RENATA PETRYLAITE[*]
Vytautas Magnus University,
School of Law

CAN THE DOCTRINE OF EQUITABLE ESTOPPEL BE APPLIED AGAINST A GOVERNMENT?

Contents

[*] RENATA PETRYLAITĖ. Address: Vytautas Magnus University, School of Law, Daukanto 28, Kaunas 3000 Lithuania. Email: <renata_petrylaite@fc.vdu.lt >.

Introduction

Government is an integral part of human lives. This term can mean the "form of fundamental rules and principles by which a nation or state is governed, … [a] constitution, … the framework of political institutions … or control which is exercised upon the individual members of [a] … society"[1]. Supposedly, the first meaning of this term that comes to one's mind is that government is "the political organs of a country regardless of their function or level"[2] or, stated otherwise, "the federal government and all its agencies and bureaus, state and county governments, and city and township governments"[3]. Namely this broad definition of the concept will be referred to throughout this paper when talking about government.

Government plays a very important role in the lives of individuals, not only society as a whole. It is no longer some distinct and far away sovereign power whose influence upon people's lives is insignificant. It can no longer be asserted that government deals with public matters only and leaves private issues out of the scope of its concern. On the contrary, the expanding boundaries of governmental activities and regulations make it clear that the influence of the government pervades more and more spheres of the lives of individuals and business entities. Every day of our lives we encounter various manifestations of governmental regulation and control. Therefore, it can fairly be said that a government becomes a part of our private affairs and a partner in our every day dealings. Consequently, it can further be inferred that the same standards of conduct should apply to governmental entities as to every other entity that functions in the private world.[4]

However, a governmental agency is not regarded to be the same as a private entity. It represents the interests of all the members of a society and is protected from interference with its functions by the doctrine of sovereign immunity [5]. While "governmental immunity from estoppel is an offshoot of sovereign immunity"[6], it follows logically that there can be no estoppel against a government. This is a fundamental rule. Obviously, such a rigid rule can entail injustice and unfairness towards individual members of a society dealing with a government and can undermine private interests very harshly. The doctrine of estoppel emerged namely as a tool to fight injustice[7], however, it is "a private law concept"[8]. Therefore, the question arises whether it could be applied as a defense against a government by an individual who suffered or can potentially suffer injustice because of government's actions.

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[1] Henry Campbell Black, *Black's Law Dictionary*, Sixth Edition (St. Paul, Minnesota: West Publishing Co., 1990).

[2] Bryan A. Garner, Ed. In Chief, *Black's Law Dictionary*, Seventh Edition (St. Paul, Minnesota: West Group, 1999).

[3] See note 1: *Black's Law Dictionary*, 6th ed.

[4] "Fairness has to be a two edged sword. People who deal with the state must be fair and the same principle should apply to the state" (*Foote's Dixie Dandy, Inc. v. McHenry*, 607 S.W.2d 323 (Ark.1980)).

[5] Sovereign immunity is a government's immunity from being sued in its own courts without its consent. (See note 2: *Black's Law Dictionary*, 7th ed.). For more information about this doctrine, see also Alfred C. Aman Jr. et al., *Administrative Law* (St. Paul, Minnesota: West Publ. Co., 1993), pp. 342-347.

[6] *American Law Reports Federal*: Cases and Annotations, vol. 27, 1976, p. 708.

[7] "The doctrine of estoppel is one of fundamental justice. …Courts have gone a long way in applying it to prevent manifest injustice and wrong" (*Scott County v. Advance-Rumley Thresher Co*., (CA8) 288 F 739, 36 ALR 937).

[8] William F. Funk et al., *Administrative Procedure and Practice: Problems and Cases* (St. Paul, Minnesota: West Publishing Co.: 1997), p. 356.

The hypothesis of this article is that the doctrine of equitable estoppel can and should be used against a government, its agencies and officers, when justice and fairness, which lie at the heart of this doctrine, so require. The purpose of the article is to convince that the old rule and its exceptions do not suit the present situation. The paper suggests a new approach towards this issue, namely the justice and fairness test.

The first part of the paper will explain the doctrine of estoppel. The aforementioned fundamental rule of no estoppel against a government will be discussed in the second part. The exceptions to the rule and modern attitudes stating that this doctrine can be applied against a government will be presented in the third part of this article. Only the legal system of the United States of America will be analyzed since other common law countries treat this problem in practically identical ways.[9]

1. The Doctrine of Equitable Estoppel: Theoretical Background

So that one could argue in favor of estopping the government or against such practice, one must first become acquainted with this concept. Equitable estoppel is just one kind of the whole system of estoppels. Estoppel has been variously defined in cases and in legal theoretical works. It generally means "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true"[10]. There are three kinds of estoppels: (1) by deed; (2) by matter of record; and (3) by matter *in pais* [11]. Estoppel by deed "prevents a party to a deed from denying anything recited in that deed…"[12]. Estoppel by record means that "when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again…, so long as judgment or decree stands unreversed"[13].

As the title of this article indicates, however, only the equitable estoppel, otherwise referred to as estoppel by matter *in pais* or estoppel by conduct [14], will be analyzed in this paper. Presumably the most comprehensive definition of equitable estoppel that can be found is the following one:

> *It is the principle by which a party who knows or should know the truth is absolutely precluded … from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed.* [15]

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[9] For attitudes towards estopping a government in England, see David Herling, *Briefcase on Constitutional and Administrative Law* (London: Cavendish Publishing Ltd., 1995), pp. 89-90; in Australia, see article *Government Contracts: Detrimental Reliance and the Operation of the Doctrine of Equitable Estoppel: Future Contingent Obligations of Government: Audit Observations*, < http://www.audit.sa.gov.au/97-98/a3/govcontoblig.html>, visited 30/03/2003; in Canada, see article by Glen Loutzenhiser, *Holding Revenue Canada to its Word: Estoppel in Tax Law*, (1999) 57(2) U.T. Fac. L. Rev. 127, <http://www.law-lib.utoronto.ca/law-review/abstract/ultr57_2/57_2_127.htm>, visited 12/05/2003.

[10] See note 2: *Black's Law Dictionary*, 7th ed.

[11] See note 1: *Black's Law Dictionary*, 6th ed.

[12] See note 2*: Black's Law Dictionary*, 7th ed.

[13] See note 1: *Black's Law Dictionary*, 6th ed.

[14] See note 2: *Black's Law Dictionary*, 7th ed.

[15] *American Jurisprudence*, vol. 28 (Escrow to Estoppel and Waiver), Second Edition, 1966; Estoppel and Waiver § 27, pp. 627-628.

As the very term 'equitable' implies, "the whole doctrine of equitable estoppel is a creature of equity and is governed by equitable principles"[16]. Equity in its turn denotes fairness and justice. This parallel between justice and equitable estoppel is very important. This concept evolved as a tool to prevent fraud and injustice and must serve this purpose. Various restrictions upon its application will undermine its essence and the rule of justice. If it is allowed in a situation where private parties are involved, but not in a situation where a public body is involved, the ends of justice and fairness will not be served to the utmost.

This doctrine is a common law doctrine. It does not exist in continental law systems. However, continental law countries have the same notions of basic fairness and elementary justice, therefore they also have certain legal doctrines that help achieve a fair balance among competing interests. The counterparts, at least to some extent, of estoppel in civil law countries are the principles of good faith[17], legitimate expectations[18] or "administrative morality"[19].

When claiming that the doctrine of equitable estoppel should be applicable to the facts and circumstances of a particular situation, no matter whether in private or administrative law, the elements of the doctrine must be proved. There are several opinions as to how many elements the doctrine of equitable estoppel comprises[20]. A careful study of various sources and the definition of equitable estoppel discussed above leaves one with the set of the following elements of equitable estoppel: there must be a party whose 1) conduct amounts to a false representation or a concealment of material facts and who 2) knows or should know the real facts and who 3) intends or expects the other party to act upon such representation, and there must be another party who 4) does not know the truth and who 5) in fact acts in good faith reliance upon such representation, 6) which results in his detriment.[21] All these elements must be present and proved to establish the applicability of the doctrine of equitable estoppel. If any of these elements is missing, the equitable estoppel cannot be asserted.

It is also necessary to notice that this doctrine can never be a cause of action, only the defense[22], but a very powerful one, since "equitable estoppel is a rule of justice which … prevails over all other rules"[23]. Once this defense is established as applicable, other considerations that might have been important or even crucial to the outcome, such as statutes of limitation or assertion of certain rights, lose their weight and are ignored. Again, one comes across this notion of justice, which is the very core of the concept. Equitable estoppel makes justice and fairness more important than truth, no matter how paradox this may appear. It prevents a party from asserting one's right which otherwise might have

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[16] *J. F. Johnson Lumber Co. v. Magruder*, 218 Md 440, 147 A2d 208.

[17] Rudolf B. Schlesinger et al., *Comparative Law: Cases – Text – Materials*, Fifth Edition (Mineola, New York: The Foundation Press, Inc., 1988), p. 754.

[18] See web page <http://www.curia.eu.int/en/actu/activites/act00/0002en.htm>, visited 16/03/2003. See also the Civil Code of the Republic of Lithuania (18/07/2000, No VIII-1864), Arts. 1.87 and 6.227.

[19] Jose Giacomuzzi, *Common Law Doctrine of Estoppel and Brazilian Constitutional Principle of Administrative Morality*, <http://www.gwu.edu/~ibi/minerva/spring2001/jose.giacomuzzi.pdf>, visited 05/03/2003.

[20] See note 8: William F. Funk, p. 356; note 2: *Black's Law Dictionary*, 7th ed. For discussion about the prerequisites of estoppel, see also cases: *Lentz v. McMahon*, 777 P.2d 83 (Cal. 1989); *US v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); note 4: *Foote's Dixie Dandy* case.

[21] For similar views, see note 15: 28 Am Jur 2d Estoppel and Waiver § 35, pp. 640-641.

[22] "Estoppel operates always as a shield, never as a sword" (see note 15: 28 Am Jur 2d Estoppel and Waiver § 33, p. 637). See also Raymond Youngs, *English, French and German Comparative Law* (London, Sydney: Cavendish Publ. Ltd., 1998), p. 362.

[23] See note 15: 28 Am Jur 2d Estoppel and Waiver § 34, p. 639.

existed or bars a party from announcing the truth if that truth contradicts the facts established earlier upon which another party acted in reliance to his own injury.

As previously mentioned, equitable estoppel is a private law concept. Traditionally, it has not been applied in the public law context. However, as the public law changes and begins to merge with certain private law spheres, so the doctrine of equitable estoppel commences to make its way into administrative law and influence relations of public institutions with private entities. It is hard to see why this powerful doctrine of equity and justice, which plays such an important role in private relations by preventing manifest injustice and wrong, is so often ignored in the sphere of public relations. Does that mean fundamental notions of fairness and justice are not so important in the public sector? It will be argued further in the text that the ends of justice should not be undermined only because certain relations happened to occur in the public sphere. Equitable estoppel must find its place in the administrative law.

2. The General Rule: No Estoppel Against a Government

Traditionally, the doctrine of equitable estoppel had no application in the sphere of government's relations with private entities. As the governmental functions and control pervade ever more spheres of the lives of individuals, the attitude of courts towards this rule has changed[24]. Still, the majority of courts and, what is most important, the Supreme Court of the United States of America follow the old fundamental rule that government cannot be estopped[25]. There are many arguments that support this attitude. They can be grouped according to three major issues, namely: 1) performance of governmental functions; 2) protection of public interests; 3) *ultra vires* conduct of governmental officers. These are discussed below in more detail.

2.1. Performance of Governmental Functions

The sovereign powers of the state are exercised through its government. Therefore, governmental functions and the doctrine of sovereign immunity are connected. The same arguments on which the latter doctrine is based can be applied to the governmental immunity from estoppel when acting in governmental, or sovereign capacity.

Government represents the state and its people. So that the society could function properly, certain duties and responsibilities have been assigned to the discretion of government. Only government can decide to impose additional taxes or cancel some of them. Government is responsible for developing infrastructure of the state and for exercising the police power. Such spheres of societal life are considered of major importance. Therefore, the responsibility to handle these affairs are conferred upon a government, which is undoubtedly in a better position - financially and from the point of view of human resources - to take care of them than any cluster of individuals of a society.

Together with these responsibilities certain powers and immunities have been conferred upon a government so that it could properly carry out its duties. The governmental immunity from estoppel is namely one of these privileges. It has been reiterated many times that a government cannot be estopped when functioning in its governmental capacity[26].

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[24] "[T]he doctrine of … governmental immunity from estoppel [has] been much discussed, criticized and limited in recent years" (see note 6: 27 ALR Fed, p. 708).

[25] "[W]e have reversed every finding of estoppel that we have reviewed" (*Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990)).

[26] "A governmental unit is not estopped when functioning in a governmental capacity … The doctrine of estoppel is not applied to the extent of impairing sovereign powers of a state. [T]he

The leading case in the field of the fundamental rule of no estoppel against a government is *Federal Crop Ins. Corp. v. Merrill*[27]. This case discussed many issues on applying estoppel against a government, as well as the issue of good faith reliance on unauthorized statements of government agents, which will be discussed in the third chapter below, but it also touched upon the issue of governmental functions. This decision is a landmark precedent and it therefore deserves to be discussed first, before going on to other cases.

The facts of *Merrill* were as follows. The government assumed the responsibility of insuring crop for the benefit of farmers while the private insurers considered crop insurance too risky. The Federal Crop Insurance Act was enacted and the Federal Crop Insurance Corporation was created, which published certain regulations in the Federal Register that precluded insurance for "reseeded wheat". Merrill was a wheat farmer who applied for crop insurance under the Act and was advised, incorrectly, that his crop was insurable. Relying on such representation, the farmer procured insurance. Later his crop was destroyed. The Corporation refused to pay asserting that in fact the crop was not insurable.

The Supreme Court held that under such circumstances "recovery could be had against a private insurance corporation"[28], but it refused to hold that the Federal Crop Insurance Corporation, the governmental entity, was situated just like any other private party. The Court asserted that permitting estoppel to be applied against a government would interfere with the efficient performance of governmental functions. Moreover, the Court stated that the government cannot be partly public or partly private depending upon its activities. It is clear from this holding that the Supreme Court rejected the public-private functions distinction and regarded every activity related to a government public. It follows from this decision that a government cannot be estopped in any of its activities. Whether they be conducted in a public or private sphere, they are nevertheless considered governmental functions. Thus, the Court adopted a quite rigid rule against estopping the government and rejected any suggested exceptions to it. However, the modern Supreme Court "has shied away from a flat rule against estoppel"[29], which will be discussed below.

Another illustrative case on the point there can be no estoppel against a government in its sovereign capacity is *United States v. Florida*[30]. The United States made an agreement with the State of Florida according to which a certain parcel of land was to be conveyed to Florida and be used for public park purposes. If the land was not so used, according to the terms of the agreement, it was to be reverted back to the United States. The Court found that the land was not in fact used for the mentioned purpose and therefore the title to the land reverted to the US. It was argued that by certain actions the United States had acknowledged that the land was used for the public park purposes, and therefore, it had to be estopped from asserting otherwise. However, the Court held that the conveyance of the land was a governmental function, and that the defense of equitable estoppel could not be asserted against the United States performing its governmental functions.

The argument that a government cannot be estopped when acting in its sovereign capacity has been mentioned in many other cases. The reasoning is similar to that of sovereign immunity. Governmental functions are the expression of sovereign powers and as such should not be susceptible to the laws and judgment of ordinary men in their ordinary lives. While governmental duties and activities are considered to be somewhat more

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doctrine of estoppel will not be applied against the state in its governmental, public, or sovereign capacity" (see note 15: 28 Am Jur 2d Estoppel and Waiver § 122, p. 782; § 123, p. 784).

[27] *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

[28] Id.

[29] See note 5: Alfred C. Aman Jr., p. 324.

[30] *United States v. Florida*, 482 F2d 205 (CA5 Fla), 1973.

important than activities of individuals of a society, the same laws should not govern these two distinct spheres.

Another important point is the efficiency of performance of governmental functions. If a government could be held estopped in performing its functions, this would entail two consequences. First, government officials and agencies would feel restrained in their actions and this would impede the efficiency and quality of governmental services. However, this argument can be rebutted by a contrary consideration. If there is no estoppel against a government, there is no responsibility of governmental agents, consequently, they can neglect their duties or even indulge in self-dealing or licence. The second consequence of allowing estoppel against a government, as the Supreme Court held in another landmark case, *Office of Personnel Management v. Richmond*, is that "to open the door to estoppel claims would only invite endless litigation over both real and imagined claims … by disgruntled citizens, imposing an unpredictable drain on the public fisc"[31]. However, such argument is not well-founded. It is difficult to imagine that people would go to courts just for the sake of litigation, without substantial claims.

Thus, such considerations stand behind the general rule that there can be no estoppel against a government in its sovereign capacity. These arguments also relate closely with the second issue, public interest protection, discussed below.

2.2. Protection of Public Interests

Government acts for the public benefit. Duties and responsibilities in such spheres as taxation or police power have been conferred to the government namely because the interests of the public will be served better this way. Therefore, a government must enjoy certain immunities, one of which is immunity against estoppel, to ensure that public interests will not be harmed[32].

One of such public interests is, again, efficient performance of governmental functions, which would be precluded by equitable estoppel against a government. Moreover, estoppel can also endanger another public interest, namely interest in the uniformity and predictability of administration of public activities and services. This argument was raised in *Schweiker v. Hansen*[33]. In this case the Supreme Court refused to hold the government estopped by certain misrepresentations of its officer reasoning that

> *if [an officer's] minor breach … suffices to estop [a government], then the government is put at risk that every alleged failure by an agent to follow instructions … will deprive it of the benefit of the written application requirement … essential to the honest and effective administration of the Social Security Laws.*[34]

Stated otherwise, if estoppel were allowed against a government, certain acts and mistakes of its agents would create new duties and responsibilities to the government, which could even contradict the requirements of a statute. Consequently, the administration of laws would depend on contingencies and the uniformity of administration, and equal rights of citizens would be lost, thus greatly impairing public interests. On the other hand, in certain circumstances estoppel may serve even greater public interest in fairness and justice. Thus, in every case various public interests should be carefully weighed and balanced in deciding whether to apply estoppel against a government.

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[31] See note 25: *Richmond* case.
[32] See note 6: 27 ALR Fed, p. 712.
[33] *Schweiker v. Hansen*, 450 U.S. 785 (1981).
[34] Id.

The rights and interests of the public are usually considered more important than any private interest. Sometimes this results in great expense for private parties as happened in *Utah Power & Light Co. v. United States*[35]. In this case a private company, relying on representations of government agents, built a hydroelectric power plant on a reservation land. When government tried to enjoin the company from using the public lands, the company argued that the government should be estopped. However, the Court ruled for the government, stating that even though the construction of the power plant cost so much, the land on which it was built was held by the government in trust for all people and their interests were acknowledged to be superior. And yet one cannot assert that public interests will always be more important than private ones. There may be situations in which the scales would be tipped in favor of a private party.

Another argument on the issue of public interest protection is related to a very important function of governmental agencies, namely providing information and advice. This point was brought to attention in the *Richmond* case:

> *A rule of estoppel might create not more reliable advice, but less advice. The natural consequence of a rule that made the Government liable for the statements of its agents would be a decision to cut back and impose strict controls upon Government provision of information … Not only would valuable informational programs be lost to the public, but the greatest impact of this loss would fall on those of limited means, who can least afford the alternative of private advice.*[36]

However, this argument becomes considerably weaker, remembering that the government itself respects its advice and often protects the interests of citizens created by a mistake of its officer even if it is under no legal obligation to do so[37]. Such practice does not trigger any impairment of information rendering service.

Still, the above enumerated and many other governmental activities and services rendered for the benefit of the public speak against the proposition that government can be estopped. Whether it is in the field of law administration or where public lands are involved or any other sphere where the government purports to act for the benefit of the public, the protection of public interests seems to overcome those weak voices asserting that private interests also deserve to be protected.

2.3. Ultra Vires *Conduct of Governmental Officers*

In every case involving the issue of estoppel against a government some misconduct of a governmental agency or officer will be involved. It is natural while a government acts only through its agencies and employees. It is also worth reminding that the necessary elements of estoppel include some conduct amounting to misrepresentation or concealment of material facts and reliance on such misrepresentation to one's detriment.

The prevailing attitude is that a government cannot be estopped in situations "where the officials … acted wholly beyond their power and authority, or were guilty of illegal or fraudulent acts, or of unauthorized admissions, conduct or statements"[38], in other words,

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[35] *Utah Power & Light Co. v. United States*, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917).

[36] See note 25: *Richmond* case.

[37] "Most agencies consider themselves bound by erroneous advice" (Michael Asimov et al., *State and Federal Administrative Law*, Second Edition (St. Paul, Minnesota: West Group, 1998), pp. 214-215.

[38] See note 15: 28 Am Jur 2d Estoppel and Waiver § 122, p. 782.

where an agent acts *ultra vires*[39]. The rationale behind this argument is simple. So many people work for the government that "it ignores reality to expect that the Government will be able to secure perfect performance from its hundreds of thousands of employees"[40]. It is argued that it would be unfair to hold government accountable for every misstatement, however minor, by governmental agents. It would also be a waste of public funds.[41] Besides, unauthorized statements of its officers cannot legally bind the government, for it is another well-settled rule that "a principal is bound by the actions of its agent under either actual or apparent authority"[42]. If there is no authority, the principal cannot be bound.

The famous *Merrill* case[43] illustrates these considerations. The agent of the Federal Crop Insurance Corporation had knowledge that the crop planted was actually reseeded and assured that such crop was insurable. This was a mistake, while the Corporation refused insurance on reseeded crop. The farmer relied on the agent's representations and suffered detriment. The Supreme Court announced that the government could not be estopped. Firstly, "the Wheat Crop Insurance Regulations were binding on all… regardless of actual knowledge of what is in the Regulations"[44], while publication of any legal act in the Federal Register constitutes constructive notice. Secondly, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority"[45]. In other words, the Court placed the whole burden of responsibility on the private entity and imputed to it the knowledge of all the laws published in the Federal Register and knowledge of the limits of agent's authority. Such statements justly raise doubts and counterarguments. In one of the dissents to the decision, Justice Jackson argued that if a farmer had time to read the Federal Register, "he would never get time to plant any crops"[46].

Indeed, it is hard to understand the reasoning in the *Merrill* case. Governmental officers are or must be skilled enough to read and explain the Federal Register to others. It is their duty and responsibility. If every person is held to have notice of the statutes and agency regulations, it is hard to understand why people need such "an extraordinarily valuable service [as] advice-giving"[47] that governmental agencies are admittedly rendering. One of the arguments for not allowing the government to be estopped that follow from the *Merrill* case is that a person dealing with the government has to know the rules himself and therefore he cannot rely on representations of public officials. Another argument advanced in favor of the general rule is that estoppel against the government will interfere with and impair the government's ability to advise and provide information. These two arguments are clearly incompatible and subsequently should not be used as arguments against estopping the government.

Another important consideration weighing against estopping the government is the doctrine of separation of powers. As the Court discussed in the *Richmond* case, "to recognize estoppel based on the misrepresentations of Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved to Congress"[48]. The rationale of this issue is that governmental actions and

[39] *Ultra vires* means beyond the legal authority of an individual or corporation. *Webster's College Dictionary* (New York: Random House, Inc., 1996).

[40] See note 25: *Richmond* case.

[41] Id. Also: "[E]stoppel opens agencies to bogus claims … These claims … consume scarce agency resources" (see note 5: Alfred C. Aman Jr., p. 332).

[42] See note 37: Michael Asimov, p. 210.

[43] See note 27: *Merrill* case.

[44] Id.

[45] Id.

[46] Id.

[47] See note 37: Michael Asimov, p. 215.

[48] See note 25: *Richmond* case.

functions are prescribed strictly by laws and regulations enacted by Congress. The conduct of governmental officials and their duties are defined in statutes and agency rules, which must be obeyed. If a government would be held bound by the statements of its officials, which are unauthorized and thus contrary to such laws and regulations, this "would infringe upon Congress' exclusive constitutional authority to make law"[49], as agents and officers would be able to change law by their acts. However, these considerations lack strong merits. As Professor M. Asimov put it, "the application of estoppel hardly means the repeal of a statute; it would simply preclude the retroactive correction as to particular individuals of a particular mistake"[50]. Estoppel against a government would not invade legislative powers of Congress. It would protect a great public interest in justice by not allowing the retroactive correction of mistakes, which would unduly prejudice individuals.

Moreover, it is argued that if estoppel were allowed against a government where unauthorized acts of its agents were involved, public officials would have powers to deal with public funds and public property more or less at their discretion[51]. If a government officer conferred certain benefits or rights to a person not eligible to such benefits or rights, the government could not deny them even if they were conferred contrary to legal acts. In such light a quite artificial scenario about conspiracy between private citizens and dishonest public officials[52] does not seem so impossible. However, most government employees perform their duties properly. An innocent mistake does not give rise to estoppel; there must be fraud or at least some kind of negligence[53]. There are not so many dishonest or negligent officers to justify the inference that estoppel against a government would mean an intense waste of public funds and property.

To sum up, arguments in favor of the general rule that a government cannot be estopped abound. Still, however convincing they may be, at a closer look their merits seem to disappear or at least grow weaker. Let us now discuss arguments in favor of estopping the government.

3. The Modern Tendency: Arguments in Favor of Estopping a Government

The arguments discussed above are quite strong and sound. However, there appear to be situations in which courts are willing to allow the defense of equitable estoppel against a government[54]. Despite the strict view of the Supreme Court of the United States, more courts, especially state courts[55], consider that estoppel as an equitable doctrine should not distinguish between governmental and private entities in its application and "may properly

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[49] *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir.1982). For a similar attitude, see also note 25: *Richmond* case.

[50] See note 37: Michael Asimov , p. 214.

[51] "[T]hese officials would perforce gain the power to distribute agency benefits unequally at their discretion." (See note 5: Alfred C. Aman Jr., p. 328).

[52] "Dishonest officials might conspire with private citizens to promise benefits that the government would then have to pay" (Douglas Laycock, *Modern American Remedies: Cases and Materials*, Second Edition (Little, Brown and Company, 1994), p. 915).

[53] See note 15: 28 Am Jur 2d Estoppel and Waiver § 43-44, pp. 650-652.

[54] "The opposite [to 'nonestoppel' doctrine] now has almost uniform [case] support… The doctrine of equitable estoppel does apply to the government" (Professor Davis, *Administrative Law Treatise*, 1958, a quote in a text: Stephen G. Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text and Cases*, Fourth Edition (Aspen Law & Business, 1998), p. 525). "Decisions repudiating the no-estoppel rule still constitute the rare, though growing, exception" (Bernard Schwartz, *Administrative Law: A Casebook*, Second Edition (Boston and Toronto: Little, Brown and Co., 1983), p. 284).

[55] See note 8: William F. Funk, p. 367.

concern itself with elemental fairness to the private citizen dealing with his government…"[56]. The arguments in favor of application of the doctrine of equitable estoppel against the government can be grouped according to four major issues: 1) government acting in its proprietary capacity; 2) protection of private interests; 3) governmental agents acting *intra vires*; 4) justice and fairness.

3.1. Government Acting in Its Proprietary Capacity

Generally, it is asserted that while there can be no estoppel against a government in its sovereign capacity, things are different when a government enters into private or contractual relations. "Estoppel may be asserted against the government in the performance of a proprietary, as distinguished from a governmental, function"[57]. A governmental entity becomes the same as any other party to a contract, while it voluntarily puts itself in a position of a private company. As the government decides to relinquish its duties to act for the benefit of the public, and acts for its own benefit solely, it is only fair that by such acts it also relinquishes its immunity form estoppel.

Such reasoning was adopted in *Portmann v. United States*[58]. In this case a graphic arts designer mailed some of her works via the United States Post Office. She was told that her films were insured up to $50,000. However, when the films were lost, the Post Office told her that the insurance was limited to $500 by certain regulations. Portmann claimed that the Post Office should be bound by the representations of its employee. The Court distinguished this case from *Federal Crop Insurance Corp. v.Merrill*[59]. While in *Merrill* the governmental agency was the only source of insurance established for the benefit of farmers, in *Portmann* the U.S. Post Office was one of many carriers. The plaintiff could have selected any private carrier. It would be unfair to let her suffer detriment only because she trusted a governmental agency, which cannot be estopped. Besides, in this case the Post Office, although a governmental entity, was doing business and used revenues from such business to sustain itself, just like any other private company. Therefore, the Court held that the defense of equitable estoppel was appropriate in this case.

The distinction of sovereign and proprietary functions, as a way to circumvent the harsh no-estoppel rule, was adopted in an earlier, very important case, *United States v. Georgia-Pacific Co*.[60] In 1934, the United States entered into a contract with a private company. The parties agreed that certain forest lands owned by this private company will be added to the lands of a national forest and that the government will thus provide fire protection to them. In return for the fire protection, the company agreed to convey the land to the government after the timber on it would be cut.

Some time later the company cut and conveyed some parcels of land to the government. No more lands were cut or conveyed thereafter. The government reduced the boundaries of the national forest so that all the lands of the company were excluded, and thus, the fire protection was also withdrawn. Then, almost 30 years after the contract was made, Georgia-Pacific Co. bought the land from that private company and undertook an extensive forest management program, improving the lands and spending large amounts of money. The government sued seeking specific performance of the 1934 contract, maintaining that the reduction of the forest boundaries had no effect on the enforcement of the contract while

[56] See note 6: 27 ALR Fed, p. 719.

[57] Id., p. 722. Also: "A state may be held estopped when acting in a proprietary or contractual capacity" (see note 15: 28 Am Jur 2d Estoppel and Waiver § 123, p. 785).

[58] See note 49: *Portmann* case.

[59] See note 27: *Merrill* case.

[60] See note 20: *Georgia-Pacific* case.

the official who issued the order retracting the bounds acted beyond the scope of his authority.

The Court ruled for Georgia-Pacific Co. It noted that "the growth of government and the concomitant increase in its functions, power and contacts with private parties"[61] advocate for the adoption of the defense of equitable estoppel against a government. The Court also reminded that other courts have also found that in certain situations estoppel may be asserted against the government. One of such situations is when "the Government is acting in its proprietary rather than sovereign capacity"[62]. However, the Court touched upon an important issue of distinguishing proprietary functions from governmental functions and vice versa: "the authorities are not clear about just what activities are encompassed by each"[63]. In this particular case the Court found that it was clearly a proprietary action while the purpose here was not to preserve public lands, but to enforce a contract to acquire new lands. However, this distinction will not always be clear. The very presence of a governmental entity in a private transaction will make such transaction seem public, as it was argued in *Merrill* case[64]. That is why some courts tend to abandon this traditional governmental-private function distinction and turn their attention on the basic question of what is just and fair in a particular situation. This issue will be discussed in the fourth chapter below.

3.2. Protection of Private Interests

Another important consideration favoring estoppel against the government is the protection of interests of individuals dealing with the governmental agencies and officers. As the Court in *Georgia-Pacific* noted, nowadays "few individuals and corporations, if any, can escape numerous dealings with the Government and its agents"[65]. Therefore, courts have become more willing to apply the doctrine of equitable estoppel against the government where private interest is involved, however, with certain restrictions. Courts tend to search for balance and find estoppel against the government applicable where no damage to the interests of the public will be done.[66]

An instructive case on the point is *Lentz v. McMahon*[67]. The Court here was confronted with the issue whether an individual may assert the defense of equitable estoppel against a state welfare agency, which seeks recoupment of overpayments. The State Department of Social Services (DSS) was responsible for supervising administration of various public assistance programs. Under one of such programs the recipients would receive payments for their dependent children. DSS had rarely sought recoupment of overpayments until certain legislation was enacted that required to correct overpayments. Still, in cases of an agency error, DSS would allow recipients to assert the defense of equitable estoppel to bar recoupment of overpayments. Later, a new policy of DSS was adopted which refused any equitable remedy, including equitable estoppel, to be asserted in administrative hearings. A few recipients complained, and the case reached the court.

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[61] Id.

[62] Id.

[63] Id.

[64] See note 27: *Merrill* case.

[65] See note 20: *Georgia-Pacific* case.

[66] "Estoppel … may properly concern itself with elemental fairness to the private citizen dealing with his government … so long as application of the doctrine does not infringe upon the government's paramount responsibility to represent all of the people" (see note 6: 27 ALR Fed, p. 719).

[67] See note 20: *Lentz* case.

The Court concluded that an individual might use the defense of equitable estoppel against a state welfare agency under appropriate circumstances. The Court adopted a balancing approach:

> *The government may be bound by an equitable estoppel … when the elements requisite to such an estoppel … are present and … the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest …*[68]

Considering the circumstances of this particular case, the Court reasoned that the requisite elements of estoppel were present and that "a recipient's justified reliance … can produce compelling hardship. The failure to apply estoppel … may cause serious injustice"[69]. The Court also noticed that the public interest involved would not be seriously undermined while the issue involved procedural, as opposed to substantive, preconditions to eligibility the disregard for which could not "defeat the underlying statutory policy of … accurate and orderly administration of the welfare system"[70].

The *Lentz* Court was not very brave in allowing the governmental agency to be estopped. Although it felt that justice weighs to adopting the defense, apparently the influence of the Supreme Court was too strong. Therefore, the Court in the *Lentz* case strained its reasoning to achieve this rather artificial balance of public and private interests. It invoked all its ingenuity and tried to clarify the difference that procedural or, alternatively, substantive legislative norms would make to the issue of estoppel against the government. Thus, a very narrow exceptional situation in which estoppel could be applied against the government was described.

There were number of other cases which allowed the government to be estopped in circumstances where the private interest was compelling[71]. Some cases considered not only material rights and interests of citizens, but also "interest of citizens in some minimum standard of decency, honor and reliability in their dealing with Government", as the Supreme Court articulated in *Heckler v. Community Health Services, Inc.*[72] In this case the Supreme Court was not very strict about estoppel against the government. However, instead of resolving the issue of whether or not there can be estoppel against the government, the Court chose an easier way. It simply assumed for the sake of the argument that the government can be estopped if the prerequisites are established. In this particular case, the Court found that two of the elements of estoppel, injury and reasonable reliance, had not been met, therefore, in this case the governmental agency could not be estopped. Even though this Supreme Court's decision does not mean the green light for estopping the government, it does not mean the red one either.

The aforementioned "interest … in decency, honor and reliability" can be considered a public interest, while interests of private citizens form the common public interest[73]. Here the controversy arises. As previously discussed, the government cannot be estopped when it acts in favor of the whole society and protects public rights and interests. While trust with the government and reliability of its actions can and should be considered of paramount importance to the public, the very protection of such public interest may require the

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[68] Id.
[69] Id.
[70] Id.
[71] See note 6: 27 ALR Fed, p.719.
[72] *Heckler v. Community Health Services, Inc*., 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984).
[73] "Public interest is comprised of aggregated private interests" (see note 5: Alfred C. Aman Jr., p. 333).

government to be estopped in certain situations[74]. This controversy can easily be solved if the private-public interest distinction is abandoned. The rule of no estoppel where public interests are involved is of no use, as we can see, because the public interest itself may require estopping the government. Public and private rights and interests are closely interconnected. It is not easy to draw the line between them. Instead of trying to distinguish the public and private spheres, it would be more efficient to look closely to what would be a fair and just solution to a particular problem and then apply the doctrine of equitable estoppel where justice requires it.

3.3. Intra Vires *Conduct of Government Agents*

There is a general rule in the private law that a principal is bound by the acts of its agent. The same rule applies to the government. If its agents and officers act within the scope of their authority, the government is bound by such acts and representations and, consequently, it is estopped to deny the validity of such conduct[75]. This issue was discussed in the landmark *Georgia-Pacific* case and many other cases[76].

One of example cases concerned with this issue of an agent acting *intra vires* is *Walsonavich v. United States*[77]. The problem here arose when a taxpayer paid certain taxes, which later were declared erroneous. The taxpayer could file a refund claim immediately, but he made an agreement with the government agency extending the time for tax assessment. The taxpayer honestly believed that he would have time for a refund claim during that extended period. However, later the government refused to accept his refund claim asserting that the statute of limitations had run out. The Court sided with the plaintiff contending that while the general rule is that the government cannot be estopped by *ultra vires* conduct of its agents, certainly the circumstances were different here. The officer with whom the plaintiff had made an agreement had the necessary authority to act and to bind the United States in this particular situation. Therefore, the government was estopped by the *intra vires* conduct of Commissioner of Internal Revenue to assert the statute of limitations[78].

The *Walsonavich* case not only illustrates the rule that *intra vires* acts of government officers condition estoppel against the government, but also reminds a quite controversial issue which was raised in the *Merrill* case, namely that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that [the agent] … stays within the bounds of his authority"[79]. In other words, an individual who deals with the government is held to have knowledge of the limits of the agent's authority. The unfairness of this assumption is apparent. The line between *intra* and *ultra vires* conduct is difficult to draw. How is an ordinary person to know where the scope of the agent's authority starts and where it ends, especially where a fraud on the part of a governmental officer can be found?

Government is a huge apparatus ensuring the smooth functioning of a society. It is created for the benefit and convenience of people and it is sustained by people's money. It

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[74] "It is hardly in the public's interest for the Government to deal dishonestly or in an unconscientious manner" (see note 20: *Georgia-Pacific* case).

[75] See note 15: 28 Am Jur 2d Estoppel and Waiver § 123, p. 786.

[76] "An equitable estoppel may be found against the Government … if its representative has been acting within the scope of his authority" (see note 20: *Georgia-Pacific* case). Also, see note 6: 27 ALR Fed, pp. 717-719; *Oil Shale Corp. v. Morton*, 370 F. Supp.108 (D. Colo. 1973).

[77] *Walsonavich v. United States*, 335 F2d 96 (CA3 Pa 1964).

[78] "[T]he government is estopped if its agents are authorized to bind the government in a particular transaction and if the agents act within the scope of their authority" (Id.).

[79] See note 27: *Merrill* case.

is natural to expect that government will take care of public interests. One of such interests and rights, indeed, is reliability and trust with the governmental agencies. It is the government's duty to ensure that this interest is protected and the rights of people are properly implemented. Therefore, the government needs to take the trouble to employ qualified staff and constantly train them. If government fails to perform this duty properly and does not create a well-functioning body of honest and qualified officers, it is not the particular individuals that should bear the costs. Government should pay for the mistakes of its employees, thus spreading the price of the government's mistake among many people. The burden would not fall on a single individual, thus the ends of justice would be served better.

Some recent cases discerned the profound unfairness inherent in the *ultra-intra vires* distinction and allowed estoppel against the government even where it was created by unauthorized conduct of its agents. One of such cases was *Oil Shale Corp. v. Morton*[80]. Here the Court found that even though the acts of the Secretary of the Interior were unauthorized, the estoppel could be asserted, while "some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped…"[81].

Of course, the arguments that the government cannot be held responsible for every negligent statement of any of its thousands of employees and that the rule of estoppel against a government would drain the public treasury considerably have merits. On the other hand, there are always certain measures to protect against unfounded claims. One of such measures cannot be a flat rule against estopping the government with a few strained exceptions of private functions, protection of private interest or *intra vires* conduct of agents. Such exceptions are rather artificial and inflexible. It would be more reasonable to look at the essence of the doctrine of equitable estoppel and apply it whenever the circumstances of a case and the ends of justice warrant its application.

3.4. Justice and Fairness at the Core of Equitable Estoppel

All the above arguments, both in favor and against estopping the government, are sound. In the most recent cases, however, the courts tend to abandon the traditional public-private function or *intra-ultra vires* conduct distinctions. They now turn to "the basic question of what is justice in a particular situation"[82], the only restriction of application of the doctrine of equitable estoppel being the harm to the public's interests[83]. However, even this latter restriction could be eliminated from the considerations of estoppel against government while the principles of elementary fairness and justice, in other words equitable principles, when applied to a particular situation, will ensure that both private and public interests are balanced and unnecessary harm to any of them is avoided.

As it has been discussed in the theoretical part on estoppel in this article, justice and fairness lie at the very heart of the concept. The Court in the *Georgia-Pacific* case emphasized that point in its decision: "[E]quitable estoppel is a doctrine … based upon consideration of justice and good conscience. …Equitable estoppel is a rule of justice"[84]. Finding that all the prerequisites for estoppel were present in this case, the Court argued that the government should "be held to the same standard of rectilinear rectitude that it

[80] See note 76: *Oil Shale* case.

[81] Id. Also: "Administrative regularity must sometimes yield to basic notions of fairness" (*Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir.1970)).

[82] See note 6: 27 ALR Fed, p. 710.

[83] Id.

[84] See note 20: *Georgia-Pacific* case.

demands from its citizens"[85] and that the government's immunity from estoppel is in fact "exemption from the requirements of morals and justice"[86].

Cases with similar or identical attitudes towards this issue are not wanting[87]. In this context it is worth remembering that even the Supreme Court in the famous *Richmond* case, in which the decision was reached that there could be no estoppel against the government in these particular circumstances, did not reject the possibility that "some type of 'affirmative misconduct' might give rise to estoppel against the Government"[88]. Apparently following that reasoning some lower courts held that "the government could be estopped even in its governmental capacity when it was guilty of 'affirmative misconduct' "[89]. The Court in the *Schweiker* case also discussed the lower court's holding that "misinformation provided by a Government official combined with a showing of misconduct … should be sufficient to require estoppel"[90]. The Supreme Court found that in this case the official's acts did not amount to an 'affirmative misconduct'. However, the Court did not deny the possibility that if such conduct were shown, estoppel could be asserted against the government.

It is difficult to define what "affirmative misconduct" is. In *Brandt v. Hickel* case[91], the Court held that "a crucial misstatement" was enough to estop the government. The theory on estoppel points out that "even good faith representations that become untrue because of changing circumstances can create an estoppel"[92] in private law. Adding the doctrine of 'affirmative misconduct' to the already complicated issue of estoppel against the government can make the matters even worse and obscure the sight of a just and fair solution altogether. Therefore, some courts refused to search for the 'affirmative misconduct', simply holding that "even in the exercise of governmental functions, [the government] may be estopped where justice, right, and the equities of the situation demand it"[93]. In other words, some courts apply the doctrine of equitable estoppel against the government to the same extent as against a private party[94].

The issue of estoppel against the government would by much less complicated if various distinctions and exceptions were abandoned, while those exceptions tend to overcome the rule. Apparently, courts are often uneasy to apply the fundamental no-estoppel-against-government rule where the equities of the case strongly favor it. Therefore, they either strain their reasoning to find and clarify any circumstance that would justify their deviation from such rule, or find other ways to avoid the controversial decision[95]. There is a more straightforward way to serve the purpose of the doctrine of equitable estoppel. The very notions of justice, equity and fairness are by themselves sufficient to

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[85] Id.

[86] Id.

[87] See *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); *Gestuvo v. Immigration and Naturalization Service*, 337 F.Sup. 1093 (C.D.Cal.1971); See note 76: *Oil Shale* case. See also note 15: 28 Am Jur 2d Estoppel and Waiver § 123, pp. 783-785.

[88] See note 25: *Richmond* case.

[89] See note 52: Douglas Laycock, p. 913.

[90] See note 33: *Schweiker* case.

[91] See note 81: *Brandt* case.

[92] See note 52: Douglas Laycock, p. 910.

[93] See note 15: 28 Am Jur 2d Estoppel and Waiver § 128, p. 794. Again, estoppel is available against the government if "the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged…" (see note 87: *Lazy FC Ranch* case).

[94] See note 15: 28 Am Jur 2d Estoppel and Waiver § 123, p. 785; § 128, p. 793.

[95] Cases in which courts evaded the estoppel against the government question: *Moser v. United States*, 341 U.S. 41 (1951), applying the doctrine of waiver; *Appeal of Eno (New Hampshire Department of Employment Security)*, 126 N.H. 650, 495 A. 2d 1277 (N.H.1985), employing the due process concepts. See also note 8: William F. Funk, p. 366, for a discussion of another alternative to estoppel – inconsistency in agency actions.

balance the public and private interests. If estoppel against the government could be applied whenever the necessary prerequisites were present and the equities of a particular situation required that, the courts would simply have to weigh the arguments and see what is just and fair, without the unnecessary search for exceptional circumstances. It is not rational to create rules and exceptions to these rules, and then exceptions to these exceptions. The matter becomes unnecessarily complicated. The issue of estoppel against the government should be decided on a case-by-case basis, examining the circumstances carefully and applying only one test, a test of justice and fairness.

Conclusions

The influence of the government pervades more and more spheres of human lives. Government has become not only a subject of public law. It tries to make its way into a private law sphere. Nowadays a governmental agency can become business partner just like a private company. In view of these developments certain legal concepts have to be reconsidered. One of such concepts is equitable estoppel.

The doctrine of equitable estoppel evolved in common law and it was traditionally applied to private relations. However, with the changing circumstances and the status of the government in the modern society more and more courts are willing to apply this doctrine to relations in which one party is a governmental entity.

Concepts of equity, fairness, and justice lie at the core of the doctrine of equitable estoppel. These concepts trigger the application of equitable estoppel in a situation where a private company or an individual dealing with the government would suffer injury because of good faith reliance on governmental conduct if estoppel against the government were not applied.

However, because of traditional views towards the government and the doctrine of sovereign immunity, many courts, including the Supreme Court of the United States, are reluctant to apply estoppel against a government. They advance various arguments to defend their views. It is argued that a government cannot be estopped in performance of governmental functions, following the same line of reasoning on which the doctrine of sovereign immunity is based. Also, estoppel against a government will allegedly impair public interests. Finally, it is considered that a government cannot be held accountable for misconduct of its agents who act without authority.

Courts that felt uneasy with such rigid attitude of no estoppel against a government began inventing exceptions to the rule. Thus, estoppel was found to be applicable where a governmental agency acted in its private, or contractual, capacity. Similarly, estoppel was used to prevent great damage to private interests in cases where public interests would not suffer injury. Lastly, it was argued that a government should be held responsible for *intra vires* conduct of its agents.

These developments towards a more frequent application of the doctrine of equitable estoppel against the government are of course necessary and welcome. Still, the artificial and stiff exceptions to the fundamental rule of no estoppel against the government cannot always guarantee a just and fair solution to a particular problem. It is not enough to concede that there can be no flat rule against estopping the government, as the Supreme Court did in the *Richmond* case. Those artificial and elaborated exceptions should be abandoned. There is no need for the complex public-private function or *intra-ultra vires* conduct divides. They only make the issue more complicated. The notions of fairness and justice underlying the doctrine of equitable estoppel can help reach sensible and well-balanced decisions.

In conclusion, if the necessary prerequisites of estoppel are present in a certain situation and the equities of the case require application of the doctrine, equitable estoppel can and should be used against the government. Just as courts looked at the notions of

justice and fairness when elaborating the aforementioned exceptions, they can simply apply the test of fairness to any situation and weigh arguments of both sides of the dispute in light of what is just. Such test would undoubtedly balance both public and private interests and help find the most appropriate solution. The test of fairness would be more flexible and thus better serve the ultimate ends of justice and equity.

Abstract in Lithuanian

Renata Petrylaitė

AR ESTOPELIS GALI BŪTI PANAUDOTAS PRIEŠ VALDŽIĄ?

Santrauka

Valstybės institucijų įtaka vis labiau jaučiama privačiame žmonių gyvenime. Valdžios organai tampa ne tik viešosios, bet ir privatinės teisės subjektais. Šiais laikais valstybės institucija gali tapti verslo subjektu kaip bet kuri privati įmonė. Vykstant šiems pokyčiams kai kurios teisinės sąvokos ir koncepcijos turi būti apsvarstytos, apibrėžtos ir paaiškintos iš naujo. Viena iš tokių sąvokų yra estopelis. Šiame straipsnyje aptarta estopelio doktrina, jos taikymas, tradicinė taisyklė, kad estopelis negali būti naudojamas prieš valdžios institucijas, ir šios taisyklės išimtys.

Estopelio doktrina atsirado ir išsivystė bendrosios teisės sistemoje. Straipsnyje pasirinkta Jungtinių Amerikos Valstijų teisinė sistema, reprezentuojanti ir kitų bendrosios teisės šalių požiūrį į estopelio koncepciją. Estopelis užkerta kelią asmeniui, atlikusiam tam tikrus veiksmus, ginčyti ar neigti su tais veiksmais susijusius padarinius ar aplinkybes[96]. Tradiciškai ši doktrina buvo laikoma privatinės teisės dalimi ir buvo taikoma būtent privačiuose, kitaip tariant, sutartiniuose santykiuose. Tačiau besivystant viešajai teisei ir besikeičiant valdžios organų padėčiai šiuolaikinėje visuomenėje, vis daugiau teismų pritaiko šią koncepciją ir tokioje situacijoje, kurioje viena iš šalių yra valstybinė institucija.

Estopelio doktrinos pagrindas yra teisingumo ir nešališkumo principai. Šie principai ir sąlygoja tai, jog estopelis turėtų būti taikomas tokioje situacijoje, kurioje privati įmonė ar privatus asmuo, sudaręs sandorį su valdžios institucija, gali patirti didelių nuostolių dėl to, kad sąžiningai pasitikėjo tos institucijos ar valdininko elgesiu, jei estopelis nebus panaudotas kaip gynyba prieš tą instituciją.

Tačiau dėl tradicinio valdžios kaip suvereno suvokimo daugelis teismų, taip pat ir Jungtinių Valstijų Aukščiausiasis Teismas, nėra linkę taikyti estopelį kaip gynybos priemonę prieš valdžią. Pateikiami įvairūs argumentai, pavyzdžiui, jog valdžiai negali būti trukdoma vykdyti tas funkcijas, kurias valstybė kaip suverenas jai patikėjo, o estopelis tam būtent ir trukdytų. Taip pat tvirtinama, kad estopelis prieš valdžią gali pakenkti visuomenės interesams bei, kad valdžia negali atsakyti už kiekvieno savo tarnautojo, viršijančio įgaliojimus, neatsargiu ar neatsakingu elgesiu padarytas klaidas.

Kai kurie teismai jautėsi suvaržyti griežtos tradicinės taisyklės, kad estopelis prieš valdžią negali būti naudojamas, todėl pradėjo ieškoti išimčių. Taip estopelis imtas taikyti tada, kai valstybinė institucija veikia kaip privatus asmuo, t. y. sutartiniuose santykiuose, taip pat kai estopelis gali užkirsti kelią dideliems privačios šalies nuostoliams, jei tik visuomenės interesams tai nekenkia. Galiausiai buvo tvirtinama, kad valdžia turi atsakyti už tuos savo tarnautojų veiksmus, kurie atlikti įgaliojimų ribose.

Šios išimtys bei dažnesnis estopelio doktrinos taikymas prieš valdžios organus, be abejo, yra reikalingos ir sveikintinos. Tačiau minėtos pagrindinės taisyklės išimtys yra gana dirbtinės ir nelanksčios, todėl negali garantuoti teisingo kiekvienos problemos sprendimo. Nepakanka tiesiog pripažinti, kad negali būti vienareikšmiškos ir kategoriškos taisyklės, jog estopelis negali būti taikomas prieš valdžią, kaip tai padarė JAV Aukščiausiasis Teismas *Richmond* byloje. Nepakanka išgalvoti sudėtingas ir kiek dirbtines išimtis, nes tos išimtys negali numatyti kiekvienos galimos situacijos. Šis straipsnis siūlo atsisakyti tiek pagrindinės taisyklės, tiek jos išimčių. Nereikalingas ir skirstymas į privačias bei valstybines institucijų funkcijas ar į valdininkų veiksmus, viršijančius įgaliojimus bei veiksmus įgaliojimų ribose. Toks skirstymas tik komplikuoja sprendžiamą klausimą. O jį

[96] Olimpija Armalytė ir kiti, *Anglų-lietuvių kalbų teisės žodynas* (Kaunas: Alma Littera, 1998).

protingai ir teisingai išspręsti gali padėti jau minėti teisingumo ir nešališkumo principai, kurie yra visos estopelio koncepcijos pagrindas.

Viską apibendrinant, galima teigti, jog jei tam tikroje situacijoje egzistuoja visos sąlygos būtinos estopeliui taikyti ir ši doktrina reikalinga teisingam sprendimui pasiekti, tada estopelis gali ir turi būti panaudotas prieš valdžią. Teismai rėmėsi teisingumo ir nešališkumo principais bandydami ieškoti aukščiau minėtų išimčių iš bendros taisyklės, kad estopelis negali būti naudojamas prieš valdžią. Tačiau jie gali pritaikyti šiuos principus žymiai paprasčiau. Reikėtų tiesiog taikyti teisingumo kriterijų duotai situacijai ir to kriterijaus aspektu įvertinti kiekvienos ginčo šalies, tiek privataus asmens, tiek valstybinės institucijos, argumentus. Toks kriterijus be abejonės padėtų teisingai pasverti ir privačius, ir visuomeninius interesus, bei priimti tinkamiausią duotai situacijai sprendimą. Teisingumo ir nešališkumo kriterijus būtų lankstesnis už minėtas išimtis ir todėl būtų žymiai naudingesnis siekiant teisingų sprendimų teismo procese.