The indispensable administrative preclusion (res judicata)*

A indispensável coisa julgada administrativa

*Egon Bockmann Moreira***
*Gabriel Jamur Gomes****

ABSTRACT

The article reviews and re-elaborates the concept of administrative res judicata, making it compatible with the Brazilian constitutional reality. Besides, the article verifies its applicability parameters, and the precedents of the Brazilian Federal Supreme Court (STF) and the Superior Court of Justice (STJ).

KEYWORDS

Res judicata — claim preclusion — administrative law res judicata — administrative process — legal security — protection of legitimate expectation — administrative litigation — precedents — Superior Court of Justice (STJ) — Brazilian Federal Supreme Court (STF)

---

* Article received May 21, 2018 and approved June 18, 2018. DOI: http://dx.doi.org/10.12660/rda.v277.2018.76711

** Universidade Federal do Paraná, Curitiba, PR, Brazil. E-mail: egon@xvbm.com.br. Economic law professor at the Law School, Universidade Federal do Paraná (UFPR). Master's and doctor's degrees in law. Attorney. Arbitrator.

*** Universidade Federal do Paraná, Curitiba, PR, Brazil. E-mail: gabriel@xvbm.com.br. Master's degree in law from Universidade Federal do Paraná (UFPR). Attorney.

RESUMO

O artigo revisa e reelabora o conceito de coisa julgada administrativa, compatibilizando-o com a realidade constitucional brasileira. Além disso, verifica seus parâmetros de aplicabilidade, bem como os precedentes do Supremo Tribunal Federal (STF) e do Superior Tribunal de Justiça (STJ) acerca da matéria.

PALAVRAS-CHAVE

Coisa julgada — coisa julgada administrativa — processo administrativo — segurança jurídica — proteção da confiança — contencioso administrativo — precedentes — Superior Tribunal de Justiça (STJ) — Supremo Tribunal Federal (STF)

> To be entirely satisfactory, a legal system must be both intelligible and efficacious. In its current state, administrative law does not fully meet either of these requirements.
>
> Prosper Weil, *O direito administrativo*, 1977.

Introduction

"Administrative proceeding" as a settled sphere of Brazilian law refers to legal relations developed over time following specific normativity (procedural principles and rules) in order to practice a final administrative act. To the extent that these relations, their purpose or finality, specific rights, duties and burden have now been consolidated, a further initiative to address the matter of "administrative res judicata" is required.

Brazilian law has yet to settle the limits and applicability of administrative res judicata — despite its importance for the legal certainty and efficiency of legal-administrative relations. Hence the need to consolidate the concept and its foundations thus to manage the necessary stabilizing effects of public administration decisions rendered in procedural terms.

The purpose of this article is therefore to introduce the problem and its relevance; review the essential characteristics of res judicata; propose the construction of the administrative res judicata concept (based on the

principles of legal certainty and protection of legitimate expectations); and review related STJ and STF precedents.[1] Finally a brief prospective conclusion will be submitted.

I. Contextualization of the problem and its relevance

The idea of res judicata has the same nature as a legal proceeding. The final act — judgment, appellate decision or administrative decision — must be honored, otherwise there is no reason for the existence of the proceeding. Therefore a common sense view of this principle or concept rules out review of the content of any merits decision that can no longer be appealed. This view prompts some legal scholars and case law to conclude that the concept is supposedly inapplicable to Brazilian administrative proceedings. From the point of view of guaranteeing fundamental rights, however, administrative res judicata undeniably protects the individual against the State's volubility, due to the principle of legal certainty and its consequences arising from objective good faith: the principle of protecting legitimate expectations.

Although there are STF judgments stating that the "res judicata" mentioned in Article 5 — XXXVI of Brazil's Federal Constitution does not refer to the "administrative" sphere[2], note that the *mens legis* of the provision is precisely to assure individuals that solutions to disputes are definitive before the State. After all, some degree of predictability in the State's behavior is necessary, otherwise it would be degraded to mere voluntarism or arbitrary power disguised as public interest. Likewise, neither the idea of rule of law or efficiency coexists with precarious administrative decisions, especially those made in the condition

---

1 Selected from official STF and STJ databases (www.stf.jus.br and www.stj.jus.br) from January 1 through February 13, 2018 using the search term "coisa adj julgada adj administrativa" [administrative res judicata]" which found 13 STF and 34 STJ instances. No temporal or spatial scope limitations were applied except for those used by the databases. Since all judgments were analyzed, statistical sampling methods were not required. All contents of judgments were individually analyzed and if their *ratio decidendi* involved administrative res judicata they were selected. A search for references in journals located RE 31.233, reporting judge Vilas-Boas, *Revista de Direito Administrativo* Rio de Janeiro, v. 59, pg. 57-60. Apr. 1960. Available at: <www.http: // bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/20381/19118>. The latter was confirmed in the STF database and added to the cases analyzed to total 14 STF instances

2 See judgment rendered after the promulgation of the current Constitution: "The res judicata referred to by the Constitution's Article 5-XXXVI, as the LICC's Article 6 §3 conceptualizes, is a judicial decision that can no longer be appealed; it is not so-called administrative res adjudicata (STF. RE 144.996, reporting judge Moreira Alves, date of decision April 29, 1997, 1st Panel, legal gazette *DJ* September 12, 1997).

of a typical act, whose purpose is to end a specific legal relationship (the administrative proceeding) and thus obtain stability and social peace.

However, given the administration's compliance and enforcement powers (*autotutela*) and given the sole jurisdiction enshrined in the constitutional principle (the Federal Constitution's Article 5-XXXV, under which the law cannot exclude any injury or threat from right from review by the Judiciary) this principle of procedural law (civil and criminal) cannot be simply copied into the administrative proceeding. For the same reasons, Europe's administrative res judicata concept cannot be[3] transplanted from dual-jurisdiction countries: by adopting the sole jurisdiction system, Brazilian law requires the necessary tempering, since administrative res judicata does not impede jurisdictional action.

In addressing the issue, the argument will be developed based on the Brazilian literature in particular, and res judicata will be analyzed from the civil procedural and administrative law angles to combine them in the constitutional law context.

II. Right to stability and res judicata in civil procedural law

Being an element structuring the notion of proceeding, res judicata is subject to thorough examination and continuous refinement in both legal literature and routine practices of the courts. Therefore, the core aspects of this concept must be examined from the contemporary constitutionalized perspective of civil procedure in order to reveal the points of connection with administrative res judicata.

Initially, important aspects regarding the *purpose* and *value —imbued nature* of the concept may be observed. From a teleological point of view, res judicata seeks social pacification or settlement in order to prevent litigation going on endlessly and does so by stabilizing a final solution on merits and the respective ban on the same case being repeatedly litigated.[4] From an *axiomatic*

---

[3] Themistocles Brandão Cavalcanti noted that the analysis of administrative res judicata depends on the peculiarities of the system of which it is part: "Firstly [the following] must be considered: the regime's mechanism, the role of administrative or common jurisdiction bodies, in order to assess the prestige and force of administrative acts and decisions in relation to reviewing bodies, jurisdictional entities" (*Tratado de direito administrativo.* 3rd ed. Rio de Janeiro: Freitas Bastos, 1956. v. IV, pg. 553).

[4] "The useful exercise of jurisdiction requires its results to be immune to any further challenges,

point of view, its purpose is to materialize the principle of legal certainty for those who seek to settle conflicts. It ensures confidence in the binding nature of the proceeding and trial and ultimately in the State's legitimacy and authority.

Both res judicata components — value and purpose — also structure the modern notion of the rule of law and its relation to private persons. In Brazil's case, these fundamental guarantees go back to the 1824 Imperial Charter denying the judicial authority the possibility of "reviving finished cases" (Article 179). At present, res judicata protection has been elevated to fundamental right status by the Constitution's Article 5 — XXXVI, which Araken de Assis calls the *right to stability* of jurisdictional relief.[5]

In general, res judicata refers to the authority that a judicial decision on the merits acquires by being stabilized once rights to further appeals have been exhausted or precluded. It is associated with the notion of immutability of judgment that cannot be re-litigated, disobeyed or modified by the parties or the Judiciary (excepting very specific limits — especially an action to set aside judgment). Likewise, res judicata is immune to new laws and is therefore a fundamental guarantee or right.[6] It is currently positivized on the

---

because total vulnerability of these results would severely compromise the social scope of settlement: legal certainty is recognized as a factor making for peace among persons in social life or social coexistence. Hence the law's recognition of the res judicata concept, through which the winning party is assured stabilized effects of judgment on merit and prevents new laws or new judgments annihilating or reducing exercise of the action in the process of discovery (Federal Constitution, Article 5-XXXVI; CPC articles 502 and following pages.)." (DINAMARCO, Cândido Ran el. *Instituições de direito processual civil.* 8th ed. São Paulo: Malheiros, 2016. v. I, pg. 448.). As Egas Moniz de Aragon notes, res judicata has two roles, one positive and the other negative: "The former may be described as the noble role of res judicata; which is ending a dispute and providing the outcome sought by both litigants: the extinction of the state of doubt in which they find themselves. It is a matter of getting to the end of disputes; *finem controversiarum accipit,* as Modestino would say. The immutability that characterizes res ajudicata is the hallmark of its positive role. The chronologically prior latter role corresponds to a consequence and lacks the same ontological relevance as the former. Preventing judges from reopening litigation ended by a final judgment is said to be the negative role of res judicata." *(Sentença e coisa julgada.* Rio de Janeiro: Aide, 1992. pg. 216.)

5 *Processo civil brasileiro.* São Paulo: RT, 2015. v. I, pg. 514-525.

6 As the STF had decided in a ruling on Article 17 of the Transitional Constitutional Provisions [local acronym ADCT]. ("Article 17. Salaries, remuneration, advantages and additional benefits, as well as retirement benefits received beyond those allowed under the Constitution shall be immediately reduced to the limits thereof, in which case denying appeal based on acquired right or perception of excess for any reason.") with the following case summary:" RES JUDICATA- INTANGIBILITY — ARTICLE 17 — TRANSITIONAL CONSTITUTIONAL PROVISIONS ACT. The temporary and extravagant clause of Article 17 of the Transitional Constitutional Provisions Act of the 1988 Constitution does not affect legal situations covered by the preclusion principle, which is res judicata protection." (RE 146331, reporting judge Marco Aurélio, 2nd Panel, decision date December 2, 1997, federal gazette *DJ June* 6, 1998.)

infra-constitutional level in article 6, paragraph 3 of the Law of Introduction to Rules of Brazilian Law (LINDB) and articles 502 et seq. of the Code of Civil Procedure (CPC).

In the Brazilian literature, the res judicata concept is structured in three main ways,[7] as: (i) *effect of judicial decision;*[8] (ii) *quality of the effects of the judicial decision;* and (iii) *legal status of the content of the decision.*[9] In view of the scope of the present analysis, we have adopted the second meaning — which is supported particularly by Enrico Tullio Liebman. This is the perspective that best fits the meaning or sense of res judicata being addressed here; this is the mainstream interpretation in Brazil, and the option stipulated in Article 502 of the 2015 Code of Civil Procedure — which dropped the conformation of res judicata as "*efficacy*, which makes the judgment immutable and indisputable " from Article 467 of the 1973 Code of Civil Procedure.[10] For the approach adopted here, the authority of res judicata is not one of the effects of a judgment, but rather the quality of its effects, which implies its immutability.[11]

---

7 Nomenclatures used by DIDIER JR., Fredie; BRAGA, Paula Sarno; OLIVEIRA, Rafael. *Curso de direito processual civil.* 5th ed. Salvador: Jus Podivm, 2010. v. 2, pg. 412. More recent editions no longer address the issue in depth, but the three currents were maintained without specific nomenclatures. See: DIDIER JR., Fredie; BRAGA, Paula Sarno; OLIVEIRA, Rafael. *Curso de direito processual civil.* 13th ed. Salvador: Jus Podivm, 2018. v. 2, pg. 593-594.

8 This position is found in: PONTES DE MIRANDA, F. C. *Comentários ao Código de processo civil.* 3rd ed. Rio de Janeiro: Forense, 1997. t. V, pg. 116; SILVA, Ovídio A. Baptista da. *Sentença e coisa julgada.* 4th ed. Rio de Janeiro: Forense, 2003. pg. 71 and following pages.; ASSIS, Araken de. *Processo civil brasileiro.* São Paulo: RT, 2015. v. I, pg. 522-525. Also known as the *German doctrine*, it was positivized in Article 467 of the 1973 Civil Procedure Code: "Material res judicata refers to efficacy, rendering the decision immutable and indisputable, no longer subject to ordinary or extraordinary appeal."

9 Represented by: BARBOSA MOREIRA, José Carlos. A eficácia preclusiva da coisa julgada no sistema do processo civil brasileiro. In: _. *Temas de direito processual civil:* primeira série. São Paulo: Saraiva, 1977. pg. 82-89; Fredie Didier Jr., Paula Sarno Braga e Rafael Oliveira. *Curso de direito processual civil,* 13th ed., op. cit., pg. 593-594; GUIMARÃES. Luiz Machado. Preclusão, coisa julgada e efeito preclusivo. In: _. *Estudos de direito processual civil.* Rio de Janeiro: Jurídica e Universitária, 1969. pg. 9-32.

10 CPC, Article 502: "Material res judicata refers to an authority that makes a merit decision, no longer subject to appeal, immutable and indisputable."

11 According to E. T. Liebman: "Today we do not speak of res judicata except when using an elliptical form in order to designate the authority of res judicata (articles 1,350 — 1,351 of the Italian Civil Code). Now this very abstract expression cannot and does not refer to an autonomous effect that may be in any way alone; on the contrary it shows the force and the manner in which certain effects are produced, hence their quality or mode of existence. The same may be said of the various words used to explain the traditional legislative form: immutability, definitiveness, intangibility, incontestability — all terms that express a particular property or quality, or attribute of the object to which they refer, because they are in themselves empty expressions bereft of content and meaning. Language has thus unconsciously induced us to find this truth: the authority of res judicata is not an effect of the decision but a quality, a mode of existence and manifestation of its effects, whatever they may be, variously and

However, it is not all the elements of a final and no longer appealable merit decision that are covered by res judicata.

The core content of res judicata resides in the immutability of the declaratory character of the decision on materializing the abstract norm.[12] Only declaratory content generates effects in and of itself in the legal world, so it is only this content to which res judicata applies. Other effects (condemnatory, mandamus or executive) will depend on the declaratory element contained if they are to exist, as well as on external agents to be substantiated on the tactical level. Since external circumstances are required for their materialization, they do not relate to the immutability of res judicata. For example, note that these protections depend on the interested parties' executive measures to produce practical effects.

Therefore res judicata is conceptualized as the *"quality that renders the declarative effect of the judgment immutable"*[13] and affects only the conclusion reached or order imposed by the judgment, which may be directed both at the parties' claims and at the questions referred for a preliminary ruling (even those decided *ex officio* as per the CPC's Article 503 §1). Nor does res judicata arise from "the motives, although they may be important to determine the scope of the operative part of the judgment," and the "truth of the facts, established as grounds for the judgment" (CPC, Article 504). Only a final declaratory decision on merits is covered by res judicata.

Based on the abovementioned procedural-law principle, we shall proceed to the initial demarcation within which the administrative res judicata concept may be construed.

---

differently depending on the different categories of decisions." *(Eficácia e autoridade da sentença e outros escritos sobre a coisa julgada.* Translated by A. Buzaid; Buenos Aires and A. P. Grinover. 3rd ed. São Paulo: Forense, 1984. pg. 5-6.)

12 The position that restricts res judicata to declaratory content is not endorsed by E. T. Liebman (ibid., pg. 4-6). However, others have supported this interpretation derived from German law: CARNELUTTI, Francesco. *Lezioni di diritto processuale civile.* Pádua: Litotipo, 1933. t. IV, pg. 93; F. C. Pontes de Miranda, *Comentários ao Código de processo civil,* op. cit., pg. 143- 144; MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. *Novo curso de processo civil:* tutela dos direitos mediante procedimento comum. São Paulo: RT, 2015. v. 2, pg. 622-627; BAPTISTA DA SILVA, Ovídio Araújo. *Sentença e coisa julgada.* Porto Alegre: Fabris, 1995. pg. 104-106.

13 Luiz Guilherme Marinoni, Sérgio Cruz Arenhart e Daniel Mitidiero, *Novo curso de processo civil,* op. cit., pg. 626.

III. Administrative res judicata in Brazilian law

Since the purpose of the present article is to align the administrative res judicata concept and applicability in Brazilian law, its historical provenance in duality of jurisdiction originating from the French legal system must be analyzed to clearly demarcate the issues discussed in terms of administrative res judicata.

III.1 Brief points on "French" administrative res judicata

Administrative res judicata logically relates to dual jurisdiction systems because along with civil and criminal courts, administrative justice must correspond to the consolidation of the respective decisions in the related courts.[14] Indeed, it would not be overstating the case to attribute to administrative law the merit of stabilizing the classical concepts of administrative law, including those operated in Brazil: administrative act; misappropriation; ultra vires; administrative contract; exorbitant clauses; economic-financial balance; state liability — all originally shaped by French administrative courts.[15] Were it not for administrative res judicata, these principles would have been lost in time.

Administrative justice involved creating a set of judicial institutions for the selection and resolution of issues pertaining exclusively to administrative law. This autonomy was consolidated by the "delegated justice" system introduced in 1872, whereby sovereign justice was attributed to the French Council of State, leaving decisions in litigation cases to require approval from

---

[14] The dual jurisdiction concept was posited by the French Constituent Assembly's Law on Judicial Organization voted on August 16 and enacted on August 24, 1790, in which article 13 was worded as follows: *"Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions."* ["Judicial roles are different to administrative roles and shall always remain separate from them. The judges shall not, subject to prevarication, disturb the operations of administrative bodies in any way, nor summon before them the administrators by reason of their roles" — convenience translation]. On this system's evolution and crisis, see Garcia de ENTERRIA, Eduardo. La crisis del contencioso- administrativo francés: el fin de un paradigma. In:_. *Hacia una nueva justicia administrativa.* Madrid: Civitas, 1989. pg. 71-95.

[15] See WEIL, Prosper. *Direito administrativo.* Translated by M. G. Ferreira Pinto (from 1964 edition). Coimbra: Almedina, 1977. passim; SILVA, Vasco Pereira da. *Em busca do ato administrativo perdido.* Coimbra: Almedina, 1998. pg. 11-37; MOREIRA, Egon Bockmann. O princípio da legalidade, a lei e o Direito. In: MARRARA, T. (Org.). *Princípios de direito administrativo.* São Paulo: Atlas, 2012. pg. 45-61.

public administration entities. Although administrative law's birth certificate came with the 1873 Blanco decision (when the Conflicts Tribunal ruled that the public administration could not be governed by the principles established in the Civil Code and required a "special regime"),[16] it could equally be argued this was due to the fact that 1872 was the year in which the cognitive-decision-making —executive autonomy of the Council of State's judgments was recognized.

So the administrative litigation system ceased to be consultative and gained executive autonomy, so the administration itself had to recognize administrative res judicata and the enforceability of administrative court judgments (which was consolidated by the 1889 *l'arrêt Cadot)*.[17]

This was the case despite the non-injunctive quality of administrative litigation decisions, hence the privilege of enforceable judgment historically being reserved for the active administration. This situation remained unchanged until laws in the 1990s established *astreintes* and deadlines for enforcing judgments (in addition to provisional orders). The definitive nature of administrative court decisions has therefore been further strengthened. The parties must comply with judgment, since no other consideration, "whether of opportunity or right, however severe it may be, may justify failure to execute res judicata", since this "obligation is absolute".[18]

---

[16] Which established the origin of administrative law, see CHAPUS, René. *Droit* administratif général. 12th ed. Paris: Montchrestien, 1998. t. 1, pg. 2-3. L'*arrêt* Blanco may be found on the website of the French Council of State: www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/Tribunal-des-conflits-8-fevrier-1873- Blanco. Accessed on: April 1, 2018.

[17] See GRAZIER, François. *O Conselho de Estado francês.* Rio de Janeiro: FGV/EBAP, 1955. (Insert No. 29). Available at: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11942/29_000043756. pdf?sequence=1&isAllowed=y>. Accessed on: Apr. 1, 2018. Accessed on: April 1, 2018. On the origin and evolution of the French system of administrative litigation, see further development in CORREIA, J. M. Sérvulo. *Direito do contencioso administrativo — I.* Lisboa: Lex, 2005. pg. 43-76; CASSESE, Sabino. *La construction du droit administratif.* France et Royaume-Uni. Translated by J. Morvillez-Maigret. Paris: Montchrestien, 2000. pg. 21-42; Prosper Weil, *Direito administrativo,* op. cit., pg. 105-167; René Chapus, *Droit administratif general,* op. cit., pg. 415-425; SEILLER, Bertrand. Les juges de l'administration. In: GONOD, P.; MELLERAY, F.; YOLKA, P. (Org.). *Traité de droit administrative.* Paris: Dalloz, 2011. t. 2, pg. 435-485; DEBBASCH, Charles; COLIN, Frédéric. *Droit administrative.* 10th ed. Paris: Econômica, 2011. pg. 517-701.

[18] René Chapus, *Droit administratif general,* op. cit., pg. 752 (convenience translation). Further developed in J. M. Sérvulo Correia, *Direito do contencioso administrativo — I,* op. cit., pg. 61-66. For the previous system's difficulties see Prosper Weil, *Direito administrativo,* op. cit., pg. 146 and following pages.; and Eduardo García de Enterría, La crisis del contencioso-administrativo francês: el fin de un paradigma, op. cit., pg. 71-95.

This interpretation — of administrative justice and administrative res judicata — has been consolidated in other European countries too.[19] In Portugal, for example, the classical Marcello Caetano long ago showed that the value of res judicata was that facts or rights verified in a case became certain and gained the force of legal truth and thus began to enjoy the following attributes: "immutability, incontestability, compulsion and enforceability".[20] More recently, José Carlos Vieira de Andrade emphasized the Administration's duty of respecting a judgment, complying with its content and any limitations that may arise thereof on the exercise of its powers".[21]

Having posed the above explanations, we may proceed to examine administrative res judicata in terms of Brazilian administrative proceeding.

III.2 Criticisms of the administrative res judicata concept in Brazilian law

Examining administrative res judicata in the Brazilian case requires a firm premise: merely transposing the judicial res judicata notion to the administrative branch is not feasible given the absence of dual jurisdiction combined with the peculiarities of Brazilian administrative law. This does not mean to say that one cannot coin a Brazilian administrative res judicata concept.

The core notion is that the characteristics and principles governing the Administration are distinct from those guiding the Judiciary's activities, especially in terms of *general powers of compliance and enforcement* and *unified or sole jurisdiction.* These elements comprise the basis for most of the legal literature's criticisms of the concept's applicability in Brazil, in its material sense. As a starting point for the construction of an administrative res judicata concept, some of the main contrary arguments are briefly analyzed below.

Some critics note that adopting res judicata would be unduly transposing a concept from procedural, civil and criminal law, which is of a completely different nature to that of the administrative sphere.[22] Unlike cases brought

---

[19] The Italian system is summarized in: PAJNO, Alessandra. II riparto dela giurisdizione. In: CASSESE, S. (Org.). *Traüato di diritto amministrativo.* Milão: Giuffrè, 2000. v. IV, pg. 3177-3263 (includes extensive bibliography). The Spanish case was addressed by Eduardo Garcia de Enterría in the collection of essays *Hacia una nueva justicia administrativa,* op. cit.

[20] *Manual de direito administrativo.* 10th ed. Coimbra: Almedina, 2008. t. II, pg. 1395.

[21] *A justiça administrativa.* 3rd ed. Coimbra: Almedina, 2000. pg. 289.

[22] Denying the extension of res judicata's legal force to administrative acts, given the formal

before the Judiciary, the administrator-adjudicator would not be a third party (like a trial judge) but one directly or indirectly interested in the useful outcome of the proceeding. This would imply that there is no such thing as "administrative proceeding".[23] Lacking the objectivity required to assess the matter before the court would mean the decision was not definitive (without proceeding there would be no res judicata). In addition, the institutional purposes would be different, since the judiciary would be deciding conflicts, while the mission of the administration would be to materialize the public interest. Therefore, res judicata would be an *exclusive attribute of decisions rendered by the jurisdictional authority.*

On the other hand, some arguments are based on the fact that an administrative act may always be annulled or revoked by the Administration itself in the exercise of its *power-duty of compliance and enforcement*. As an emanation of the principle of legality, under the Federal Constitution's Article 37 and Law No. 9.784/1999's articles 53 through 55, the authority may annul or validate an illegal act or revoke one that no longer meets the criteria of convenience and opportunity that led to its being created. Within the limits of this power-duty, there would in theory be no obstacle for compliance and enforcement power to cover a final decision on merits in administrative proceeding. There is no need for it to be submitted to another power or even a higher authority to be reviewed, since the same authority that issued the act has the power to declare it annulled (or revoked), as per the STF's Precedents

---

value distinct from its manifestations and the different nature of its objectives, does not impede the stability of definitively constituted legal situations and the guarantee of rights legitimately acquired through them. The opposing argument applies only to the adoption of legal technique extraneous to Administrative Law and peculiar to judicial decisions..." (BANDEIRA DE MELLO, Oswaldo Aranha. *Princípios gerais de direito administrativo.* 3rd ed. São Paulo: Malheiros, 2007. v. I, pg. 636). On the same lines: "... it must be borne in mind that, since judicial and administrative roles are very different, because of the way in which the State acts in them, one must not simply transpose a notion such as res judicata from a branch where it is fully grounded to another in which it is not justified."(Dl PIETRO, Maria Sylvia Zanella. *Direito administrativo.* 30th ed. São Paulo: Atlas. 2017, pg. 439). Likewise: "[...] although there may be similar judgments rendered in the Judiciary and the Administration, they are not to be confounded: while judicial decisions may be absolutely definitive, administrative decisions will always lack this aspect. The definitive nature of the jurisdictional role is absolute because there is no other means of appeal to reverse it; the purpose of an administrative decision, when taken, is relative because it may well be reversed and reformed by a decision from another sphere of power — the judicial branch. Therefore administrative res judicata means only that a certain matter decided administratively may no longer be altered by the same administrative means, although it may be altered through judicial means..." (CARVALHO FILHO, José dos Santos. *Manual de direito administrativo.* 30th ed. São Paulo: Atlas, 2016. pg. 1019).

[23] On this debate, see: MOREIRA, Egon Bockmann. *Processo administrativo.* 5th ed. São Paulo: Malheiros, 2017. pg. 50-68.

346 and 473.[24] In this precarious situation, decisions could not be covered by res judicata's immutability.[25]

Thirdly, under the principle of non-exclusion of the Judiciary enshrined in the Constitution's Article 5 —XXXV as a subjective public right, no "injury or threat to a right" may be excluded from jurisdiction, so there is a right to invoke jurisdictional activity whenever necessary and the Judiciary must uphold this right. In theory, therefore, controversies and disputes decided by the administration will always be subject to the Judiciary's review: so they would be precarious from the outset. Given these factors, there would be point in speaking of administrative res judicata, since, unlike the judicial concept, there would be no power to bind or limit external control.[26]

At most, critics associate res judicata in the context of administrative proceedings merely with the idea of *preclusion* or *formal res judicata*[27]. In this respect Hely Lopes Meirelles argues that it constitutes "merely administrative preclusion or irreversibility of the act for the Administration itself. And it is inalterable by administrative means, for the sake of stabilizing relations

---

[24] Specifically: "The Public Administration may declare the nullity of its own acts" (STF Precedent No 346, Plenary session of December 13, 1963) and "The Administration may annul its own acts if vitiated by defects that make them illegal because they do not give rise to rights; or revoke them due to of convenience or opportunity, respecting acquired rights and in all cases subject to judicial review "(STF Precedent No. 473, Plenary session of December 3, 1969).

[25] See JUSTEN FILHO, Marçal. *Curso de direito administrativo*. 12th ed. São Paulo: RT, 2016. pg. 217; and Oswaldo Aranha Bandeira de Mello, *Princípios gerais de direito administrativo,* op. cit., pg. 637.

[26] "Administrative jurisdictional acts lack that which American publicists call *the final enforcing power* freely translated as the conclusive power of ordinary Justice. In the case of constitutional systems that do not adopt administrative litigation, this power is restricted to judicial decisions." (MEIRELLES, Hely Lopes. *Direito administrativo brasileiro.* 15th ed. São Paulo: Revista dos Tribunais, 1990. pg. 576). The same position was retained by the writers who updated this publication (*Direito administrativo brasileiro.* 42nd ed. São Paulo: Malheiros, 2016. pg. 815). On the same lines, see: GUIMARÃES, Hahnemann. Jurisdição — órgãos administrativos e órgãos do Poder Judiciário — efeito das respectivas decisões — regulamentos internos dos órgãos colegiais. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 7, pg. 330, Jan. 1947; SOUSA, Rubens Gomes de. A coisa julgada no direito tributário. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 5, pg. 48-76, Jul. 1946; and DI PIETRO, Maria Sylvia Zanella. Limites da utilização de princípios do processo judicial no processo administrativo. *Revista do TCE/RJ,* Rio de Janeiro, n. 12, pg. 14-46, 2016.

[27] "Formal administrative res judicata is the legal effect of terminating an administrative procedure, thus preventing review the decision adopted therein without moving a specifically distinct procedure. Once an administrative procedure has been closed, the matters decided therein are not subject to review in the same case. For example, the Public Administration must not decides that a certain act is valid and subsequently de-constitute the same act without bringing a new specific case" (Marçal Justen Filho, *Curso de direito administrativo,* op. cit., 28 pg. 216).

between parties".[28] In other words it precludes repetition or resumption of acts from stages that have already been exhausted in the same administrative proceeding, thus barring any attempt to re-litigate a final decision on the merits only in the case for which it was rendered. However, there would in principle be no obstacle to a decision being reviewed in another proceeding before the same administrative authority — other than the limits imposed by peremption or acquired rights.

Ultimately, all the competent authority would have to do is practice a new act or file another proceeding. Therefore its immutability would be very fragile (or even nonexistent), regardless of legitimate expectations and resources (financial, temporal and material) expended by the participants to obtain a final decision on the merits for the matter. This would be greatly aggravated by characteristics self-imputed to administrative acts — presumption of legitimacy, self-enforceability, imperativeness, etc. — which would undermine all the efficacy and certainty required for the final decision of the proceeding, even in cases involving subjective public rights (of individuals, legal entities or collectivities).

Nevertheless, these criticisms do not appear to be sufficient explanation for administrative res judicata being absent from Brazilian law. Although apparently relevant limits for the concept in question, they are not sufficient to completely overshadow its potentialities. Indeed they should be used as barriers against the res judicata concept, but as beacons guiding the concept's construal in line with Brazil's constitutional framework.

III.3 Construction of Brazil's administrative res judicata concept

Reiterating procedural law's material res judicata concept by merely switching the adjudicating authority (from "judicial" to "administrative") would obviously be ruled out since the Brazilian system does not allow dual jurisdiction. The premises on which these types of proceeding and jurisdictions would be based do not allow reiteration of this nature. A specific administrative res judicata concept has to be construed in accordance with the characteristics governing public administration in Brazil's legal system.

---

[28] Hely Lopes Meirelles, *Direito administrativo brasileiro,* 15th ed., op. cit., pg. 576. Also retained in the updated edition: *Direito administrativo brasileiro,* 42nd ed., op. cit., pg. 815.

Although not the same as the judicial res judicata concept, there are similar aspects or points of connection in the sense of "affording certainty and stability to administrative proceeding"[29] – all of them particularly in terms of the teleological and axiomatic components of judicial res judicata.

Both aspects — those related to stabilizing the purpose of decisions on merits and the need to protect legal certainty — are extremely relevant to administrative proceedings.

In relation to the purpose, given the principles of legality, impersonality, morality, publicity and efficiency efficacy governing administrative conduct, its procedural activity must progress toward a determinate ending and prevent the same dispute being repeatedly re-litigated based on the same facts of the matter. There is an objective to be attained through the proceeding and it cannot be reversed once it has been reached. Therefore attributing stability to a final merit decision is relevant for both the public power and the community. As Sérgio Ferraz writes, "the stability of an administrative decision is a quality of administrative activity required by the abovementioned principles of Public Administration".[30] Public matters and affairs would be unmanageable in the absence of solid legal grounds for situations analyzed by government agencies in compliance with due process of law. Against any arbitrary measures taken by the State, society must be assured protection, which would not be viable if administrative decisions could be rejigged by vacuous generic pleas to protect varying conformations of public interest. On this last point in particular rests the connection between judicial and administrative res judicata concepts: legal certainty.[31]

Absent legal certainty, there can be no legal-administrative relationship, no rule of law, no principle of legality. Having law determine that

---

[29] Egon Bockmann Moreira, *Processo administrativo,* op. cit., pg. 411. Likewise: DI PIERRO JÚNIOR, Miguel Thomaz. Prescrição administrativa e coisa julgada administrativa. *Revista Forense,* Rio de Janeiro, v. 394, pg. 539, Nov./Dec. 2007.

[30] Processo administrativo ou procedimento administrativo; a coisa julgada administrativa. *Revista* do Instituto dos Advogados Brasileiros, São Paulo, XXXIV, n. 92, pg. 107, 2nd Q 2000. Likewise, Luiz Carlos Galvão de Barros notes: "On our part, we accept the existence of administrative res judicata with different characteristics to jurisdictional res judicata and more restricted application due to the stability of relations between the Administration and the individual. (Há coisa julgada administrativa? *Justitia,* São Paulo, v. 44, n. 117, pg. 215, Apr./ Jun. 1982).

[31] Sérgio Ferraz starts from a broader theoretical background than the one posed here: "One can (and should) rather speak of administrative res judicata. This is an imperative for administrative principles in general, good faith, morality and legal certainty (among other tenets) in particular." (Processo administrativo: prazos e preclusões. In: SUNDFELD, Carlos Ari; MUNOZ, Guillermo Andrés. *As leis do processo administrativo.* São Paulo: Malheiros, 2000. pg. 299).

administrative procedure must culminate in a certain final act would be pointless if administrative agents were not compelled to comply with it, therefore the public administration must not be allowed the freedom of not executing administrative decisions.

As the late Almiro do Couto e Silva emphasized, the legal certainty principle has two dimensions, one objective and the other subjective.[32] The purpose of the former is to stabilize the legal system's *objective elements* and restrict the State's retroactive measures, thus ensuring protection for acquired rights, perfected legal measures and res judicata under the Federal Constitution's Article 5 — XXXVI. The latter (*subjective*) dimension refers to protection of the trust deposited by an individual in relation to the legal effects of the State's conduct or measures. This principle:

> (a) restricts the State's freedom to alter its conduct and any measures that benefited recipients, even if they were illegal; or (b) attributes consequences to any such alterations in terms of property interests or assets, since beneficiaries, administrators or society in general had been acting on the belief that said measures were legitimate and had very reason to assume they would continue in place.[33]

Obviously legal certainty in any of the abovementioned aspects is situated in the sphere of individual guarantees and serves as safeguard for private persons. No matter whether decisions are judicial or administrative, they must all must ensure the stability of the legal effects of legal-procedural relations and protect the individuals' confidence arising from the later.[34]

---

[32] "O Princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da Administração pública de anular seus próprios atos administrativos", *Revista de Direito Administrativo — RDA.* Rio de Janeiro: FGV, 237/273-274, Jul./Sep. 2004.

[33] "O Princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da Administração pública de anular seus próprios atos administrativos". *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 237/274, jul./set. 2004. The STF's First Panel accepted this thesis in judging ARE 823985 AgR: "The principle of legal certainty objectively prohibits retroactive law, protects acquired rights, perfect juridical acts and res judicata. From its subjective perspective, legal certainty protects legitimate expectations, preserves past facts against any altered legal interpretation, and safeguards the legal effects of acts deemed invalid for any reason. Ultimately, the principle of legitimate expectations is primarily intended to protect legitimately created expectations held by individuals by acts of the State" (ARE 823985 AgR, reporting judge Roberto Barroso, First Panel, March 23, 2018).

[34] "The general principle of legal certainty in a broad sense (thus including the idea of protecting legitimate expectations) may be formulated as follows: the individual has the right to be able to rely on their acts or public decisions affecting their rights, positions or legal relationships based

These dimensions are fully applicable to administrative proceedings, especially protection of legitimate expectation. The mere existence of an act performed by an administrative authority meeting publicity, broad defense and due legal process requirements is capable of giving rise to a presumption of legitimate protection of expectations to the individual in relation to acts practiced and merit decisions that create rights. The principle in question would not be obeyed if an individual were to participate in a procedural relationship in relation to the administration, submit their reasons, participate in the production of evidence (civil-code equivalent of discovery), follow proceedings and incur the related expenses only to eventually get a merit decision in their favor that was not protected by any degree of stability beyond mere preclusion.

The final decision is a construct gradually pieced together by the parties that strengthens the binding effect for the authority and narrows the reach of its power-duty of compliance and enforcement as the proceedings move forward to culminate in a final merit decision that can no longer be appealed. As the proceedings evolve, this sequence of acts and facts gradually limits administrative discretionary power. Once a final decision has been made, it will not allow any return to the previous *status quo* or any re-vesting of full administrative discretionary power. The abovementioned binding effect arises from a constitutional guarantee attributed to individuals and therefore applies to decisions that confer rights on them, or provide advantages for them, thus "extending the legal sphere of the persons administered" as noted by Celso Antonio Bandeira de Mello.[35] On this basis, administrative res

---

on legal rules in effect and valid through these legal acts decided by the authorities based on these rules are bound by legal effects stipulated and prescribed in the legal system. The most important repercussions of the principle of legal certainty relate to: (1) normative acts — prohibition of retroactive rules restricting legally protected rights or interests; (2) jurisdictional acts — inalterability of res judicata; (3) acts of the administration — tendency to stabilize cases decided through administrative acts constituting rights "(CANOTILHO, J. J. Gomes. *Direito constitucional.* 7th ed. Coimbra: Almedina, 2003. pg. 257). Valter Shuenquener de Araújo thus conceptualizes the principle of the protection of legitimate expectations: "Norm for the purpose of complementarity with coverage determinable by the concrete case, impeding or attenuating any negative effects arising from the State's non-fulfillment of a legitimate expectation of the administered or jurisdictional party. The concept is primarily drawn from the principle of legal certainty and the rule of law, and its primary purpose, complementary to fundamental rights, is to protect the legitimate expectations of administered parties against the State's acts or omissions." *(O princípio da proteção da confiança:* uma nova forma de tutela do cidadão diante do Estado. 2nd ed. Niterói: Impetus, 2016. pg. 295). Developed further in BAPTISTA, Patricia. *Segurança jurídica e proteção da confiança legítima no direito administrativo.* Createspace, 2014. pg. 91-225.

[35] *Curso de direito administrativo.* 33rd ed. São Paulo: Malheiros, 2017. pg. 475. Themistocles Brandão Cavalcanti emphasized that posing administrative res judicata makes sense only for

judicata bears a symmetrical relation to res judicata in criminal law, which only allows relativization against decisions that harm a defendant through the criminal-law review concept as per the Code of Criminal Procedure's Article 621 — which is not even subject to peremption.[36] In both cases, fundamental guarantees are fulfilled.

In addition, a final decision emanating from an administrative proceeding is not an isolated act rendered by an individual authority that favors a particular individual, but the result of construction based on adversarial procedure through a series of successive acts following due process of law and motivations or reasons for administrative measures.[37] Note that the point here is not that procedural acts cannot be repeated for the same case due to preclusion (logical, consummative or temporal), but rather the force and binding effect on the public power exerted by the final decision or holding. This aspect only materializes when no further appeals may be filed, although appeal court levels do not necessarily have to be exhausted — since this decision would have been rendered by the authority "interested" in the filing.[38]

---

acts that generate right for the individual: "The administrative act is only beyond appeal and excluded from review and reform when it involves individual rights to be protected; otherwise this act may be modified at the administration's discretion (*ad libitum*); this is the principle that applies mainly in relation to acts of internal administration. (*Tratado de direito administrativo,* op. cit., pg. 555.) On the same lines: FRANCO, Fernão Borba. *Processo administrativo.* São Paulo: Atlas, 2008. pg. 169.

36 Unlike civil procedure, which allows *judicium rescindens* e o *iudicium rescissorium* for either party, the criminal-law review concept amounts to a constitutional guarantee for the defendant, and does not allow it to be carried out *pro societate.* In this respect, see: GRINNOVER, Ada Pelegrini; GOMES FILHO, Antonio Magalhães; FERNANDES, Antonio Scarance. *Recursos no processo penal.* São Paulo: RT, 1996. pg. 306; NUCCI, Guilherme de Souza. *Código de processo penal comentado.* São Paulo: RT, 2008. pg. 984. Likewise, this is the unanimous position in precedents from Brazil's highest courts: "The decision's stability is a value that, in criminal procedure, with greater vigor, due to the *favor rei* principle, allows relativization only when its deconstitution is motivated by the interest of the accused, which is why criminal review is always to favor a defendant, never *pro societate"* (HC 358.916, Antonio Saldanha Palheiro, Sixth Panel, April 4, 2017). In the same sense, see the following STJ cases: HC 339.635; REsp 1147274; HC 215647; HC 257376; HC 180872; HC 68373; RHC 27613; AgRg in Rcl 2451; HC 131562; HC 162063; HC 205482; HC 176320; HC 36091; HC 16425; HC 23275; and RHC 9018, or the STF's HC 108952 and RHC 59249.

37 The STJ's Second Panel has had the chance to determine that: "[...] since administrative procedure consists of a consecutive chain of acts, as does civil law procedure, it must march forward until the final outcome. An isolated act that does not represent the end of the process must not be vested with the rigors of immutability. Such an interpretation would lead to the mistake of forcing the public administrator — whose conduct must follow the principle of legality — to bow down before wrongful acts that were not discovered in good time (*opportune tempore)*, preventing its exercise of the right to legally punish repeated contractual deviations committed by contractors "(RMS 44.510, reporting judge Mauro Campbell Marques, Second Panel, March 10, 2015).

38 Fernão Borba Franco emphasizes that this aspect even precludes judicial review of a decision:

In this context, it makes perfect sense to use the term *administrative res judicata for final decisions rendered by the public administration in administrative proceedings submitted to adversary testing, ample defense and due process of law.*

These principles show that there is some similarity between judicial and administrative res judicata, but they are certainly not to be confounded with each other, since their legal and ontological bases are different. Nonetheless, the principle of legal certainty shows there is some intersection between the two concepts in the sense of sharing the same basis in axiomatic (certainty and protection of legitimate expectations) and teleological (stability) terms. Once due process of law has materialized, these two elements — 'certainty' and 'stabilizing' legal relationships — predominate over other values and as such they are inserted in the system from this source. In the context of relations with the Administration, the public interest loses its usual abstraction and is materialized in the sense of preservation and concretization of these values to the detriment of any others. In other words, the public interest in the specific case is to attribute legal certainty to a particular decision rather than any other meanings that the authorities may subsequently have.[39] This presumption may be elided only in extremely exceptional cases, as we shall see below.

In relation to the structure of administrative decisions, for reasons similar to those of the judicial decision on the merits, immutability basically rests on the *declaratory content of the decision-making act and* reaches any other effects (such as those of a constitutive or condemnatory nature, etc.) derived from the latter. In the declaration pronounced by the public body or entity at the end

---

" when a decision favors the administration, the administrative res judicata concept precludes the latter seeking judicial review, except for exceptional circumstances in which there was breach of the principle of administrative morality, with bad faith on the part of the individual or public employee" *(Processo administrativo,* op. cit., pg. 169).

[39] Although not dealing specifically with administrative res judicata, Caio Tácito emphasized that the administration may not reverse even an illegal act for the sake of the system's stability: "Exceptionally, the administration may not reverse an illegal act practiced in good faith, if it is best for the public interest and the legal system's stability." *(Direito administrativo.* São Paulo: Saraiva, 1975. pg. 29.) On the same lines Lúcia Valle Valle Figueiredo writes: "[...] consummated situations should be preserved and the Administration should not invalidate them in light of the legal system's supreme values: legal certainty and certainty of right. *(Curso de direito administrativo.* 9th ed. São Paulo: Malheiros, 2008. pg. 260). More extensively, Celso Antônio Bandeira de Mello states: " Administrative res judicata, as we understand it, concerns only situations in which the Administration has litigated to decide a certain question, in which it has formally assumed the position of applying the Law to a litigation issue; therefore, also with the implications of adversarial testing" *(Curso de direito administrativo.* 33rd ed. São Paulo: Malheiros, 2017. pg. 475).

of the administrative proceeding, a favorable judgment is imbued that poses legitimate expectation for the individual and presumption of adequacy for the collectivity. It does not behoove the Administration, on explicitly or implicitly declaring the content of a certain act (when all internal appeals have been exhausted and administrative proceedings ended), to act in a contradictory manner that violates legal certainty.

The authority cannot betray the trust an individual places in the proceeding by, after due process of law, having that which it had recently declared legal then be deemed illegal (except in very exceptional situations, and then with a pinch of salt (*cum grain salis).* In this scenario, there is some similarity with judicial res judicata particularly for direct Administration bodies and administrative agencies that exercise quasi-judicial functions, in the form of administrative courts or tribunals, such as: the anti-trust Administrative Council for Economic Defense (CADE); audit courts; taxpayers' councils and the Administrative Council of Tax Appeals (CARF); regulatory agencies; or municipal planning councils/committees.

Imagine an audit court that undertakes a special review of accounts and declares them correct and valid. Or CADE declaring that a certain merger or acquisition is valid. This reflects the purpose of a regulatory agency that recognizes and thus declares the validity of specific contractual economic-financial balance. Based on city planning decisions, a competent municipal council declares the validity of a building or structure to be executed by individuals. Quite clearly, these decisions then become part of the material and moral assets of the persons involved so the administrative bodies cannot reverse their decisions and undermine the legal certainty and legitimate expectations concerning their decision that they themselves have created.

For these entities the very notion of political and legal guidelines is a fluid one that may vary over time, since it is not unusual for their normative interpretation to change and their "case law" to evolve — especially when there are changes in their composition.[40] Although these changed interpretations

[40] In order to address the legal uncertainty arising from altered interpretation affecting the practice of administrative acts, the New Law of Introduction to the Rules of Brazilian Law (LINDB) (Law No. 13.655/188) clearly states that an act already protected by administrative res judicata as a result of altered precedent or interpretive guidance cannot be subject to review. In this respect it states: "Article 24. Review, in the administrative, controlling or judicial spheres, in relation to the validity of an administrative act, contract, agreement, process or norm, whose production has been completed, shall take into account the general guidelines at that time, and precludes fully constituted situations being declared invalid on the basis of a subsequent change in general guidance. Sole paragraph. General interpretations

are natural and legitimate, they must not affect administered parties who are beneficiaries of finalized proceedings.

Violating the expectation of a definitive solution for a proceeding means that the trust placed by individuals in the Administration itself will be eroded, as will the trust (legitimate expectations) of society as a whole ultimately. The authority must not breach this duty, otherwise its action will be arbitrary and harm the fundamental objectives of the Federative Republic, especially the criterion of justice determined by the Constitution's Article 3 — I. Here there is an obvious limitation to the Administration's compliance and enforcement power-duty (*autotutela*).

Also applicable is the principle prohibiting contradictory conduct, or *nemo potest venire contra factum proprium* (no one may set himself in contradiction to his own previous conduct), which precludes the exercise of a legal position that contradicts a previous one, especially when there is breach of trust or legitimate expectation entitled to protection.[41] In relation to the applicability of the above principle to public administration, the Brazilian Federal Supreme Court has stated that "*('nemo potest venire contra factum proprium')* applies to legal relations, including those in public law established between administered parties and the public power".[42] From this point of view, acting

---

and specifications contained in public acts of a general nature or in majoritarian judicial or administrative precedent, and those adopted by repeated administrative practice and widely known to the public, shall be considered as general guidelines."

41 See Egon Bockmann Moreira, *Processo administrativo,* op. cit., pg. 149-154.

42 This has been the STF's clearly majoritarian position. The entire content and tone of the judgment shows the applicability of the principle to public-law relationships, even to those that not contractual: "... in the context of administrative-law relations between the Public Authorities and the candidates who entered the competitive examination, the act challenged in the present case introduced a factor of instability and uncertainty that unduly undermined the defendant's legitimate aspirations, especially if one considers the general *'nemo potest venire contra factum proprium'* principle which prohibits contradictory behavior and poses consequences arising from the principles of protecting legitimate expectations and objective good faith, which seek to prevent inconsistent practices in legal relationships on the part of those who harm or injure others due to their conduct "(MS 31695 AgR, reporting judge Celso de Mello, Second Panel, decision date February 3, 2015). This position was adopted again by Justice Celso de Mello in his casting vote on MS 33406, decided by the STF's 1st Panel (MS 33406, reporting justice Marco Aurélio, judgment reporter Justice Roberto Barroso, First Panel, decision date February 2, 2016). The Supreme Court plenum had already affirmed this interpretation: "The origin of the principle of protection of trust lies in the good faith of the individual, as a rule of conduct, and therefore in the *ratio iuris* of *venire contra factum proprium*, all of which entails the Public Administration being legally bound to its own practices, even of they are illegal from their origin. The "rule of law" State is above all one of trust, or protection of legitimate expectations. And good faith and trust add scope and meaning to the traditional principle of legal certainty in a context which has long included, in particular, administrative positions and acts as legal literature warns, underlining the decisive importance of the values

in a contradictory manner would be an abuse of the administration's right, thus violating the individual's legitimate expectation.

In short, the elements comprising the administrative res judicata concept in accordance with Brazil's constitution are found to be present. The criteria for applicability are as follows:

i. Immutability — for the authority — of the declaratory effect of a decision that:

a. Broadens the sphere of the administered party's rights;
b. Complies with due process of law;
c. Is rendered at the end of administrative proceedings;
d. Can no longer be appealed, although appellate levels do not necessarily have to be exhausted;

ii. Based on the principles of legal certainty (objective dimension) and protection of legitimate expectations (subjective dimension);

iii. Applicability of the "*nemo potest venire contra factum proprium" principle [barring contradictory or inconsistent behavior].*

Once these premises have been defined, an administrative res judicata concept may be posed as the *quality that makes the declaratory effect of a decision immutable for the public administration that enlarges the sphere of rights of the administered party, is rendered at the end of an administrative proceeding that can no longer be appealed, follows due process of law and is based on the principles of legal certainty and protection of legitimate expectations*.

The concept in question, although bearing a certain resemblance to judicial res judicata, has a more specific scope related to the peculiarities of the constitutional regime of Brazilian administrative law. Hence clear limits emerge for administrative res judicata's applicability in public law relationships.

III.4 Limits of administrative res judicata

The limits of administrative res judicata both circumscribe and define it at the same time. Therefore, they constitute more than mere obstacles for

of legality and certainty as epistemological and hermeneutical criterion historically destined to materialize the supreme idea of justice" (ACO 79, reporting judge Cezar Peluso, Court plenary session, decision date March 15, 2012).

applicability. These boundaries apply on two main levels, objective and subjective.

In the *objective* sphere, they come closer to the objective limits of judicial res judicata. They apply *directly* to the declaratory content of a decision issued by the authority and *indirectly* to other effects arising thereof. They do not affect the grounds on which the *decisum* or decision is based and motivate the practice of the act (much less *obiter dictum),* but do affect the outcome of the matter decided. Although motivation and other constituent elements of the act should serve as an element of analysis for other *external* control bodies, the authority that issued the judgment on merits is bound by the content of its statement.

On the *subjective* level, the immutability of the effects of a decision is specifically delineated. In general, it will only produce effect for the parties involved ("*interpartes*"), both for the public administration (the authority that issued the decision and the entire hierarchical chain, as well as other collateral authorities) and for the private person. In other words it has a vertical-horizontal intra-administrative applicability, originating precisely from the competence normatively attributed to the authority that rendered the decision. On the internal level of the relationship, on the one hand it affects only the beneficiary party (and any related parties) and on the other hand, the public administration body or entity that issued the decision (and its related legal entities).

On the external level, it does not affect third parties who did not take part in the administrative relationship (unless the absolute nullity of a regulatory act is declared, for example — but in this case due process against third parties is required). Likewise, since it is based only on the protection of legitimate expectations, it is not binding on other external control bodies, especially the Judiciary and Courts of Accounts. They have precisely the constitutional attribution of verifying the legality of an administrative action's *ultima ratio* and therefore on deciding do not assure the beneficiary a legitimate expectation of upholding the favorable content decided. Here there is an important distinction between judicial and administrative res judicata, the latter's *positive or external efficacy* has limits that are far less comprehensive than the former's. This does not imply that the concept does not exist in administrative law, but it is only a characteristic that delimits its own contours.[43]

---

[43] Which comes close to the interpretation posed by Celso Antonio Bandeira de Mello: "Conversely, its scope is less extensive than res judicata as such. Indeed, its definitiveness is

Although not binding, with this decision there is a relative presumption of the act's legality, which may be elided by control bodies only when there are solid elements to the contrary. Even so, this presumption cannot be unilaterally excluded but requires mandatory observance of due process, thus assuring the interested party full exercise of adversary testing and ample defense. This also requires significant attention to the limits of the chronological effects of the controlling decision (whether retroactive or henceforth, *ex tunc* or *ex nunc).*

Although the decision is binding internally for the Administration, its annulment by the latter will be valid only in extremely exceptional cases, for an outright breach of legality or for other relevant principles. There is no prohibition per se of administrative power of compliance and enforcement but there are extremely strict criteria for its applicability. A judgment of illegality requires the verification of an abnormally severe and frontal violation of a legal norm that is blatantly offending of legal provision. There can be no review if it arises merely from differences over normative interpretation or the Administration's convenience and opportunity. Articles 20, 21, 22, 23, 24, 27 and 30 of the LINDB are fully applicable here.

In a similar sense, parameters for review must obey the same limits as an action for relief from judgment that are determined by the Code of Civil Procedure's Article 966[44] posing the most appropriate solution to a specific case.[45] In these cases, the administrative decision does not have the power to assure legitimate expectation; therefore it can and must be subject to the

---

restricted to itself, the Administration, but third parties are not precluded from attempting to judicially correct the act" *(Curso de direito administrativo.* 33rd ed. São Paulo: Malheiros, 2017. pg. 475).

[44] "Article 966. A final non- appealable decision may be cancelled if:

I — it is found to have been rendered due to the judge's prevarication or corruption;

II — it is rendered by an impeded judge or an absolutely incompetent court;

III — it arises from fraud or coercion of the winning party to the detriment of the losing party or from simulation or collusion between the parties to defraud the law;

IV — it offends res judicata;

V — it manifestly breaches legal regulations;

VI — it is founded on evidence found to be false in criminal proceedings or that will be demonstrated in the action to vacate itself;

VII — if, after a final decision, the plaintiff obtains new evidence that he did not know of, or could not make use of, and which may in itself ensure a favorable decision;

VIII — it is based on verifiable factual error when examining the brief. [...]. "

[45] Note the CPC's Article 15 expressly defines its applicability to administrative procedures. In this respect, see MOREIRA, Egon Bockmann. O novo Código de Processo Civil e sua aplicação no processo administrativo. *Revista de Direito Administrativo — RDA*, Rio de Janeiro, v. 273, pg. 131-334, Sep./Dec. 2016.

exercise of compliance and enforcement powers. Nevertheless, the deadline set for reviewing administrative decisions, even in the abovementioned cases, must obey the peremptive period required by Law No. 9.784/1999 Article 54.

Having submitted these points concerning administrative res judicata, we shall proceed to analyze STJ and STF precedents in order to verify applicability (although subject to different premises and parameters) to Brazilian legal-administrative relations.

IV. Brazilian higher courts — precedents for administrative res judicata

Regrettably, there is no uniform set of precedents from administrative res judicata cases thus adding to the division of opinion among academic writers. There is currently no ruling that ensures stability and uniformity for the law's interpretation of the matter. Nevertheless, an overview of judgments shows a majoritarian trend favoring administrative res judicata.

IV.1 STF precedents

Brazil's constitutional court has been arguing over administrative res judicata for almost 70 years. In the 1950s, justices Macedo Ludof and Antônio Martins Vilas Boas recognized the application of the principle to the country's legal system in appeals to the Supreme Court 25.785 and 23.830 respectively.

In both cases, the administrative authority was denied subsequent review of the act granting the administered party's rights. Although implicitly, its subsequent revocation was seen as misuse of the Administration's compliance and enforcement powers that violated the individual's legal sphere. Examples of grounds for this decision are seen in a number of extracts from the court's Appeal to Supreme Court 23.830.[46]

[46] RE 25785, reporting judge Macedo Ludolf — summoned, Second Panel, decision date September 9, 1955; RE 23830, reporting judge Antonio Martins Vilas Boas, Second Panel, decision date September 17, 1957.

> Once it has been admitted that the authority may review its own decisions, the problem arises from the limitation in time on this power. [...]
> An acceptance or denial issued by the Justice is therefore not a common administrative act. It is part of the judgment of the Council, on whose decisions the law confers in many passages the force of res judicata. Once a judgment has been rendered, the Administration must execute it. [...]
> [...] in this case revocation is imbued with misuse of power, which justified granting a writ of mandamus as per the Constitution's Article 141, §24.[47]

The judgment states that the Administration's power to review its own decisions is limited especially by lapse of time, thus conferring on decisions the status of administrative res judicata. The favorable content of the decision became part of individual legal assets, thus allowing a writ of mandamus granted for violation of clear and certain right.

The judgment in RE 31.233, also rendered by Justice Vilas Boas, on the same lines stated that there could be no second review of the tax assessment since the first had been decided by the administrative authority. In his vote he expressly stated that:

> Just as a judicial act cannot return to matters previously decided, so too in an administrative act an adjudicating authority cannot revoke a decision that constituted a legal situation in favor of the citizen, by reopening cases or any other unfavorable solution.[48]

In the course of the session, Justice Hahnemann Guimarães disagreed and argued that "there is no res judicata for tax assessment matters. The tax authority has five years in which it can make as many revisions as it

[47] RE 23830, reporting judge Antônio Martins Vilas Boas, Second Panel, decision date September 17, 1957.
[48] RE 31233, reporting judge Antônio Martins Vilas Boas, Court plenum, decision date August 8, 1958.

deems appropriate and justified."[49] Nevertheless the position favorable to administrative res judicata prevailed through a majority vote[50]

However, in a later ruling, in RMS 8.797, Justice Victor Nunes reviewed this position in a statement that excludes the possibility of assuring administrative decisions the inherent quality of the res judicata. In this respect, the judgment categorical stated that *"the alleged administrative res judicata does not exist; the order granting the advantage, being illegal, could be made administratively ineffective.* The equity grounds to which the plea refers do not transform the judge into a legislator".[51]

A characteristic of these positions from this period, favorable or contrary, was the absence of concern for more precise delimitation of the matter.

Only in the judgment of AR 950 does the matter begin to take on clearer outlines. However administrative res judicata was not equated with the same dimensions as judicial res judicata Justice Rafael Mayer's position, unanimously approved by the STF Plenum, stated that:

> Notwithstanding that the Judiciary constitutionally has jurisdiction for unrestricted appreciation of harmed rights, the Administration must materialize the right, applying the law to cases and following to its own procedures that are logically and necessarily translated into decisions or judgments that, due to preclusion, become definitive. The final administrative tax assessment is definitive, when there is no administrative appeal pending, since that which arises is the actual constitution of tax credit, arising from the relevant tax procedure. [...]
>
> In order for the administrative act, including in the field of taxation, to be properly perfected and show efficacy and enforceability, it must be vested with the characteristic of effectiveness. If the act has decisive content, involving the delineation of private interests in a dispute with the Administration in the course of a proceeding, there is judgment

---

[49] Hahnemann Guimarães, at the time federal attorney general and professor of civil law at Faculdade Nacional de Direito, had published an opinion denying administrative res judicata due to the non-exclusion of the Judicial Branch (Jurisdiction — administrative bodies and those of the Judiciary — effect of respective decisions — internal regulations of collegiate bodies. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 7, pg. 330, Jan. 1947)

[50] In the transcript of the debate, the rapporteur (reporting judge) expressly states in relation to the criticisms: "I am following the administrative res judicata concept". RE 31233, reporting judge Antônio Martins Vilas Boas, Court plenum, decision date August 8, 1958.

[51] MS 8797, reporting judge Victor Nunes, Full Court, decision date July 4, 1962 (emphasis added).

> within the limits of administrative jurisdiction and final judgment when there is no further possibility of alteration by this level of jurisdiction. Although lacking propriety, this has been called administrative res judicata by analogy. [...]
>
> The recognition of the purpose of the administrative judgment, in its own scope, for the purpose of tax credits, does not mean denying the possibility of its judicial control under the terms of the Constitution, nor, therefore, in violation of Article 153, §3, of the Constitution, or Article 6 §3 of the Law of Introduction to the Civil Code, since it is not a case of judicial res judicata.[52]

The judgment recognizes administrative res judicata as binding the Administration, while determining the possibility of judicial control over the act. It considers the Administration responsible for the application of the right in concrete cases, by means of acts with decision-making content. Once appellate levels have been exhausted by preclusion, the latter decisions become definitive for the public entity. Despite the definitive nature of the act for the administrative entity or body, control by the Judiciary is not excluded.

After these judgments, the matter did not feature in STF decisions until 1997.

In the post-1988 context, Justice Moreira Alves' relevant judgment in the First Panel categorically states that "the res judicata referred to in the Constitution's Article 5, XXXVI, as conceptualized by Article 6-3 of the Law on Introduction to the Civil Code, is the judicial decisions that there can be no further right to appeal, and not so-called administrative res judicata".[53]

Although it was not supported by the court's plenum, this interpretation influenced two judgments reported by Justice Marco Aurélio Mello. The first, although it refutes the concept, does not address administrative res judicata *per se*, since it merely excludes the Court of Auditors' being bound by the act registering retirement issued by the original authority.[54] Nevertheless, it states that there is "non-substantiation of a judicial decision in which administrative res judicata is used to avoid examining legality." In fact, administrative res judicata referred to in his vote differs from the abovementioned parameters for application. The case arises from a complex administrative act: retirement is

---

52 AR 950, reporting judge Rafael Mayer, Full Court, decision date March 26, 1980.
53 RE 144996, reporting judge Moreira Alves, First Panel, decision date April 29, 1997.
54 RE 195861, reporting judge Marco Aurélio, Second Panel, decision date August 26, 1997.

perfected only after examination by the Court of Auditors. Until that happens, there is a mere expectation of right. In the case on which the judgment was based, the appeal procedure had not been exhausted when the denial decision was rendered by the court of audit. It did not, therefore, create a legitimate expectation for the interested party as to upholding the original act, and did not constitute administrative res judicata.

In a later judgment for which the same justice acted as reporting secretary, the First Panel stated that "there can be no question of res judicata for an administrative proceeding".[55] It completely excludes this concept, based particularly on administrative compliance and enforcement power-duty (*autotutela*). The following excerpt expressly mentions Justice Moreira Alves' precedent in Appeal to the Supreme Court 144.996:

> The petitioner attempts to equate the governance of administrative and judicial proceedings. The former, in the federal sphere, are generally governed by Law No. 9.784/99, which explicitly refers to the duty to review administrative acts vitiated by illegality — Article 53. Noe that this corresponds to the normative materialization of the Supremes' own precedents, as shown by the Precedent sections 346 and 473.
>
> The Public Administration's compliance and enforcement power-duty has long been recognized as allowing it to review its own acts if found defective or null, and acting on its own initiative and authority. This prerogative extends to the Legislative and Judiciary branches when operating in a typically administrative sphere and is based on the application of the principle of legal certainty, which normally occurs by applying the peremptive period established in article 54 of Law No. 9.784/99. In the absence of this circumstance, or any other factor which may lead to compliance with other principles, such as those of good faith or of legitimate expectation, a claim on these grounds must not be upheld. Given the above, administrative res judicata does not exist as a formal or material legal figure. Using the expression may induce to error due to the Federal Constitution's Article 5 — XXXVI. Efficacy arising from res judicata is an exclusive characteristic of judicial decisions formalized in the exercise of jurisdictional function. Precedent: Appeal to the Supreme Court No.

[55] MS 28343, reporting judge Marco Aurélio, First Panel, decision date September 23, 2014.

> 144.996, reporting judge Moreira Alves, tried by the First Panel on April 29, 1997.[56]

The decision notes that there is only judicial res judicata and the administrative res judicata concept is inadequate given in the Constitution's Article 5-XXXVI and holds that it would be wrong to equate the governances of judicial and administrative proceedings. However, it fails to notice that the argument for administrative res judicata does not imply equating these regimes, but only attributing specific status to the latter.

However, the matter has not been settled. The following STF, First Panel judgments reported by Justice Luiz Fux, explicitly recognized the applicability of administrative res judicata. In both cases, res judicata with the force of res judicata is attributed for the administration to decisions of administrative bodies that exercise "judicial" activity.

MS 33.668 AgR refers to the National Council of Justice decision that had been settled in 2013[57] in the sense that the local Internal Affairs could not de-characterize the act.

In MS 30.780 AgR, the STF ruled that the federal audit court (TCU) statement on the legality of a certain portion of remuneration prevented the review of the case by the body — particularly after the five-year term stipulated by Article 54 of Law No. 9.784/1999 had lapsed. The decision (*decisum)* alters the applicability of the Court's precedents to administrative res judicata since the reason given was protection of legitimate expectations. It notes that the TCU's administrative review of the act took place six years after the original decision and

> [...] clearly violated Article 54 of Law No. 9.784/99, in addition to completely undermining the legitimate expectation created by the TCU's own statement. Note that the constitutional principle of protecting legitimate expectations may very well bar state interventions that could compromise life-cycle projects already in progress by substantially emptying them of content, especially when guided by a previous ruling made by the State. Additionally it demands a high degree of respect for the concrete consolidated effects of past acts practiced by political,

[56] MS 28343, reporting judge Marco Aurélio, First Panel, decision date September 23, 2014.
[57] MS 33668 AgR reporting judge Luiz Fux, First Panel, decision date June 19, 2017.

> administrative and judicial institutions.
>
> Indeed, although Federal Court of Audit decisions made in the exercise of its constitutional function as an external control body are formally similar to judicial acts, their nature is that of administrative acts.[58]

Note that the judgment does not comply with the parameters for application defined in the previous topics, since its focuses exhaustion on administrative provision for the peremptive period of Law No. 9.784/1999. However, it presents protection of legitimate expectations as evaluative grounds for the decision, granting it administrative res judicata status.

Although few cases have specifically addressed the concept, the STF's precedents in this matter have been variable and they have not yet been consolidated in any sense. In the post-1988 decisions, only judgments by subdivisions of the court prevail. Nevertheless, they are issued incidentally and use different parameters for application. They do not show that the Supreme Court has a predominant position in this respect. Nevertheless, there are favorable judgments that differ from the abovementioned criteria for applicability such as: *(i)* immutability for the authority of a previous administrative decision which can no longer be appealed; *(ii*) made on the ground of the principles of legal certainty and protection of legitimate expectations; and *(iii*) stabilizing decisions that broaden the sphere of rights of administered parties.

In addition, in relation to the constitutional treatment of the matter, the preponderance of the protection of legitimate expectations in relations with the administration is reiterated as a subjective dimension of the principle of legal certainty. This aspect shows that the axiomatic grounds proposed for the concept is securely supported by the STF's judgments.

IV.2 STJ precedents

The STJ has rendered more judgments on the matter than the STF. Therefore the analysis posed here will cover the principal shared characteristics of their decisions rather than examine each of them. Our intention is to seek consistency across judgments in order to standardize comprehension of their reasoning (*ratio decidendi).*

---

[58] MS 30780 AgR, reporting judge Luiz Fux, First Panel, decision date September 11, 2017.

In relation to general characteristics, there is no settled interpretation of the matter and precedents have been variable. However, judgments have predominantly — directly or indirectly — accepted administrative res judicata with different nuances. From the total of 22 judgments in which the grounds for decisions have addressed the issue (albeit incidentally), 16 have at least to some extent favored res judicata being applicable to legal relations with the public power.[59] These positions have been stated at different points in time rather than showing abrupt changes. They are also spread across the various subdivisions ("fractional bodies"). They are collective rather than individual and include several judgments from the First and Third sections — comprised of panels that deal with public law and criminal law matters.

The other 6 judgments explicitly or implicitly opposed the notion of res judicata.[60] In all of them, the core element is administrative compliance and enforcement power, including those based on Precedent No. 473/STF. An example that may stand for all of the above is the vote of reporting judge Milton Luiz Pereira in MS No. 5.611/DF, which emphasized:

---

[59] The following judgments were *favorable* to administrative res judicata: RMS 10.338 / PR, reporting judge Laurita Vaz, Second Panel, decision date November 19, 2002; REsp 472.399/AL, reporting judge José Delgado, First Panel, decision date November 26, 2002; RMS 14.109/ES, reporting judge Paulo Medina, Sixth Panel, decision date May 17, 2005; MS 10.254/DF, reporting judge Hélio Quaglia Barbosa, Third Section, decision date March 22, 2006; MS 10.026/DF, reporting judge Arnaldo Esteves Lima, Third Section, decision date August 9, 2006; EDCl in MS 12.460/DF, reporting judge José Delgado, First Section, decision date November 14, 2007; MS 15.459/DF, reporting judge Benedito Gonçalves, First Section, decision date March 14, 2012; RMS 32.495/AM, reporting judge Eliana Calmon, Second Panel, decision date May 7, 2013; HC 266.462/SP, reporting judge Laurita Vaz, reporting for judgment Regina Helena Costa, Fifth Panel, decision date February 25, 2014; RMS 44.510/GO, reporting judge Mauro Campbell Marques, Second Panel, decision date March 10, 2015; AgInt in RMS 51.043/MA, reporting judge Mauro Campbell Marques, Second Panel, decision date September 27, 2016; RMS 44.188/RJ, reporting judge Gurgel de Faria, First Panel, decision date February 2, 2017; AgInt in EDCs in RMS 31.710/ES, reporting judge Napoleão Nunes Maia Filho, First Panel, decision date February 14, 2017; AgInt no REsp 1459326/SC, reporting judge Gurgel de Faria, First Panel, decision date April 6, 2017; REsp 1240691/RS, reporting judge Herman Benjamin, Second Panel, decision date April 20, 2017.

[60] The following judgments *opposed* the concept: MS 5611/DF, reporting judge Milton Luiz Pereira, First Section, decision date September 9, 1998; RMS 6.165/RJ, reporting judge Felix Fischer, Fifth Panel, decision date December 3, 1998; MS 6.787/DF, reporting judge José Arnaldo da Fonseca, Third Section, decision date June 14, 2000; RMS 19.309/MG, reporting judge Mauro Campbell Marques, Second Panel, decision date March 3, 2009; RMS 43.613/PR, reporting judge Humberto Martins, Second Panel, decision date February 25, 2014; AgRg in EDcl in RMS 28.569/RN, reporting judge Nefi Cordeiro, Sixth Panel, decision date October 15, 2015.

> In this respect, in terms of the discussion of legal scholars, I agree with those who accept preclusion; however I do not believe there is a (formal or material) "administrative res judicata" principle that is binding for all parties (*erga omnes)*. In the procedural sense, the latter only materializes in judicial decisions (Articles 467, 471 and 473, CPC). Hence the sudden appearance of Precedent 473/STF, made on the court's own initiative and authority, which allowed an administrative act to be invalidated. Therefore "res judicata" is unacceptable whereas the admissibility of preclusion is reasonable.[61]

According to the judgment, as per the abovementioned scholars interpretation, given the power-duty of requiring compliance and enforcement (*autotutela*), administrative res judicata would be inadmissible, even if exercised on an entity's own initiative and authority (*ex officio)*. At most, there would be preclusion. There would be no right to stabilize an administrative decision if a private person's right is violated by review of the act, the latter could only "in principle, claim damages and losses (the Federal Constitution's Article 37, §6)." The other cases do not drill down to the same level of detail; in general, they simply reject the concept's being applied as a means of individual protection against the administration's power to annul its own acts.

Judgments favoring the administrative res judicata concept base their position on the protection of legal certainty. Instead of being limited by the administration's power to require compliance and enforcement, it would amount to a means of restricting the latter. In the universe examined, this position is especially prominent in the control of acts of federal audit courts. The Second Panel's judgment in AgInt in RMS 51.043/MA, reporting judge Mauro Campbell Marques, stated that the audit court is not allowed internal review of its judgment after appellate levels have been exhausted. To do so, it categorically states that:

> The precedents summarized in Precedent No. 473/STF [do not support administrative res judicata], nor is there a legal provision allowing the Public Administration to correct alleged illegality, once an

[61] MS 5.611/DF, reporting judge Milton Luiz Pereira, First Section, decision date September 9, 1998.

> administrative judgment has ended, to review that which it decided, even if [ordered] to do so when the appropriate administrative appeals have been exhausted.[62]

The judicial body states that not even Precedent 473/STF would allow the exercise of administrative compliance and enforcement powers by the federal audit court (TCU), after exhausting appellate levels. On the same lines was the position adopted in REsp 472.399/AL, which also recognizes that the TCU cannot exercise administrative compliance and enforcement powers when administrative appeals are no longer possible due to administrative res judicata. At the same time this judgment emphasizes that the decision "is not, however, excluded from analysis by the Judiciary, since no legal right can be excluded from the latter."[63] Non-exclusion of the Judiciary in relation to limiting administrative res judicata (without, however, denying it) is also stated in RMS 14.109/ES, AgInt in REsp 1.459.326/SC and MS 15.459/DF.

In most of cases in which administrative res judicata was recognized, the decision that gave rise to litigation arose from administrative litigation that did not allow any further appeal. In this context, note that RMS 44.510/GO stated that there was no violation of administrative res judicata, because "an isolated act that does not represent the end of the proceeding cannot be vested with the rigors of immutability".[64]

As shown above, neither the STF nor the STJ has reached settled or uniform interpretation of administrative res judicata. Nevertheless, their positions predominantly tend to recognize the principle, although with different nuances. For the majority, it is seen as a means of consolidating interested parties' rights and obligations in the administrative sphere, even if the decision-making act is not definitively exempted from subsequent jurisdictional control.

The few positions to the contrary, in line with scholars opinions differences, believe that the power-duty of administrative compliance and enforcement is a principle preventing acceptance of the concept. Although all cases have in some way examined the legality of overly severe or harsh

---

[62] AgInt in RMS 51.043/MA, reporting judge Mauro Campbell Marques, Second Panel, decision date September 27, 2016.

[63] REsp 472.399/AL, reporting judge José Delgado, First Panel, decision date November 26, 2002.

[64] RMS 44.510/GO, reporting judge Mauro Campbell Marques, Second Panel, decision date March 10, 2015.

administrative acts, the principle of non-exclusion of the Judiciary was not used at any time as grounds for any denial of administrative res judicata. Their judgments on the whole considered the applicability of immutability to decisions only for the administration, which did not entail its rejection.

Conclusion

As shown above, the administrative res judicata concept is fully compatible with Brazil's constitutional law. It is supported by the Constitution, administrative law, the CPC's subsidiary application to the administrative proceeding, and by the New Law of Introduction to the Rules of Brazilian Law.

However, Brazilian administrative res judicata has typically legal and identifiable characteristics of its own. It is not to be confounded with judicial res judicata (nor with "French type" administrative res judicata). Despite differences, they share the same teleological and axiological basis, guided by predictability and stability for legal relations; as well as materializing the principles of legal certainty and protection of legitimate expectations. The power-duty of administrative compliance and enforcement and the principle of non-exclusion from judiciary review merely show that the concept has narrow demarcations in comparison with judicial res judicata. However, they do not impede the former's existence.

Although there is no settled precedent on the subject, acceptance is the prevailing opinion of Brazil's highest courts, especially the STJ, although with different nuances and criteria for applicability. In several aspects, there is an alignment of judgments with the elements of the notion of administrative res judicata posed herein, especially in relation to the immutability of the effects of a decision rendered in favor of an individual that can no longer be appealed.

All the above elements show that administrative res judicata has its own legality in Brazilian law. In addition, it has an important role for the system by protecting the individual against the state's obtuseness and stabilizing legal-procedural relations with the public power. In addition to respecting private persons, the public administration must also be subject to the legal qualities of its decisions.

Reinforcing the above content of this article, an administrative law that is not intelligible and efficacious is not entirely satisfactory in terms of what is expected from the rule of law. The same is true of an administrative law that is not certain and does not assure confidence or stability. The consolidation of administrative res judicata, to which this article modestly hopes to contribute,

should confer the clarity, stability and security expected of a right that is so important for private persons and the State itself.

References

ANDRADE, José Carlos Vieira de. *A justiça administrativa.* 3rd ed. Coimbra: Almedina, 2000.

ARAGÃO, Egas Moniz de. *Sentença e coisa julgada.* Rio de Janeiro: Aide, 1992.

ARAÚJO, Valter Shuenquener de. *O princípio da proteção da confiança:* uma nova forma de tutela do cidadão diante do Estado. 2nd ed. Niterói: Impetus, 2016.

ASSIS, Araken de. *Processo civil brasileiro.* São Paulo: RT, 2015. v. I.

BANDEIRA DE MELLO, Celso Antonio. *Curso de direito administrativo.* 33rd ed. São Paulo: Malheiros Editores, 2017.

BANDEIRA DE MELLO, Oswaldo Aranha. *Princípios gerais de direito administrativo.* 3rd. ed. São Paulo: Malheiros, 2007. v. I.

BAPTISTA, Patrícia. *Segurança jurídica e proteção da confiança legítima no direito administrativo.* Createspace, 2014.

BAPTISTA DA SILVA, Ovídio Araújo. *Sentença e coisa julgada.* Porto Alegre: Fabris, 1995.

BARBOSA MOREIRA, José Carlos. *Temas de direito processual civil:* primeira série. São Paulo: Saraiva, 1977.

BARROS, Luiz Carlos Galvão de. Há coisa julgada administrativa? *Justitia,* São Paulo, v, 44, n. 117, pg. 211-216, Apr./Jun. 1982.

BRASIL. STF. RE 31.233, rel. min. Vilas-Boas. *Revista de Direito Administrativo — ROA,* Rio de Janeiro, v. 59, pg. 57-60, April 1960. Available at: www.http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/20381/19118.

CAETANO, Marcello. *Manual de direito administrativo.* 10th ed., 9th reprint. Coimbra: Almedina, 2008. v. II.

CANOTILHO, José Joaquim Gomes. *Direito constitucional.* 7th ed. Coimbra: Almedina, 2003.

CARNELUTTI, Francesco. *Lezioni di diritto processuale civile.* Padova: Litotipo, 1933. v. IV.

CARVALHO FILHO, José dos Santos. *Manual de direito administrativo.* 30th ed. São Paulo: Atlas, 2016.

CASSESE, Sabino. *La Construction du droit administratif:* France et Royaume-Uni. Translated by J. Morvillez-Maigret. Paris: Montchrestien, 2000.

CAVALCANTI, Themístocles Brandão. *Tratado de direito administrativo.* 3rd ed. Rio de Janeiro: Freitas Bastos, 1956. v. IV.

CHAPUS, René. *Droit Administratif Général.* V. 1. 12th ed. Paris: Montchrestien, 1998.

CORREIA, José M. Sérvulo. *Direito do contencioso administrativo — I.* Lisboa: Lex, 2005.

COUTO e SILVA, Almiro do. O princípio da segurança jurídica (proteção à confiança) no direito público brasileiro e o direito da administração pública de anular seus próprios atos administrativos. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 237/273-274, Jul./Sep. 2004.

DEBBASCH, Charles; COLIN, Frederic. *Droit administratif.* 10th ed. Paris: Econômica, 2011.

DI PIERRO JÚNIOR, Miguel Thomaz. Prescrição administrativa e coisa julgada administrativa. *Revista Forense,* Rio de Janeiro, v. 394, Nov./Dec. 2007.

DI PIETRO, Maria Sylvia Zanella. *Direito administrativo.* 30th ed. São Paulo: Atlas, 2017.

____. Limites da utilização de princípios do processo judicial no processo administrativo, *Revista do TCE/RJ,* Rio de Janeiro, n. 12, 2016.

DIDIER JR., Fredie; BRAGA, Paula Sarno; OLIVEIRA, Rafael. *Curso de direito processual civil.* 5th ed. Salvador: Jus Podivm, 2010. v. 2.

____;____;____. *Curso de direito processual civil.* 13rd. ed. Salvador: Jus Podivm, 2018. v. 2.

DINAMARCO, Cândido Rangel. *Instituições de direito processual civil.* 8th ed. São Paulo: Malheiros, 2016. v. I.

GARCÍA DE ENTERRÍA, Eduardo. *Hacía una nueva justicia administrativa.* Madrid: Civitas, 1989.

____. La crisis del contentioso-administrativo francês: el fin de un paradigma. In:____. *Hacía una nueva justicia administrativa.* Madri: Civitas, 1989.

FERRAZ, Sérgio. Processo administrativo ou procedimento administrativo; a coisa julgada administrativa. *Revista do Instituto dos Advogados Brasileiros*, São Paulo, yr. XXXIV, n. 92, 2nd Q. 2000.

____. Processo administrativo: prazos e preclusões. In: SUNDFELD, Carlos Ari; MUÑOZ, Guillermo Andrés. *As leis do processo administrativo.* São Paulo: Malheiros, 2000.

FIGUEIREDO, Lúcia Valle. *Curso de direito administrativo.* 9th ed. São Paulo: Malheiros Editores, 2008.

FRANCO, Fernão Borba. *Processo administrativo.* São Paulo: Atlas, 2008.

GRAZIER, François. *O Conselho de Estado Francês.* Rio de Janeiro: FGV/Ebap, 1955. (Insert No 29). Available at: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/11942/29_000043756.pdf?sequence=1&isAllowed=y>. Accessed on: Apr. 1, 2018.

GRINNOVER, Ada Pelegrini; GOMES FILHO, Antonio Magalhães; FERNANDES, Antonio Scarance. *Recursos no processo penal.* São Paulo: RT, 1996.

GUIMARÃES, Hahnemann. Jurisdição — órgãos administrativos e órgãos do Poder Judiciário — efeito das respectivas decisões — regulamentos internos dos órgãos colegiais. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 7, Jan. 1947.

GUIMARÃES, Luiz Machado. Preclusão, coisa julgada e efeito preclusivo In: ____. *Estudos de direito processual civil.* Rio de Janeiro: Jurídica e Universitária, 1969.

JUSTEN FILHO, Marçal. *Curso de direito administrativo.* 12th ed. São Paulo: RT, 2016.

LIEBMAN, Enrico Tullio *Eficácia e autoridade da sentença e outros escritos sobre a coisa julgada.* Translated by A. Buzaid; B. Aires e A. P. Grinover. 3rd ed. São Paulo: Forense, 1984.

MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. *Novo curso de processo civil:* tutela dos direitos mediante procedimento comum. São Paulo: RT, 2015. v. 2.

MEIRELLES, Hely Lopes. *Direito administrativo brasileiro.* 15th ed. São Paulo: Revista dos Tribunais, 1990.

____. *Direito administrativo brasileiro.* 42nd ed. São Paulo: Malheiros, 2016.

MOREIRA, Egon Bockmann. O novo Código de Processo Civil e sua aplicação no processo administrativo. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 273, pg. 131-334, Sep./Dec. 2016.

____. O princípio da legalidade, a lei e o Direito. In: MARRARA, T. (Org.). *Princípios de direito administrativo.* São Paulo: Atlas, 2012.

____. *Processo administrativo.* 5th ed. São Paulo: Malheiros, 2017.

NUCCI, Guilherme de Souza. *Código de processo penal comentado.* São Paulo: RT, 2008.

PAJNO, Alessandro. Il riparto dela giurisdizione. In: CASSESE, S. (Org.). *Trattato di diritto amministrativo.* Milão: Giuffrè, 2000. v. IV.

PONTES DE MIRANDA, F. C. *Comentários ao Código de processo civil.* Rio de Janeiro: Forense, 1948. v. V.

____. *Comentários ao Código de processo civil.* 3rd. ed. Rio de Janeiro: Forense, 1997. t. V.

SEILLER, Bertrand. Les juges de l'administration. In: GONOD, P.; MELLERAY, F.; YOLKA, pg. (Org.). *Traité de droit administrative.* Paris: Dalloz, 2011. t. 2.

SILVA, Vasco Pereira da. *Em busca do ato administrativo perdido.* Coimbra: Almedina, 1998.

SOUSA, Rubens Gomes de. A coisa julgada no direito tributário. *Revista de Direito Administrativo — RDA,* Rio de Janeiro, v. 5, pg. 48-76, Jul. 1946.

TÁCITO, Caio. *Direito administrativo.* São Paulo: Saraiva, 1975.

WEIL, Prosper. *Direito administrativo.* Translated by Maria Glória Ferreira Pinto (from 1964 edition). Coimbra: Almedina, 1977.