RULE OF LAW DISCRETION: A LIMITED POWER

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ABSTRACT: Administrative discretion continues to be the main vexata quaestio of administrative law under the rule of law. Simultaneously fundamental and highly complex, administrative discretion has traditionally been used for purposes unrelated to law and material justice, as a means of arbitrariness and the abuse of power. In this article we seek to subject discretionary power to legal-administrative principles (values) and intense judicial control, precisely so that discretion is not distorted and becomes anti-right and anti-public interest. This evolution presupposes a new culture of public power, based on the functional exercise of power.

Keywords: Discretionary; Functional Duty; Functional Exercise of Power; Intense Judicial Control of Administration; Material Justice; Prohibition of Discretion.

INTRODUCTION

The theme "administrative discretion" continues to be the "Achilles heel" of Administrative Law, although it has historically been the most controversial and most addressed issue by legal-administrative dogmatics, since the preliminary studies by BERNATZIK [2] and TEZNER [18]. The great relevance of this topic results from the fact that it is the safety valve and guarantee of the implementation of the rule of law, and thus of the achievement of material justice and public interest. Significant progress has been made in the meantime, but there is still a long way to go before

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satisfactory levels have been reached in terms of theoretical conception, practical application and above all judicial control. Discretionality, therefore, continues to be a current topic of transcendent theoretical and practical relevance; continues to be a challenge rather than an obstacle to the achievement of justice in the specific case. This reflection seeks to be a valid contribution to the juridification of administrative discretion.

1. DISCRETION: CORE FIGURE, BUT WITHOUT LEGAL DEFINITION

1.1. Lack of Legal Definition

The legislator frequently uses the term discretion, but does not define it. Discretion is thus presupposed, but not defined. Although a legal definition of administrative discretion would not solve all of its problems, it would certainly contribute to its clarification, because the lack of a legal definition of administrative discretion contributes to its ambiguity at dogmatic and jurisprudential levels. Also for this reason, administrative discretion continues to be a complex domain full of legal uncertainties, often exploited to achieve purposes contrary to the law and the public interest. The rule of law in general and the Portuguese legislator in particular require determination and greater clarity and objectivity in all areas of the law, particularly when fundamental rights are directly or indirectly at stake. Therefore, the Portuguese legislator must regulate the content and exercise of discretion, so that the administrative authority knows clearly what it can and should do, the citizen can know unequivocally where his rights and duties begin and end, and the courts better fulfil their function of controlling the interpretation and application of the law, from the outset. The legislator must clearly establish the criteria and limits of judicial control.

1.2. Discretionary as an Instrument for Achieving Material Justice and Public Interest

Discretionary power results from the fact that the generality and abstraction of the law are not perfectly suited to the implementation of justice in specific concrete situations that require analysis and consideration on a case-by-case basis, in their concrete contours. The legislator's general and abstract decision then gives way to the concrete decision, which analyses and considers the specificity of the specific case, with a view to achieving material justice and the public interest. But this "delegation" of the law to the Administration must be restricted to cases of absolute necessity, as it occurs by sacrificing the virtues of generality and abstraction, which provide legal certainty and material justice and which prevent arbitrary inequality of treatment. Discretion is, therefore, not a power alien to the State under

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the rule of law, but an indispensable instrument for achieving material justice and the public interest. Discretion has here its *raison d'être* (right to exist) and its limit, its beginning and its end.

1.3. Attribution of Discretion

The first big question that arises is knowing when we are faced with a discretionary power.

1.3.1. General Principle: The Powers of the Administration Are Attributed by Law

In a State under the rule of law, there is no Administration without law, that is, the Administration only has the powers that the law grants it, especially within the scope of the so-called Administration of interference, and also in the Administration of provision there will have to be a legal qualification: the Functions and competencies are not presumed, but are conferred by law.

1.3.2. Strengthened Requirements for Discretion

As the exercise of discretionary power runs the serious risk of materializing serious interference with the rights and freedoms of citizens, and it is very difficult, or even impossible, for those affected to prove the real intentions of the Administration in determining the end of its actions, it is sensible, logical and legitimate to demand that the attribution of a power that poses so many dangers be restricted to cases in which there is a clear and unequivocal expression of a corresponding will in the enabling law. In other words, discretionary power means in principle less intensity of judicial control. This implies an important limitation for the legislator himself. The attribution by the legislator of discretionary power means a certain exclusion from judicial control of subjective, possibly fundamental, rights. The legislator must therefore take into account that, in a State under the rule of law with separation of powers, the final binding interpretation of the norm and control of the application of the law are, by virtue of the Constitution, reserved to the courts. Thus, a "liberation" of the application of the law in relation to judicial control can only be made when there is a sufficiently important material basis in relation to the principle of effective judicial protection [4].

1.3.3. Prohibition of Presumption of Discretion

Thus, in a State under the rule of law, discretion is not presumed and cannot result from the use of analogy. In the rule of law there is no discretion without law (without legal authorization), due to the indeterminacy of the law, beyond the law or against the law. As discretion is the product of the

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clearly expressed will (of the legislator), there is also no discretion resulting from mere isolated concepts or from complex situations of mere cognition, mere recognition, or mere observation, where the legislator has not left the Administration with any possibility of alternative or choice.

This position was already defended by me in 1987, when I wrote: "Whether or not the law attributes discretionary power to the Administration, this results, and can only result, from the will of the law as a whole, and not from individual concepts, even if it is a matter of the so-called 'discretionary clauses', such as 'may' or 'is authorized'. The interpretation of the law as to whether or not it grants discretionary power falls, as a matter of law, under judicial control. Individualized concepts, detached from the laws in which they are inserted, however indeterminate they may be, are not sufficient to conclude whether or not discretionary powers exist."[16]

As argued in 1986, "the distinction between experience concepts and value concepts does not play any role in the question of whether or not a 'margin of free appreciation'[9] is recognized in the *Tatbestand* (forecast of the legal norm) of the norm. Decisive is only the will of the legislator." [15] To which it was added: "the nature of the bound decisions cannot be changed just because the decision factors cannot be fully determined" [16].

1.3.4. Discretion as a Space not Controlled by the Court

Some doctrine and jurisprudence have defined administrative discretion in a negative way, returning it to the corner of the decision that the court did not control. This understanding must, however, be rejected. "Administrative discretion does not depend on judicial control" [16], but on the legislator, as only this confers powers on the Administration. "A negative concept of discretion, that is, discretion as a space that the administrative court could not or would not control, means the denial of discretion and constitutes a danger for the legal protection of citizens. A negative concept of discretion is also disadvantageous to the Administration, as it does not accurately delimit its powers. Even the legislator would not in certain cases know exactly, whether the powers he assigns would be free or bound." [16] "From the forced recognition of self-withdrawal of jurisdictional control, it should not be concluded that the uncontrolled zone has therefore been transformed into a discretionary zone" [16]. "The flexibility of judicial self-restraint allows the court to permanently adapt itself to new situations, new scientific knowledge and new control techniques" [14]. And "the judge, judicious and responsible, knowing the real meaning of the function of judging, will establish the ideal line of his control according to the circumstances surrounding the specific case" [14]. Thus, there can and must be self-

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retraction of jurisdictional control, but the powers, whether bound or discretionary, are received by the Administration from the law and do not result from possible jurisdictional control.

1.3.5. The "May" Clause, the "False May" and Strict Binding

Traditionally, legal-administrative dogmatics maintained that to grant discretion the legislator often resorts to the so-called "may" clauses. However, the legislator's use of the 'may' clause constitutes a mere indication (and nothing more) of the attribution of discretionary power. Therefore, the use, in the establishment of the legal norm, of the term "may" does not *ipso facto* mean, always and inevitably, the attribution of a discretionary power. This may only be a question of the assignment of a competence or authorization within the scope of the bound Administration. Thus, despite the use of the "may" clause in the legal norm, in this specific case we may be dealing with a bound power. In many cases, this results from the interpretation of the legal norm itself, as many norms contain within them a denial of the statement itself (a "false may").

Just an example from the law:

Art. 92, n.º 4, DL n.º 214-G/2015, of 02/10) says: "The eviction must be carried out…, except when there is an imminent risk of cave-in or serious danger to public health, in which case it may be carried out immediately." This "may" is unequivocally a must, whenever there is a situation of "imminent risk of cave-in or serious danger to public health".

1.4. REDUCTION OF DISCRETION TO ZERO

In general, there is a "reduction of discretion to zero" (as it was so emphatically formulated by ALFONS GERN[8], when a discretionary power attributed by the legislator is converted, in the specific case, by the application of current norms and principles, into a binding decision.

An illustrative case of reducing discretion to zero results from the following example: a person is drowning in a river. The competent authority (*e. g.* the police) can save that person by throwing a buoy, swimming to them, calling a lifeguard.

Only apparently is there freedom of choice between these means. In reality, the high value of the asset at risk (human life) and the high risk (imminent danger of drowning) require the adoption of the means that in due time proves to be more appropriate, faster and less costly to achieve the end in view which is the rescue. In view of the specific circumstances and the means available, the choice thus becomes an obligation to use the most appropriate means.

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1.5. RULE OF LAW DISCRETION: JURIDIFIED DISCRETION AND MATERIAL JUSTICE

1.5.1.Juridified Discretion

In a State under the rule of law there is only room for juridified discretion, that is, discretion conceived and limited by law, as a product of law. Discretion and assessment, as well as public interest, develop within the criteria of law and the limits of law. The discretionary solution must be the solution imposed by law and by right; it must be found in accordance with the best exercise of power, the best conviction, the best concept of justice, the greatest transparency, clarity and objectivity (which are legal principles). Administrative discretion is, therefore, an instrument not for carrying out whims or arbitrary actions, but for achieving justice in the specific case and the public interest. The range of alternatives already slumbers in the norm and is determinedly conditioned by the law of discretionary authorization and by right. Therefore, when it is sometimes said that in the discretion the legislator "does not want to know" the solution that will be adopted in the specific case, this cannot be taken literally, as it cannot mean a solution outside the law or indifferent to the law. Quite the reverse: the exercise of discretionary power is still the implementation of law and right. There is no administrative discretion in the form of freedom of arbitrary choice, but only administrative discretion in the form of 'functional choice', which is also 'choosing the best', that is, a false choice. Discretion is still a question of legality and not only or mainly of administrative policy or subjective opinion. Law and right impose the most convenient measure; and, if they are necessary, we are facing a question of legality. It is true that determining what is most convenient or opportune may involve, to a greater or lesser extent, the use of extra-legal elements, which cannot be confused with legal aspects, but these elements must be clearly and objectively demonstrated (because they have legal relevance)".

Discretion is not a way of separating the Administration from the law and right. Discretion and law are not antagonistic or substantially different realities, but consubstantial, made of the same material. Discretion is exercised through the means and within the limits of the law, to put it into effect, with the public interest being part of this. It is the necessary, right and appropriate way to realize the right in the specific case. The will exercised in the exercise of discretion is the will of the law and the right, through the Administration body or agent.

1.5.2. Discretion as Functional Power: Subjective Will and Functional Will

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The law cannot depend on the subjective will, as the personal will of the administrative agent, but it imposes the exercise of the functional will, which is the agent's will limited by law and by right, in the scrupulous fulfilment of his functional duties. An objective and functional will is required, capable of being clearly understood by third parties (especially the interested citizen and the court). The law prohibits the agent from being guided by his strictly personal will, both from the perspective of his personal interest and from the perspective of his strictly personal 'view of the world', but also by individual-personal tastes and preferences. Every administrative body and agent is legally bound to neutrality, not only political, religious and ideological, but also strictly subjective. The functional will comes from the law and must be directed towards compliance with the law, towards the realization of the public interest, towards respect for the rights of citizens. Functional will is formed and exercised within the limits imposed by the strict fulfilment of functional duties, that is, the duties of careful performance of the function, which implies good faith, integrity, common sense, consideration and loyalty of the body or holder that acts according to the law and right. Disloyalty to the Constitution, understood as a violation of fundamental values of the Constitution, reveals (and provides sufficient proof) a lack of suitability for the position. In this case, the consequence should automatically be the loss of mandate or dismissal from office.

1.5.3. Discretion for Achieving Material Justice: the veritable DNA of Public Administration

The veritable DNA of Public Administration under the rule of law is the achievement of material justice and, essentially through this and for this, the public interest. To achieve this, the Administration has at its disposal, first and foremost, the principle of justice and equity.

In Portugal, equity is a source of law (cf. art. 4 of the Civil Code) and a criterion or principle of decision that requires justice in the specific case.

Material justice prohibits an unfair decision, even in cases where, due to a gap in the law, an imperfection or incorrectness in the law, or even an express determination of the law, everything points to an unfair decision: material justice must always prevail; if necessary, even *contra legem*. The State under rule of law is a state of effective or material justice (realized, made reality, lived), always and everywhere. Unjust laws are not low, because right superior to positive laws prevents their validity.

Strictly speaking, in the specific case, the recognition of the empire of material justice over formal justice implies the very denial of discretion, since in the specific case only one decision is materially

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fair: the one that, in respect for the law and right, achieves material justice and best satisfies the public interest.

1.5.4. Discretion as a Culture of Material Justice: Responsible Power and Power to Serve - Cultural Paradigm Shift

Portuguese public administration must abandon the idea of power as a privilege or perk, the result of an education that emerged and developed, as Karl POPPER observed, in a "system whose ultimate basis is the worship of power"[12], but which no longer has any place in the current rule of law.

In the exercise of discretionary power, the culture of enjoying privileges must be replaced, as an imperative of the rule of law, by the culture of fulfilling duty, as this is the true essence of freedom: only fulfilling duty sets me free. If culture provides human beings in general with "walking straight", this is first and foremost valid for the holder of discretionary power. Law and the rule of law develop through the experience of a culture of compliance with duty.

The imperative to achieve material justice commits the law enforcer as a whole, the official or agent from top to bottom, the person at their highest level. Through injustice, a person moves away from the world, but gets in touch with it through justice. Material justice is the right as a whole, while the law is only part of it. A State under rule of law is not one in which blindness or indifference (often to the positive norm itself) prevails towards justice. The University that trains jurists who are indifferent to justice is not excellent (and University Porto is statutory excellent). It is not the law, but justice that shapes society.

1.6. DISCRETION: ACHIEVEMENT OF THE PUBLIC INTEREST, RESPECT FOR THE LAW AND THE PRINCIPLE OF THE BEST CHOICE

The relationship between discretion and the "public interest" has, for a long time, generated a heated doctrinal debate. Traditionally, the public interest served as a refuge clause for arbitrary decisions and the refusal of judicial control. It was against this wrong understanding that P. HÄBERLE rebelled in his fundamental work *The public interest as a legal problem*, dated 1970. The public interest is a fundamental pillar of the rule of law and a constitutional requirement. It is an essentially legal problem and not an extra-legal or anti-legal problem. The public interest does not exist against the law, but arises within it, is part of it and exists for it. In the rule of law, the public interest manifests itself in multiple ways, has different dimensions, but emanates from the law, lives and develops within it, is limited by it and at its

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service. Therefore, the first and fundamental public interest, which determines all other public interests, lies in the observance of the law, above all the Constitution, and right.

1.7. DISCRETION AND SIMILAR FIGURES

1.7.1. Appreciation/Valuation: Verification and Declaration of Value

I now go over to the fundamental question of appreciation/valuation. As a State of material justice, the State under the Rule of law only allows fair assessment/valuation. Everything beyond this is unconstitutional and illegal. Fair assessment/valuation becomes, in the specific case, a single decision and, thus, a binding of the Administration to that single decision. This is an issue that requires the most intense judicial control possible. The rule of law and its effective judicial protection require maximum levels of control intensity, because only such control, as intense as possible, is capable of ensuring material justice. Therefore, the court cannot limit itself to complying with minimums (minimum control).

1.7.2. Margin of Free Appreciation

In legal-administrative dogmatics, the question of the margin of free appreciation continues to raise controversy. This is sometimes positively defined as a power or prerogative of the Administration that does not fall under judicial control and that, therefore, would in practice end being equivalent to a discretionary power, as a zone of free decision-making. I reject this understanding as unconstitutional. But the margin of appreciation can also be defined negatively, as a power that is bound by nature, and whose judicial control must, however, be, to a greater or lesser extent, (self)limited by the court, taking into account:

a) the circumstances of the specific case;

b) the legitimacy of the Administration's decision; It is

c) the very nature of the judicial control action.

This negative formulation of the margin of appreciation is the one that best meets the requirements of the rule of law. Therefore, this is the guideline that must be followed. In the margin of appreciation, what is fundamentally at stake is a question of greater or lesser intensity of judicial control of the Administration's legally bound assessment.

1.7.3. The Special Case of Judicial Control of Knowledge Assessment

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Let us look more specifically at the - for us - paradigmatic case, of knowledge assessment. All knowledge assessment is subject to legal principles, first and foremost the principle of fair, functional and responsible assessment. And, in general, human dignity and fundamental rights are limits to the assessment of knowledge, in the same way as the general principles of administrative law in general.

In this sense, it constitutes, for example, a principle of evaluation with general validity that correct answers and useful contributions to the solution (depending on the specific case) should not, in principle, be considered as being wrong, and therefore cannot lead to or contribute to failure or a lower evaluation. When, due to the specificity or nature of the question subject to examination, the correctness or suitability of solutions are not clearly determinable, that is, when the question is technical-scientifically controversial, the examiner certainly enjoys a margin of evaluation, in view of which, however, the examinee also enjoys a margin of response. Therefore, an acceptable (or sustainable) answer or solution that is reasonably supported by consistent arguments should not be considered wrong. An assessment (score) based on a personal technical-scientific criterion of the examiner which, for a specialist in the field, must be considered as unsustainable, also does not fall within the evaluator's margin of assessment. Technical-scientific assessments can be intensely controlled by courts.

1.7.4. "Freedom of Conformation": imperative of Fair Weighing (*Abwägungsgebot*)

The general considerations formulated on discretion and the margin of appreciation also apply pertinently in the field of administrative planning. But this domain has an individualizing specificity: the planning procedure ("fixing the plan" – "planning decisions") is associated, by its very nature, with a fair (or "adequate") weighing of the multiple conflicting interests, including public and private, which is inherent in a so-called "margin of planning conformity", which is known as "planning discretion" [17] [1]. The "freedom of planning" or "freedom of planning conformation" is associated with the fact that planning norms do not predict subsumable facts, but impose goals to be achieved, the achievement of which extends over time ("like a musical interval" – Joseph Heinrich Kaiser) and requires, by nature, freedom of conformation. "Planning without freedom of conformation would be a contradiction in itself". The law imposes the pursuit of objectives that must be achieved respecting the balancing criteria and the general limits of the law. The Administration's freedom of conformity implies a limitation of judicial control.

1.7.5. "Freedom of prediction": prediction according to the rules of the art.

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Prediction according to the rules of the art (base: technical knowledge and data from experience). Prediction principle and precautionary principle (pre-prevention, for example in the case of risk of causing cancer; impartiality, risk of violation)

So-called prognosis decisions or danger or risk decisions too are located in the zone of tension between the function and responsibility of the Administration, on the one hand, and judicial control, on the other hand. Typically, "prognosis decisions" involve predictions about future events. As the prognosis decision lacks the typical rational criteria of subsumption, its jurisdictional control has to be retreated, not full, but eventually "creative" (judicial law – *Richterrecht*). The self-retreat of judicial control does not result in the Administration having "freedom to predict" the risk. In terms of prognosis control, judicial control focuses on the basis of the prognosis and the proven validity or sustainability of the forecast criteria.

1.8. ATTRIBUTION OF MANDATES FOR ASSESSMENT, CONFORMATION, FORECASTING, GOOD ADMINISTRATION AND "GOOD MANAGEMENT"

A particularly relevant aspect in this field is the attribution of the administrative function as a mandate. The State under the rule of law and the law give the Administration a mandate, as a power-duty to carry out the best possible, the best choice, the greatest efficiency, economy, speed, which configures a true link to legal-administrative principles that represent in themselves imperative orders of fair assessment, fair conformation, correct forecasting, good administration and good management [3]. These mandates for the maximum and the best possible have a legal nature and strong legal implications, making concrete demands on organization and functioning, procedure and process, time (*e. g.* the present evidence procedure) and space, but also material justice, appreciation, fair weighing, correct prediction, celerity, economy. Here too, law prevails and predominates, with direct consequences for judicial control.

1.9. DECISION PROCEDURE WITH FAIR ASSESSMENT/RATIONAL AND PREDICTABLE WEIGHING

The administrative procedure is in itself a form of legitimization and limitation of administrative power, as it subordinates the Administration to the observance of legal-procedural principles and rules. Reliable and necessary guidance in the legal community, in an open society, is not based on an "indisputable right" based on the "autonomous" or "independent" judgment of the conscience of

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those who decide or judge. This judgment is not enough to create certainty of guidance; it is necessary to subordinate the formation of judgment to principles and norms, procedures and legal arguments. Decisions must be based on an acceptable, sensible, reasonable, logical and convincing way for third parties and the community in general ("legitimation pressure"). Thus, decisions follow predictable rational procedures. The rationality of law favours objectification, respect for rational principles of conduct. A sensible basis and a functional distance from the interests on which decisions are made are required. The law needs a guarantee of execution, a certainty of realization, in order to ensure a normative certainty of guidance in the community.

The decision procedure with fair weighing or rational and predictable consideration is a procedure that operates in three phases: gathering of the material to be considered; individual and reciprocal weighing of each element of the material to be weighed; and decision.

1.10. GENERAL ASPECTS OF JUDICIAL CONTROL

1.10.1. Interlocution Between Judging and Administering: Jurisdictional Control

Good control generates good administration; bad control breeds bad administration. In this sense, extremely important from the perspective of implementing the rule of law, controlling the Administration is an (indirect) way of administering. In other words, the good or bad functioning of the Administration in everything that has to do with the correct interpretation and application of law and right depends to a large extent on the action of the courts. Trusting the Administration is good, but it is not enough; controlling the Administration is better, and is a requirement of the effective rule of law.

1.10.2. Pedagogical-cultural function of the Sentence ("Cultural-Administrative Engineering"): Judging is still Administering

The judicial sentence has an inherent pedagogical function. The sentences of the administrative courts must be "lessons of law" addressed to the Administration, in all its aspects. They must denounce and censure, clearly and objectively, illegality, especially "disguised" forms of illegality, and point out the paths to legality and the achievement of material justice.

1.11. LEGAL LIMITS TO JUDICIAL CONTROL

A first and important line of guidance to consider is the fact that the Constitution and, on its basis, the Code of Procedure in Administrative and Tax Courts guarantee citizens, as a fundamental right,

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effective judicial protection. On the other hand, judicial control must be adequate to ensure that the protection of rights and freedoms guaranteed in the Constitution is fully effective in practice. Citizens have the right to full judicial protection of their rights and freedoms. It follows from this right and from the duty that the law imposes on the courts that, in principle, whenever possible and within the realms of possibility, control must be complete from a legal-material perspective. These principles overlap and exclude any discretion or margin of appreciation that the Administration intends to invoke without a clear and objective legal basis; they are limits on discretion.

1.11.1. Total control of the nature of the power exercised (especially: true or false "may"): a question of interpretation of the norm

First of all, it is important to check the nature – bound or discretionary – of the power exercised, namely whether we are dealing with a true or false "may".

Still controlling the nature of the specific power granted, the court must, from the outset, control the possible reduction of discretion to zero.

1.11.2. Control of the (three-phase) procedure for exercising discretion

Judicial control of decisions taken in the exercise of discretionary power (such as in the exercise of evaluation powers) extends to the gathering of material to be considered; the individual and reciprocal weighing of this material; and the decision itself. This means that control focuses on:

1. whether the facts were considered completely and accurately.
2. whether procedural standards and legal evaluation principles were respected;
3. Whether strange aspects were considered.

But the administrative court also has the duty to control a wide range of legal aspects that are fundamental to the defense of legality, good administration and the public interest.

1.11.3. Control of the Non-Exercise of Discretion, That Is, Decision-Making on the False Assumption That Power Is Linked

Thus, the court must control a possible "non-exercise of discretion", that is, if the decision was based on the false assumption that the power is bound, when it was actually discretionary.

1.11.4. Internal Limit Control: End of the Enabling Law

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On the other hand, internal limit control must be carried out, that is, the end of the enabling law, which for many decades was considered the only possible control in the form of misuse of power.

1.11.5. Control of Multiple External Limits

But the control of multiple external limits (to the enabling law) cannot be ignored, such as:

The principle of equality and, within its scope, the issue of the Administration's self-binding, its basis, its assumptions and its effects.

The principle of impartiality, whose judicial control, we are very pleased to point out, has registered a very important positive evolution in recent years, although the so-called institutional impartiality has not yet been reached. The most important idea to highlight in this case law is that, for a violation of impartiality to occur, it is sufficient to verify the risk of partial action by the Administration. The Supreme Administrative Court is clear when it states that "the principle of impartiality prevents the creation of situations of risk of impartiality, regardless of whether there is an actual violation of impartiality", and "the demonstration of a violation of the principle of impartiality is not dependent on the proof of concrete partial actions".

The principle of proportionality, in its well-known sub-principles of fitness, indispensability and proportionality in the strict sense.

1.11.6. Control of Other Principles Limiting Discretion

And also several other principles limiting discretion, such as respect for human dignity and fundamental rights in general, respect for the principles of valuation that arise from fundamental rights (which incorporate an order of values), the principle of the rule of law, the principle of fair, functional and responsible evaluation, the principle of prohibition of discretion, respect for action directives (*e. g.* in planning law), respect for the Administration's internal directives or guidelines for the application of standards or guidance from the exercise of discretion (provided that in themselves they are in accordance with the law), the principle of justice of the system, *e. g.* respect for seniority, the principle of rotation, equal opportunities and the prohibition of demanding when there was no opportunity, the principle of institutional or system impartiality, which requires, for example, distance (in terms of interests) between the evaluator and the person being evaluated, the principle of respect for the elementary rules of material justice in the attribution of priority (in the admission procedure, e.g. priority for those who do not yet have any taxi licenses at the rank in relation to those who already have licenses; or priority for those who have already waited longer time), the principle of respect for

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generally recognized valuations, the principle of adopting criteria of elementary justice in the allocation of an exhibition space at a fair, or in the allocation of teaching of a desired subject by two or more teachers or in any other performance relevant to professional achievement, the principle that discretion cannot be a means to circumvent binding legal norms, the principle of good faith, the prohibition of a *venire contra factum proprium*, that is, the Administration should not, without sufficiently strong basis, contradict its declarations or traditional conduct, the prohibition of making discretionary decisions depend on factors that are not related to them, the principle of supportability (burdens or commitments, *e. g.* in the field of the environment) of the imposed requirement, the principle of protection of legitimate expectations (e.g. extension of a license that has always been extended and exercised without any correction), the principle of non-simplification of operations (with the mere objective of saving work or costs, regardless of the goods sacrificed or when these could lead to a reduction in the guarantees of individuals), the principle of respect for the rules of the game, or *fair play*, in exams (which, for example, could be violated by comments on the answers or even gestures during the examination by the examiner), the principle of objectivity of assessment. Norms of probity or administrative integrity, ethical, aesthetic, deontological or social norms when legally imposed as codes of conduct imposed on administrative bodies and employees are also limits to discretion. If, in the abstract, there may be some overlap between these principles, in the concrete case they may gain a prominent individuality that suits them as valid legal limits for effective judicial control. This is how, in certain legal systems, administrative courts exercise total control over vague evaluative notions such as, for example, public order, public security, aptitude for public office, the capability of advertising to affect the normal development of children and adolescents or what separates pornography from art.

1.12. DECISION SUPPORT GRIDS

1.12.1. Advantages of Decision Support Grids

In recent decades, decision support grids have been implemented, constituting the basis and limit of discretionary decisions and assessment and weighing, as a guarantee of impartiality, proportionality, equality, transparency, objectivity, self-binding and good administration. Their use is recommended at all levels, as long as they are not cunningly converted into instruments of material injustice.

1.12.2. A special Case of "Artificial Grid"

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In public administration, the use of "artificial grids" designed in many ways has become frequent, but, inevitably, always with the intention of covering up illegality, maintaining the appearance of ethics, legality, good faith, impartiality; however, everything was nothing else than pure exercises in dissimulation. Because we are in the academic world, and even to avoid the temptation of admitting that evil can always be found in others (in other domains), we have chosen the case, similar to many others that have been considered by administrative courts, of a grid designed within the scope of a application for associate professor.

The grid used is "artificial", because it is nothing else than a trick, a ruse or a ploy to violate the law, although (but in vain) it seeks to convey the idea of legality and even scrupulous concern for legality. To better disguise malevolent intentions, the grid was used informally, in a non-schematic way. But to clearly denounce and illustrate the ruse engendered, we ourselves have drawn up the criteria and scores, which make them easier to see.

The application form said: "The competition is intended to assess the merit of the candidates' scientific work and their research capacity, their pedagogical value and their capacity for institutional work. These parameters correspond, respectively, to a weighing of 50%, 30% and 20%." In its meeting for evaluation and ordering of candidates, therefore after knowing the candidates' CVs, the competition jury decided the following, although not in a schematic way:

1. Merit of the candidates' scientific work and their research capacity (50%)

1.1. Scientific merit of the curriculum (25%) (5 points)

Quality and innovation of publications (1 point)

Other areas of research (1 point)

Academic experience and legal-scientific recognition (1 point)

Dissertation supervision (1 point) Participation in juries (1 point)

1.2. Scientific value of the report (25%) (5 points):

Rigor, (1 point)

Quality, (1 point)

Update, (1 point)

Originality, (1 point)

Rationale. (1 point)

2. Pedagogical value of candidates (30%) (6 points)

Pedagogical value of the *curriculum vitae* (15%) (3 points)

Pedagogical value of the report (15%) (3 points)

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3. Institutional work capacity (20%) (4 points)

Participation and possibility of participation in the institutional life of the Faculty.

In other words, in summary, not expressly assumed (perhaps because the scandal would be too obvious):

- Curriculum: 8 points;

- Report: 8 points

- Institutional work (without "wanting to know about the manifest inequality of opportunities"): 4 points.

Equating the *curriculum* (containing all research, published works and articles, as well as pedagogical activity) with the report (in itself, by nature, quite limited, especially in terms of the possibility of innovation), reveals a clear (and shocking) disproportion with the clear intention of "depreciating" the candidate(s) with the best curriculum, that is, with more publications and more pedagogical performance. The same results from the multiplication of items into subitems, operated without nexus or justification and largely overlapping. Such a grid, apparently rather harmless, has however, for those directly harmed, the devastating force of nullifying the constitutional guarantees of the rule of law.

1.13. OBJECTIFICATION OF APPRECIATION FOR ARTIFICIAL INTELLIGENCE

New technologies combined with the enormous potential of quantum computing suggest a bright future for juridification and the implementation of material justice in most of the traditional domains of discretion and indeterminate concepts, especially whenever an activity - even if complex and requiring evaluation, consideration, prediction – of evaluation, graduation and decision to 'choose' the best one(s) [is at stake]. The emergence of computer programs specially designed to receive and process a wide and varied range of information will soon appear, each with its own meaning and relevance. These programs, carefully designed with the participation of jurists, will largely replace the procedures currently in force, with many advantages of objectivity, transparency, speed and savings in human and material resources. A base model will certainly be made up of dynamic grid computing systems that, once carefully designed, will quickly, transparently and objectively indicate which jury, which performance, which is the best candidate, which is the sanction, which is the fine, which compensation, whether the license should be issued or the authorization should be withdrawn, whether the work should be embargoed, whether the dilapidated building should be demolished, etc. Let this admirable world of the machine come quickly and take the place of Man! The machine inspires me more

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confidence when it comes to objective, transparent, impartial, quick, cheap, efficient decisions. The 'new era' has already begun: recently (16th and 17th March 2019), the 1st *Legal Hackathon* was held in Portugal, which will be followed by other initiatives, in a process that will not return. The world of *legal Startups* has just been born!

FINAL CONCLUSIONS

In a State under the rule of law, discretionary power continues to be necessary as an instrument for achieving justice in the specific case and in the public interest. It is fundamentally a mandate for fair consideration and decision, considering the circumstances of the specific case and the dictates of the Constitution and the law. As a legal power, discretionary power is essentially bound. Compliance with the law through the achievement of material justice is not for the Administration a possibility, an option, a freedom, a subjective will, but an obligation, a legal imperative, under penalty of civil, criminal, functional liability and even loss of suitability for the position.

The powers of assessment/evaluation are typically powers to investigate and declare an existing reality (as a value), excluding any discretion such as freedom of choice and any "margin of free appreciation" as an exclusion zone from judicial control. The powers of appreciation, conformity, prediction, good administration and good management are functional powers of mandate that are the product of law and are limited by law. These powers are based on the "rules of art" - which are based on experience and science - recognized and delimited by law. Public Administration, not being Hercules Administration, in the sense of perfect Administration, close to divine action, is legally bound to come as close as possible to the perfect ideal, to achieve as much and in the best way as possible (principle of optimization). In terms of assessment decisions, judicial control must be complete whenever in the specific case there is an objective standard of assessment, which takes the place of the examining evaluator's autonomous assessment in the context of answers to technical questions. In the absence of this objective standard, judicial control must be withdrawn.

Judicial control is legal control, which must extend to everything that in the decision is legal or of legal relevance, and must be flexible, but in the specific case as intense as possible, as long as it is legally founded. There are no 'taboo zones', 'sanctuaries' where the law does not penetrate, "administrative justices", "improper discretions", "technical discretions" and "margin of free appreciation" to be respected by the court. Good administration, efficiency, economy, public interest, ethics in public administration are today legal principles that, for this very reason, must be subject to judicial control. When interpreting and applying legal-administrative principles, the judge must always be guided by the

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imperative of optimization. The judge is not a "Hercules judge" (in the sense of a perfect judge), but must demand the best, to the greatest extent possible. By being demanding and exercising control as intense as possible, the judge does not usurp the power of the Administration, but acts as a qualified interlocutor of the administrative function, a function for which he has also been constituted, and the way in which he exercises his function will result in the degree of his legitimation in the democratic system, as democratic representation does not only result from an electoral procedure, but above all from a material union with the feeling and will of the community transposed into law. Both the Administration and the courts legitimize themselves by the way they carry out their function.

Administrative procedure guarantees are interconnected with judicial process guarantees. The Constitution confers the judicial process (in the form of access to justice) a clear mark of effective judicial protection. Therefore, the Constitution and the law make a requirement of content and scope (depth) for judicial control of administrative decisions. This requirement of content and depth also extends to the judicial control of administrative discretion. The poorly defined and objective formulation of the administrative procedure (*e. g.* ingenious grid) does not serve this imperative of the rule of law. Demands on the administrative procedure (ultimately by the court) in terms of objectivity, clarity and transparency must be the greater, the less the courts can control in the specific case, in terms of content and depth, administrative decisions (whether or not qualified as discretionary, whether or not they involve evaluations, conformations, forecasts, good management duties). As for the court's weighing up, the idea, often held (R. ALEXY), that weighing up allows judges to impose their political and ideological points of view, thus usurping legislative power, is unfounded. Through reasoning, the courts provide rationality to sentences and prove the legitimacy of their control. The court's creativity in applying principles is much greater than in applying positive norms of law. There is more space and need for the creation and development of jurisdictional law. If the legitimization of the court's control arises from the way it carries out its function, then this implies control by criticizing the performance of the public administration. The rational foundation of sentences is the basis for legitimizing the jurisdictional function. In the rule of law, the legitimacy of jurisdiction arises from its understanding and acceptance as a "representation of the law", within the framework of an effective justice system. More than a usurper of functions (legislative and administrative), the court is a qualified interlocutor of the legislator and the Administration. The requirement for rationalization and rational argumentative foundation is associated with a requirement for correctness of legal reasoning.

As a criterion for judicial control, the principle that the greater the risk and the degree of intensity of interference with a right (especially fundamental right) and the more relevant the legal good affected

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(human life, personality rights, etc.), the more intense the judicial control and the requirement for objectivity and plausibility of reasoning must be. The essential core of fundamental rights marks the limit of their susceptibility to restriction and the basis of their harmonization in practical agreement. This harmonization, by means of weighing, is the only way to not eliminate some fundamental rights to the detriment of others.

There is an urgent need for a cultural change in Portuguese public administration towards the assimilation of administrative power as functional power, as fulfillment of duty, as responsibility. Whoever does not manage to serve, is not fit to manage. On the other hand, material justice is achieved by the daily winning of people committed to it. Law Faculties must, therefore, transmit not only legal knowledge, but also form the character of future jurists regarding the fundamental values of law, such as commitment to the truth, to material justice, to civic responsibility, towards society and before nature (the environment), jurists who free themselves by fulfilling their duty, jurists from top to bottom, up right jurists and with their heads held high. Law Faculties must contribute to the creation of a fair society by adequately training their students in a double dimension: as legal technicians (lawyers, judges, consultants, researchers, teachers) and as jurists with integrity and willing to permanently fight for material justice.

Judicial control must be legally pedagogical for the Administration (and for the lower courts), making demands for a change of attitude and paradigm, contributing to an Administration culture of observance of the law and of the fulfillment of functional duty (the "*true freedom*"), of total transparency, impartiality and impartiality. Through intense and pedagogical control, guided by new legal-cultural paradigms, judging is still administering. By demanding material justice, always and everywhere, the rule of law placed the administrative court as ultimately responsible for the dialogue between legislating, administering and controlling: by controlling, the court corrects the law and integrates its gaps, corrects the Administration and makes material justice prevail.

Before finishing, I would like to make it clear that the ideas held and the proposals made do not exclude the permanent doubt and provisionality that characterize legal science. Being aware of the possibility of making mistakes, I have all the same tried to ensure that my reflection could bring something new, and be a valid contribution to improving the current system with a view to a more effective rule of law and a fairer society. I have preferred the risk of making mistakes rather than accommodating traditional and commonly accepted theses, but which have not proven to be credible, logical, sensible solutions and, above all, capable of materializing the necessary justice in the specific case.

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