanding of one or more parties to a future contract – can be used to denote pre-contractual instruments that go by a number of other names, including ‘heads of agreement’, ‘memorandum of understanding’, ‘protocol d’accord’, ‘protocol’, ‘letter of understanding’, ‘memorandum of intent’ and ‘term sheet’. All are used regularly, but ‘letter of intent’ seems to be used more frequently, and to an extent is replacing the others¹⁹². The Brazilian case (which dealt with a ‘memorandum of understanding’) fits exactly in this situation, where the administrative morality should – as it effectively did – take place¹⁹³.

It seems clear to me that the doctrine of estoppel plays, in the U.S., the same role that the doctrine of good-faith reliance or, in the pre-contractual phase, the notion of *culpa in contrahendo* plays in civil law countries, as well as the principle of “administrative morality” expressed in the Brazilian Constitution should play in the Brazilian administrative law. Estoppel *in pais* doctrine, in America, as well as good-faith reliance theory in some civil law countries, underlies the philosophy that it’s vitally

¹⁹² LAKE, *Letters*, at 5.

¹⁹³ ATIYAH, *Promises*, at 152, notes that philosophers nearly always assume that promises are only made by individual human beings. But this is not true. Promises are made by people acting collectively in all manner of institutional groups, by companies, associations, schools, hospitals, universities, Governments, and many other institutions.

necessary, in a given law system, to protect the legitimate expectations and the reliance caused by a given act¹⁹⁴. And reliance¹⁹⁵ is the gist of all these theories¹⁹⁶.

When Government, through its leader of economic policy, gives out to the public official information in which it promises to act in a given direction, its reasonable – it wouldn't be better say it's morally? – to expect the government acts in this exact direction. In a modern democracy, it seems obvious that some promises – mainly those given by the Government – should be able to be taken seriously by the citizens¹⁹⁷.

CONCLUSION

Different legal systems have different theories to deal with the problem of the expectance created by a party that has acted and has led another to believe in a particular state of affairs. Common law doctrine of estoppel plays the same role that continental law doctrine of good-faith reliance plays in the German legal system and in the countries influenced by it: they protect reliance of the party that acted upon this trust. In Brazil, specifically in public law, and concerning to the government action, principle

¹⁹⁴ This conclusion is by all means similar to the conclusion reached by Kessler and Fine, just being worthy observing that their conclusion is specifically referred to the private law. See KESSLER & FINE, *Culpa*, at 448-49.

¹⁹⁵ I take for granted that term 'reliance' is well understood in the estoppel/good faith context, in the sense that one can even discuss, for instance, 'how much' reliance would be necessary to estop someone. I assume that 'reliance' here means an affection not just in mind of the representee, but also in his action. "Reliance, then – stresses Cooke – involves believing something and doing something." – COOKE, *The modern law of estoppel*, at 96.

¹⁹⁶ As COOKE, *The modern law of estoppel*, at 13, has noted, writing about estoppel doctrine, "Yet the need for reliance is a hallmark of the law of estoppel in its developed forms, and the state of mind of the parties is relevant to whether or not it is unconscionable for either to go back on a statement or assumption;"

¹⁹⁷ Of course life presents cases where there's no wrong in changing one's mind. The introduction of Cooke's book shows us an example that can be considered as socially unacceptable: withdrawing from a dinner engagement at the last minute (COOKE, *The modern law of estoppel*, at 1). Some changes, however, must be limited in order to avoid unfairness. Estoppel, good-faith reliance, *culpa in contrahendo* doctrines, and the principle of 'administrative morality' are, roughly speaking, just a mechanism for doing this.

of 'administrative morality', written in the Constitution, plays the same role. This principle, if well understood, may be able to change some government actions and lead, this is my hope, the nation to a fairer and more reliable era.

Everyone agrees that a citizen must trust the bureaucrat and consequently the Government. It's quite obvious that it's impossible to have a nation without trusting. The Government has a duty to act in good-faith and morally in order to be trusted. Otherwise, as any private party, it can and must be estopped.

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