

10-27-2016

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Thiago Luís Sombra

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**THE DUTY OF GOOD FAITH TAKEN TO A NEW LEVEL:  
AN ANALYSIS OF DISLOYAL BEHAVIOR**

Thiago Luís Sombra\*

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## ABSTRACT

*By focusing on improving the role of certain mechanisms for controlling private autonomy under a crisis of liberal values, contract law has reached an objective and straight dimension. The prohibition of disloyal or inconsistent behavior, also known as *venire contra factum proprium* in Roman Law, constitutes one of the concepts that is renowned for protecting the trust relationship. The prohibition of disloyal behavior lies in avoiding contradictory behaviors regarding previous manifestations of will that are based on good faith and that can cause damages. This article aims to challenge the main reason why disloyal behavior should be limited by good faith in order to promote the legitimate expectations of contractual relationships. This paper first seeks to explain the concepts related to the limits of disloyal behavior in relation to the grounded theory of contracts. It then develops a model in which the theory might be invoked to rectify contradictory conduct. Finally, some cases heard before the Brazilian Federal Supreme Court and Superior Court of Justice are analyzed to demonstrate how good faith can also improve contractual due performance in comparative law.*

Keywords: Disloyal Behavior, Trust, Good Faith, Contract Law, Contradicting One's Own Act, Due Performance, Damages, Loyalty.

## I. INTRODUCTION

Given the decline of the political model of liberalism and its values,<sup>1</sup> the basis of contract law has developed an objective dimension, resulting in the reemergence of a number of mechanisms for controlling private autonomy and will.<sup>2</sup> Among these mechanisms are duties that are based on Roman Law, the high ethical value of which underscores the control of contractual rights.

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1. Moreover, the idea of freedom of contract has been used as a political argument in favor of individualism in a *laissez faire* economy. The case *Lochner v. New York* is the main example of that concept, as highlighted by Steven J. Burton in STEVEN J. BURTON, *PRINCIPLES OF CONTRACT LAW* 207–208 (2d ed. 2001).

2. Thiago Luís Santos Sombra, *Representation and Deliberation: Does Every Vote Have the Same Influence in the Voting Process of Civil Associations?*, 41 T. MARSHALL L. REV. (2015).

The prohibition on contradicting one's own behavior, conceived in the expression *venire contra factum proprium*, or estoppel in common law countries,<sup>3</sup> constitutes one of the concepts from Roman Law that is renowned for protecting a commitment to loyalty. The core of the prohibition of contradicting one's own behavior, therefore, lies in avoiding behaviors that conflict with previous manifestations of will.<sup>4</sup>

The Roman Law concept of *venire contra factum proprium* and estoppel,<sup>5</sup> as mechanisms aimed at protecting trust relationships, are triggered by two distinct behaviors of the same person: an original conduct of this person (*factum proprium*), and a subsequent contradictory behavior, with a difference of timing: so that the interest of another party relying in good faith on the first conduct may be harmed by the subsequent conduct.<sup>6</sup> It is, therefore, a mechanism that was created to discourage disloyalty and promote any other duties attached to good faith.

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3. The principle *venire contra factum proprium* is cited in some cases in the International Court of Justice; see *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, at 120–21 (Feb. 1969) (separate opinion of Judge Fouad Ammoun). See also Thiago Luís Santos Sombra, *The Interpretation of the Parties' Conduct, the Uses and Customs in the United Nations Convention on Contracts for the International Sale of Goods* in COMMENTARIES ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), 20 (Silvo de Salvo Venosa & Rafael Gagliardi eds., 2015), <http://papers.ssrn.com/abstract=2623247> (last visited Oct 23, 2015).

4. Martijn W. Hesselink, *The Concept of Good Faith in TOWARDS A EUROPEAN CIVIL CODE 619-620* (3rd ed., Arthur S. Hartkamp, Ewoud H. Hondius & Martijn W. Hesselink eds, 2004) available at <http://ssrn.com/abstract=1098856>; HANS-BERND SCHÄFER & CLAUS OTT, *THE ECONOMIC ANALYSIS OF CIVIL LAW 384* (Matthew Braham trans., 2004).

5. BASIL MARKESINIS, HANNES UNBERATH & ANGUS JOHNSTON, *THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE 123* (2d ed. 2006).

6. Zimmermann highlights that:  
going against one's own previous conduct (*venire contra factum proprium*) is frowned upon, and so is relying on a right which has been dishonestly acquired (*nemo auditur turpitudinem suam allegans*), demanding something which has to be given back immediately (*dolo agit qui petit quod statim redditurus est*), proceeding ruthlessly and without due consideration to the reasonable interests of the other party (*incivilliter agere*), or reacting in a way which must be considered as excessive when compared with the event occasioning the reaction (*Übermaßverbot*).  
REINHARD ZIMMERMANN & SIMON WHITTAKER, *GOOD FAITH IN EUROPEAN CONTRACT LAW 24–25* (2000).

Notably, the prohibition of inconsistent behavior is not an abstract prohibition on contradictory behaviors; rather, it provides only a barrier to behaviors that reflect inconsistent positions under good faith. Because contradiction is an inherent human characteristic and is also inherent in the dynamics of modern social relations, only inconsistencies that affect another party's patrimonial sphere through the inobservance of objective good faith (as will be explained next<sup>7</sup>) can be prohibited.

Nevertheless, *venire contra factum proprium* should not be viewed from the perspective of an unlimited incentive for consistency in human behavior because, in principle, incipient behaviors have no legal consequences.<sup>8</sup> Strictly speaking, something has a legal effect only with the emergence of a contradictory position subsequent to the first act that is based on good faith.

The prohibition of disloyal behavior,<sup>9</sup> therefore, should not be inferred as an expression of caprice for excessive coherence or strict reason. In fact, the typical dynamic nature of mass societies demonstrates the invariable concept that wellbeing lies in the freedom to change one's positions when facing the new and unknown. Faced with this reality, the comprehension of a modern and suitable *venire contra factum proprium* pervades any attempt to curb the excessive manifestation of inconsistent behaviors that harm others, however, without implying a disproportional limitation on the exercise of individual rights. Thus, both estoppel and *venire contra factum proprium* reinforce the idea that legal relationships are centered on reliance, loyalty, and the fulfillment of one's expectations.

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7. The concept and distinction between objective and subjective good faith in civil law systems will be explained in the next section.

8. See YUVAL NOAH HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* 173 (2014) (explaining that this feature is called cognitive dissonance, which refers to the human ability to hold contradictory beliefs and values).

9. It is important to highlight that the term disloyal behavior is used with the same meaning as contradictory behavior in this context. Indeed, disloyalty represents the origin of contradictory behavior.

## II. PREMISE FOR UNDERSTANDING THE THEORY OF DISLOYAL BEHAVIOR

### A. Definitions

The prohibition of disloyal behavior, or *venire contra factum proprium*, constitutes a legal premise that is derived from the idea of trust and, therefore, from the perspective of good faith,<sup>10</sup> which considers any objectively contradictory intention in relation to previously manifested conduct to be unacceptable.<sup>11</sup> Strictly speaking, the prohibition of disloyal behavior comprises not only the annulment of performed acts but also the rejection of their predictable and desired consequences.<sup>12</sup> It is, therefore, a reasonable mechanism to limit the exercise of individual rights.<sup>13</sup>

The prohibition of disloyal behavior, or *venire contra factum proprium*,<sup>14</sup> is justified as the protection of legitimate expectations, which is used as the element that accords this legal premise axiological content in order to only prevent inconsistent behaviors that breach an assumption of trust.<sup>15</sup> Nevertheless, it is not an inconsistency or a contradiction that the prohibition of disloyal behavior aims to prevent, but behavior that would result in an unreasonable interference with a legitimately created trust relationship, that allowed the other party to reasonably rely on the original conduct.<sup>16</sup>

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10. ANTÓNIO M.R. MENEZES CORDEIRO, *DA BOA-FÉ NO DIREITO CIVIL* 753 (2001).

11. ALEJANDRO BORDA, *LA TEORÍA DE LOS ACTOS PROPIOS* 53 (3d ed. 2000).

12. For Antônio Junqueira de Azevedo, “the expression *venire contra factum proprium* underpins the exercise of a legal position in contradiction with a previously adopted behavior; there is a violation of good faith as it violates the expectations created—to all parties, but especially to the party at odds.” ANTONIO JUNQUEIRA DE AZEVEDO, *ESTUDOS E PARECERES DE DIREITO PRIVADO* 167 (2004).

13. LUIS DÍEZ-PICAZO, *LA DOCTRINA DE LOS PROPIOS ACTOS* 186 (1963). Individual rights are understood as a category of protected interests that were received from the law the instruments to repeal any attempt of violation as stated in MARKESINIS, UNBERATH, AND JOHNSTON, *supra* note 5 at 124–125.

14. BORDA, *supra* note 11 at 53.

15. Paulo Mota Pinto, *Sobre a Proibição do Comportamento Contraditório (Venire Contra Factum Proprium) no Direito Civil*, VOLUME COMEMORATIVO BOLETIM FACULDADE DIREITO UNIVERSIDADE COIMBRA 269–322 (2003).

16. CORDEIRO, *supra* note 10, at 750.

The valuable restructuring of *venire contra factum proprium* lies exactly in the attempt to solidify good faith. The prohibition of disloyal behavior is reinvigorated by the endeavor to improve it as a paradigm for concreteness when faced with behaviors that contradict good faith. The provision of *venire contra factum proprium* should, however, receive an accurate, systematic study to avoid its substantial deterioration by overuse and abuse by claimants, which would result in the trivialization of the mechanism and the exhaustion of the normative content of good faith. Thus, it should be used to corroborate the path of the adopted argumentation.<sup>17</sup>

In this way, *venire contra factum proprium*, as a category of contradictory acts, will be apt to be functionally invoked both actively and defensively. For example, it can be invoked as an action to affirm the existence of a right, including but not limited to, the right to damages, as a substantial exception of illegality, or as a means of defense of a legal position or situation that is presented as undeniable.<sup>18</sup>

As the basis for *venire contra factum proprium*, the protection of legitimate expectations should be the dispositive factor in identifying the disloyal behaviors that are relevant<sup>19</sup>—that is, the requirement of trust does not refer to a simple and strict obligation of coherence or truth.<sup>20</sup> Moreover, *venire contra factum proprium* is a mechanism that focuses on the protection of legitimate expectations, not a mechanism for the mere prohibition of bad faith or deceit.<sup>21</sup>

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17. ANDERSON SCHREIBER, A PROIBIÇÃO DE COMPORTAMENTO CONTRADITÓRIO: TUTELA DA CONFIANÇA E VENIRE CONTRA FACTUM PROPRIUM 121–122 (2012).

18. Judith H. Martins-Costa, *A Ilícitude Derivada do Exercício Contraditório de um Direito: o Renascer do Venire Contra Factum Proprium*, 97 REVISTA DA AJURIS 143, 145 (2005).

19. MARKESINIS, UNBERATH, & JOHNSTON, *supra* note 5, at 123.

20. Menezes Cordeiro stated that when the idea of *venire contra factum proprium* is taken to its ultimate consequences: “the normative permissions would be extinguished in the first exercise and the whole social relationship would be converted into a rigid structure of undeniable obligations.” CORDEIRO, *supra* note 10, at 751.

21. RUY ROSADO DE AGUIAR JÚNIOR, EXTINÇÃO DOS CONTRATOS POR INCUMPRIMENTO DO DEVEDOR 254 (1991).

The identification of trust and good faith as normative bases for *venire contra factum proprium* represents a highly favorable measure for the consolidation of the prohibition of disloyal behavior. It implies the inclusion of dogmatic and axiological aspects that are already aggregated by good faith.<sup>22</sup> One of the most significant characteristics of good faith expressed by the conception of *venire contra factum proprium* is its use as a general principle.<sup>23</sup>

The general principle of good faith comprises of both objective and subjective good faith.<sup>24</sup> Objective good faith (for civil law systems) or just fair dealings (for common law systems) comprises of the belief and trust in the loyalty, in which a given subject will satisfy the legitimate expectations created in someone else.<sup>25</sup> As the prohibition of disloyal behavior bars any objectively considered inconsistent conduct, it is irrefutable that such conduct should specifically affect good faith.<sup>26</sup> The prohibition of disloyal behavior follows *pari passu* the axiological content attributed to good faith. For

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22. In fact, “bringing *venire contra factum proprium* to the doctrine of trust reveals a higher status of ascending duties, of systematization of the casuistry around contradictory behaviors, and of descending with the concretization of good faith.” CORDEIRO, *supra* note 10, at 755.

23. Hesselink, *supra* note 4, at 621.

24. Martijn Hesselink outlines that the English common law does not accept the concept of objective good faith as the European continental system and civil law countries do. Hesselink, *supra* note 4, at 619. Nonetheless, Teubner notes the “legal transplant” of good faith to the British by the Unfair Terms in Consumer Contracts Regulation 1994 (EC Council Directive 93/13/EEC) caused a great deal of irritation. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies*, 61 MOD. LAW REV. 11, 11–12 (1998). Zimmerman quotes the case *Chapman v. Honig* [1963] 2 QB 502 (Eng.) to confirm the premise that English law does not recognize the effect of good faith in contract law. According to him, “the relationship between English law’s exclusion of any general requirement of good faith in the performance of contract and its more general denial of a theory of the abuse of rights perhaps reflects its traditionally wide, liberal approach to the concept of a right itself.” ZIMMERMANN & WHITTAKER, *supra* note 6, at 41. Steven J. Burton has also mentioned the difficulties of understanding good faith in the Uniform Commercial Code. Steven J. Burton, *Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1, 2–3 (1981).

25. STEFANO RODOTÀ, *LE FONTI DI INTEGRAZIONE DEL CONTRATTO* 149 (2004). For an economic approach related to the costs of protecting trust and good faith, see SCHÄFER AND OTT, *supra* note 4 at 375.

26. BORDA, *supra* note 11, at 60.



example, the connection between both is interrelated to the point where one finds its ontological foundations in the other.<sup>27</sup>

On the other hand, subjective good faith consists of a belief arising from an excusable mistake that certain conduct does not contradict a given right.<sup>28</sup> It is a concept that is not very familiar in common law countries and that encompasses a two-pronged analysis: a belief or ignorance about not causing harm to another person's interests that are protected by the law and the mistake of an agent in a given factual situation to that person's benefit.<sup>29</sup>

Notwithstanding these aspects, it is important to note the remarks of Menezes Cordeiro in the sense that this is not only the invocation of a certain mechanism over others, but rather it is also an effective relation of its relevant elements.<sup>30</sup> In other words, we should aim to raise good faith to the condition of a general principle that is autonomous, abstract, and subject to being invoked for a variety of legal relations, but with consideration of the peculiar aspects of each case.<sup>31</sup>

Conversely, the prohibition of disloyal behavior, on the other side of the dichotomy of the principle of good faith, illustrates and embodies some conditions of the normative coverage attributed to this general duty;<sup>32</sup> however, *venire contra factum proprium* has its limitations.<sup>33</sup> The discussion would be of lesser importance if the application of the general duty of good faith was something pacific,

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27. JUDITH H. MARTINS-COSTA, *A BOA FÉ NO DIREITO PRIVADO: SISTEMA E TÓPICA NO PROCESSO OBRIGACIONAL* 471 (1999); ZIMMERMANN & WHITTAKER, *supra* note 6, at 30.

28. PETER A. ALCES, *A THEORY OF CONTRACT LAW: EMPIRICAL INSIGHTS AND MORAL PSYCHOLOGY* 77 (2011).

29. DÍEZ-PICAZO, *supra* note 13, at 136.

30. CORDEIRO, *supra* note 10, at 756.

31. MARKESINIS, UNBERATH, & JOHNSTON, *supra* note 12, at 120–121 (explaining how codes stay up to date).

32. *See* FRANZ WIECKER, *HISTÓRIA DO DIREITO PRIVADO MODERNO* 545–546 (2d ed., António M. Botelho Hespanha trans. 1967).

33. ANDERSON SCHREIBER, *A PROIBIÇÃO DE COMPORTAMENTO CONTRADITÓRIO: TUTELA DA CONFIANÇA E VENIRE CONTRA FACTUM PROPRIUM* 99 (2012) (highlighting the evolution of good faith as an open clause in the German Civil Code).

technical, and straightforward within Brazilian doctrine and jurisprudence and in other countries.<sup>34</sup> We should note, for example, that the applicability of the general duty of good faith in public law is still subject to some controversy, as is the framing of its essential core in extra-contractual, pre-contractual, and even post-contractual relations.<sup>35</sup>

*B. Distinction Between the Prohibition of Disloyal Behavior and Other Similar Categories that Stem from Good Faith*

With these considerations noted in relation to the concept, legal nature, and foundations of *venire contra factum proprium*, it is imperative to analyze some of the norms that bear similarities to the prohibition of disloyal behavior. The following distinctions will aim to anchor the theoretical limits of *venire contra factum proprium*, without, however, implying an absence of complementarity or even an imagined casuistic overlap of the norms.

The real intention here is to highlight the necessity of a full comprehension of the applicable criteria of each norm in order to contemplate, *in concreto*, the best conditions for resolving a controversy under the perspective of the legal order.

*1. Implied Waiver in Civil Law Systems*

Given the influence of liberalism, *venire contra factum proprium* is commonly confused with the norm of implied waiver.<sup>36</sup> To the followers of voluntarism, it is more convenient to associate initially-adopted conduct with an implied declaration of will through

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34. Hesselink, *supra* note 4, at 621; ZIMMERMANN & WHITTAKER, *supra* note 6, at 8. According to Zimmermann, “[p]rivate law in Europe is in the process of reacquiring a genuinely European character.”

35. Article 422 of the 2002 Civil Code considerably eased the alleged controversies around the time frame of the observance of good faith. Furthermore, the thesis of Menezes Cordeiro on guilt *post factum finitum* should also be considered. CORDEIRO, *supra* note 10, at 626; THIAGO LUÍS SANTOS SOMBRA, ADIMPLENTO CONTRATUAL E COOPERAÇÃO DO CREDOR 89 (2011).

36. DÍEZ-PICAZO, *supra* note 13, at 149–150.

which one renounces the exercise of the rights to be obtained in contradiction of that will, rather than finding non-voluntarist grounds to restrict individual freedom.<sup>37</sup>

The fallacy of the syllogism constructed by voluntarists lies in always considering the *facta proprium* of an implied declaration of will when, in fact, this is not the rule.<sup>38</sup> Furthermore, *venire contra factum proprium* is marked by its objective character that does not restrict the scope of legal acts.<sup>39</sup> In refuting this argument, the prohibition on disloyal behavior is independent from the will of whoever practices the inconsistent act. In fact, a contradiction in violation of the expectations rightfully derived from the initial conduct is sufficient for its existence.<sup>40</sup>

Given this explanation, it is worth noting that part of the hypotheses regarding the application of the prohibition of disloyal behavior is not subject to characterization as an implied waiver or an implied declaration of will because the *factum proprium* does not require an intention, even if presumed, to achieve specific legal effects.<sup>41</sup> It is not always possible to understand initial conduct and the implied waiver to exercise a given right, or even as trying to restrict legitimate expectations to implied declarations of will.

Unless the intuitive analysis of Brazilian jurisprudence leads to the understanding that *venire contra factum proprium* has been invoked to resolve controversies where implied waiver does not provide clear answers, each mechanism must be conceived according to its own peculiarities.<sup>42</sup>

## 2. Self-Declared Turpitude

The prohibition of self-declared turpitude derives from the maxim *nemo auditur propriam turpitudinem allegans* and presents

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37. SCHREIBER, *supra* note 17, at 162.

38. DíEZ-PICAZO, *supra* note 13, at 159.

39. MARKESINIS, UNBERATH, & JOHNSTON, *supra* note 5, at 125.

40. SCHREIBER, *supra* note 17, at 163.

41. BORDA, *supra* note 11, at 133–134.

42. Hesselink, *supra* note 4, at 623.

elements that are very similar to those of *venire contra factum proprium*.<sup>43</sup>

Under the influence of liberalism, article 104 of the 1916 Brazilian Civil Code states that “[w]here there is intent to harm a third party or violate a legal provision, the contracting parties are forbidden to make pleas or allegations before the court related to misrepresentation [though it seems the article is addressing simulation, misrepresentation seems to be a good translation here] in actions between the parties or before third parties.” Strictly speaking, whoever has benefited from their own turpitude cannot plead it with the intention of causing damage to others, as the guilt inherent in this conduct has completely extinguished the conflicting intention. The discovery of fraudulent conduct prevails over any other analysis of the inconsistent nature of the posterior act because, in fact, the fraudulent conduct has occurred only because of the initial malicious intent.

The resemblance between the legal mechanisms is seen in the attempt to prevent the practice of a posterior act in contradiction to a previous one. The difference, however, lies in the circumstances in which, in the case of self-declared turpitude, the initial conduct is marked by malice, whereas in *venire contra factum proprium*, it is independent of the subjective elements. The application of the prohibition of disloyal behavior only requires the characterization of an objective contradictory situation. For example, the underlying willful element is in conflict with the actual facts supporting it.

### 3. *Mental Reservation*

What is commonly known as mental reservation (article 110 of the 2002 Brazilian Civil Code) occurs when one party hides their

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43. See REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 667–668 (1996) (explaining the different meanings of *dolo* and self-declared turpitude).

real intention when manifesting their will with the objective of causing damage to someone.<sup>44</sup> It is a type of simulation. The difference between them in the Brazilian Civil Code is that mental reservation depends on the bad faith of only one person, whereas simulation requires the bad faith of at least two people. Therefore, the previously declared manifestation of will persists even if the author has made a mental reservation of not wanting what he or she has actually manifested, unless the other party was aware of that fact.<sup>45</sup>

In fact, mental reservation contains aspects that are very similar to those of self-declared turpitude, such that the arguments used to distinguish it from the prohibition of disloyal behavior are also valid here.

#### 4. *Tu Quoque*

The expression *tu quoque* originated from the dialogue between Emperor Julius Caesar and Marcus Junius Brutus when the latter stabbed the former: “*tu quoque, Brutus, tu quoque, mi fili?*”<sup>46</sup> In its literal translation, *tu quoque* means “even you” and denotes a feeling of surprise mixed with disappointment for inconsistent behavior.<sup>47</sup> Thus, how is it possible that even you (*tu quoque*), who engaged in acts that created a well-grounded and legitimate expectation in someone else, now come to dishonor what you had previously committed to do? *Tu quoque* is a term that is invoked to express that no

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44. SCHREIBER, *supra* note 17, at 163; MARTINS-COSTA, *supra* note 27, at 66; AGUIAR JÚNIOR, *supra* note 21, at 35.

45. MÁRIO JÚLIO DE ALMEIDA COSTA, *DIREITO DAS OBRIGAÇÕES* 320 (2000); LUÍS M. T. MENEZES LEITÃO, *II DIREITO DAS OBRIGAÇÕES* 76 (2003); *MANUALE DI DIRITTO CIVILE* at 110 (6th ed., Pietro Perlingieiri org. 2007).

46. See GUNTHER TEUBNER, *GEGENSEITIGE VERTRAGSUNTREUE: RECHTSPRECHUNG U. DOGMATIK Z. AUSSCHLUSS VON RECHTEN NACH EIGENEM VERTRAGSBRUCH* 10–25 (1975). In Portugal, Germany, and Brazil, the expression *tu quoque* is well known and is employed to refer to behaviors that represent an undesirable surprise for the other party.

47. CORDEIRO, *supra* note 10, at 837; EGON LORENZ, *DER TU-QUOQUE-EINWAND BEIM RÜCKTRITT DER SELBST VERTRAGSUNTREUEN PARTEI WEGEN VERTRAGSVERLETZUNG DES GEGNERS* 312 (1972).

one who violates a norm can obtain benefits that stem from one's own disloyal behavior.<sup>48</sup>

Although the expression *tu quoque* is employed in philosophy and rhetoric as an argument of a fallacious nature or of an inconsistent thesis, from a legal perspective, the term consolidates different evaluative criteria for substantially identical situations.<sup>49</sup>

When comparing *tu quoque* and *venire contra factum proprium*, one can notice a markedly similar factor identified by a contradiction observed in a given conduct. However, the difference between *tu quoque* and *venire contra factum proprium*, is associated with preventing the coexistence of different valuation criteria for objectively similar situations. In other words, the repulsion of disloyalty and malice seems to stand out more incisively in *tu quoque* than in *venire contra factum proprium*.

### 5. *Suppressio and Surrectio*

The mechanism of *suppressio*, which is most known for its similarity to *Verwirkung*, can be understood as the inertia of the party entitled to a right to exert it after a given time lapse, making it impossible to claim it again later under penalty of a violation of the principle of good faith.<sup>50</sup> Thus, while prescription protects an intention only for the passage of time, for *suppressio* to be recognized, one is required to demonstrate that such behavior is unacceptable under the principle of good faith.<sup>51</sup>

Notably, *suppressio* is not the deprivation of the ability to exert a right simply as a result of the passage of time. In fact, the controversy involves the non-observance of good faith by someone who has instilled in another person the legitimate expectation that a right that had been neglected until then would no longer be exercised.<sup>52</sup>

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48. *Id.* at 840.; ANTÓNIO MENEZES CORDEIRO, TRATADO DE DIREITO CIVIL PORTUGUÊS (2d ed. 2007).

49. SCHREIBER, *supra* note 17, at 175.

50. CORDEIRO, *supra* note 10, at 798–800.

51. AGUIAR JÚNIOR, *supra* note 21, at 254.

52. CORDEIRO, *supra* note 10, at 812.

Therefore, in cases of contracts of successive performance or installments, when the creditor has failed to act in a timely manner on a certain requirement as a result of a lack of initiative, he is prevented from taking another position on that issue “if the debtor had reason to believe that the obligation had been extinguished and has planned their life under that perspective.”<sup>53</sup>

*Surrectio* represents the other side of *suppressio*—that is, the emergence of a right due to the repeated practice of certain acts. As an illustration, Ruy Rosado de Aguiar Junior evokes the hypothesis of the distribution of profits in a commercial association, in clear violation of statutes, which would engender the right to continue to receive such distributions.<sup>54</sup>

#### 6. Estoppel in Common Law

Etymologically, the term *estoppel* means barrier, obstacle, or impediment. Originally a procedural common law mechanism, it developed into a rule of substance that maintains significant proximity to the prohibition of disloyal behavior in Roman Law.<sup>55</sup>

The reason why the alluded resemblance between the two is commonly evoked is because *estoppel* appeared during the Middle Ages at a time when Roman Canon Law exerted a considerable degree of influence on the English lawmakers. In addition, the use of *estoppel* is frequently associated with the expression *own act*.

Although both mechanisms are applied with the objective of preventing contradictory behaviors, it is imperative to note that they developed with the idiosyncrasies of their respective legal order.<sup>56</sup>

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53. AGUIAR JÚNIOR, *supra* note 21, at 254.

54. *Id.* at 255.

55. Borda affirms that some authors restrict the application of estoppel to the procedural scope as a means of defense against a party who has practiced or failed to practice a procedural act. BORDA, *supra* note 11, at 28. We thus verify a relative resemblance between this line of thought and the concept of logical preclusion as established in the Brazilian legal order. DíEZ-PICAZO, *supra* note 13, at 180.

56. SCHREIBER, *supra* note 17, at 72.

The concept of *estoppel* is related to the protection of the practice of an initial behavior that results from a legitimate expectation that such practice conforms with good faith.<sup>57</sup> The main peculiarity of estoppel in common law is related to the creation of a presumption *jure et de jure*, an irrebuttable presumption that prevents a person from affirming or denying the existence of a given right for having engaged in a certain act or having made a positive or negative statement in the opposite sense.<sup>58</sup> Consequently, it is possible to conclude that *estoppel* is aimed at objectively protecting the practice because it safeguards the good faith and trust generated by an unequivocal conduct.

Estoppel is traditionally applied as a defense rather than a cause of action, though there are exceptions, particularly in the United States (promissory estoppel). It cannot be applied *ex officio* by a judge. The prohibition of disloyal behavior, in contrast, can be applied as both a defensive protection and a cause of action, as well as in a way that can be enforced *ex officio* or if provoked.<sup>59</sup>

### 7. *Verwirkung in German Law*

*Verwirkung* can be understood as a significantly similar mechanism to *venire contra factum proprium* and is mainly based on the analysis of historical events marked by the assimilation of Roman Law by the Germanic peoples. Note that this affirmation implies no intention to attribute a position of superiority of *Verwirkung* over *venire contra factum proprium*.

*Verwirkung* strongly connects with the doctrine of abuse of rights, as it seeks to prevent the delayed exercise of a right.<sup>60</sup> *Verwirkung* applies when the beneficiary of a right did not exercise it at the proper time, which provides the other party with the legitimate

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57. MARKESINIS, UNBERATH, & JOHNSTON, *supra* note 5, at 132.

58. BORDA, *supra* note 11, at 25.

59. DíEZ-PICAZO, *supra* note 13, at 69.

60. MARKESINIS, UNBERATH, & JOHNSTON, *supra* note 5, at 124.



expectation that the right was waived, independently of the existence of a will to do so.<sup>61</sup> *Verwirkung*, therefore, aims at preventing conduct that is engaged in unexpectedly, after a considerable period of inertia, because such a posture would challenge the assumptions of good faith.<sup>62</sup>

Moreover, we should note that *Verwirkung* can also be applied to extend certain deadlines so as to allow the exercise of a prescribed or expired interest.

#### 8. *Duty to Mitigate Loss*

The *duty to mitigate loss* imposed on the creditor of damages originates in the common law. Like *venire contra factum proprium*, the *duty to mitigate loss* has been subject to a significantly unsystematic normative approach, especially when we observe its development in Germany, Switzerland, and France.

Strictly speaking, the duty of a creditor to mitigate the loss caused by the debtor finds broad acceptance in international conventions such as Article 77 of the 1980 Vienna Convention on Contracts for the International Sale of Goods; the Hague Convention of July 1st, 1964, relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables); the UNIDROIT Principles of International Commercial Contracts, published in Rome in 1994; the Principles of European Contract Law; and the *lex mercatoria*.

The *duty to mitigate loss* is not an obligation in the strict sense, and this is the reason why it must be called a duty. There is no liability in case of non-performance. German law gives the *duty to mitigate loss* the legal nature of *Obliegenheit*,<sup>63</sup> which is a less im-

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61. BORDA, *supra* note 11, at 103.

62. DíEZ-PICAZO, *supra* note 13, at 180.

63. Clóvis V. do Couto e Silva, *A Obrigação como Processo* 112–113 (1976).

portant duty that only results in the loss of a favorable legal position.<sup>64</sup> By contrast, in Switzerland, the legal nature of the mechanism is equated to an *incombance*.<sup>65</sup> As such, the creditor's duty is more clearly noted as a claimable obligation.

As it has been suggested, French jurisprudence may link the *duty to mitigate loss* with the requirement of good faith and the doctrine of abuse of rights, coming very close to *venire contra factum proprium*.<sup>66</sup>

As stated by Vera Maria Jacob de Fradera,<sup>67</sup> French jurisprudence uses *venire contra factum proprium* as a justification to impute to the creditor a sanction derived from *l'obligation de mitigation*. To illustrate this, it is worth mentioning *Bailleux v Jarety*.<sup>68</sup> In this case, a landlord did not charge a full-year rent for eleven years and when he invoked a termination clause, he was prevented from exerting his right based on the requirement of good faith. This may be described as an application of *venire contra factum proprium*.

After the promulgation of the 2002 Civil Code, which expressed for the first time the principle of good faith, the *duty to mitigate loss* could be identified within the Brazilian legal order as a duty that attaches to the general duty of good faith.<sup>69</sup> Notwithstanding this relevant foundation of validity for the application of the *duty to mitigate loss*, we could also consider it as an abuse of rights, which is acknowledged as a type of unlawful act.<sup>70</sup>

Having established the premises for an accurate understanding of the *duty to mitigate loss*, it is important to remember that with the example of defaulting on a payment obligation, creditors must accept their responsibility and proceed with the required measures to

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64. Christoph Fabian, O Dever de Informar no Direito Civil 53 (2002).

65. Silva, *supra* note 63 at 112–113.

66. AGUIAR JÚNIOR, *supra* note 21, at 174.

67. *Id.*

68. Cass. Com., January 7, 1963, Bull. III, no. 16, p. 14.

69. MARKESINIS, UNBERATH, & JOHNSTON, *supra* note 5, at 121.

70. In Germany, the abuse of rights was viewed as some sort of violation of the principle of good faith. See ZIMMERMANN & WHITTAKER, *supra* note 6.

attempt to minimize their loss, or as it is premised in *res perit domino*, the creditors must bear the economic consequences of their inertia.

Hence, by failing to mitigate his or her own loss, “the creditor may be subject to sanctions, either based on the prohibition of *venire contra factum proprium*, or for incurring an abuse of right.”<sup>71</sup> This is caused by the non-observance of a duty attached to the requirement of good faith.

### III. BASIC ELEMENTS OF THE ENFORCEMENT OF LOYALTY BASED ON GOOD FAITH

Because the fundamental scope of *venire contra factum proprium* is related to the protection of legitimate expectations, all of the criteria for its application should reflect this objective.<sup>72</sup> Although the prohibition of disloyal behavior has essentially been associated with protecting consistent behaviors or their consideration *per se*, such an understanding should not prevail over the new perspective of protecting legitimate expectations.

#### A. One's Own Act as the Starting Point

The first criterion for invoking the prohibition of disloyal behavior is the existence of two legal behaviors by the same person at different points in time. The first of these behaviors can be identified as the *factum proprium*.<sup>73</sup> However, the *factum proprium* cannot be classified from the beginning as a legal act<sup>74</sup> because, in principle, the initial behavior does not have any legal meaning, i.e., it is not legally binding in nature.<sup>75</sup> Moreover, this aspect arises from the

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71. AGUIAR JÚNIOR, *supra* note 21, at 177.

72. DÍEZ-PICAZO, *supra* note 13, at 193.

73. *Id.* at 194.

74. This is an opportune time to invoke the lessons of Menezes Cordeiro, who states that “the broad scope in which *venire contra factum proprium* may be encompassed requires prior delimitation, even if empirical and provisional, of the figurative reach of the mechanism.” CORDEIRO, *supra* note 10, at 746.

75. SCHREIBER, *supra* note 17, at 126.

reasonable conclusion that if a behavior is already binding under the terms of a positive right—because the law so declares or because the legal requisites are fulfilled to qualify it as a legal act—it is not necessary to invoke trust or reliance to impose the duty of maintaining that behavior’s objective meaning.<sup>76</sup>

Moreover, if a norm that gives effect to the act exists within the legal order to make it binding, any breach of the alleged provision will be subject to rules of civil accountability (contractual or extra-contractual).<sup>77</sup> The consistency embodied by the protection of legitimate expectations in the alleged hypothesis is an irrelevant factor, considering the legal effects arising from the act taken in contradiction to the initial position.<sup>78</sup>

Thus, we should not forget that the *factum proprium* is generally a non-binding act that becomes binding because it creates legitimate reliance<sup>79</sup> in someone else and, therefore, subjects the previous behavior to *venire contra factum proprium*.<sup>80</sup>

Invoking the rule of the prohibition of disloyal behavior is unnecessary whenever the non-fulfillment of obligations deriving from a legal relationship receives due sanction from other legal orders, such as in cases involving mandatory responsibility.<sup>81</sup>

Therefore, *venire contra factum proprium* can be identified in two general hypotheses: i) when a person manifests an intention to not engage in a certain act and then engages in the act; and ii) when a person declares their intention to engage in a certain act and then refuses to do so.<sup>82</sup>

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76. *Id.* at 126–127.

77. Pinto, *supra* note 15, at 166.

78. For Schreiber, the law exempts the requirement of trust in coherent conduct, “as the inconsistent behavior will have violated a conduct that positive law itself already determines as binding.” SCHREIBER, *supra* note 17, at 126.

79. BORDA, *supra* note 11, at 69.

80. Díez-PICAZO, *supra* note 13, at 195–196.

81. CORDEIRO, *supra* note 10, at 746.

82. *Id.* at 747.

Thus, the *factum proprium* should be considered neither legally relevant nor effective<sup>83</sup> unless it generates some effects regarding the incoherence of the previous conduct in contradiction to good faith, as defined earlier.<sup>84</sup>

It is very important to clarify that not all *factum proprium* should be identified as binding conduct<sup>85</sup> because the development of the prohibition of disloyal behavior does not have the objective of causing excessive legal security; rather, it only protects the legitimate expectations arising from social relations, independent of the existence of legal norms between the parties.<sup>86</sup>

### *B. General Principles for Protecting Legitimate Expectations*

The prohibition of disloyal behavior is a rule derived from the general principle of good faith.<sup>87</sup> It is a principle that advocates the duty of loyalty,<sup>88</sup> liability, cooperation, and satisfaction of others' expectations<sup>89</sup> in the fulfillment of their obligations.<sup>90</sup> This led

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83. Díez-PICAZO, *supra* note 13, at 201.

84. SCHREIBER, *supra* note 17, at 129–130.

85. “The person manifesting the intention of practicing a certain act but who is not committed to doing so normally creates the expectation of a nonexistent or invalid deal.” CORDEIRO, *supra* note 10, at 745.

86. ZIMMERMANN, *supra* note 43, at 636–637.

87. See SOMBRA, *supra* note 35 at 20; ROBERT AXELROD, THE EVOLUTION OF COOPERATION 6 (1984). For Stefano Rodotà, good faith acts as a functional tool to improve cooperation in contract performance. RODOTÀ, *supra* note 25, at 150.

88. See C. MASSIMO BIANCA, 3 DIRITTO CIVILE: IL CONTRATTO 422–423 (2d ed. 2000) (underlining that the duty of liability imposes an obligation to not cause unreasonable surprise).

89. TERESA NEGREIROS, FUNDAMENTOS PARA UMA INTERPRETAÇÃO CONSTITUCIONAL DO PRINCÍPIO DA BOA-FÉ 238 (1998). Moreover, it is worth noting the reference made by the author on the judgment of the tomato sauce industry, which distributed seeds to several farmers and, after the harvest, failed to acquire the harvested crops. For more, see MARTINS-COSTA, *supra* note 27, at 473–474.

90. For Judith Martins-Costa:

if there is no protection of fair expectations, it is because legal acts are social acts, and as such, they commonly affect, either directly or indirectly, the lives of our partners and third parties. This is the reason why a serious and well-grounded evaluation of the trust we arouse in others is imperative.

Clóvis do Couto e Silva to affirm that “the duties derived from good faith are, thus, arranged in degrees of intensity, depending on the category of the legal acts attached to them.”<sup>91</sup> As reported by Reinhard Zimmermann and Judith Martins-Costa, for a long time, the instruments controlling the exercise of subjective rights were restricted to *exceptio doli* and to the abuse of rights.<sup>92</sup>

The principle of good faith, which was expressly adopted in the 2002 Brazilian Civil Code, limits the exercise of subjective rights.<sup>93</sup> However, the presence of elements of subjective good faith in *venire contra factum proprium* cannot be ignored, especially when the belief is considered to arise from the initial behavior.<sup>94</sup> The initial expectation is maintained only if the personal perspective of the receiving agent is favorable.

Despite the considerations established regarding subjective good faith, note that good faith constitutes the primordial foundation for invoking the prohibition of disloyal behavior because of two factors<sup>95</sup>: i) the conduct that is objectively considered inconsistent; and

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Judith Martins-Costa, *A Ilicitude Derivada do Exercício Contraditório de um Direito: O Renascer do Venire Contra Factum Proprium*, 32 REVISTA DA AJURIS 168 (2005).

91. Silva, *supra* note 63, at 31.

92. Martins-Costa, *supra* note 18, at 455. Zimmermann draws an insightful comparison when explaining that:

comparative studies normally focus on specific subject matters, problem areas and real life situations, or on relatively well-defined legal institutions like mistake, agency or stipulation *alteri*. Good faith fits into neither of these categories. At the same time, however, it is at least in some legal systems regarded as a vitally important ingredient for a modern general law of contract.

ZIMMERMANN & WHITTAKER, *supra* note 6, at 12–13, 16.

93. Díez-PICAZO, *supra* note 13, at 141.

94. *Id.* at 209.

95. Hesselink explains that:

the process of concretization has not been totally identical in all countries. Whereas in Germany and in the Netherlands legal doctrine rather reacts to court decisions and tries to regroup them, and thus they build up a system (a rather more inductive approach), French and Italian legal doctrine seem to follow the more deductive approach of asking themselves what, in theory, the content of the duty of good faith, or the good faith standard could be, and thus they build up a system of sub-duties *et cetera*, in which the legal decisions are given their place at a later stage,

ii) the assumption of good faith by the person adversely affected by the disloyal behavior.<sup>96</sup>

*C. Unraveling the Contradiction from One's Own Act*

In order for the prohibition of inconsistent behavior to be correctly invoked, first, the presence of a posterior conduct to the *factum proprium*, which encompasses the exercise of an intention grounded in a subjective right<sup>97</sup> that will consequently generate a conflict of interests, must be identified.

The inconsistent conduct required for the application of *venire contra factum proprium* is comprised of two different distinctions. First, it requires the performance of a new act, and this act must then embody the pretention of exercising a subjective right.<sup>98</sup> In the absence of the first act, the second one would obviously be legally valid and effective. It only becomes illegitimate when faced with the previously manifested conduct.<sup>99</sup>

The second act, considered isolatedly, does not have any legal relevance for the prohibition of inconsistency. It only becomes relevant when contrasted with the previous behavior that generated the reliance of the other party.<sup>100</sup> Actually, the first act becomes binding only after the posterior contradictory intention is manifested.

The contradictory posterior intention evokes the exercise of a completely acceptable right if it were in another context, and it only becomes inadmissible after a timespan associated with the objective violation of the duty of coherence and loyalty. The exercise of a subjective right, therefore, appears as an element of fundamental importance to verify whether the posterior conduct is acceptable.

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the Italian authors thereby relying heavily on the achievements of German courts and legal doctrine.  
Hesselink, *supra* note 4, at 625.

96. BORDA, *supra* note 11, at 61.

97. DíEZ-PICAZO, *supra* note 13, at 217.

98. *Id.* at 228–229.

99. CORDEIRO, *supra* note 10, at 747–748.

100. DíEZ-PICAZO, *supra* note 13, at 142.

The party who was favored by the initial act must obviously be in good faith.<sup>101</sup> The claimant can invoke the prohibition of disloyal behavior as a means to protect him or herself from posterior contradictory conduct only if the relationship of trust was also initiated in conformity with good faith.<sup>102</sup> Thus, it is undeniable that *venire contra factum proprium* cannot be used as a mechanism to protect a relationship of trust arising out of bad faith.

The prohibition of disloyal behavior, therefore, arises as an ethical assessment<sup>103</sup> of the initial conduct that legitimately engenders a relationship of trust guided by good faith.<sup>104</sup>

#### IV. THE PROHIBITION ON DISLOYAL BEHAVIOR IN THE BRAZILIAN CIVIL CODE

Due to the unquestionable influence of liberalism, the 1916 Civil Code did not unequivocally contemplate the prohibition of disloyal behavior. Moreover, as stated above, such a posture highlights an alignment with the principles of private autonomy that allowed acts that were purely guided by the unusual manifestations of the will of the agent, even if that would result in a contradiction with previous behavior.

The 2002 Civil Code<sup>105</sup> was marked by the adoption of principles of ethics, solidarity, and the objective analysis of legal acts. As a consequence, legislators were more inclined to prohibit disloyal behavior and to protect legitimate expectations. The requirement for coherent behavior being recognized *per se* in line with the protection of good faith, *venire contra factum proprium* began to occupy a

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101. Hesselink, *supra* note 4, at 625.

102. BORDA, *supra* note 11, at 78.

103. As well argued by Menezes Cordeiro:

*venire contra factum proprium*, because it is invested with negative ethical, psychological and sociological values, should be mandatorily contrasted with good faith, a concept that bears positive cultural representation and that is, furthermore, contained in the Roman tradition of *Corpus Iuris Civilis* in such a state of dilution that makes it omnipresent.

CORDEIRO, *supra* note 10, at 753. *See also* RODOTÀ, *supra* note 25, at 131.

104. Díez-PICAZO, *supra* note 13, at 143.

105. For instance, *see* articles 187 and 421 of the Brazilian Civil Code.



prominent position in the resolution of conflicts of interest.<sup>106</sup> What one must bear in mind in considering the application of the provisions of *venire contra factum proprium* is that whenever coherence is protected, such protection is based on reasons that go beyond a requirement of consistency.

*A. The Federal Supreme Court's Understanding*

The *leading case* in Brazil regarding the adoption of the prohibition of disloyal behavior or *venire contra factum proprium* is Extraordinary Appeal No. 86.787, registered by Justice Rapporteur Leitão de Abreu. The dispute centered on the divorce of a Brazilian couple who had been married in Uruguay, in full compliance with Uruguayan law, under a separation of property regime.

Because the separation of property regime was the legal regime in Uruguay and was also accepted in Brazil, it could not be impugned by the appellant two years after the marriage and after having represented that he was married under a separation of property regime in several notarial acts, as clarified by Justice Leitão de Abreu.<sup>107</sup>

After an in-depth analysis of the opinion of Justice Leitão de Abreu, it is possible to identify two specific factors, namely, the previous conduct of the appellant in conformity with good faith and his attempt to break a relationship of trust that he had consciously agreed to and then later tried to deny. *Venire contra factum proprium* appears, in this case, to be an impediment to the appellant's behavior, who, after living under the separation of property regime for two years, then attempted to adopt another regime.

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106. José Gustavo Souza Miranda, *A Proteção da Confiança nas Relações Obrigacionais*, 153 REVISTA INFORMAÇÃO LEGISLATIVA 131, 141 (2002).

107. S.T.F.J., RE 86.787/RS, Justice Rapp.: Leitão de Abreu, 20.10.1978 90 R.T.J. 968 (Brazil).

*B. The Development of the Superior Court of Justice's Interpretation*

At the Superior Court of Justice level, the first judgment to expressly adopt the prohibition of disloyal behavior was articulated by Justice Ruy Rosado de Aguiar. In this case, a married couple who had agreed to sell property failed to sign a purchase and sale agreement. The buyers were in possession of the property, the sellers acknowledging the validity of the contract. However, after seventeen years, they refused to provide the property's final deed.<sup>108</sup>

Previously, when deciding Special Appeal No. 37.859, Justice Ruy Rosado de Aguiar reaffirmed arguments regarding the prohibition of disloyal behavior. He asserted that it was inadmissible for a party, who requested the issuance of a charter to alienate an encumbered property with an inalienability clause and then refuse to actualize its subrogation:

The party that requests the charter and alienates the encumbered property, having received the price, has the duty to provide its subrogation, which is still possible, as foreseen by the law and established in the judgment. It is inadmissible for the party who benefitted in the process filed under their request and who breached their duty to actualize the subrogation to obtain, in violation of the prohibition on disloyal behavior and at the detriment of the party acquiring the property in good faith, the annulment of the alienation simply because, as years have passed, they regret closing the deal.<sup>109</sup>

Another important Superior Court of Justice decision on the prohibition of disloyal behavior was rendered by Justice Adhemar Maciel, who affirmed that "if the alleged mistake in the property deed was caused by the Administration itself, through a high-ranking official, there is no reason to plead the existence of a vice, at the risk of causing damage to the party who, in good faith, has paid the

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108. S.T.J., REsp 95.539/SP, Justice Rapp.: Ruy Rosado Aguiar 3.9.1996 (Brazil).

109. S.T.J., REsp. 37.859/PR, Justice Rapp.: Ruy Rosado Aguiar, 28.04.1997 (Brazil).

price established for the acquisition,”<sup>110</sup> without violating the principles *nemo potest venire contra factum proprium* and *memo creditor turpitudinem suam allegans*.

In another case related to the signing of a purchase and sale agreement by a municipality, Justice Ruy Rosado de Aguiar once again applied the criteria of *venire contra factum proprium*. He noted that because the municipality had signed the purchase and sale agreement for a lot located on its property, the request for annulment of the act was denied. He also opined that the municipality should proceed, if possible, with the regularization of the allotment. According to Justice Ruy Rosado, “the prohibition on disloyal behavior prevents the Public Administration from not following its own procedures, to the detriment of others who have trusted in the consistency of its procedures.”

In another case in which the reporting judge was Justice Antônio de Pádua Ribeiro, *venire contra factum proprium* was strongly supported, as stated in the judgment:

[t]he mere circumstance that the Federal Government, through the Ministry of Health, has bestowed on the defendant laboratory a license for the commercialization of a harmful and disastrous medicine does not create, by itself, a right of recourse against the National Treasury to the extravagant claim of the so-called objective responsibility.<sup>111</sup>

Therefore, for the reporting Justice, in such cases, the license of fabrication and commercialization is conferred based on the research data provided by the laboratory itself, and therefore, the right of recourse would correspond to a case of *venire contra factum proprium*.<sup>112</sup>

The prohibition of disloyal behavior received another endorsement by the Second Chamber of the Superior Court of Justice. The

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110. S.T.J., REsp. 47.015/SP, Justice Rapp.: Adhemar Ferreira Maciel, 9.12.1997 (Brazil).

111. S.T.J., REsp. 60.129/SP, Justice Rapp.: Antônio Pádua Ribeiro, 20.09.2004, 185 R.S.T.J. 352 (Brazil).

112. S.T.J., REsp. 60.129/SP, Justice Rapp.: Antônio Pádua Ribeiro, 20.09.2004, 185 R.S.T.J. 352 (Brazil).

case, headed by Justice Eliana Calmon, referred to the bidding process for a use and exploration license for areas for the new and former passenger terminals of the Pinto Martins – Fortaleza International Airport.

A car park service provider was awarded the bid for the former passenger terminal. However, after having signed the concession agreement, the Brazilian Company of Airport Infrastructure (INFRAERO) discovered that the winning bidder had participated in the process using false documentation. Consequently, INFRAERO terminated the contract and invited the second-place winner to determine whether it was still interested in signing a contract for a period of eight months and nineteen days, which could eventually be extended for another three years. After the contract was signed, INFRAERO finished the construction of the new international passenger terminal, which was located far away from the parking area used by the new winner of the bidding process.

Actually, INFRAERO had forwarded correspondence to the second-place winner of the bidding process with the objective of encouraging it to sign the concession agreement for the remaining period of eight months and nineteen days, when the initial proposal was for three years. In such correspondence, INFRAERO assured the second-place winner that the concession agreement would be extended for another three years and that the company would be favored in the bidding process for the new parking area of the international arrivals terminal. After a review request, following Justice Eliana Calmon, Justice Franciulli Neto delivered his opinion and, invoked *venire contra factum proprium* to help solve the controversy. In addition, he noted important considerations regarding the aspects of said mechanism.<sup>113</sup>

Hence, since the first case that was decided by Justice Ruy Rosado, the Superior Court of Justice has provided significant steps

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113. S.T.J., REsp 524.811/CE, Justice Rapp.: Eliana Calmon, 14.14.2004 (Brazil).

toward the construction of a paradigm of *venire contra factum proprium* in private law.<sup>114</sup>

#### V. CONCLUSION

The theory of disloyal behavior, or *venire contra factum proprium*, as a mechanism aimed at protecting reliance relationships, stemmed from good faith and to become an important tool for controlling private autonomy in comparative private law. In general, it occurs in two distinct behaviors by the same person—one's own act (*factum proprium*) and a contradictory behavior, with a difference of timing such that the latter represents an incoherence with the good faith that governs the former. It is, therefore, an expressive tool to discourage disloyalty and promote any other duties attached to good faith.

Notably, the prohibition of disloyal behavior does not at all consist of an abstract prohibition on contradictory behaviors; rather, it only applies to behaviors that reflect inconsistent positions under good faith. Because contradiction is an inherent human characteristic and is inherent in the dynamics of modern social relations, only inconsistencies that have a harmful effect on another party's patrimonial sphere, through the non-observance of good faith, can be avoided.

Nevertheless, *venire contra factum proprium* should not be viewed from the perspective of an unlimited incentive to consistency in human behavior because, in general, many types of be-

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114. See Hesselink, *supra* note 4, at 624 (explaining that "in Germany, scholars both in private law and in jurisprudence have developed methods for rationalizing and objectivating the decisions of the court. The purpose of these Methodenlehren is to render the application of the law in general, and of general clauses like good faith in particular, as rational and objective (and thereby predictable) as possible, instead of leaving it to the subjective judgment of the individual judge. The generally agreed method for rationalizing is that of distinguishing functions and developing groups of cases in which good faith has previously been applied (*Fallgruppen*). In doing so, legal doctrine has developed an 'inner system' of good faith, which is regarded as the content of that norm.").

haviors have no legal consequences. Strictly speaking, in accordance with the disloyal behavior doctrine, it is feasible to underline legal effects only when someone faces a contradictory position subsequent to the first act. Nonetheless, what can be observed is that good faith has been an engine of change in contract law and the law of obligations in both civil law and common law systems based on values such as cooperation.