THE PROBLEMS OF *RES JUDICATA* IN THE ITALIAN ADMINISTRATIVE JUSTICE SYSTEM

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Abstract

The aim of this paper is to study '*res judicata*' in the Italian administrative justice system. After providing an overview of some essential concepts of the general theory of proceedings, the paper seeks to conduct a critical analysis of the main solutions developed by legal commentators and in administrative case-law, highlighting the various issues raised in the national legal debate. The objective of the paper is to set forth a new concept of administrative *res judicata* – defined as having a "stabilising entitlement" – that is more consistent with the values of full, effective and stable procedural protection underpinning the current system governed by the Code of Administrative Proceedings (Italian Legislative Decree No 104/2010).

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1. Introduction

This paper seeks to examine the main problematic issues associated with 'administrative *res judicata*'[1]: an institution of fundamental importance for the administrative justice system dedicated to resolving disputes between the public administration holding the administrative power and the private individual asserting a right to satisfy his subjective legal position known as his 'legitimate interest'[2].

Within the framework of a broader discussion, the aim of the paper is to assess the balance between the two essential components underpinning administrative *res judicata*: the inexhaustibility of the administrative power and the corresponding constant duty to protect the public interest[3], on one hand, and the procedural values of effectiveness, satisfactoriness and stability of the outcome of proceedings, on the other[4].

To do this, a preliminary review shall be conducted on the key points of general theory on the concepts of *res judicata* and effectiveness of the judgment, with specific attention being given to the concept of 'objective limits' of *res judicata*, representing the main aspect of interest for the answer to the question posed above.

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[1] On administrative *res judicata* see, in legal literature, in addition to the fundamental paper by M. Clarich, *Giudicato e potere amministrativo* (1989), at least F. Satta, *Brevi note sul giudicato amministrativo*, 2 Dir. proc. amm. 319 ff. (2007); A. Travi, *Il giudicato amministrativo*, 4 Dir. proc. amm. 912 ff. (2006); C. Cacciavillani, *Giudizio amministrativo e giudicato* (2004); C. Calabrò, *Giudicato – Diritto processuale amministrativo (voce)*, 15 Enc. giur. (2003). More recently, S. Valaguzza, *Il giudicato amministrativo nella teoria del processo* (2016), and, if I may suggest, S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo* (2017).

[2] On 'legitimate interest' in the Italian administrative law system, see simply F.G. Scoca, *L'interesse legittimo. Storia e teoria* (2017).

[3] See simply M. Trimarchi, *L'inesauribilità del potere amministrativo* (2018).

[4] See F. Guzzi, *Effettività della tutela e processo amministrativo* (2013); G. Mari, *Giudice amministrativo ed effettività della tutela. L'evoluzione del rapporto tra cognizione e ottemperanza* (2013); M. Renna, *Giusto processo ed effettività della tutela in un cinquantennio di giurisprudenza costituzionale sulla giustizia amministrativa: la disciplina del processo amministrativo tra autonomia e "civilizzazione"*, in G. della Cananea, M. Dugato (eds.), *Diritto amministrativo e Corte Costituzionale* 505 ff. (2006). On transformation of the Italian administrative process due to the impact of European principles concerning judicial protection see V. Cerulli Irelli, *Trasformazioni del sistema di tutela giurisdizionale nelle controversie di diritto pubblico per effetto della giurisprudenza europea*, 2 Riv. it. dir. pubbl. com. 433 ff. (2008).

Secondly, it shall be necessary to reconsider the main theories developed by Italian legal commentators on the matter of administrative *res judicata*, in order to show the reader the distinctive characteristics of disputes that are brought before the authorities of the national administrative justice system.

If the outcome of this analysis should highlight a number of significant imbalances in the relationship between the guarantee that the administrative power can be re-exercised post-judgment and the stability of the protection afforded to the successful applicant, a number of reconstructive proposals shall be put forward with the aim of achieving the ambitious solution of administrative *res judicata* that is fully effective and that actually manages to 'stabilise' the legal relationship between public administration and private individuals.

The proposed construction shall expand on the 'paradigm shift' introduced by the new Code of Administrative Proceedings, in force since 2010, which in many respects has created a new system of administrative procedural law that marks the passing of many limits traditionally linked to the original framework of the Italian administrative justice system.

2. *Res judicata* and effectiveness of the judgment: brief overview of general theory

In general theory on proceedings, the term '*res judicata*' usually refers to the final and permanent judgment issued for the purpose of resolving a dispute – or an issue – by a body called to perform its judicial role[5].

Therefore, as a legal institution *res judicata* mainly pursues the aim of putting an end to disputes that have arisen, while at the same time contributing to legal certainty and to peace between associates.

[5] See, of the most important Italian literature, at least S. Menchini, *Regiudicata civile*, Dig. disc. priv. (1998); A. Attardi, *Diritto processuale civile* 416 ff. (1997); E.T. Liebman, *Giudicato (voce)*, Enc. Giur. (1989); G. Pugliese, *Giudicato civile (dir. vig.)* 18 Enc. Dir. 785 ff. (1969); E. Redenti, *Il giudicato sul punto di diritto*, Riv. trim. dir. proc. civ. 258 ff. (1949); G. Chiovenda, *Istituzioni di diritto processuale civile* 342 ff. (1935).

This concept also appears related to the concept of 'judgment'[6], although the two do not overlap entirely.

More specifically, the relationship between *res judicata* and judgment can be summarised by using the image of the relationship between the 'content' and the 'container', where *res judicata* is the 'matter judged', which is contained and conveyed by the 'means' represented by the judgment, meaning the formal measure.

This distinction is especially relevant in terms of effectiveness.

In fact there is no unequivocal correlation between all the effects set out by the judgment and the judgment becoming *res judicata*, given that some of its effects are also produced when it has not yet 'become *res judicata*', because it is still subject to ordinary means of appeal or challenge[7].

In any case, a study of *res judicata* (even where administrative proceedings are concerned) must start from the few provisions of positive law that enable a "minimum definition" of the institution to be gathered.

Reference is obviously made to Article 2909 of the Italian Civil Code on one hand and Article 324 of the Italian Code of Civil Procedure on the other.

The first provision which, as the heading suggests, is dedicated to "*res judicata*" (we could add 'substantive'), provides that "[*the*] *finding contained in the judgment that has become res judicata is conclusive for all intents and purposes between the parties, their heirs or assigns*".

Instead the second article governs, as opposed to 'substantive' or 'material' *res judicata*, "*formal res judicata*", attributing the authority of formal final judgment to a "[…] *judgment that is no longer subject to rulings on jurisdiction, appeal, petition to the highest court or revocation for the reasons set forth in Article 395(4) and (5)*".

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[6] On civil judgments see A. Chizzini, *Sentenza nel diritto processuale civile*, Dig. Civ. (1998); E. Fazzalari, *Sentenza civile*, Enc. Dir. (1989); A. Rocco, *La sentenza civile* (1906). Instead, on administrative judgments see F. Patroni Griffi, *Forma e contenuto della sentenza amministrativa*, 1 Dir. proc. amm. 17 ff. (2015); Id., *Sentenza amministrativa*, in S. Cassese (ed.), *Trattato di diritto amministrativo* vol. V 4457 ff. (2003).

[7] See G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 787.

The fact the Italian legal system dedicates two different provisions to *res judicata* has led legal commentators to question the existence of a twofold concept of *res judicata*, namely 'material/substantive *res judicata*'[8] (Article 2909 Italian Civil Code) and 'formal/procedural' *res judicata*[9] (Article 324 Italian Code of Civil Procedure) and to reflect on the reciprocal relations.

In particular, for many years two opposing theories were developed around the issue. One approach held that the '*res judicata*' formula could be broken down into two different legal concepts corresponding to Articles 2909 Italian Civil Code and 324 Italian Code of Civil Procedure respectively, while the other held that there was only one concept of '*res judicata*' and therefore that the two provisions referred only to the different scope of application – procedural or substantive – of the same institution[10].

Today the majority of legal scholars[11] tend to criticise the approach endorsing a twofold concept of *res judicata*, as their explanations increasingly favour the unitary approach.

In other words, it is considered preferable to treat the concept of *res judicata* as a single issue, only making an internal distinction between the various formal or substantive implications. More specifically, the 'formal' aspect of *res judicata* emerges when we only look inside the process, while the 'substantive' aspect is evident when the focus is also placed on substantive law, that is, on the substantive legal position or on the legal relationship,

[8] On this matter see, mainly, F.C. Von Savigny, *System des heutigen Römischen Rechts* 274 ff. (1847); and consequently, in Italian legal literature, F. Carnelutti, *Lezioni di diritto processuale civile* 270 ff. (1925); and, subsequently, A. Attardi, *La cosa giudicata*, 1 Jus 16 (1961); F.D. Busnelli, *Considerazioni sul significato e sulla natura della cosa giudicata*, Riv. trim. dir. proc. civ. 1317 ff. (1961); M. Vellani, *Appunti sulla natura della cosa giudicata* (1958); E. Allorio, *Natura della cosa giudicata*, 1 Riv. dir. proc. civ. 215 ff. (1935); Id., *La cosa giudicata rispetto ai terzi* 3 ff. (1935).

[9] On this matter see, mainly, A. Von Brinz, *Lehrbuch der Pandekten* 348 ff. (1873); and consequently, in Italian legal literature, C. Vocino, *Considerazioni sul giudicato*, Riv. trim. dir. proc. civ. 1485 ff. (1962); E. Betti, *Diritto processuale civile italiano* (1936); E.T. Liebman (despite some peculiarities in the reconstruction), *Ancora sulla sentenza e sulla cosa giudicata*, Riv. dir. proc. civ. 237 ff. (1936); S. Satta, *Premesse generali alla dottrina dell'esecuzione forzata*, 1 Riv. dir. proc. civ. 352 (1932).

[10] For a summary of the various positions, see G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 802 ff.

[11] G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 805.

raised in court, which shall be subject to the series of effects (declaratory, constitutive, etc.) typically produced by the various types of judgments[12].

Accordingly, the subject of '*res judicata*' is identified as the decision contained in the judgment by which the court issues a permanent ruling on how to settle a certain dispute and on the practical framework to be given to a certain substantive legal relationship.

That said, the next question that logically arises is how to identify the extent of the area covered by *res judicata*.

For this purpose the concept of 'objective limits of *res judicata*'[13] is used. This formula serves to indicate 'what' has been made immutable and permanent by a certain judgment that has acquired formal finality and, above all, what shall be the scope of the preclusion arising from the *res judicata* effect for future proceedings dealing with an identical case to the one that has been decided.

In this respect it is important to underline the close relationship existing between the concepts of 'subject of *res judicata*', 'objective limits of *res judicata*' and 'identification features' of the application.

Some clarification needs to be provided on the matter.

In general theory, emphasis is very frequently placed on the specific nexus between the 'subject of the application' and the 'subject of the ruling'. This is because the precise purpose of the jurisdictional role is to satisfy the need for protection arising from a certain situation of substantive law brought before the court through the plaintiff's application, on which the court shall decide by a judgment establishing how the disputed legal relationship is to be handled.

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[12] On the distinction between the concepts of 'effectiveness of the judgment' and of 'res judicata', see E.T. Liebman, *Efficacia ed autorità della sentenza* (1935).

[13] See the fundamental paper by E. Heinitz, *I limiti oggettivi della cosa giudicata* (1937); and again, in legal literature, C. Consolo, *Oggetto del giudicato e principio dispositivo. Parte I. Dei limiti oggettivi e del giudicato costitutivo*, 1 Riv. trim. dir. e proc. civ. 215 ff. (1991); A. Attardi, *In tema di limiti oggettivi della cosa giudicata*, Riv. trim. dir. proc. civ. 475 ff. (1990); S. Menchini, *I limiti oggettivi del giudicato civile* (1987); A. Proto Pisani, *Osservazioni sui limiti oggettivi del giudicato*, 1 Foro it. 89 ff. (1972); E. Heinitz, *Considerazioni attuali sui limiti oggettivi del giudicato*, 1 Giur. it. 755 ff. (1955).

Accordingly, there tends to be an overlap between the concepts of 'subject of the application', 'subject of the proceedings', 'subject of the ruling' and 'subject of *res judicata*'[14]: the subject of the application defines the subject of proceedings which in turn identifies the subject of the court's decision and, as a necessary consequence, the subject of *res judicata*.

In light of these preliminary considerations, from a methodological point of view any study on the 'objective limits of *res judicata*' must firstly investigate the concept of 'subject of the proceedings'[15]. As this is inevitably dependent on an action being brought by the plaintiff[16], it shall be tantamount to studying the criteria for identifying the action[17] and in particular the '*petitum*' and '*causa petendi*'[18], in other words the claim and the factual and legal basis for the claim.

To conclude, by studying the criteria for identifying the action the court shall be provided with theoretical tools to dispel doubts concerning the boundary of *res judicata* and specifically the identification of its 'objective limits'. This shall help to resolve the complex issues of identity between actions, especially when the court has already decided on certain such issues with a judgment that has become final.

In this respect it is worth noting that in Italian civil proceedings, in order to attribute the maximum stability and completeness to a judicial decision, case-law almost unanimously[19] holds that the objective limits of *res judicata* should

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[14] See F.P. Luiso, *Diritto processuale civile* 150 ff. (2007).

[15] See A. Romano, *La pregiudizialità nel processo amministrativo* 48 ff. (1958); and recently, S. Valaguzza, *Il giudicato amministrativo nella teoria del processo*, cit. at 1, 60.

[16] To this effect, C. Mandrioli, *Diritto processuale civile* 149 (2007); G.F. Ricci, *Diritto processuale civile* 296 (2005).

[17] E. Heinitz, *I limiti oggettivi della cosa giudicata*, cit. at 13, 130.

[18] On the correlation between res judicata and the criteria for identifying the action see, in case-law, Supreme Civil Court, Div. I, 24 March 2014, no. 6830. More generally see, in legal literature, G. Chiovenda, *Identificazione delle azioni. Sulla regola "ne eat iudex ultra petita partium"*, in Id., *Saggi di diritto processuale civile* 175 ff. (1931); E. Allorio, *Per una teoria dell'accertamento giudiziale*, 2-3 Jus 266 ff. (1955); E. Redenti, *Diritto processuale civile* 48 ff. (1952); P. D'Onofrio, *Identificazione delle azioni in rapporto alla teoria della litispendenza e della cosa giudicata* (1924); M. Bellavitis, *L'identificazione delle azioni* (1924).

[19] See, among the many, Supreme Civil Court, Labour Div., 23 February 2016, no. 3488; Supreme Civil Court, Labour Div., 16 August 2012, no. 14535;

cover both the pleas of fact and law raised in court by way of action or objection (and as such expressly contemplated in the decision – referred to as 'what has been pleaded'), and – evidently using a 'legal construct' – all the issues which, even though not specifically pleaded, form a logical and irreproachable basis for the decision (referred to as 'what could be pleaded')[20].

Lastly, attention shall be drawn to the heated debate in legal literature and case-law on the relationship between the operative part of the judgment and the statement of reasons with regard to marking the boundary of the subject of *res judicata*.

From a theoretical point of view, the 'operative part' of the judgment refers to the ruling on the applications lodged to resolve, with the binding force that the legal system assigns to the courts, the dispute between the parties to proceedings.

Instead the 'statement of reasons'[21] refers to the part of the judgment that contains "*a brief explanation of the legal and factual reasons behind the decision*" (as generally stated in Article 132(1)(4), Italian Code of Civil Procedure): in other words, an explanation of the logical and legal reasoning followed by the court to reach the decision stated in the operative part.

This however gives rise to the question as to whether *res judicata* covers – with its objective limits – only the rulings contained in the operative part or whether it also extends to the issues contained in the statement of reasons for the judgment.

Interpreters are deeply divided on the matter.

Supreme Civil Court, Div. I, 28 October 2011, no. 22520; Supreme Civil Court, Div. III, 6 July 2009, no. 15807; Supreme Civil Court, Labour Div., 10 March 2009, no. 5723. As shall be further clarified below (point 3), the majority of legal commentators and prevailing case-law are instead firmly against the extension of such a rule within final administrative proceedings, holding that the objective limits of res judicata should only cover 'what has been pleaded' and not 'what could be pleaded'.

[20] However, this is without prejudice to factual 'contingencies' and new situations that arise after res judicata has been declared or, at least, that could not 'be pleaded' in the proceedings where res judicata was established.

[21] See further M. Taruffo, *Motivazione della sentenza (voce)*, Enc. giur. (1990); and Id., *La motivazione della sentenza civile* (1975).

A substantial part of legal literature[22] and of case-law[23] believes that when the operative part is patchy or incomplete it is possible to also refer to parts of the statement of reasons to achieve a precise reconstruction of the scope of the judicial decision. Accordingly, the use of the statement of reasons as an aid to interpretation is included within the objective limits of *res judicata*.

On the other hand, another part of legal literature[24] holds that the statement of reasons for the judgment must be excluded from the objective area of *res judicata*. It is believed that extending the objective limits of *res judicata* to include issues examined by the court in order to decide on the parties' applications could excessively strain the ruling and give rise, not only to possible uncertainties and ambiguities, but also to the risk of *ultra petita* rulings.

3. The problems of administrative *res judicata*: the pros and cons of the main constructions developed within the modern Italian administrative justice system (Sandulli, Benvenuti, Nigro, Piras)

After making these basic observations on general theory, the same concepts should now be developed with regard to administrative proceedings[25] and in particular to disputes between a public administration, holding a certain administrative power, and the private individuals allegedly harmed by exercise (or failed exercise) of said power within the wide range of actual administrative relationships.

The singular characteristic of this type of proceedings consists in the particular position taken by the public

[22] See simply G. Pugliese, *Giudicato civile (dir. vig.)*, cit. at 5, 864; V. Denti, *Ancora sull'efficacia della decisione di questioni preliminari di merito*, 4 Riv. dir. proc. 569 (1970).

[23] See, at least, Supreme Civil Court, Div. III, 17 June 1966, no. 1559; Supreme Civil Court 18 February 1965, no. 266; Supreme Civil Court 23 July 1964, no. 1988; Supreme Civil Court 27 August 1963, no. 2366.

[24] See, in particular, E.T. Liebman, *Giudicato (voce)*, cit. at 5, 13; E. Heinitz, *Considerazioni attuali sui limiti oggettivi del giudicato*, cit. at 13, 756; A. Proto Pisani, *Osservazioni sui limiti oggettivi del giudicato*, cit. at 13, 89.

[25] On the 'special' nature of administrative jurisdiction in the Italian legal system, see A. Police, *Administrative Justice in Italy: Myths and Reality*, 7 I.J.P.L. 34 ff. (2015).

administration, respectively party to the proceedings and – at the same time – holder, at substantive level, of the administrative power[26].

This factor should not be underestimated. In fact the relationship between administrative power and administrative proceedings could be represented using the following pattern: power – proceedings – power.

In other words, the administrative proceedings would appear to fulfil the symbolic role of "parenthesis"[27] between the first tangible manifestation of the power by the public administration and the subsequent second post-judgment exercise of said power.

The purpose being not only to comply with the judgment issued, but also and above all, to constantly pursue the public interest to which the executive function appears to be functionalised [28] in light of the traditional principle of the inexhaustibility of administrative power[29].

This means that the conclusive judgment in the administrative proceedings, with its effectiveness and authority of '*res judicata*', acts as a "nexus"[30], so to speak, for resumption of the administrative action.

And it is precisely for this reason that, with regard to the type of proceedings under review, the study of the objective effectiveness of the judgment, or perhaps more appropriately, of the 'objective limits' of *res judicata*, is of key importance. This is because it is essential to be able to understand the scope of the

[26] See C. Calabrò, *Giudicato – Diritto processuale amministrativo (voce)*, cit. at 1, 5; and, if I may suggest, S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo*, cit. at 1, 55 ff.

[27] M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 1.

[28] On the 'functionalisation' of administrative action, understood as the directing of administrative power towards the achievement of tangible public interests, see R. Villata, M. Ramajoli, *Il provvedimento amministrativo* 70 ff. (2017).

[29] On which see, for further details, M. Trimarchi, *L'inesauribilità del potere amministrativo*, cit. at 3; M. Clarich, *Termine del procedimento e potere amministrativo* (1995); C. Leone, *Il principio di continuità dell'azione amministrativa* (2007).

[30] F. Francario, *La sentenza: tipologia e ottemperanza nel processo amministrativo*, 4 Dir. proc. amm. 1045 (2016).

stabilising capacity that the administrative judgment can ensure in relation to the power of public administration.

Legal literature and case-law have taken different approaches to the matter when establishing the relationship between the objective limits of *res judicata* and the subsequent exercise of administrative power, narrowing or widening the relationship of inverse proportionality between the two terms of the relationship.

In fact if the objective limits of *res judicata* are extended to a wider degree, there shall be less room left for the public administration to enjoy freedom of action when re-exercising its power. On the contrary, if the scope of the judgment's effectiveness is narrowed, the administration's room for manoeuvre shall extend considerably, even to the extreme possibility of being able to lawfully issue a measure of the same content – albeit justified by a different basis of power – as the one previously challenged and annulled during the first instance proceedings.

The various theories on the matter lie along a spectrum where one extreme is the construction of *res judicata* with a 'minimum' objective extension, while the other is the configuration of *res judicata* with a 'maximum' objective extension.

These two diametrically opposed theories in turn represent the legal translation of the following fundamental 'value-based' options: the propensity to protect the administration's needs and maximum concern for public interest on one hand and the implementation of a series of principles inherent in the jurisdictional role, such as the stability, fullness and effectiveness of the protection given to the successful party.

To provide an insight into the current state of the scientific debate on the matter, a number of brief references shall be made to the main theories developed in literature and in many cases also endorsed by administrative case-law.

One of the first theories was developed by Aldo Mazzini Sandulli[31] who, at a time when a strictly appeal-based procedural model was preeminent, reconstructed the objective restriction

[31] See A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati* 38 ff. (1963); Id., *Consistenza ed estensione dell'obbligo delle autorità amministrative di conformarsi ai giudicati*, by Multiple Authors, *Atti del convegno sull'adempimento del giudicato amministrativo* 17 ff. (1962).

arising from administrative *res judicata* by using the '*causa petendi*' element as criterion for identifying actions.

More specifically, the authoritative legal commentator held that each ground for appeal – and therefore each ground of illegality of the challenged measure – identified an independent *causa petendi* and consequently an independent and different action[32].

Hence, this led to the objective limits of administrative *res judicata* being interpreted as having a narrow scope, with the obvious consequence that the stability of the outcome of proceedings was limited compared to the room for freedom left for re-exercise of the administrative power[33].

Moreover, this approach implied a relationship between the administration and citizens based on the supremacy and authority of the former over the latter. In fact in its intent to safeguard as far as possible the action of the administrative machinery, this theory appears strongly biased towards ensuring full freedom in re-exercise of the administrative power, to the detriment of the stability of the outcome of proceedings for the successful party.

In other words the idea was to do the upmost to release the administration from the "tight constraints" of *res judicata* in order to allow it to effectively look after public interests by retaining wide margins of discretion and choice.

However this approach put forward an idea of the 'subject of proceedings' [34] that fully coincided with the "classic" conception [35] (which was therefore subject to progressive criticism [36] and obsolescence over the years) of administrative

[32] A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati*, cit. at 31, 54.

[33] In the case-law of that time, this approach was endorsed by Council of State, Div. IV, 13 March 1963, no. 161; Council of State, Div. IV, 2 May 1962, no. 351; Council of State, Div. V, 14 April 1962, no. 359.

[34] See A.M. Sandulli, *Il giudizio davanti al Consiglio di Stato e ai giudici sottordinati*, cit. at 31, 52.

[35] See the approach of G. Roehrssen, *Giurisdizione amministrativa*, 7 Noviss. dig. it. 1004 (1961).

[36] See, simply, the criticisms raised by G. Greco, *L'accertamento autonomo del rapporto nel giudizio amministrativo* 22 ff. (1980); M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, 19 Enc. Dir. 255 ff. (1970). On the need for forms of "full protection" in the Italian administrative justice system (that is, in addition to

proceedings as appeal proceedings centring on the simple 'loss of effect'[37] of the challenged measure[38].

In other words, an administrative proceedings framework which, aside from eliminating the unlawful administrative measure with retroactive effect, failed to clarify the scope for assessing the wider 'administrative relationship' existing between the administration and the individual. In this regard, it is mentioned that as the Italian administrative justice system evolved (see below), this aspect became increasingly central and inherently "forward-looking" rather than "backward-looking", and also considered as an effect of the administrative court's judgment, the finding on the correct procedures for re-exercising the administrative power in order to achieve an outcome that guarantees the successful party more effective and stable protection.

While this approach was being developed, the theory of Feliciano Benvenuti[39] was also widely propagated. Benvenuti regarded administrative *res judicata* as a simple "fact", based on the assumption that jurisdiction and administration were fully equivalent and independent. Like Sandulli's position, the result of

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the simple annulment of the challenged measure) see A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo* (2000-2001).

[37] It should be noted that – as a rule – an administrative measure is effective and enforceable; therefore, in order to protect legal positions impacted by the effects produced by a certain unlawful administrative measure an equal and contrary judicial ruling is required: the annulment of the challenged measure. Only a constitutive ruling is able to retroactively remove from the legal system the effects produced by a measure issued through the exercise of administrative power. For a further study on the evolution of the Italian administrative justice system, see E. Codini, S.A. Frego Luppi, *The Transformation of Dual Jurisdiction in the Italian System of Administrative Justice*, 22 E.P.L.O. 78 ff. (2010); F.G. Scoca, *Administrative Justice in Italy: origins and evolution*, 2 I.J.P.L. 118 ff. (2009); G. Falcon, *Judicial Review of Administrative Action in Italy*, in L. Vandelli (ed.), *The Administrative Reforms in Italy: Experience and Perspectives* 207 ff. (2000); A. Piras, *Administrative Justice in Italy*, in W. Leisner, A. Piras, M. Stipo (eds.), *Administrative Law. The Problem of Justice*, Vol. III, *Western European Democracies (Germany – Italy)* 237 ff. (1997); G. Treves, *Judicial Review in Italian Administrative Law*, 26 U. Chi. L. Rev. 419 ff. (1959).

[38] See, in the case-law of the time, focused only on the constituting/quashing effect of the administrative judgment of annulment, Council of State, Div. V, 5 May 1962, no. 367; Council of State, Div. VI, 27 September 1951, no. 402.

[39] F. Benvenuti, *Giudicato (dir. amm.)*, 18 Enc. Dir. 896 ff. (1969).

this approach was to greatly reduce the objective limits of *res judicata*.

Based on a "rigid" conception of the principle of separation of powers, Benvenuti construed the relationship between the two "mandatory orders", represented by the judgment and by the challenged administrative measure [40] respectively, as the manifestation of the exercise of two different sovereign functions[41]. In the relationship between these two functions a distinctive role is played by the administration's original and specific power to independently govern the actual relationship between the administration and the citizens.

On this authoritative basis, legal commentators developed the idea that the effectiveness of administrative *res judicata* extended no further than the simple decision on the specific grounds of illegality raised against the challenged administrative measure[42].

This gave rise, as far as is relevant here, to a weak preclusive effect for the subsequent administrative activity.

In fact, an infringement of the operative part of the judgment by the renewed exercise of the administrative power did not so much constitute an 'infringement of *res judicata*', but rather a less serious 'misuse of power' because of conflict with a weaker "restriction on administrative discretion" arising from *res judicata*[43].

Hence administrative *res judicata* tended to play the role of a simple "fact" [44] to be measured against the renewal of the administrative power and given the same standing as the various factors that the administration is required to consider and align when once again exercising its power.

To sum up, once again this approach appears to be excessively biased towards the administration, to the detriment of the need for full and effective protection of the subjective legal positions asserted by citizens in proceedings brought before national administrative courts.

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[40] On the mandatory nature of administrative powers, see B.G. Mattarella, *L'imperatività del provvedimento amministrativo* (2000).

[41] See F. Benvenuti, *Appunti di diritto amministrativo* 37 ff. (1959); and Id., *Disegno dell'amministrazione italiana* 276 ff. (1996).

[42] F. Benvenuti, *Giudicato (dir. amm.)*, cit. at 39, 901.

[43] See, in case-law, Sicilian Regional Council, 15 May 1952, no. 68.

[44] F. Benvenuti, *Giudicato (dir. amm.)*, cit. at 39, 903.

The principles of effectiveness and satisfactoriness in public law disputes received a pivotal boost from the papers by Mario Nigro[45]. This author devoted his scientific work to attempting to overcome the shortcomings of the administrative proceedings model of that period, which was structured according to a purely appeal-based logic.

To this end, Nigro embarked on a work that would extensively influence subsequent case-law, consisting in an analytical "breakdown" of the effects of administrative judgments of annulment, with the final objective of helping to strengthen the restriction produced by *res judicata* on the subsequent activity of the public administration.

The basis for the work arose from the assumption that anyone appealing against an administrative measure considered unlawful was not just pursuing the "immediate objective" of its elimination from the legal system, but was in actual fact seeking a much wider and more satisfactory "mediated objective"[46], consisting in the satisfaction of the material claim – also termed 'essential right' – underlying his legal position of legitimate interest.

More specifically, to enable the administrative court's decision to go beyond (what has been defined as) the "shield"[47] of the challenged administrative measure to achieve the correct procedure for re-exercising the power, the author no longer focused on just the traditional and quintessential 'constitutive effect' of a judgment of annulment, but rather on seeking a different and additional content containing 'indications'[48] – and

[45] The summary of the author's view illustrated in the following pages has been drawn from the following papers: M. Nigro, *Giustizia amministrativa* (1983); Id., *Esperienze e prospettive del processo amministrativo*, 2 Riv. trim. dir. pubbl. 401 ff. (1981); Id., *Il giudicato amministrativo ed il processo di ottemperanza*, Riv. trim. dir. proc. civ. 1157 ff. (1981); Id., *Trasformazioni dell'amministrazione e tutela giurisdizionale differenziata*, 1 Riv. trim. dir. proc. civ. 3 ff. (1980); Id., *Linee di una riforma necessaria e possibile del processo amministrativo*, 2 Riv. dir. proc. 271 ff. (1978); Id., *Il giudice amministrativo oggi*, 2 Foro it. 249 ff. (1978); Id., *Processo amministrativo e motivi di ricorso*, 5 Foro it. 17 ff. (1975); Id., *L'appello nel processo amministrativo* (1960).

[46] M. Nigro, *Giustizia amministrativa*, cit. at 45, 396.

[47] M. Nigro, *Il giudice amministrativo oggi*, cit. at 45, 166.

[48] M. Nigro, *L'appello nel processo amministrativo*, cit. at 45, 26.

before that 'findings' – which should represent the real cornerstone of the administrative judgment.

To this end, the theory clearly showed that the outcome of the proceedings could have different degrees of "utility"[49] for the plaintiff – while still retaining the effect of eliminating the challenged measure – depending on the different grounds of illegality on which the judgment of annulment was based.

Consequently, a second legal effect began to emerge, in addition to the traditional 'loss of effect', serving to complete the constitutive scope of the ruling, known as the 'reinstatement effect'[50].

The reinstatement effect obliges the administration to modify the factual situation – as far as possible – in order to remove any material changes made by enforcement of the challenged measure with the ultimate objective of re-establishing the previously existing situation (*status quo ante*). In other words, adjusting the factual situation to the new rule of law produced by the judgment of annulment.

Furthermore, while considering the other aspect of the resumption of the administrative action, the legal theory under review also went on to isolate a third effect that is typical of an administrative judgment of annulment.

It was noted that the judgment also has the capacity to restrict the phase of post-judgment re-exercise of the administrative power. This additional effect of the administrative judgment took the name of 'conformative effect'[51], according to a formula that was instantly taken up on a wide scale.

The conformative effect makes it possible to discern the correct way to re-exercise the administrative power by using a 'reverse' technique, i.e. by translating into "positive" practices (such as specific behavioural obligations) all that, by definition, the administrative judgment traditionally assesses in "negative" terms, that is, as specific grounds of illegality of the administrative action in question.

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[49] M. Nigro, *L'appello nel processo amministrativo*, cit. at 45, 435.

[50] M. Nigro, *Giustizia amministrativa*, cit. at 45, 386.

[51] M. Nigro, *Giustizia amministrativa*, cit. at 45, 389 ff. See in the case-law of the period, Council of State, Plen. Meeting, 22 December 1982, no. 19; Council of State, Plen. Meeting, 10 March 1978, no. 10.

Therefore, given the natural tendency for the administrative power to be re-exercised after the jurisdictional "parenthesis" has been closed, the rules of action translated into "positive" practices thanks to the aforesaid conformative effect then take the lead in the renewed phase of exercise of the power and, serving as a restriction, form part of the objective limits of administrative *res judicata*.

Nonetheless, the set of "positive" restrictions arising from administrative judgments of annulment varies depending on the nature of the administrative power and in particular on whether it is 'discretionary' or 'restricted', as well as on the type of defects found and used as the basis for the constitutive ruling.

While the effect of elimination remains inherent in each declaration of annulment, this difference in objective limits means that the 'preceptive' force of *res judicata* cannot be inferred from the operative part of the judgment alone, but also requires a joint examination of the relevant statement of reasons[52].

However, the frequent co-existence of administrative *res judicata* and free areas (of a greater or lesser size) of administrative action means that in individual cases it is difficult to establish the real scope of the "stabilising" effect of the objective limits of administrative *res judicata*. This is precisely why the legal theory in question defines administrative *res judicata* as an 'implicit' and 'subordinate' rule of the relationship, as well as being characterised by 'elasticity' and 'incompleteness'[53].

The consequences of this reconstruction of administrative *res judicata* are seen in the subsequent compliance proceedings, which take on a "mixed"[54] character, dealing with aspects of enforcement of the judgment and at the same time areas of cognisance in order to complete the (often incomplete) "rule" laid down in the proceedings on the merits. The expression

[52] See, in case-law, Council of State, Div. V, 12 September 1986, no. 442; *contra*, however, Council of State, Div. VI, 23 May 1962, no. 425; Council of State, Div. VI, 4 July 1962, no. 522.

[53] See M. Nigro, *Il giudicato amministrativo ed il processo di ottemperanza*, cit. at 45, 1168 ff.

[54] M. Nigro, *Il giudicato amministrativo ed il processo di ottemperanza*, cit. at 45, 1190.

'progressively formed *res judicata*' is also used to explain this phenomenon[55].

However, as this approach entrusts identification of the legal rules to be followed in the subsequent administrative action to the statement of reasons for the judgment of annulment, it introduces a strong degree of subjectivity and consequent uncertainty.

In fact, while the operative part of the judgment offers reliable protection of the claim involved in the action, the statement of reasons is instead influenced by the argumentative intention (and even capacity) of the individual judge, who must translate the grounds of illegality found into a series of directives, guidelines and limits for future administrative action[56].

However this approach runs the risk of subjugating the effectiveness of the protection to "subjective" factors that are therefore difficult to foresee. In other words, the stability of the outcome ends up being correlated to the different propensity of each administrative judge to clarify, in the statement of reasons for the judgment of annulment, the conformative content inferable from the illegalities found in the challenged measure.

The real danger lies in the fact that appeals based on the same grounds of illegality can give rise to conformative restrictions that vary in scale depending on the different drafting technique used by the administrative judges to draw up the statement of reasons for the judgment of annulment.

Precisely on account of this state of uncertainty, in the majority of cases it proves necessary to conduct further compliance proceedings in order to "complete" the spaces that were not covered by (or that were often implicit in) the final judgment of annulment of an administrative court. Although this consequence is consistent with the above-mentioned theories of the "mixed" nature of the compliance proceedings and of progressively formed *res judicata*, it seems to be clearly at odds

[55] See M. Nigro, *Giustizia amministrativa* 288 (1979). See, in case-law, Council of State, Plen. Meeting no. 10/1978; Council of State, Div. V, 16 November 1973, no. 874; and recently, Council of State, Plen. Meeting, 9 June 2016, no. 11.
[56] See R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato* 567 ff. (1971).

with the principles of effectiveness and concentration of protection, and reasonable duration of proceedings[57].

While this theory was being formed, a new approach, again seeking to overcome the numerous shortcomings in the rigidly appeal-based Italian administrative justice system, was developed on the basis of the studies of Aldo Piras[58]. This approach regarded administrative proceedings as a judgment on the 'relationship' rather than on the 'measure' which had traditionally been the focus of attention.

The new approach sought to identify the subject of the administrative proceedings for annulment not so much in the measure challenged due to a series of specific irregularities, but rather in the 'administrative relationship'[59], meaning the legal relationship between an administration holding a certain public power and a private individual holding a subjective legal position entitling to a legitimate interest linked to a certain 'essential right'.

The change in approach draws on a reconstruction of the administrative judgment in terms of an 'ascertained fact'[60], regarding the overall 'relationship' on which the decision to recognise or deny the essential right claimed by the plaintiff is based, and which must consequently be explained in the judgment in sufficient detail to guarantee immutability of assignment of the 'right'.

The bringing together of the concepts of administrative relationship and subject of proceedings produces a theory of administrative *res judicata* that differs from those developed until

[57] See the criticisms raised by M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 111; and F. La Valle, *Azione di impugnazione e azione di adempimento nel giudizio amministrativo di legittimità*, 1-2 Jus 169 ff. (1965).

[58] See A. Piras, *Interesse legittimo e giudizio amministrativo* voll. I-II (1962); and also M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, 19 Enc. Dir. 229 ff. (1970).

[59] On the concept of 'administrative relationship' see, furthermore, M. Protto, *Il rapporto amministrativo* (2008).

[60] See A. Piras, *Interesse legittimo e giudizio amministrativo* vol. II, cit. at 58, 140 ff.; M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, cit. at 58, 255. *Contra*, viewing administrative proceedings as 'control' activity concerning the 'measure' and not the 'relationship', E. Capaccioli, *Per l'effettività della giustizia amministrativa (Saggio sul giudicato amministrativo)*, in Id., *Diritto e processo. Scritti vari di diritto pubblico* 457 ff. (1978).

that moment and, more importantly, is able to achieve the result of stable assignment of the essential right sought by the plaintiff.

A natural consequence of this theory is that in proceedings the respondent administration is obliged not only to put forward pleas and defence arguments in respect of the individual grounds of illegality raised by the plaintiff, but also to prove the overall validity of its action[61]. In other words, the burden on the respondent expands as far as having to prove that the framework of interests established by the challenged measure created an administrative relationship compliant with the conceptual configuration imposed by the legislator[62].

This means that if the public administration is unable to justify the full validity of its administrative decision through additional factual and legal arguments submitted in the investigative phase, the subsequent final judgment of annulment shall establish a total preclusion to prevent any possible new exercise of the power for the purpose of issuing a measure of equal substantive content.

The legal expedient that enables the final judgment of the administrative court to have stabilising effectiveness on the 'relationship' consists in use of the preclusion of 'what has been pleaded and what could be pleaded'[63]. This is the only possible

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[61] A. Piras, *Interesse legittimo e giudizio amministrativo* vol. II, cit. at 58, nt. 101.

[62] This implies that the traditional prohibition on late supplementation of the statement of reasons is obsolete. This rule, followed by the most important administrative case-law, and recently critically reviewed in some legal literature and case-law (see below), seeks to prevent the administration from putting forward before the courts (and therefore ex post) new substantive justifications of the measure issued, with a view to guaranteeing the position of the private plaintiff. On the prohibition on late supplementation of the statement of reasons see, in legal literature, at least A. Zito, *L'integrazione in giudizio della motivazione: una questione ancora aperta*, 3 Dir. proc. amm. 577 ff. (1994); P. Virga, *Integrazione della motivazione nel corso del giudizio e tutela dell'interesse alla legittimità sostanziale del provvedimento impugnato*, 3 Dir. proc. amm. 516 ff. (1993); A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità* 393 (1987); A. Azzena, *Natura e limiti dell'eccesso di potere amministrativo* 311 ff. (1976); in case-law, see Council of State, Div. IV, 20 May 1992, no. 546; Council of State, Div. V, 13 November 1990, no. 776.

[63] See A. Piras, *Interesse legittimo e giudizio amministrativo* vol. II, cit. at 58, 581; M.S. Giannini, A. Piras, *Giurisdizione amministrativa e giurisdizione ordinaria nei confronti della pubblica amministrazione*, cit. at 58, 257. *Contra*, on non-applicability of the preclusion of 'what could be pleaded' within administrative

way to extend the objective limits of *res judicata* to the widest degree, while remaining within the confines of proceedings generating a ruling within which the court cannot extend the scope of its cognisance by its own motion.

Application of the aforesaid preclusion places a proper 'burden' on the respondent administration to justify the decision contained in the administrative measure. If the administration were unable to justify the validity of its action, this would produce preclusion capable of absorbing every subsequent possibility of re-exercise of the administrative power (without prejudice, obviously, to the impact of 'contingencies' of a factual or legal nature).

That said, leaving aside the positive results in terms of effectiveness and stability of the protection, this theory was – and still is – widely criticised.

More specifically, the main criticism concerns the generalised use of procedural preclusions for the purpose of ensuring full and stable assessment of the substantive legal relationship in every administrative proceedings.

Firstly, attention is drawn to the absence of an explicit legal basis for precluding 'what has been pleaded and what could be pleaded'[64], and secondly to the frequent occurrence of situations where, even applying such a preclusion, it would still not be possible to extend the objective limits of *res judicata* to the entire administrative relationship. This occurs with particular frequency in appeal proceedings against negative administrative measures of a 'pre-trial' or 'preliminary' nature[65]: i.e. measures resulting from exercise of power which, for various factual or legal reasons, had to be halted before its natural conclusion.

In these cases, even application of preclusion of 'what could be pleaded' would not help to achieve the result of full stabilisation of the relationship, for the simple reason that it could not, by definition, be included as part of the matter to be decided in proceedings, either on a direct or presumptive basis, as the challenged measure does not concern the definition of the

proceedings, R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato*, cit. at 56, 580 ff.; G. Greco, *L'accertamento autonomo del rapporto nel giudizio amministrativo*, cit. at 36, 182.

[64] See the criticisms raised by the authors mentioned in the previous note.

[65] On the relevant conceptual categories, see F. Ledda, *Il rifiuto di provvedimento amministrativo* 150 ff. (1964).

relationship but only refers to its propaedeutic or preliminary aspects[66].

To conclude, the weaknesses pointed out in the theory of administrative *res judicata* on the (overall) 'relationship' are the natural consequence of the difficulties in combining an advanced theoretical approach, specifically focusing on achieving full, effective and stable protection, and an administrative justice system which at the time was still too limited in 'structure' (in terms of the actions available, investigative techniques, etc.).

This is why the search for a definitive solution to the substantive conflict between administration and private plaintiff needs to be developed and resumed from the perspective of a new study on *res judicata* within the current 'administrative procedural law', meaning with regard to the changes made to the Italian administrative justice system by the new Code of Administrative Proceedings (Italian Legislative Decree N 104/2010).

4. Some reconstructive proposals for setting forth a principle of administrative *res judicata* with a "stabilising entitlement" that can be adapted to current administrative procedural law

Italian administrative proceedings underwent a significant structural transformation following the entry into force of the new Code of Administrative Proceedings, enacted by Italian Legislative Decree No 104 of 2 July 2010, in implementation of the guiding criteria contained in Article 44 of the relevant enabling law (Italian Law No 69 of 18 June 2009)[67].

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[66] See, on the matter, G. Greco, *L'accertamento autonomo del rapporto nel giudizio amministrativo*, cit. at 36, 30 ff.

[67] See, in particular, Article 44 of Italian Law No 69/2009 in the part where it delegates the Government «[…] *to adopt, within one year of the date this law enters into force, one or more legislative decrees for the restructuring of proceedings brought before regional administrative courts and the Council of State, in order to adjust the current rules to the case-law of the Constitutional Court and of the higher courts, to coordinate them with the rules of the code of civil procedure insofar as expression of general principles and to ensure concentration of protection. The legislative decrees referred to in paragraph 1,* […] *concern the following guiding principles and criteria: a) ensure that protection is simple, concentrated and effective, in order to guarantee the principle of reasonable duration of proceedings, also by using computer and electronic procedures,* […]; *b) regulate the court's actions and functions: 1) reorganising current*

From a study of the various parameters established by the enabling law it is immediately apparent that specific attention has been dedicated to a series of "functional values" of proceedings, such as, concentration, simplicity, effectiveness of protection, etc.

A general tendency has developed, also on the basis of more recent case-law of the Joint Chambers of the Supreme Court[68], requiring these procedural values to be stated in each type of proceedings and also to be used to support the interpretation and reconstruction of the various procedural institutions.

This means that in the current system of administrative procedural law, the full and effective protection of the 'need' to safeguard and satisfy a certain substantive legal position (and obviously also the legitimate interest) requires the use of procedural protection models and techniques – i.e. 'actions' – that differ according to the type of 'claim' asserted by the private individual[69].

In other words, given that the 'remedies' must follow the 'rights'[70], the forms of judicial protection must adapt to and serve

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rules on the jurisdiction of the administrative court, also in respect of other jurisdictions; 2) reorganising cases where jurisdiction extends to the merits, also by eliminating cases that no longer comply with the current system; 3) regulating, and possibly reducing, the time limits for lapse or time barring of available actions and the types of measures that can be issued by the court; 4) providing for declaratory, constitutive or conviction rulings capable of satisfying the successful party's claim; […]». In literature, on the new 'codification' of Italian administrative proceedings pursuant to the aforesaid legislative delegation, see A. Pajno, *La giustizia amministrativa all'appuntamento della codificazione*, 1 Dir. proc. amm. 119 ff. (2010). In general, on the current framework of Italian administrative justice, see E. Silvestri, *Administrative Justice in Italy*, 3 Brics Law Journal 67 ff. (2016).

[68] See in particular the landmark judgment of the Supreme Civil Court, Joint Chambers, 22 December 2014, no. 26242 (with note by S. Menchini, *Le sezioni unite fanno chiarezza sull'oggetto dei giudizi di impugnativa negoziale: esso è rappresentato dal rapporto giuridico scaturito dal contratto*, 3 Foro it. 931 ff. (2015)).

[69] See F. Luciani, *Funzione amministrativa, situazioni soggettive e tecniche giurisdizionali di tutela*, 4 Dir. proc. amm. 979 ff. (2009). To the same effect, A. Carbone, *L'azione di adempimento nel processo amministrativo* 31 (2012); and recently, I. Pagni, *La giurisdizione tra effettività ed efficienza*, 2 Dir. proc. amm. 413 (2016).

[70] According to the combined reading of Articles 24(1), (*Anyone can bring legal action to protect their legitimate rights and interests*) and 113(1), (*Against measures of public administration it is always possible to seek judicial protection of legitimate rights and interests before ordinary or administrative courts*) of the Italian Constitution, see

the various protection requirements arising from the many and varied situations occurring in legal relationships governed by substantive law[71].

This approach forms the basis of current administrative procedural law[72], where thanks to a new system of actions[73],

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the important paper by V. Bachelet, *La giustizia amministrativa nella costituzione italiana* (1966); and more recently A. Pajno, *Per una lettura "unificante" delle norme costituzionali sulla giustizia amministrativa*, 4 Giorn. dir. Amm. 459 ff. (2006). On the impact of supranational sources in the evolution of the Italian system of administrative procedural law see A. Carbone, *Il contraddittorio procedimentale. Ordinamento nazionale e diritto europeo convenzionale* (2016); M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (2012).

[71] On the 'fullness' of the review conducted by the administrative court see Article 1 of the Italian Code of Administrative Proceedings: «[t]*he administrative court ensures full and effective protection in accordance with the principles of the Italian Constitution and of European law*». In case-law see Council of State, Div. VI, 23 April 2002, no. 2199. More generally, on the 'instrumentality' of proceedings with regard to substantive law see A. Proto Pisani, *Introduzione sulla atipicità dell'azione e la strumentalità del processo*, 5 Foro it. 1 ff. (2012); Id., *Appunti preliminari sui rapporti tra diritto sostanziale e processo*, 1 Dir. e giur. 1 ff. (1978).

[72] On the 'paradigm shift' (according to the well-known theory of T. Kuhn, *La struttura delle rivoluzioni scientifiche* (1969)) achieved by the new Italian Code of Administrative Proceedings, see A. Pajno, *Il codice del processo amministrativo tra "cambio di paradigma" e paura della tutela*, 9 Giorn. dir. amm. 885 ff. (2010). On the Italian legal system's transformation from a system of 'administrative justice' to a more advanced and modern system of 'administrative procedural law', see G.P. Cirillo (ed.), *Il nuovo diritto processuale amministrativo* (2014); B. Sassani, R. Villata (eds.), *Il codice del processo amministrativo. Dalla giustizia amministrativa al diritto processuale amministrativo* (2012). For a comparative reading of the transformations of national administrative justice systems see E. García De Enterría, *Le trasformazioni della giustizia amministrativa* 65 ff. (2010).

[73] See, once again, Article 44 of enabling law no 69/2009, in the part where it invites the Government to reform the administrative courts «[…] *providing for declaratory, constitutive or conviction rulings capable of satisfying the successful party's claim;* […]». On the multiple actions available within the new Italian system of administrative procedural law see, in legal literature, V. Cerulli Irelli, *Giurisdizione amministrativa e pluralità delle azioni (dalla Costituzione al Codice del processo amministrativo)*, 2 Dir. proc. amm. 436 ff. (2012); B. Sassani, *Arbor actionum. L'articolazione della tutela nel Codice del processo amministrativo*, 6 Riv. dir. proc. 1356 ff. (2011); A. Pajno, *Il codice del processo amministrativo ed il superamento del sistema della giustizia amministrativa. Una introduzione al libro I*, 1 Dir. proc. amm. 100 ff. (2011).

central importance has been given – in line with a model of 'subjective' jurisdiction – to the plaintiff's claim[74].

In this regard, in Articles 29 ff. the Code laid down a "catalogue" of actions available to the plaintiff[75], such as the action for annulment, action for conviction, action against silence, action for declaration of nullity, action for performance, in addition to the other actions implicitly permitted (consider for example the action of simple assessment) on the basis of the more general principle that the forms of protection may be 'atypical'[76].

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[74] See V. Cerulli Irelli, *Legittimazione "soggettiva" e legittimazione "oggettiva" ad agire nel processo amministrativo*, 2 Dir. proc. amm. 359 ff. (2014); A. Carbone, *Different Remedies in the Judicial Review of Administrative Decisions: the Introduction of the Azione di Adempimento in Italy (from a Comparative Perspective)*, 25 E.P.L.O. 1225 ff. (2013). In case-law, Council of State, Div. V, 6 July 2002, no. 3717. *Contra*, S. Valaguzza, *Il giudicato amministrativo nella teoria del processo*, cit. at 1, 112; G. Romeo, *La cultura del narcisismo e l'assenza del "limite" nella giurisdizione amministrativa*, 1 Dir. proc. amm. 40 ff. (2015). On the various theories developed in Italian legal literature (even in the past) on the complex issue of the 'subject' of administrative proceedings see, in general, L. Mazzarolli, *Il processo amministrativo come processo di parti e l'oggetto del giudizio*, 3 Dir. proc. amm. 463 ff. (1997); R. Villata, *Nuove riflessioni sull'oggetto del processo amministrativo*, by Multiple Authors, *Studi in onore di Antonio Amorth* 705 ff. (1982); S. Giacchetti, *L'oggetto del giudizio amministrativo*, by Multiple Authors, *Studi per il centocinquantenario del Consiglio di Stato* vol. III 1483 ff. (1981). More specifically, on the theory that considers the subject of administrative proceedings to concern a 'question of the lawfulness of the challenged measure', see A. Romano, *La pregiudizialità nel processo amministrativo*, cit. at 15, 260; on the theory that considers the subject of administrative proceedings to concern a 'potestative right to annulment of the challenged measure', see M. Nigro, *L'appello nel processo amministrativo*, cit. at 45, 18; on the theory that considers the subject of administrative proceedings to concern a combination of the 'frustration of a legitimate interest and the question of the lawfulness of the challenged measure', see R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato*, cit. at 56, 526; U. Allegretti, *L'imparzialità amministrativa* 175 ff. (1965).

[75] See the actions typified in Articles 29 ff. of the Code of Administrative Proceedings (Article 29 – action for annulment; Article 30 - action for conviction; Article 31 – action against silence and declaration of nullity; Article 34(1)(c) – action for performance). See S. Raimondi, *Le azioni, le domande proponibili e le relative pronunzie nel Code del processo amministrative*, 3 Dir. proc. amm. 913 ff. (2011); F. Patroni Griffi, *Riflessioni sul sistema delle tutele nel processo amministrativo riformato*, Giustizia-amministrativa.it (2010).

[76] See M. Ramajoli, *Le tipologie delle sentenze del giudice amministrativo*, in R. Caranta (ed.), *Il nuovo processo amministrativo* 573 ff. (2011); E. Scotti, *Tra tipicità e atipicità delle azioni nel processo amministrativo (a proposito di ad. plen. 15/2011)*, 4 Dir. amm. 765 ff. (2011). *Contra*, in favour of a more cautious 'moderated

The recovery of greater consistency between the substantive claim and the corresponding form of procedural protection also produces important consequences from the point of view of administrative *res judicata*.

In fact, given the evident links between the concepts of 'subject of proceedings' and 'objective limits' of *res judicata*[77], the claim brought before the court by the plaintiff and falling within (as far as possible) the matter to be decided, shall form part of the content of the judicial decision, which shall also be subject to the stabilising effect of *res judicata* and its preclusive force.

Nevertheless, even the new administrative proceedings based on the availability of multiple actions are still hampered by a series of obstacles that frustrate the ambitious objective of constructing *res judicata* that can really "stabilise" the substantive administrative relationship and can fully achieve the values of effective and satisfactory protection for the successful plaintiff.

Consider firstly subjective legal positions carrying a legitimate interest 'involving an opposition' to something[78] and concerning the entitlement to retain a certain 'essential right' that has been affected by the exercise of power by the public administration. As we know, for holders of this type of subjective position the most suitable means of protection to satisfy their claim is an action for annulment of the harmful administrative measure[79].

However, the claim brought before the court by the plaintiff shall only be truly satisfied when recognition of 'entitlement'[80] to the essential right is characterised by stability and finality.

The issue clearly raises the delicate question of the extension of the objective limits of administrative *res judicata* that is formed on judgments annulling unlawful measures.

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typicity', A. Travi, *La tipologia delle azioni nel nuovo processo amministrativo*, by Multiple Authors, *La gestione del nuovo processo amministrativo: adeguamenti organizzativi e riforme strutturali* 87 (2011).

[77] See paragraph 2 of this paper.

[78] See M. Nigro, *Giustizia amministrativa*, cit. at 55, 131 ff.

[79] F. La Valle, *L'interesse legittimo come profilo di ulteriore rilevanza delle libertà e dei diritti*, 3 Riv. trim. dir. pubbl. 844 (1969).

[80] Concept developed in Italian legal literature by G.D. Falcon, *Il giudice amministrativo tra giurisdizione di legittimità e giurisdizione di spettanza*, 2 Dir. proc. amm. 287 ff. (2001).

More specifically, when the reconstruction of the concept of administrative *res judicata* is centred on the criterion of the '*causa petendi*' – which, as stated earlier, causes a contraction of the objective limits – each event shall end up corresponding to an independent action and, accordingly, to an independent exercise of administrative power. The obvious consequence of this approach is that the plaintiff's claim shall be satisfied on a merely formal, and consequently, unstable basis.

In fact in all likelihood, a hypothetical plaintiff who obtains satisfaction of his claim in proceedings, could find that – very soon after conclusion of the administrative proceedings – his 'essential right' is once again called into question as a result of re-exercise of the administrative power. The justification would be based on a different source of power taken from the (broader or narrower) set of conditions envisaged by the law assigning the power[81].

Hence, real and effective satisfaction of the plaintiff's claim can be achieved, not only through a simple judgment on the merits upholding the application for annulment, but rather when the ruling is accompanied by administrative *res judicata* that is able to give 'stability' to the decision. In other words, the final administrative judgment has to be characterised by objective limits with a range of effect that prevents the administration from once again exercising its power in such a way as to deprive the successful plaintiff of the essential right recognised in proceedings.

This is the only possible way to limit the wide freedom of action that the administration normally retains in the post-judgment phase, because of the traditional restricted approach to the objective limits of a final administrative judgment of annulment.

However, this problem cannot be solved by simply calling for case-law to also apply the abovementioned preclusion of 'what has been pleaded and what could be pleaded' to the public administration holding the power. Indeed, it cannot be denied that – at least in terms of establishing procedural principles – this solution is weak, given that it lacks a precise positive legal basis to justify the existence of this preclusion[82].

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[81] See M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 129 ff.

[82] In addition to the criticisms raised in note 63, see also C. Ferri, *Profili dell'accertamento costitutivo* 110 ff. (1970).

Conversely, a different approach could be taken (as explained in greater detail below) to reconstruct the matter in a way that, in order to seek a different basis for exhausting the administrative power, widens the investigation beyond the proceedings phase to also include the earlier procedural phase conducted by the administration itself at substantive level[83].

Instead with regard to subjective legal positions carrying a legitimate interest 'involving a claim' to something[84], the new Code grants the possibility – by bringing a special 'action for performance'[85] – of raising the claim directly as the subject of proceedings. This occurs in the form of an application for an order against the respondent administration for the issue of a favourable measure after it has been established that the claim is well-founded.

It is immediately clear that the extension of the remedies available to holders of legitimate interests involving a claim shall have evident repercussions on administrative *res judicata*.

Under the new system of administrative procedural law, the upholding of an action for performance allows the formation of objective limits of *res judicata* corresponding to a full and stable and therefore truly final assessment of the claim[86]. In other words, an assessment that is consistent with the hypothesised model of administrative *res judicata* with a "stabilising entitlement".

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[83] See M. Nigro, *Procedimento amministrativo e tutela giurisdizionale contro la pubblica amministrazione (il problema di una legge generale sul procedimento amministrativo)*, 2 Riv. dir. proc. 263 ff. (1980).

[84] This refers to subjective legal positions of a private individual concerning an application to obtain a certain 'essential right' through the issue of a favourable administrative measure by the competent public administration (e.g. a building permit or a business authorisation).

[85] See, in case-law, Council of State, Plen. Meeting, 23 March 2011, no. 3. In legal literature, see simply A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69. On the distinction between 'models' of action (performance and annulment), see F. La Valle, *Azione di impugnazione e azione di adempimento nel giudizio amministrativo di legittimità*, cit. at 57, 152. It should also be noted that the action for performance currently provided for by the Italian Code of Administrative Proceedings is based on the German model of '*Verpliflichtungsklage*' set forth in paragraph 42(2) of the V.W.G.O.

[86] See P. Cerbo, *L'azione di adempimento nel processo amministrativo ed i suoi confini*, 1 Dir. proc. amm. 30 ff. (2017); A. Travi, *Alla ricerca dell'azione di adempimento*, 3-4 Riv. amm. Reg. Lomb. 161 ff. (2011).

However, this result cannot be achieved in every case where there are limits to the upholding of the action for performance brought by the plaintiff[87]. This occurs above all in cases where there is still room for administrative discretion, perceived by the court as a limit to its own fact finding and decision-making activity, to avoid taking over the administration's role in breach of the fundamental principle of separation of powers[88].

However, the very fact that the Italian Code of Administrative Proceedings admits the possibility of the public administration being ordered to act even in cases where «[...] *there is no longer any margin for discretion* [...]» (Article 31(3) Italian Legislative Decree No 104/2010) indicates the absence, at least at theoretical level, of an *a priori* incompatibility between the action for performance and discretionary administrative powers.

In other words, even 'theoretical' discretionary activity could 'in practice' be restricted as the result of its progressive exhaustion within the administrative proceedings, thanks to the further details and additional investigative input provided at that stage[89].

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[87] See Article 31(3) of the Italian Code of Administrative Proceedings, which provides that «[t]*he court may rule on the merits of the claim raised in proceedings only when carrying out its mandatory activity or when there are no further margins for the exercise of discretion and no further investigative obligations to be fulfilled by the administration*».

[88] On relations between 'jurisdiction' and 'administration' in the Italian administrative procedural law system, see G. Tropea, *L'ibrido fiore della conciliazione: i nuovi poteri del giudice amministrativo tra giurisdizione ed amministrazione*, 3 Dir. proc. amm. 965 ff. (2011). On the existence of assessments 'reserved' to public administration, see D. Vaiano, *La riserva di funzione amministrativa* (1996).

[89] On the distinction between 'theoretical' discretionary powers and 'practical' restriction see M. Clarich, *Manuale di diritto amministrativo* 128 (2017). The exhaustion of discretionary powers in practice is well-known in German legal literature, which has developed the theory known as '*Reduzierung auf Null*' (see K.A. Bettermann, *Die Verpflichtungsklage nach der Bundesverwaltungsgerichtsordnung*, N.J.W. 654 (1960); F. Schoch, E. Schmidt-Assman, R. Pietzner (eds.), *Verwaltungsgerichtsordnung. Kommentar* Section 113(27) (2009); and, in Italian legal literature, see A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69, 97; S. Rodolfo Masera, *Contenuto della sentenza amministrativa e sua esecuzione in Spagna, Francia e Germania*, in G.D. Falcon (ed.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato* 205 (2010);

As for the problem of stable and definitive protection of legitimate interests involving an opposition, the solution to the problems regarding legitimate interests involving a claim could also be found by extending the inquiry to the time before the proceedings, that is, by examining the extent to which discretionary powers may be exhausted in proceedings.

As already mentioned, the possible limits to administrative *res judicata*, which can be defined as having "stabilising entitlement"[90], depend on both the presence of 'administrative alternatives' not covered by the objective limits of *res judicata* in cases where the exercise of a certain administrative power is justified on a number of different bases, and on the impossibility

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C. Fraenkel-Haeberle, *Giurisdizione sul silenzio e discrezionalità amministrativa: Germania – Austria – Italia* 93 ff. (2004); L. Tarantino, *L'azione di condanna nel processo amministrativo* 47 ff. (2003), to which explicit reference has also been made in a number of judgments by Italian case-law (see Regional Administrative Court of Trento, Div. I, 16 December 2009, no. 305). As we know, in Section 42 of the *Verwaltungsgerichtsordnung* – VwGO (on which see, simply, E. Eyermann, L. Fröhler (eds.), *Verwaltungsgerichtsordnung. Kommentar* Section 42 (2019)), the German legal system provides, in addition to the action for annulment of unlawful administrative measures (*Anfechtungsklage*), also an action for enjoinder (*Verpflichtungsklage*), which formed the main model of inspiration for the solution recently introduced to the Italian Code of Administrative Proceedings (see, in particular, among the differing views put forward by legal commentators before the Code was issued, M. Clarich, *L'azione di adempimento nel sistema di giustizia amministrativa in Germania: linee ricostruttive e orientamenti giurisprudenziali*, 1 Dir. proc. amm. 66 ff. (1985)). More specifically, when the German court hands down a conviction against public administration involving the issue of a favourable measure (*Vornahmeurteil*), the 'question' must be 'ready' for the decision (Section 113(5), VwGO - '*wenn die Sache spruchreif ist*'): according to the interpretation provided by German case-law, this occurs (see, in this respect, A. Carbone, *Different Remedies in the Judicial Review of Administrative Decisions: the Introduction of the Azione di Adempimento in Italy (from a Comparative Perspective*, cit. at 74, 1239 ff.) «[…] *where its adoption is mandatory for the public authority, or where, despite the presence of administrative discretion, there is no room left for it to be exercised, either because the discretionary choice has already been made or because any decision other than the adoption of the measure requested would be unlawful due to misuse of discretion. In the latter cases, even though there is not a proper statutory duty upon the authority, the public body is bound to adopt the decision requested, since its discretionary power, conferred by the law, can no longer be lawfully exercised; it is, in other words, "reduced to zero" (Ermessensreduzierung auf null)*».

[90] Reference is made furthermore to S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo*, cit. at 1, 252 ff.

of upholding the action for performance because there are still non-"exhausted" margins for exercising administrative discretion[91].

However neither of these situations appears relevant to the framework of administrative proceedings.

Today, thanks to the new system introduced by the Italian Code of Administrative Proceedings, it is possible to find a symmetrical correspondence between claims and protective measures available for the plaintiff's specific protection needs.

Hence it may be more appropriate to place the problem in the phase leading up to the dispute brought before the court, and namely when the administrative power is exercised within specific proceedings on the merits of the case.

It is easy to see that a direct relationship exists between the scope of the analysis carried out in the preliminary proceedings and the exhaustiveness or completeness of the subsequent protection (that may be) provided in proceedings, meaning both the scope of the 'relationship' to be examined by the court, as well as the exhaustion – due to the absence of further 'alternatives' – of the original discretionary powers of the administration.

In this respect there is a series of legal principles, rules and arguments that can lead to the identification of a 'duty of procedural preclusion'[92] to be fulfilled by the administration, which can produce preclusive effects right from the first time a certain administrative power is exercised.

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[91] In case-law, on the real risk of giving rise to an "endless" dispute between a private individual and the public administration, see Council of State, Div. IV, 6 October 2014, no. 4987; and Regional Administrative Court of Liguria-Genoa, Div. I, 21 February 2002, no. 164.

[92] See the theory drawn up towards the end of the 1980s by M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 189 ff., but also *passim*; and of which a re-proposal was attempted – taking into account the changes in the Italian administrative law system – in S. Vaccari, *Il giudicato nel nuovo diritto processuale amministrativo*, cit. at 1, 282 ff. *Contra*, however, G. Greco, *Giudizio sull'atto, giudizio sul rapporto: un aggiornamento sul tema*, 2 Dir. e soc. 242 (2016); L. Ferrara, *Dal giudizio di ottemperanza al processo di esecuzione. La dissoluzione del concetto di interesse legittimo nel nuovo assetto della giurisdizione amministrativa* 189 ff. (2003); C. Consolo, *Per un giudicato pieno e paritario a prezzo di un procedimento amministrativo all'insegna del principio di preclusione*, 1 Dir. proc. amm. 188 ff. (1990).

This means that the administration would be encouraged to 'problematise' its practical decision right from the start, justifying it in the light of all the possible sources on which it could be based. In this way, if the public administration did not intend to clearly express all the bases for its power, in order to retain a chance to adopt a second measure with the same substantive content after an unfavourable judgment, this possibility would be precluded.

The hypothesised duty of procedural preclusion would apply according to a mechanism that is similar – albeit transposed in a different substantive phase of the administrative procedure[93] – to the well-known procedural rule of extension of *res judicata* to 'what could be pleaded' (in addition to 'what has been pleaded', obviously).

The legal basis for this duty could be drawn from a number of essential principles of administrative action[94].

Firstly, mention is given to compliance with the principles of fairness, protection of legitimate expectation and good faith (in the objective sense)[95] in administrative relations.

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[93] On Italian administrative proceedings (Italian Law No 241/1990) see, in general, G. Pastori, *The Origins of Law No 241/1990 and Foreign Models*, 2 I.J.P.L. 259 ff. (2010); and – on the evolution of relations between administration and citizens in the Italian system – Id., *Recent Trends in Italian Public Administration*, 1 I.J.P.L. 1 ff. (2009).

[94] As well as from a number of institutions of positive law, such as for example, the 'notice of dismissal', under Article 10-*bis*, of Italian Law No 241 of 7 August 1990: «[i]*n ex parte proceedings, before formally adopting a negative measure, the body responsible for the proceedings or the competent authority promptly informs the applicants of the reasons why the application cannot be upheld. Within ten days of receipt of the notice, the applicants are entitled to submit their observations in writing, possibly attaching appropriate documentation. The notice referred to in the first sentence suspends the time limits for concluding the proceedings which recommence from the date the observations are submitted, or if none are submitted, from the expiry of the time limit referred to in the second sentence. If the observations are not upheld, this shall be explained in the statement of reasons for the final measure.* […]». See, in legal literature, S. Tarullo, *L'articolo 10-bis della legge no. 241/90: il preavviso di rigetto tra garanzia partecipativa e collaborazione istruttoria*, Giustamm.it (2008); L. Ferrara, *La comunicazione dei motivi ostativi all'accoglimento dell'istanza nel riformato quadro delle garanzie procedimentali*, by Multiple Authors, *Studi in onore di Leopoldo Mazzarolli* vol. II 83 ff. (2007); E. Frediani, *Partecipazione procedimentale, contraddittorio e comunicazione: dal deposito di memorie scritte e documenti al preavviso di rigetto*, 4 Dir. amm. 1003 ff. (2005). See, in case-law, Regional Administrative Court of Piedmont, Div. I, 7 February 2007, no. 503.

[95] See the fundamental paper by F. Merusi, *L'affidamento del cittadino* (1970).

Full application of these principles should mean that an institutional body, such as every public administration, shall be prevented from providing incomplete disclosure – by concealing constituent facts that are already present and that therefore 'could be pleaded' – of all the reasons justifying an unfavourable decision that damages the legal status of a certain private individual.

On the contrary, in compliance with the more general principle of impartiality under Article 97 of the Italian Constitution[96], the public administration should always provide full disclosure, both on the facts and on all the public and private interests involved, in order to ensure that the statement of reasons for the final measure fully covers all the hypotheses supporting a certain decision.

By proceeding in this way, even an administrative power 'abstractly' configured as discretionary by the attributing law, could in practice exhaust every residual margin of choice by increasing the level of detail of the investigative phase.

Secondly, mention is given to the principle of completeness and exhaustiveness of the statement of reasons [97] for the administrative measure, in which the administration is required to explain all the factual and legal reasons to support the decision set forth in the operative part of the measure.

If the statement of reasons has these characteristics, the recipient of the administrative measure shall be able to submit a potentially full and exhaustive challenge during proceedings, producing – or at least being able to produce – evidence of the entire administrative relationship.

This shall be achieved without obliging the administrative court to conduct its own assessment of the areas of the administrative relationship not explicitly submitted by the

[96] Article 97(2) of the Italian Constitution: «[p]*ublic offices are organised according to provisions of the law, so as to ensure the administration's smooth functioning and impartiality*». See, in legal literature, the important paper by U. Allegretti, *L'imparzialità amministrativa*, cit. at 74.

[97] Article 3(1) of Italian Law No 241/1990: «[e]*very administrative measure, including those concerning administrative organisation, the conduct of open competitions and personnel, must be justified, except in the cases established by paragraph 2. The statement of reasons must specify the factual conditions and legal reasons that led to the administration's decision, in relation to the results of the investigation*». In legal literature see, simply, A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità*, cit. at 62.

plaintiff, but rather as the result of complete administrative proceedings that allow the private plaintiff to dispute exercise of the administrative power in its potential entirety.

This is the only way that it is seriously possible to advocate the formation of administrative *res judicata* that is capable of definitively concluding the dispute with stabilising effectiveness.

Certainly it could be argued that the assertion that public administrations must fulfil a duty of procedural preclusion risks making the proceedings excessively cumbersome [98] and is therefore at odds with the principle of 'smooth functioning' [99], which is also set forth in the Italian Constitution (Article 97(2)).

However, an objection can be raised to rebut the theory that the extra investigation entailed in the duty of procedural preclusion makes proceedings excessively cumbersome and therefore frustrates the requirements of administrative efficiency and effectiveness[100].

Notably, the observation that attributes to the traditional "administrative power – administrative proceedings – administrative power" model a series of major complications to be dealt with whenever the measure issued by the public administration is then challenged before the court: once the procedural "parenthesis" has been concluded, the administration may or shall have to once again rule on the matter, justifying its 'second' decision on the basis of different sources of power, therefore paving the way for new and continuous challenges before the court.

However it is also possible to think in terms of a different model that can be summarised by the formula "administrative power – administrative proceedings with *res judicata* with stabilising effectiveness".

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[98] For a critical view, C. Cacciavillani, *Giudizio amministrativo e giudicato*, cit. at 1, 316.

[99] Principle set forth, in turn, in the rule of prohibition on 'making the investigation more cumbersome', pursuant to Article 1(2) of Italian Law No 241/1990: «[p]*ublic administration cannot encumber proceedings unless this is required by extraordinary justified grounds imposed by the investigation conducted*». In legal literature, see F. Saitta, *Interrogativi sul c.d. divieto di aggravamento: il difficile obiettivo di un'azione amministrativa "economica" tra libertà e ragionevole proporzionalità dell'istruttoria*, 4 Dir. e soc. 491 ff. (2001).

[100] To this effect see M. Clarich, *Giudicato e potere amministrativo*, cit. at 1, 196.

Although this alternative approach requires more detailed investigations to be conducted when the administrative power is 'first' exercised, also in order to fulfil the duty of procedural preclusion, more immediate exhaustion of the administrative discretion would be achieved, because it would be necessary to provide a full and exhaustive statement of reasons for the final measure considering all the potential grounds that could support that particular decision.

Furthermore, if the measure was challenged before the courts this approach would contribute to reaching a definitive conclusion of the dispute at the end of proceedings, either in favour of the plaintiff or of the respondent administration. Hence the objective limits of the final judgment would be defined in full and this would only leave room for a possible judgment enforcement phase, but not for new and undefined re-exercise of the same administrative power in substantive terms.

In any case, case-law has raised the question of how to avoid the serial, and potentially endless, re-proposal of administrative proceedings arising from continuous exercise of "fractions" of administrative power in the phase after the final judgment.

The solution that appears to be endorsed by prevailing case-law is to allow the respondent administration – using the expression found in numerous judgments – a 'second shot' at exercising its administrative power[101]. That means guaranteeing the administration the possibility of once again exercising the same power with regard to areas left uncovered by the first judgment, often 'incomplete' and therefore with narrow objective limits.

However, in order to avoid the problem of an endless exchange of exercise of power and subsequent procedural challenge by the plaintiff, the 'second shot' at administrative power must be complete and exhaustive: that is, capable of exhausting – under penalty of preclusion – every residual area of discretion, or in other words, founded on all the remaining sources of power not yet covered by *res judicata*.

[101] See, among the many, Council of State, Div. V, 6 February 1999, no. 134; and, recently, Council of State, Div. VI, 11 January 2016, no. 53.

This solution may be interpreted as a judicial trade-off between the opposing requirements of continuity of administrative action, on one hand, and effectiveness and satisfactoriness of procedural protection, on the other[102].

And yet, it is not fully convincing, at the very least because it lacks a positive legal basis to justify an interpretative choice of this kind[103]: accordingly the 'second shot' theory ends up being more the product of a purely case-law phenomenon than an inevitable consequence extrapolated from the current system of administrative procedural law.

Therefore, if the idea of constructing truly stable and final administrative *res judicata* is to be pursued, it appears preferable to endorse the more radical theory of the 'one-shot' exercise of administrative power[104].

This formula corresponds to the theory (already mentioned above) that seeks to establish a duty of procedural preclusion for the administration, so as to ensure every possible objection regarding the exercise of power is dealt with in the subsequent (and only) administrative proceedings, thus achieving protection that is effective, definitive and stable.

As it has been attempted to show, the 'one-shot' theory is preferable because it has a firm legal basis in procedural principles and rules, unlike the alternative 'second-shot' approach (prevailing in current administrative case-law) which appears more like a kind of privilege granted to public administration to remedy inadequacies in the first procedural phase.

However, even if the theory of the administration's duty of procedural preclusion should not be fully convincing, there is

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[102] In these terms, clearly, Council of State, Plen. Meeting, 15 January 2013, no. 2.

[103] In legal literature, see the criticisms raised by G. Greco, *Giudizio sull'atto, giudizio sul rapporto: un aggiornamento sul tema*, cit. at 92, 237; L. Ferrara, *Domanda giudiziale e potere amministrativo. L'azione di condanna al facere*, 3 Dir. proc. amm. 622 (2013); A. Travi, *L'esecuzione della sentenza*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo generale* vol. V 4643 ff. (2000).

[104] In favour (in addition to the authors cited in note 92) also F. Patroni Griffi, *Riflessioni sul sistema delle tutele nel processo amministrativo riformato*, cit. at 75, 9 ff. *Contra*, however, the – virtually unanimous – administrative case-law. See Regional Administrative Court of Sardinia-Cagliari, Div. I, 18 June 2015, no. 880; Council of State, Div. III, 23 June 2014, no. 3187.

room for a further solution that would achieve the same objective of stable administrative *res judicata*.

This refers to the possibility of exhausting the remaining administrative power during proceedings, using the investigative phase to the maximum advantage[105], rather than leaving power to be exercised after the final judgment, as maintained by the case-law criticised earlier.

More specifically, it is necessary to ask ourselves whether the administrative court has the tools and, more in general, the power to "provoke" the exhaustion of every residual area of discretion and the using up of every administrative 'alternative' during the declaratory proceedings[106].

For this purpose the 'unofficial' measures of inquiry[107] provided for by Article 63 of the Italian Code of Administrative Proceedings[108] could prove useful. These include the 'request for documents' and 'clarification', to be interpreted as mechanisms for establishing a proactive dialogue with the administration for the purpose of involving all those aspects of the administrative action that were given 'little attention' in the concluded procedural phase and which, in the pending proceedings, represent obstacles to a final judgment on the plaintiff's claim.

To the same end, consideration could also be given to introducing the precautionary technique of '*remand*'[109] to the investigative phase of the declaratory proceedings[110].

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[105] On the constant tendency to expand the administrative court's cognisance to the 'facts' underlying the challenged measure, see Regional Administrative Court of Lombardy-Milan, Div. III, 6 April 2011, no. 904. On the investigative phase of Italian administrative proceedings, see A. Crismani, *The Rules of Evidence in the Italian System of Administrative Justice*, 7 I.J.P.L. 298 ff. (2015); and the fundamental paper by F. Benvenuti, *L'istruzione nel processo amministrativo* (1953).

[106] A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69, 242.

[107] See for full clarification on the 'model' N. Saitta, *Sistema di giustizia amministrativa* 272 (2012).

[108] Article 63(1) Italian Code of Administrative Proceedings: «[w]*ithout prejudice to the burden of proof that they must meet, the court may ask the parties to provide clarification or documents, even on an ex officio basis*». See, for further details, A. Police, *I mezzi di prova e l'attività istruttoria*, in G.P. Cirillo (ed.), *Il nuovo diritto processuale amministrativo*, cit. at 72, 455 ff.

[109] The '*remand*' consists in a type of precautionary order with a 'propulsive' content which not only imposes the traditional suspension of the effectiveness and enforcement of the challenged measure, but also requires certain 'positive'

The generalised use of 'remand', not only in the interim phase of proceedings, would "prompt" the administration to reconsider some aspects of the underlying facts and contribute to ensuring exhaustion of the remaining margins of discretion and therefore to extending the pending declaratory proceedings to facts or assessments that did not come to light in the previous phase.

And yet this new logic of exhausting the residual discretion by "concentrating" it in court proceedings appears to be met with resistance from traditional case-law[111] in favour of maintaining the 'prohibition on late supplementation' of the statement of reasons[112].

In fact whenever it has been suggested that the respondent administration should be obliged to provide full justification of all

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actions from the administration or, more in general, a review of the challenged measure in light of precise guiding criteria set forth in the statement of reasons, without prejudice obviously to the area of the public administration's discretion and responsibility. See, for further details, A. Travi, *Misure cautelari di contenuto positivo e rapporti fra giudice amministrativo e pubblica amministrazione*, 1 Dir. proc. amm. 168 ff. (1997).

[110] In line with this thinking, in some aspects, Regional Administrative Court of Lombardy-Milan, Div. III, 8 June 2011, no. 1428.

[111] See, among the many, Council of State, Div. VI, 12 November 2009, no. 6997; Council of State, Div. IV, 12 March 2001, no. 1396; Council of State, Div. VI, 1 August 1999, no. 1026; Council of State, Div. IV, 26 June 1990, no. 519. *Contra*, Regional Administrative Court of Campania-Naples, Div. IV, 20 November 2006, no. 9984.

[112] That is, the rule that the statement of reasons must precede and not follow the administrative order, in compliance with the principles of transparency, responsibility of the public administration and demarcation of legal control. This gives rise to the corresponding prohibition for the administration to supplement the statement of reasons for the challenged administrative measure during proceedings, especially by means of its own defence arguments. The spirit and purpose of the prohibition is to guarantee and defend the private plaintiff, who would otherwise be obliged to dispute the lawfulness of a certain administrative measure without full knowledge of all the reasons justifying the decision and, in the event that supervening reasons are stated, to supplement his original appeal with 'additional reasons'. In legal literature, see G. Ferrari, *Integrazione della motivazione del provvedimento amministrativo nel corso del giudizio*, 10 Giur. mer. 2189 ff. (2012); N. Paolantonio, *L'integrazione postuma della motivazione ed il problema dei cc.dd. vizi formali*, Giustamm.it (2007); G. Tropea, *La c.d. "motivazione successiva" tra attività di sanatoria e giudizio amministrativo*, 3 Dir. amm. 531 ff. (2003); A. Zito, *L'integrazione in giudizio della motivazione del provvedimento: una questione ancora aperta*, 3 Dir. proc. amm. 577 ff. (1994).

the reasons why the private individual's claim cannot be upheld (in the case of 'extended' administrative measures) or, vice versa, of all the grounds for a certain decision to sacrifice the rights of a holder of a legitimate interest involving an opposition for reasons of public interest, prevailing case-law has always categorically prohibited the supplementation of the statement of reasons of the administrative measures during court proceedings on the basis of arguments to protect the private plaintiff.

More specifically, the legal arguments used by prevailing administrative case-law to deny such a possibility can be summarised as follows[113]: the necessary concomitance of the statement of reasons for, and the formation of, the measure, which must already contain a clear and complete account of all the factual and legal elements justifying the decision; the fact that, by allowing a late supplementation of the statement of reasons, the private individual would essentially be forced to take legal action "in the dark", that is only for the purpose of ascertaining the reasons behind a certain administrative measure that damages his/her legal status; the fact that the management of public interest must be left outside the final administrative proceedings[114], also because the public administration is represented in court through the advocacy of a defence lawyer (belonging to the state legal advisory service) whose mandatory defence cannot take decisions or accept responsibilities associated with exercise of the essential administrative function.

However, as this logic is the legacy of a traditional model of appeal-based administrative proceedings centring on the 'measure'[115], it could now be considered obsolete in view of the developments in the administrative procedural law system where the plaintiff's 'claim' and the related 'essential right' take centre stage[116].

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[113] See, for a comprehensive summary, G. Tropea, *Motivazione del provvedimento e giudizio sul rapporto*, 1 Persona e Amministrazione 247 ff. (2017).

[114] See, more extensively, the arguments put forward on the matter by F. Ledda, *Efficacia del processo ed ipoteca degli schemi*, by Multiple Authors, *Per una giustizia amministrativa più celere ed efficace. Atti del Convegno (Messina, 15-16 aprile 1988)* 93 ff. (1993), recently in F. Ledda, *Scritti giuridici* 307 ff. (2002).

[115] See the criticisms raised by G. Corso, *Processo amministrativo di cognizione e tutela esecutiva*, 5 Foro it. 428 (1989).

[116] See, in case-law, Regional Administrative Court of Campania-Naples, Div. IV, 20 November 2006, no. 9984; Council of Administrative Justice for the

Consequently, according to the new administrative proceedings it would appear possible to adopt a truly 'procedural' logic, as occurs in civil procedural law. This means that in response to the claim raised by the plaintiff, the respondent (i.e. the public administration) would have to set forth, in appropriate pleadings, all the grounds for preclusion, impediment or amendment that could lead to dismissal of the plaintiff's application[117], even if they concern facts giving rise to power not yet "spent" during the first administrative proceedings[118].

5. (Contd.): Towards administrative 'compliance' proceedings as a process of 'enforcement'

The suggested reconstruction also produces important consequences in terms of the relationship between the procedural phases of 'cognisance' and 'compliance'[119].

Firstly, it is sufficient to remember that the approach widely endorsed in legal literature[120] and in case-law[121] seeks to

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Region of Sicily, Jurisdictional Div., 20 April 1993, no. 149; Regional Administrative Court of Veneto-Venice, Div. I, 10 June 1987, no. 648. In legal literature, see G. Virga, *Motivazione successiva e tutela della pretesa alla legittimità sostanziale del provvedimento amministrativo*, 5 Dir. proc. amm. 520 ff. (1993); V. Caianiello, *Manuale di diritto processuale amministrativo* 411 (1988).

[117] See the general rule on the 'burden of proof' set forth in Article 2697 Italian Civil Code: «[a]*nyone wishing to assert a right in court must prove the facts on which it is based. Anyone who alleges the ineffectiveness of said facts or that the right has been altered or has lapsed must prove the facts on which the allegation is based*».

[118] See the interesting observations made on the matter by the Regional Administrative Court of Molise-Campobasso, Div. I, 9 May 2011, no. 238. See, in legal literature, A. Carbone, *L'azione di adempimento nel processo amministrativo*, cit. at 69, 255.

[119] On the matter, see first of all, the important paper by R. Villata, *L'esecuzione delle decisioni del Consiglio di Stato*, cit. at 56.

[120] See F.G. Scoca, *Aspetti processuali del giudizio di ottemperanza*, by Multiple Authors, *Il giudizio di ottemperanza. Atti del XXVII Convegno di studi di scienza dell'amministrazione* 208 ff. (1983); C. Calabrò, *L'ottemperanza come "prosecuzione" del giudizio amministrativo*, 4 Riv. trim. dir. pubbl. 1167 ff. (1981); A.M. Sandulli, *Consistenza ed estensione dell'obbligo delle autorità amministrative di conformarsi ai giudicati*, by Multiple Authors, *Atti del convegno sull'adempimento del giudicato amministrativo*, cit. at 31, 17 ff.

[121] See simply, Council of State, Div. V, 21 August 2009, no. 5013; Supreme Civil Court, Joint Chambers, 31 March 2006, no. 7578; Council of State, Plen. Meeting, 17 January 1997, no. 1.

contextualise administrative compliance in terms of 'mixed' proceedings[122] (entailing cognisance and enforcement) according to the traditional theory of 'progressively formed *res judicata*'[123].

This interpretation attributes compliance with a "substitute" role that serves to supplement the content of the declaratory judgment[124], by nature incomplete due to the structural limits associated with the merely appeal-based conception of administrative proceedings that is still widespread in much of legal literature and case-law[125].

In this context, when faced with a final judgment of an administrative court with narrow objective limits, in order to enhance the effectiveness of protection for the (all too often only 'formally') successful plaintiff, it is necessary to develop a compliance phase that is able to translate into 'positive' findings those stated only in the 'negative' in the statement of reasons for the judgment for annulment, i.e. as grounds of illegality of the challenged measures.

However, the frequent need to conduct two trial phases (cognisance and then compliance) before achieving permanent recognition of the plaintiff's claim, often entails the inconvenience of having to strike the balance against a number of (factual and legal) contingencies[126] representing a serious obstacle to practical fulfilment of the claim[127].

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[122] According to the 'famous' formula conceived by M. Nigro, *Il giudicato amministrativo ed il processo di ottemperanza*, cit. at 45, 1190.

[123] On this matter see, recently, Council of State, Plen. Meeting, 9 June 2016, no. 11 (with note by S. Vaccari, *"Ius superveniens" e giudicato a formazione progressiva*, 4 Foro it. 204 ff. (2017)); Council of Administrative Justice for the Region of Sicily 17 September 2015, no. 601; Council of State, Div. V, 23 March 2015, no. 1558. On the theoretical development of the concept of 'progressively formed res judicata' see, simply, M. Nigro, *Giustizia amministrativa*, cit. at 55, 288. *Contra*, S. Valaguzza, Il *giudicato amministrativo nella teoria del processo*, cit. at 1, 188; M. Lipari, *L'effettività della decisione tra cognizione e ottemperanza*, Federalismi.it 8 (2010); A. Travi, *Il giudicato amministrativo*, cit. at 1, 915 ff.

[124] On the "polysemic" nature of compliance proceedings, see Council of State, Plen. Meeting, no. 2/2013.

[125] See, for a critical evaluation, G. Corso, *Processo amministrativo di cognizione e tutela esecutiva*, cit. at 115, 421.

[126] For a general outline of the problem see the paper by R. Caponi, *L'efficacia del giudicato civile. L'efficacia del giudicato civile nel tempo* (1991). With regard to the specific relationship between administrative res judicata and '*jus superveniens*' see, at least, F. Trimarchi Banfi, *L'interesse legittimo alla prova delle sopravvenienze*

An opposite stance to this scenario is taken by some interpretations in favour of regarding administrative compliance proceedings as a process of enforcement, taking the model contained in Volume III of the Italian Code of Civil Procedure as a paradigm[128].

The issue is certainly of interest for a study on administrative *res judicata*.

The relationship between the procedural phases of cognisance and compliance in fact reflects, from a widened perspective encompassing the proceedings in their entirety, the problem of the completeness and stability of the final judgment. To use as metaphor, this represents the very "nexus"[129] between the two procedural phases mentioned above.

Therefore, the fact that the central focus of the current system of administrative procedural law has shifted to the 'claim' has also had significant consequences on debate on the relationship between the cognisance phase and the subsequent phase of compliance with the administrative judgment.

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normative, 2 Dir. proc. amm. 505 ff. (2018); G. Sigismondi, *Jus superveniens e giudicato amministrativo*, 10 Giorn. dir. amm. 967 ff. (1999); C.E. Gallo, *Giudicato amministrativo e successione di leggi nel tempo*, 3 Foro it. 99 ff. (1980); G. Paleologo, *Tempo logico dei provvedimenti successivi alle sentenze del giudice amministrativo favorevoli al ricorrente*, by Multiple Authors, *Il processo amministrativo: scritti in onore di Giovanni Miele* 393 ff. (1979).

[127] In favour of the 'permanence' of administrative power, see Council of State, Div. VI, 19 January 1995, no. 40. *Contra*, in favour of the effectiveness of protection, see Regional Administrative Court of Sardinia-Cagliari, Div. I, 15 February 1995, no. 146. For a summary of the main approaches taken in legal literature and case-law see, most recently, G. Pepe, *Giudicato amministrativo e sopravvenienze* (2017).

[128] See in legal literature, L. Ferrara, *Dal giudizio di ottemperanza al processo di esecuzione. La dissoluzione del concetto di interesse legittimo nel nuovo assetto della giurisdizione amministrativa*, cit. at 92, *passim*; M. Clarich, *L'effettività della tutela nell'esecuzione delle sentenze del giudice amministrativo*, 3 Dir. proc. amm. 550 (1998); R. Villata, *Riflessioni in tema di giudizio di ottemperanza ed attività successiva alla sentenza di annullamento*, 3 Dir. proc. amm. 369 ff. (1989); G. Corso, *Processo amministrativo di cognizione e tutela esecutiva*, cit. at 115, 433 ff.; A. Pajno, *Il giudizio di ottemperanza come processo di esecuzione*, 1 Foro amm. 1645 ff. (1987); G. Verde, *Osservazioni sul giudizio di ottemperanza alle sentenze dei giudici amministrativi*, 4 Riv. dir. proc. 642 ff. (1980).

[129] See, once again, F. Francario, *La sentenza: tipologia e ottemperanza nel processo amministrativo*, cit. at 30, 1025 ff.

More specifically, an increasingly complete cognisance phase should be able to overcome the traditional problem of the widespread uncertainty over the preceptive content and effects of the final judgment, which is also a source of doubt as to the administration's conduct after the final judgment [130] and the virtually generalised need to supplement the content of the judgment in the compliance phase.

This is why the development of a model of administrative *res judicata* with "stabilising entitlement" set within the new procedural framework introduced by the Italian Code of Administrative Proceedings should once again see the compliance phase characterised, pursuant to Articles 112 ff. of the Italian Code of Administrative Proceedings, as a genuine 'process of enforcement'[131].

6. Conclusions

The points set out in this paper highlight one of the specific problems of administrative *res judicata* in the Italian legal system and namely the fact that it tends to serve as a weak "parenthesis" in the broader circular "administrative power – administrative proceedings – administrative power" sequence, as it lacks the real stabilising effectiveness that should characterise the institution of *res judicata*, according to the general theory of proceedings.

More specifically, the study of the objective limits of administrative *res judicata* has shown that there is a relationship of inverse proportionality between the effectiveness and stability of protection, on one hand, and the inexhaustibility of administrative power, on the other. When the objective scope of the final judgment is broader, the room for free post-judgment exercise of the administrative power is narrower.

However, the issues concerning the gaps in the effectiveness of the protection offered by the administrative court and, insofar as is relevant here, the pathological absence of stability in administrative *res judicata*, historically arise from the

[130] See G. Sciullo, *Il comportamento dell'amministrazione nell'ottemperanza*, 1 Dir. proc. amm. 64 ff. (1997).

[131] See M. Lipari, *L'effettività della decisione tra cognizione e ottemperanza*, cit. at 123, 4 ff. Once again, the observations made by the Regional Administrative Court of Lombardy-Milan no. 1428/2011 prove fundamental.

original purely 'appeal-based' structure of this type of proceedings, traditionally focused only on the action for annulment of unlawful administrative measures.

The structural change introduced by the entry into force of the new Italian Code of Administrative Proceedings (Italian Legislative Decree No 104/2010) makes it possible to transcend the traditional debate linked to the administrative proceedings model on the 'measure' or on the 'relationship'[132], as the range of actions now available in public law disputes allow the plaintiff's 'claim' to be placed at the centre of the proceedings. And it is precisely the claim which, having become the 'subject of proceedings', contributes to restoring the natural correlation between the 'need for protection' and the corresponding 'procedural protection techniques' forming the cornerstone – according to a certain interpretation of our Constitutional Charter – of the relationship between 'rights' and 'remedies'.

In order to create a theoretical framework for a new form of administrative *res judicata* with a "stabilising entitlement", it has been suggested that (under penalty of subsequent preclusion) the public administration should be required to exercise its administrative power in a complete and exhaustive manner within the administrative proceedings (one-shot exercise of administrative power), or if the identification of this duty of procedural preclusion is not accepted, to exploit the potential of the investigative phase and in particular the 'unofficial' measures of inquiry (clarification, remand, etc.) in order to ensure that the administrative discretion is exhausted within the proceedings.

As a natural consequence of this approach the balance between the administrative court's duties in the respective cognisance and compliance phases shall also be redressed. In fact the more the administrative *res judicata* proves complete, the more the subsequent compliance proceedings shall take on the nature of a true process of enforcement, rather than a "hybrid" and "mixed" procedure which, as we have seen, often led to ineffective protection for the private individual.

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[132] See, for a summary of the problems involved in the debate, G. Greco, *Giudizio sull'atto, giudizio sul rapporto*, in M. Andreis (ed.), *Trasformazioni dell'amministrazione e nuova giurisdizione* 35 ff. (2004).