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Neo-constitutional theory of administrative discretion

Teoría neoconstitucional de la discrecionalidad administrativa

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Abstract

This study has as its object the administrative discretion in the light of the premises of neo-constitutionalism. It distinguishes the legalist theory, in which the source of discretion is the legislation, from the neo-constitutionalist theory, in which the source is the Law, globally considered. It dissociates legislative reference from discretion. It examines the subject in the light of the formal principles' theory. It studies the various aspects of the subject, including the difference between legislative and administrative discretion, technical discretion, the lack of jurisdictional discretion, administrative restrictions on discretion, the vices inherent to discretion, the control of discretion and discretionary extinction.

Keywords: discretion, good management, formal principles, power misuse, planning, precedents.

Resumen

Este estudio tiene por objeto la discrecionalidad administrativa a la luz de las premisas del neoconstitucionalismo. Distingue la teoría legalista, en la que la fuente de la discrecionalidad es la legislación, de la teoría neoconstitucionalista, en la que la fuente es el Derecho, considerado globalmente. Disocia la referencia legislativa de la discrecionalidad. Examina el tema a la luz de la teoría de los principios formales. Estudia los diversos aspectos del tema, incluyendo la diferencia entre discrecionalidad legislativa y administrativa, la discrecionalidad técnica, la falta de discrecionalidad jurisdiccional, las restricciones administrativas a la discrecionalidad, los vicios inherentes a la discrecionalidad, el control de la discrecionalidad y la extinción de la discrecionalidad.

***Palabras clave**: discrecionalidad, buena administración, principios formales, abuso de poder, planificación, precedentes.*

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Summary

1. Introduction

The discretion theory has been called both *quaestio diabolica*[1] as the *cavalo de Tróia* of administrative law of the Rule of Law[2]. The first assertion stems from the fact that scholars use the expression in absolutely different meanings, without clarifying this fact, which generates an unfortunate confusion[3]. The second one stems from the fact that it is commonly used by state agents to justify arbitrariness. Whether for one reason or another, the fact is that the topic is classic, has already been the subject of endless studies and, despite this, it is far from being a pacified question. In this study we intend to examine it in its various aspects in the light of the premises of neo-constitutionalism[4].

2. Conceptual improprieties

Before saying what discretion is, it is necessary to say what discretion is not. First of all, many doctrinaires use the term "discretionary power". It is surprising how, even today, the doctrine is attached to some ideological issues of the ancien régime[5]. The State

[1] Cp. QUEIRÓ, Afonso Rodrigues. A teoria do "desvio de poder" em Direito Administrativo. **Revista de Direito Administrativo,** Rio de Janeiro, n. 06, p. 41-78, out.-dez. 1946, p. 44. According to him, this statement was initially made by ZORN, Karl Ludwig Philipp. Kritische Studien zur Verwalturgsgerichtsbarkeit, **Verwaltungsarchiv**, II, 1894, p. 82.

[2] Cp. SOUZA, António Francisco de. **Manual de direito administrativo**. Porto: Vila Ecónomica, 2019, §898, p. 451. The expression, according to him, was pioneered by HUBER, Hans. Niedergang des Rechts und Krise des Rechtsstaates. **Festgabe für Z. Giacometti,** Zürich, 1953, p. 65 *et seq*. In the same sense: GARCÍA DE ENTERRÍA, Eduardo. **La lucha contra las inmunidades del poder**. 3. ed., 3. reimpr. Madri: Civitas, 2004, p. 29.

[3] Many of the divergences in Law, in the shrewd lesson of Agustín Gordillo, takes place from the divergence over the meaning of words, true logomachy. Cf. GORDILLO, Agustín. **Tratado de derecho administrativo** – Tomo 1: parte general. 7. ed. Belo Horizonte: Del Rey; Fundación de Derecho Administrativo, 2003, p. I-14.

[4] The use of the term "neo-constitutionalism" is controversial in legal literature. About the topic: MARTINS, Ricardo Marcondes. Neoconstitucionalismo: perscrutação sobre a pertinência do prefixo. **Revista Internacional de Direito Público** (RIDP), Belo Horizonte, ano 2, n. 3, p. 09-37, jul.-dez. 2017.

[5] As Alexis de Tocqueville observes, the Rule of Law was formed on the rubble of the ancien régime (**O antigo regime e a Revolução.** Tradução de Rosemary Costhek Abílio. São Paulo: WMF Martins Fontes, 2009). In assonance, Eduardo García de Enterría states that the ideas of the ancien régime have survived in the understanding of Administrative Law (**Revolución Francesa y Administración contemporânea**. 4.

does not have autonomous powers. It is therefore inappropriate to use the word "power" to designate the exercise of public office. In other words, this is bypassed by the use of another sign: *potestà* instead of *poteri*[6], in italian; *potestad* instead of *power*[7], in spanish; *puissance* instead of *pouvoir*, in french[8]. In portuguese, for lack of a better word, part of the doctrine inappropriately uses the expression "power-duty" to refer to the exercise of administrative competence. Strictly speaking, however, the correct expression is "duty-power", because power exists only in an ancillary way, for the fulfillment of duty[9]. The Administration does not exercise discretionary competence because it "can", it exercises it because it "must" to carry out the public interest, and because it must, it can exercise it. For this reason, although the expression "discretionary power" is inappropriate; This is "discretionary competence" or "discretionary duty-power".

Another conceptual impropriety, although quite common, is to consider that discretion refers to the exercise of an administrative "freedom". In general, doctrinaires use this word and then make it clear that, in fact, it is not about freedom. Indeed: freedom, in Law, is the prerogative to decide by free will[10]. No state decision is valid if it is based only on the free will of the public agent. In the exercise of discretionary powers, the agent must respect impersonality, administrative morality, legality; It must always seek the optimum realization of the public interest. The decision is not arbitrary and therefore not free[11]. Having said what it is not, one can say what it is.

3. Concept, basis and service of discretion

Discretion arises when interpretation ceases[12]. The latter consists of a purely cognitive activity, which aims to understand what the Law wants. When the exegesis of the normative texts indicates that the will of the Law — using a prosopopeia or

ed., 1. Reimpr. Madri: Civitas, 2005). On this attachment to the insistence with which the doctrine refers to "administrative powers", see: MARTINS, Ricardo Marcondes. **Teoria jurídica da liberdade**. 2. ed. São Paulo: Contracorrente, 2023, p. 128 *et seq.*

6 For all: SANTI ROMANO. **Frammenti di un dizionario giuridico**. Milão: Giuffrè, 1947, p. 178-180.

7 For all: GARCÍA DE ENTERRÍA, Eduardo; FENÁNDEZ, Tomás-Ramón. **Curso de derecho administrativo** – v. I. 11. ed. Madri: Civitas, 2002, p. 443-446.

8 For all: RIVERO, Jean; WALINE, Jean. **Droit administratif.** 18. ed. **Droit administratif.** Paris: Dalloz, 2000, §4º, p. 11.

9 In this sense, with absolute accuracy: BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**. 33. ed. São Paulo: Malheiros, 2017, Cap. I-§5º, p. 101.

10 MARTINS, Ricardo Marcondes. **Teoria jurídica da liberdade**, op. cit., p. 52 *et seq.*

11 In the felicitous expression of Caio Tácito, discretion is not a "blank check". O abuso de poder administrativo no Brasil. In: TÁCITO, Caio. **Temas de direito público:** estudos e pareceres – v. 1. Rio de Janeiro: Renovar, 1997, p. 39-70, in particular, p. 52.

12 PEREIRA, André Gonçalves. **Erro e ilegalidade no acto administrativo**. Lisboa: Ática, 1962, p. 217. In the same vein: QUEIRÓ, Afonso Rodrigues. **O poder discricionário da administração.** 2. ed. Coimbra: Coimbra Editora, 1948, p. 44.

personification[13] — admits only one solution, it is configured as a bound competence. However, when the interpretation of the Law indicates — by means of objective judgments, that is, independent of the worldview of each one — that two or more possibilities are admissible, a discretionary competence is configured. In this case, interpretation and intellectual activity cease; a volitional activity is imposed on the agent: that must choose one of the alternatives. The choice is not *free*, because the agent is obliged to choose the alternative that, according to his subjective judgment, corresponds to the best way to achieve the public interest. This is a situation very well explained by Bernatzik, summed up by Queiró as follows: "na aplicação do direito, como também em qualquer outra esfera de atividade lógica do espírito, há um limite além do qual terceiras pessoas deixam de poder avaliar da justeza da conclusão obtida"[14]. Then it concludes: "Por conseguinte, essas terceiras pessoas podem ser de outra opinião, mas não podem legitimamente pretender que só elas tenham uma opinião justa e que a das outras pessoas seja falsa"[15].

From this lesson, summarized by Queiró, the *foundation* of discretion is extracted: *political pluralism*. It's about acknowledging that people have different worldviews, views that deserve equal respect[16]. It is necessary to distinguish between two types of evaluations: objective, which must be imposed on everyone, regardless of one's opinion, and subjective, which depend on one's opinion[17]. Values are, by definition, relative, but not all valuations are relative, that is, they are dependent on one's opinion; there are valuations that should be imposed on everyone, even if some disagree[18]. Discretionary competence is configured in situations in which the choice between two or more alternatives depends on subjective criteria, using the word "subjective" in the sense of

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[13] It is the figure of speech by means of which human qualities are attributed to inanimate beings. For all: FIORIN, José Luiz. **Figuras de retórica.** São Paulo: Contexto, 2014, p. 51-52.

[14] QUEIRÓ, Afonso Rodrigues. **O poder discricionário da administração,** op. cit., p. 121.

[15] Idem, ibidem.

[16] On the concept of pluralism: CITTADINO, Gisele. **Pluralismo, direito e justiça distributiva.** Rio de Janeiro: Lumen Juris, 2000, p. 25. For monists, some worldviews should prevail over others. It is the position held by PLATÃO. **A República.** Tradução de Anna Lia Amaral de Almeida Prado. 2. ed. São Paulo: Martins Fontes, 2014, Livro V, p. 211-212. To a breathless critique of Platonic monism: POPPER, Karl Raimund. **A sociedade aberta e seus inimigos.** Tradução de Milton Amado. 3. ed. Belo Horizonte: Itatiaia; São Paulo: Universidade de São Paulo, 1987. In the constitutional field, pluralism underpins Peter Häberle's theory of the open constitution, according to which everyone is an interpreter of the Constitution, and not just the Constitutional Court (**Hermenêutica constitucional:** a sociedade aberta dos intérpretes da Constituição. Tradução de Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris Editor, 1997, p. 13).

[17] This was one of Kelsen's biggest mistakes: believing that all valuation always depends on the opinion of each one and, therefore, is inherent to political pluralism (**Teoria pura do direito.** Tradução João Baptista Machado. Coimbra: Arménio Amado, 1984, p. 102-105).

[18] On the denial that all valuation is relative check: HARTMANN, Nicolai. **Ética.** Traducción Javier Palacios. Madrid: Encuentro, 2011, p. 185; SCHELER, Max**. Ética.** Traducción de Hilario Rodríguez Sanz. Madri: Caparrós, 2001, p. 164-167. One example is enough to show the truth of the assertion: inserting Jews in concentration camps is wrong, even if one disagrees. It is not a valuation that depends on one's worldview; this is an objective valuation.

dependent on pluralism, on the worldview of each one. In such cases, interpretation alone does not define the legal solution. Both alternative "A" and alternative "B" are also allowed by Law. Consequently, the Law imputes to the competent agent that he chooses the alternative that, according to his worldview, according to his subjective judgments, corresponds to the best way to achieve the public interest[19].

The decision resulting from the choice – the result of a volitional act and not only a cognitive one – consists of the so-called *administrative merit*.[20] It is a *judgment on convenience* — whether it is the case to edit the act with one or another content — or a *judgment of opportunity* — whether it is the case to edit the act at one time or another or not to edit it.

The value of discretionary competence is to define the decision-making aspect that cannot be disrespected by the control agencies, both external – the Judiciary, the Court of Auditors – and internal[21]. If the Judiciary, when triggered, disrespects the exercise of discretionary competence, it will violate the separation of powers.

These statements made it, it is possible to dispel other very common misconceptions regarding discretion. It does not arise because there is a legal controversy. Legal interpretations are often controversial and, therefore, the valuation is not "subjective" in the sense referred to here. Even if jurists disagree about what is the will of the Law, about what is the only appropriate solution[22], and if, despite the controversy, only one solution is objectively admissible, there will be binding. It is also irrelevant that the only solution admitted by the Law does not follow from the literal nature of the legislation. Even if the solution arises from the weighing of principles, interests or legal values, if the balancing results in only one admissible solution, there will be binding[23]. This

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[19] In the words of Afonso Rodrigues Queiró: "poder discricionário só existe quando a lei e o direito reconheçam como de igual valor duas ou várias decisões". (**O poder discricionário da administração**, op. cit., p. 46). It then complements: "só nestas hipóteses é que será decisiva a opinião das autoridades". (*Idem*, *ibidem*).

[20] HIRSCH, Fábio Periandro de Almeida; SILVA, Jailce Campos e. O princípio da juridicidade e o controle judicial sobre o mérito dos atos administrativos discricionários na implementação das políticas sociais. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 22, n. 89, p. 113-141, jul./set. 2022.

[21] Cp. BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional.** 2. ed., 11. tir. São Paulo: Malheiros, 2012, p. 25.

[22] The assumption here is that interpretation, contrary to what Kelsen assumed (**Teoria pura do direito**, op. cit., p. 463 *et seq.*) is a scientific rather than a political activity. Carlos Santiago Nino's Theory of the Rational Legislator is adopted, according to which the interpreter must assume that the Legislator is unique; imperishable; conscious; omniscient; operative; just; coherent; omnicomprehensive; precise (**Introduction to the analysis of law**. Translated by Elza Maria Gasparotto. São Paulo: WMF Martins Fontes, 2015, p. 386-387); and Ronald Dworkin's Theory of Creative Interpretation, according to which law is integrated by two principles of political integrity, one directed to the editor and the other to the normative applicator, which determine them to consider law as a coherent linguistic and axiological system (*The empire of law*. Translated by Jefferson Luiz Camargo. 1. ed., 2. tir. São Paulo: Martins Fontes, 2003, p. 213 et seq.). Whether by one theory or another, as a general rule, there is one interpretation that is more correct than another, imposing on the interpreter. When, objectively, the Law accepts, assuming these assumptions, only one solution, there is binding.

[23] Thus, we disagree with Massimo Severo Giannini, for whom discretion derives from the need to weigh interests in the specific case (**Il potere discrezionale della Pubblica Amministrazione**: concetto e problemi.

conclusion allows us to differentiate the Legalist Theory from the Discretion Neo-Constitutionalist Theory.

4. Legalistic and neo-constitutionalist theories

There are two types of conceptions of discretion: the *legalistic* and the *neo-constitutionalist*. The majority doctrine, attached to theoretical understandings of the past, follows the *legalistic orientation, according to which* administrative discretion is constituted by the Legislator. Therefore, it is the legislation that gives or does not give the Public Administration the possibility of choice: when it does, there is discretion; when it doesn't, there's binding. The *source of administrative discretion* is, therefore, the legislation; there is discretion only if the Legislator has assigned, in the Act, the possibility for the public agent to choose.

By the *neo-constitutionalist orientation,* more in tune with the advances of the Science of Law, administrative discretion derives from the analysis of Law globally considered. It is the weighting, in the light of the specific case, that will indicate whether or not there are two or more solutions allowed by Law. The Legislator may interfere in the result of the balancing exercise, establishing, at the abstract level, *prima facie reasons,*[24] which must be considered in the weighting carried out by the Administration at the specific level; but the *source* of administrative discretion is the Law globally considered[25], and not the Legislator. Such an understanding requires distinguishing discretion from legislative reference.

5. Legislative remission

The Legislator, when publishing an abstract rule, carries out, in view of the factual circumstances in which it exercises its functions, a weighting of the principles[26] (legal

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Milano: Giuffrè, 1939, p. 74-75). If the weighting indicates only one admissible solution, there will be binding; there will only be discretion if it indicates two or more admissible solutions.

[24] MARTINS, Ricardo Marcondes. Poder Judiciário e estado de exceção: direito de resistência ao ativismo judicial. **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 457-487, maio/ago. 2021. P. 462.

[25] Quite appropriately, both the German Basic Law (art. 20.3) and the Spanish Constitution (art. 103, item 1) provide that the Administration must comply with the Law and the Law. Discretion does not derive from the analysis of the law, but from the law, considered as a whole.

[26] The word "principle" is ambiguous in the Science of Law: it refers to the *structuring elements* of the normative system and to *the positive values*. The first meaning was disseminated in the Brazilian doctrine by: BANDEIRA DE MELLO, Celso Antônio. Criação de secretarias municipais: inconstitucionalidade do art. 43 da Lei Orgânica dos Municípios do Estado de São Paulo. **Revista de Direito Administrativo e Infraestrutura – RDAI**, São Paulo, ano 3, n. 11, p. 433-439., out.-dez. 2019, p. 434; ATALIBA, Geraldo**. Sistema constitucional tributário brasileiro.** São Paulo: Revista dos Tribunais, 1968, p. 7. The second meaning stemmed from the works of: DWORKIN, Ronald**. Levando os direitos a sério.** Tradução Nelson Boeira. São Paulo: Martins Fontes, 2002, Chapter 2, p. 23-72; ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução de Virgílio Afonso da Silva. São Paulo: Malheiros, 2008, Chapter 3, p. 85 et seq. On this ambiguity: MARTINS, Ricardo Marcondes. Teoria dos princípios e função jurisdicional. **Revista de Investigações Constitucionais,** Curitiba, vol. 5, n. 2. p. 135-164, mai./ago. 2018, p. 141-144.

values) incident. The desideratum of the legislative function, as of all state functions, is the fulfillment of the Constitution, that is, the implementation of constitutional principles. The abstract rule has the hypothesis-effect structure, to mean, there is the description in the antecedent of a factual situation and the imputation in the consequent, once the hypothesis described has occurred, of certain legal effects, or, more precisely, of the establishment of a relationship between two legal situations. It is entirely possible that, in carrying out such a weighting, the Legislator may conclude that *it is impossible* to give *a precise description* of the hypothesis or to *accurately attribute* the effects. Weighting, in such cases, may oblige the Legislator to leave it to the applicator of the abstract rule, i.e. the administration, to decide when to apply the effects, what effects to apply or how to apply them.

In these terms, by virtue of legislative consideration, it may be left to the Administration to configure both the *hypothesis of the norm* and its *commandment*. For many administrativists, these, and only these, would be the hypotheses of discretion[27]. There is, in this understanding, a double mistake: (a) the hypotheses of *express legal remission* (remission not in the sense of "redeem", but in the sense of "remittance") are not the only cases in which the Legislator leaves to the Administration the responsibility of fulfilling the rule; there are also, and are not at all uncommon, cases of *tacit legal remission*; (b) moreover, the remission of the abstract rule to administrative review does not necessarily imply discretion, It is only an indication, a possibility, that there is discretion.

Certainly, cases of *tacit remission* to the administrative assessment are more common than those of *express remission*. In these cases, the Legislator, in a clear way, assigns to the Administration the decision on the *moment*, *the means* or the *form* of its action. In the *tacit remission,* the Legislator uses — in the description of the normative hypothesis, the commandment, or the purpose — of *vague, fluid or indeterminate concepts*. By making use of signs such as "poverty", "remarkable knowledge", "urgency", the Legislator tacitly leaves to the Administration the task of filling in the norm: it is up to it, in the face of the concrete case, to specify the meaning of these terms and, in the zone of uncertainty, to define whether they are present or not. A distinction must be made between two types of vague concepts: technical and descriptive[28]. Typical examples of the former are "just" compensation and "effective" need, and of the latter "low" height or situation of "poverty".

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[27] Por todos: GARCÍA DE ENTERRÍA, Eduardo; FERNÁNDEZ, Tomás-Ramón. **Curso de derecho administrativo** – *t. 1, op. cit.* p. 454-455.

[28] Afonso Rodrigues Queiró realized that indeterminate concepts imply an appeal to administrative appreciation. He referred to practical concepts, referring to the world of sensibility, separating them from theoretical concepts or empirical-mathematical sciences, referring to the world of empirical reality (A Teoria do "desvio de poder" em direito administrativo, op. cit., p 41-78). It considers that the problem of discretion arises only in the practical and not in the theoretic (*Idem*, p. 60-61). As explained below, there is no disagreement on this point.

In both cases of remission, in order for there to be *subsumption* and *application* of the abstract rule, the Administration must, necessarily and imperatively, *complete it*, that is, finish configuring the hypothesis or the commandment. In them, the normative message of the abstract rule is not complete, it needs something more, something that must be added by the Administration. There is a *normative incompleteness*, in short, a *remission to administrative assessment*.

It is important to emphasize that the Legislator is not free to publish incomplete abstract rules: if it is practicable to concretize the respective principle in the best possible way, at the abstract level, by means of a precise abstract rule, it must necessarily do so. In other words, the publication of an incomplete abstract rule is only admissible when it is not practicable to give the best possible concrete expression to a constitutional principle at the abstract level, without taking into account the particularities of the specific case[29].

5.1. Indeterminate concepts

Many doctrinaires, as already stated, deny tacit administrative remission[30]. Vague, fluid, or indeterminate concepts, by definition, have a *positive certainty zone*, in which the concept is certainly present, a *negative certainty zone*, in which the concept is certainly absent, and an *uncertainty zone* [31]. In the certainty zones, in relation to the application of the concept, there is a binding. In the uncertainty zone, the question arises: is both the decision that considers the concept present and the decision that considers it absent valid? If so, if the two solutions are equally permissible, and the choice between one or the other is considered to the competent agent, there is discretion. It is considered that in many indeterminate concepts, yes, discretion is configured in the uncertainty zone, but not in all.

Thus, discretion only occurs when the administrative agent is the *immediate addressee* of the abstract rule, that is, in cases where the Law, globally considered, assigns to the administrative agent the mission of defining, in the uncertainty zone, whether or not the concept is present[32]. Only in this case, is the public administration, in the

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[29] In this sense: BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional**, op. cit., p. 33 e 35.

[30] For all: GARCÍA DE ENTERRÍA, Eduardo; FERNÁNDEZ, Tomás-Ramón. **Curso de derecho administrativo** – *t. 1, op. cit.* p. 459. According to them, either the concept is present or it is not: *tertium non datur.* Apparently, in the same vein: SOUSA, António Francisco de. **"Conceitos indeterminados" no direito administrativo.** Coimbra: Almedina, 1994, p. 97-99.

[31] Cp. SAINZ MORENO, Fernando. **Conceptos jurídicos, interpertación y discrecionalidad administrativa**. Madi: Civitas, 1976, p.70-71.

[32] Cp. MARTINS, Ricardo Marcondes. Conceitos indeterminados à luz da proporcionalidade e da boa administração. **Revista de direito administrativo e infraestrutura - RDAI.** São Paulo, ano 07, n. 24, p. 347-358, jan.-mar. 2023, p. 355-356. According to Pedro Costa Gonçalves, this occurs when: (a) the type of valuation that the concept evokes appeals to the Administration's own experience and appreciation; (b) the

uncertainty zone of vague, imprecise or indeterminate concepts, competent to decide whether or not they are present and, therefore, only in these cases can discretion be configured in relation to their definition.

Thus, when the legislation prohibits the use of indecent exposure clothing on a beach or when it determines that the Administration finds out whether it is the case to authorize the gun license, it is up to the competent public agent to decide, in *the uncertainty zone*, whether or not the clothing is offensive to decency, whether or not the actual need justifies the possession. This does not occur with the vague, fluid or indeterminate concepts used in the typification of a *tax fact*, a *criminal offense* and also a *disciplinary infraction*. In such cases, as the *immediate addressee is the person administered*, the agent of the Administration is not exclusively competent to determine, in his judgment, whether or not the concept is present in the uncertainty zone. In these three cases there is no tacit remission: the Judiciary has the last word on the imprecise concepts of *tax, criminal* and *disciplinary facts*.

5.2. Reduction to zero

The non-partisan doctrine of neo-constitutional premises tends to confuse discretion and binding, respectively, with normative *incompleteness* and *completeness*[33]. According to this understanding, when the abstract rule leaves no room for choice to the Administration, there is binding; when it leaves room for choice, there is discretion. This understanding, however, is not correct. It should be noted: the way in which the abstract rule was drafted, whether in a precise or imprecise way, whether complete or incomplete, whether it leaves room for the appreciation of the Administration or not, configures, at most, an *indication* of discretion. In fact, administrative discretion in relation to concrete administrative rules only arises at the *concrete level*[34]. *In relation to them, it is* wrong to speak of administrative discretion in the abstract, as well as of "reducing discretion to zero".

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concepts are intrinsically associated with the description of the typical core of administrative competences; (c) the concepts refer to a specific knowledge of the Administration; (d) There is special technical-scientific preparation of the administrative office or special legitimacy of the responsible office; (e) It is about weighting up complex problems or situations; (f) decisions have political impact or political consequences and are left to top management authorities. (**Manual de direito administrativo** – v. I. Coimbra: Almedina, 2019, p. 257-258). It is considered that these six hypotheses are mere developments of the guideline established here: in all of them, the norm elects the public administrator as the immediate recipient of the command, instructing him to define whether the concept is present in the uncertainty zone.

[33] As an example, the definition of discretion proposed by Maria Sylvia Zanella Di Pietro: "faculdade que a *lei* confere à Administração para apreciar o caso concreto, segundo critérios de oportunidade e conveniência, e escolher uma dentre duas ou mais soluções, todas válidas perante o direito". (**Discricionariedade administrativa na Constituição de 1988**. 2. ed. São Paulo: Atlas, 2001. p. 67, emphasis added).

[34] Obviously, there is administrative discretion at the abstract level when abstract administrative norms, such as regulations, are issued. About Them: MARTINS, Ricardo Marcondes. **Regulação administrativa à luz da Constituição Federal.** São Paulo: Malheiros, 2011, p. 106-114.

Many of the supporters of the so-called legalistic theory recognize that, many times, the Legislator, in the abstract, attributed a choice to the Public Administrator and in the concrete case this "discretion is reduced to zero", because there is only one solution[35]. This expression, "reduction to zero", only makes sense to those who adopt the legalistic understanding of discretion, which confuses it with legislative remission. If in the specific case there is only one solution, it is insisted, there is no discretion. A very common example: in the abstract, the public agent can be punished with a warning, suspension or dismissal, but, in the light of the concrete circumstances, considering his good records and the reduced seriousness of the infraction, only the disciplinary sanction of warning is admissible. Since only one solution is admissible, there is binding and not discretionary.

In short, the abstract rule can be worded in such a way that, apparently, it leaves room for administrative action and, despite this, there is an indisputable binding. Often, it is stated in the legislation that the Administration "may" carry out a certain conduct and, in the concrete case, the correct understanding of the Law is that it "must" carry it out: there is an apparent opening to choose at the abstract level, but competence bind to it at the concrete level[36]. It is less common, but more equally possible, for the abstract rule to be worded in such a way that it apparently leaves no room for choice to administrative action and, nevertheless, there is *discretion in the specific case*[37]. *What decisively determines whether or not there is discretion is not the normative text, but the*

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[35] Cf. SOUSA, António Francisco de. **Manual de direito administrativo,** op. cit., §988-989, p. 491; BANDEIRA DE MELLO, Celso Antônio. "Relatividade" da competência discricionária. **Revista Trimestral de Direito Público.** vol. 25. p. 13-19. São Paulo, 1999, p. 16. The latter differentiates between discretion in the norm as opposed to discretion in the concrete case and states: discretion at the level of the norm is a necessary, but not sufficient, condition for it to occur *in concreto* (**Discricionariedade e controle jurisdicional**, op. cit., p. 37). On this point, we disagree: it is quite possible that there is no discretion in the abstract, in the norm, and there is in the concrete.

[36] The term "may" is named by supporters of the legalistic orientation as a *discretionary clause*. In António Francisco de Sousa's precise lesson, it is a mere indication of discretion (**Manual de direito administrativo,** op. cit., §931, p. 469). This type of clause actually generates a reduction in discretion. This is what part of the doctrine calls *directed* or *exceptional discretion*: the Legislator establishes that the Administration must adopt the behavior established by legislation for most cases, as a general rule, except in exceptional situations. Cp. GONÇALVES, Pedro da Costa. **Manual de direito administrativo** – v. I, op. cit., p. 241.

[37] An example is given by Antônio Carlos Cintra do Amaral, inspired by the example of Chaïm Perelman. This assumed a rule prohibiting the entry of vehicles into a park (**Ética e direito.** Tradução de Maria Ermantina Galvão. São Paulo: Martins Fontes, 2002, §§ 40, p. 509, 41, p. 523, e 51, p. 623). Supposing this example of a prohibitive rule that leaves no room for specific administrative choice, Cintra do Amaral considers that, depending on the circumstances, it should be both reasonable to prohibit and release the entry of an ambulance (**Licitação e contrato administrativo:** estudos, pareceres e comentários. 2. ed. Belo Horizonte: Fórum, 2009, p 43-47). Georges Abboud disagrees: for him, in this example, the ambulance always has the right to enter the park (**Discricionariedade administrativa e judicial.** *São Paulo:* Revista dos Tribunais, 2014, p. 217). If someone goes into labor or requires medical assistance too close to the park entrance, is the ranger's decision to remove the person on a stretcher to the gate always invalid? If so, in this example, Abboud is right. If it is negative, it is Cintra do Amaral who is right. However, the distancing of the example, by itself, does not remove the theoretical premise: it is possible that at the abstract level the Legislator only establishes one solution and at the concrete level the Law admits two or more solutions.

weighting in the light of the specific case. Completeness and incompleteness generate, respectively, indications of binding and discretion, which is clarified by the formal principle's theory.

5.3. Formal principles

The possibility guaranteed to the state agent to make choices of his will, in view of his subjective criteria on the best way to achieve the public interest, is ensured by the *so-called formal principles*[38]. There are formal principles—called *special* —that only give others additional weight on the abstract level, and there are formal principles—called *fundamental* —that have the mission of securing volitional choices[39]. There are numerous specials, but only five fundamental ones: 1) the formal principle that gives primacy to the considerations of the original Constituent (Pfco), restricted only by normative postulates, understood as epistemological presuppositions for understanding Law[40]; 2) the formal principle that gives primacy to the considerations of the reforming Constituent (Pfcr), restricted by the postulates and by all the express and implicit limits to the power of reform[41]; 3) the formal principle that gives primacy to the considerations of the Legislator (Pfl), restricted by the postulates and all constitutional norms; the formal principle that gives primacy to the considerations of the Administration (Pfa), restricted by the postulates and all constitutional and legislative norms; and the formal principle that gives primacy to the considerations of individuals (Pfp), restricted by the postulates and all constitutional, legislative and administrative norms[42]. The first four have the task of ensuring respect for the exercise of discretion, the last for which freedom is respected. There is a descending order of weights, established by *the doctrinal law of normative competences*: Pfco > Pfcr > Pfl > Pfa > Pfp.

When exercising legislative competence, the Legislator must identify the constitutional principles (values) and, within the scope of its discretion, choose the principle it intends to implement. Once the choice has been made, it weighs it, determines the weight of the respective value and the values that conflict with it and, in the abstract, respecting the postulate of proportionality, establishes a means of achieving that value. An example: the Legislator identifies in the Constitution the values of protection of

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38 The formal principle's theory is controversial in doctrine. About it: MARTINS, Ricardo Marcondes. Teoria dos princípios formais. **Interesse Público** (IP), Belo Horizonte, ano 18, n. 98, p. 65-94, jul.-ago. 2016.

39 Cp. MARTINS, Ricardo Marcondes. **Abuso de direito e constitucionalização do direito privado.** São Paulo: Malheiros, 2010, p. 39 et seq.

40 On the postulates, see: BASTOS, Celso Ribeiro. **Hermenêutica e interpretação constitucional.** 2. ed. rev. e ampl. São Paulo: Celso Bastos Editor; Instituto Brasileiro de Direito Constitucional, 1999, p. 95-96.

41 On the limits to the power of reform, see: MARTINS, Ricardo Marcondes. Hermenêutica constitucional. **Revista de direito administrativo e infraestrutura - RDAI.** São Paulo, ano 07, n. 27, p. 83-142, out.-dez. 2023, p. 124-133.

42 About this formal principle: MARTINS, Ricardo Marcondes. **Teoria jurídica da liberdade,** op. cit., p 115 *et seq.*

the environment (P1),[43] protection of private property (P2), freedom of movement (P3), notes the weight that these values have at the constitutional level and chooses one of them to implement. Assuming the choice of the environment (P1), the Legislator enacts a law determining that owners of motor vehicles install a filter in their vehicles, under penalty of seizure of the vehicle by the Administration (measure of implementation of P1). Essa regra legislativa, portanto, concretiza o princípio material de proteção do meio ambiente (P1). When the Legislator enacts the rule and exercises its discretionary competence, the formal principle that gives primacy to its considerations applies and, therefore, adds weight to the aforementioned substantive principle (P1 + Pfl).

If it is incumbent upon the Legislator to carry out autonomous weightings at the abstract level, it is incumbent on the Public Administration to carry out weightings at the concrete level, taking into account — by virtue of the principle of legality (structuring element) — the weightings of the Legislator, that is, the weight of the aforementioned formal principle. Thus, in the face of a material principle concretized by a legislation (P1) and an opposite material principle (P2), it is not enough for the Administration to verify, in the concrete case, the weight of "P1" and "P2". The removal of "P1" is permissible only when the weight of "P2" is greater than the weight of "P1" and the weight of the said formal principle (Pfl). Schematically: "P2 > P1 + Pf'l". We return to the example proposed: when verifying that a vehicle is without a filter, the Administration must carry out the weighting in the specific case; as a general rule, it will execute the legislation and implement the measure of implementation set by the Legislator (P1 + Pfl > P2). In this case, it will issue an administrative act of seizure of the vehicle. Suppose it is an ambulance, which is taking a patient to the hospital. Then, even in the absence of a legislative provision, in the light of the concrete consideration, the Administration should not seize the vehicle, even if it is causing significant air pollution. In addition to the principle of protecting the environment (P1), there is the principle of protecting people's health (P2), which is heavier than the sum of "P1" and "Pfl". Result: according to the administrative consideration, the ambulance will not be seized, despite the non-existent legal provision in this regard (P2 > P1 + Pfl).

By virtue of the principle of legality and, therefore, of the weight of the aforementioned "Pfl", as a rule, in the rule of law, the Administration must implement the legislation or, failing that, not act. Thus, when carrying out a balancing exercise, the Administration must take into account not only the applicable principles (P1 and P2, for example), but also the formal principle that gives primacy to the solution adopted by the Legislator (Pfl), whether it is the application of the abstract rule issued by the Legislator or, in the absence of such a rule, inaction. If, in legalism, action *contra legem* or *praeter*

[43] See BEÇAK, Rubens; FERNANDES, Lucas Paulo. Judicialização do meio ambiente na Pandemia da Covid-19: uma análise das decisões do Supremo Tribunal Federal. **Revista de Direito Econômico e Socioambiental**, Curitiba, v. 14, n. 2, e248, maio/ago. 2023. doi: 10.7213/revdireconsoc.v14i2.29305.

legem was prohibited, in neo-constitutionalism, exceptionally, the concrete weighting can rule out abstract weighting.

The choice of the Administration is ensured by the "Pfa". Administrative discretion is configured when the solution derives from the weight of the aforementioned formal principle. Any consideration carried out by the Administration may, if provoked, be reviewed by the Judiciary. Suppose the following situation: the Administration understands that "P2" has more weight than "P1" + "Pfl" and, by virtue of this, issues an administrative act concretizing "P2" and removing "R1". The Judiciary, when reviewing the weighting between "P1 + Pfl" and "P2", should consider the formal principle that gives primacy to administrative weighting (Pfa). The weighting carried out by the Judiciary will be between "P1 + Pfl" and "P2 + Pfa". As a result of the formal principles, the judge should not simply adopt the solution that, in his judgment, according to his values, he understands to be correct: in order to properly fulfill his function, he must pay attention to the weight of the formal principles mentioned and respect the exercise of legislative and administrative discretionary powers. In the binding *there is only one legally possible solution*, that is, either the Administration has implemented the "Pn" principle in a certain way and complied with the Law, globally considered, or it has not done so, and has violated the Law. Thus, two situations of attachment can be distinguished:

1) The situation may occur in which, considering the formal principle (Pfl), the legal system imposes the application of the abstract rule (R1) or, in the absence of a rule, imposes inaction; in other words, the principle embodied by the rule or by inaction (P1), plus the formal principle that gives it primacy (Pfl), has such weight in the concrete case that it is not, even partially, reasonably excluded by another principle, also considering the formal principle that gives primacy to administrative weighting (P1 + Pfl > P2 + Pfa). In such a case, the only correct legal remedy is the application of the rule or, in the absence of it, inaction.

2) However, there may be a situation in which, considering the weight of the "P2" principle, regardless of the weight of the formal principle that gives primacy to administrative weighting (Pfa), the system imposes its implementation, despite the existence of an "R1" rule, which concretizes the "P1" principle (P2 > P1 + Pfl + Pfa), in which case the only legal solution is the implementation of the "P2" principle and the removal of the rule.

In both cases, if the Administration did not adopt the only correct solution, that is, if it did not apply "R1" or, in the absence of a rule, did not remain inert — in the first case — or did not implement "P2" —, in the second, it will be up to the Judiciary, if provoked, to review the weighting carried out by it and impose the correct solution. They are hypotheses of binding.

However, when there is no objective assessment of the greater weight of the formal principle that gives primacy to the abstract rule and of the principle concretized by it

(Pfl + P1), in relation to an opposite principle (P2), nor of the greater weight of the latter, the Administration, in the weighting carried out by it, may conclude either for the departure of the "R1" rule and the concretion of "P2", and the application of rule "R1" and the removal of "P2". In this case, the magistrate, even if in his personal judgment he understands differently, cannot change the decision (P2 + Pfa > P1 + Pfl or P1 + Pfl + Pfa > P2). When there is no objective evaluation, it should be recalled, the system imputes the choice to the competent agent, and this choice, if the restrictions set out below are not respected, cannot be changed by the Judiciary. In administrative discretion, the weight of "Pfa" is decisive for the definition of the legal decision.

These formal principles, it is important to note, are not equivalent. Here one of the consequences *of normative* completeness *or* incompleteness *is revealed*: the *greater* the *normative completeness*, the *greater* the weight of the formal principle that gives primacy to legislative weighting ("Pfl") and the lower the weight of the formal principle that gives primacy to administrative weighting ("Pfa"); the *lower* the normative completeness, the greater the weight of the formal principle that gives primacy to administrative weighting ("Pfa") and the lower the weight of the formal principle that gives primacy to legislative weighting ("Pfl"). This is the *doctrinal law of administrative discretion. The higher the weight of "Pfl" and the lower the weight of "Pfa", the greater the probability of there being, in the specific case, binding; the lower the weight of "Pfl" and the higher the weight of "Pfa", the greater the probability that there will be discretion in the specific case. Therefore, normative completeness generates an indication of binding and incompleteness an indication of discretion.*

A distinction must be made between *general relations of subjection* and special *relations of subjection*. In the former, subjection to state authority generally affects the people, nationals, or those in state territory[44]; in special cases, the subjection to the authority derives from a specific bind with the Administration and affects only those subject to this bond[45]. That said, it is clarified: in special relations of subjection, the Law is more tolerant of normative incompleteness and of express or tacit reference to administrative action than in general relations of subjection. In them, the doctrinal law of special subjection *is in force*: the formal principle that gives primacy to the considerations of the Administration ("Pfa") has greater weight in the special relations of subjection than

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[44] There are three types of general relations, in descending order of subjection.

[45] The decision BVERFGE 33.1 (*Strafgefangene*) of the German Federal Constitutional Court marked the departure of the theory of the special relationship of subjection by a large part of German doctrine and jurisprudence. On this decision, see: SCHWABE, Jürgen. **Cinquenta Anos de Jurisprudência do Tribunal Constitucional Federal Alemão.** Organização e introdução de Leonardo Martins. Tradução de Beatriz Henning e outros. Prefácio de Jan Woischnik. Montevideo: Fundación Konrad-Adenauer-Stiftung, 2005, p. 165-166. Although the decision is correct in relation to the incidence of principle of legality in such situations, the differentiation is not considered scientifically negligible, nor contrary to the rule of law. On the criteria for setting up a special relationship of subjection, see: MARTINS, Ricardo Marcondes. **Teoria jurídica da liberdade**, op. cit., p. 158-159. On the specifics of its legal regime: MARTINS, Ricardo Marcondes. **Regulação administrativa à luz da Constituição Federal,** op. cit., p. 309-310.

in the general relations of subjection; on the contrary, the formal principle that gives primacy to the considerations of the legislator ("Pfl") has greater weight in the general relations of subjection than in the special relations of subjection. For this reason, discretionary administrative competence is more easily configured in special relationships than in general ones.

6. Legislative discretion

There are three models of the legislative function: (a) the model of implementation of the *Constitution* (*Verfassungsvollzug*), according to which, similar to administrative discretion, legislative discretion consists of the execution by the legislature of constitutional precepts; (b) the model of *application of the Constitution* (Verfassungsanwendung), which, unlike the previous model, dispenses with the need for authorization from the Constituent in order for the Legislature to carry out its task; (c) the model for shaping the Constitution (*Gestaltung der Verfassung*), which, unlike previous models, presupposes a creative and shaping dimension of legislative activity[46]. The prevalence of the third model stems from the prevalence of the legalistic theory of discretion. If administrative discretion requires the legal provision of the possibility of choice, the Legislator's prerogative of choice cannot be called discretion – but rather conformity – because it does not occur only when the Constituent expressly provides for it. Once the legalistic understanding is discarded, discretion is conceptualized as the possibility of choosing, by subjective criteria, between two or more equally admissible alternatives, resulting from the analysis of the Law, the obstacles to the adoption of the first model are overcome.

According to Robert Alexy, there are two types of legislative discretion: *structural* and *epistemic*[47]. The first occurs when there is no doubt about the characterization of the possibility of choice, and is divided into three types: (a) discretion to choose the ends — which principle should be concretized, since it is not possible to concretize all of them at the same time, there is discretion in the choice of which will be concretized first; (b) discretion in the choice of means – what means of implementing a principle should be adopted, since there are almost always several ways of implementing a principle; (c) discretion for weighting, when there is a tie, i.e., the conflicting principles have equal weight[48]. The second occurs when there is doubt about the possibility of choice,

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46 Cp. CANOTILHO, José Joaquim Gomes. **Constituição dirigente e vinculação do legislador.** Coimbra: Coimbra Editora, 1994, p. 216-218.

47 ALEXY, Robert. El derecho constitucional y el derecho infraconstitucional – la jurisdicción constitucional y las jurisdicciones especializadas. In: VILLA ROSAS, Gonzalo (coord.) **Ensayos sobre la teoría de los principios y el juicio de proporcionalidad.** Lima: Palestra, 2019, p. 119-140, in particular, p. 126-139.

48 Whenever the weight formula results in 1, the decision between implementing the principle of the top or bottom numerator is discretionary. About weight formula: ALEXY, Robert. La fórmula do peso. In: VILLA ROSAS, Gonzalo (coord.) **Ensayos sobre la teoría de los principios y el juicio de proporcionalidad,** op. cit., p. 141-162.

and is divided into two groups: empirical, when it arises from doubt about the factual premises; normative, when it arises from doubt about the normative premises.

Law does not always require certainty about the premises for a decision to be adopted. Alexy gives as an example the prohibition of *cannabis use*. According to him, if there were certainty that it is very harmful to health, the constitutionality of the prohibition of consumption would be indisputable as a result of the prevalence of the principle of health protection; If it were certain that it does no harm, the unconstitutionality of the prohibition would be indisputable, as a result of the prevalence of the principle of the protection of liberty. However, if there is no certainty as to whether it is bad or not, in a situation of doubt, an epistemic discretion is configured: the legislation that prohibits it is as valid as the legislation that authorizes it is valid, and it is up to the Legislator to decide. He then enunciates the *law of epistemic weighting*: the greater the restriction of a fundamental right, the greater must be the certainty about the premises that justify the restriction[49].

Empirical discretion is also configured in the exercise of the administrative function. Suppose a building threatens to collapse. The application of the aforementioned doctrinal law is evident: the greater the certainty that it will collapse, the more the administrative interdiction of the building will be authorized; the less certain it is that it will collapse, the less such an interdiction will be authorized. That said, it's not correct to link doubt about assumptions to discretion. It is perfectly possible that, even if there is no certainty about the premises, the Law requires only one solution – the interdiction of the building, for example – in which case there will be binding. Discretion, even in situations of doubt, will only exist when the Law admits, as valid, two or more solutions.

6.1. Legality

The *quantitative difference* between legislative and administrative discretion stems from the principle of legality, which restricts only the exercise of the administrative function. Obviously, the Legislator has the prerogative to repeal and amend the laws it enacts. Thus, legislative discretion – restricted only by constitutional postulates and norms – is much broader than administrative discretion – which is also restricted by legislative norms.

6.2. Good administration

There is a *qualitative difference* between administrative and legislative discretion, stemming from the *principle of good administration*[50]. There is no principle of "good

[49] Cf. ALEXY, Robert. **Teoria dos direitos fundamentais,** op. cit., p. 612 *et seq.*

[50] About it: FALZONE, Guido. **Il dovere di buona amministrazione.** Milano: Giuffrè, 1953, p. 72 e 82; QUEIRÓ, Afonso Rodrigues. **O poder discricionário da administração,** op. cit., p. 99 e 107; SOUSA, António Francisco de.

legislation" in the normative system: the Legislator is not obliged to always choose the best measure (M1) to implement the principle (P1). For the legislation to be valid, it is sufficient that it is proportionate[51]. The postulate of proportionality requires the adoption of a measure that is *appropriate* (capable of promoting the implementation of the principle under consideration), *necessary* (that there is no other, "M2", which promotes in the same way as it, "M1", the principle under consideration, "P1", and restricts less an opposite principle, "P2") and *proportional in the strict sense* (that the opposite principle, "P2", admits that it is restricted by the said measure, "M1", because it is less burdensome than the principle it embodies, "P1"). If these requirements are met, it is perfectly possible for the Legislator to choose a measure that is not the best.

Whenever opposing principles do not specifically rule out the measure set by the Legislator, even if it is not the best measure, it shall be implemented by the Administration. However, the *doctrinal law of good administration applicable to the legislative measure is in force*: the more, in the specific case, the measure established by the Legislator distances itself from the best measure, the less weight will be given to the formal principle that gives primacy to the considerations of the Legislator (Pfl) and the more weight will be the formal principle that gives primacy to the considerations of the administration (Pfa)[52]. Therefore, the more, in the specific case, the legislative measure is characterized as a bad measure, the greater the probability of being considered disproportionate in concrete.

When the measure is chosen by the Public Administration, the *doctrinal law of good administration applicable to the administrative measure* is in force: it must always choose the best measure[53]. This occurs in three cases: (1) when the legislation refers the choice of measure to the Administration (express or tacit reference); (2) when the legislative measure is considered to be disproportionate in concrete terms and is therefore ruled out by administrative consideration; (3) when there is no law, but principles opposed to those embodied by state inaction and by the formal principle that gives primacy to legislative considerations which requires state action. When Administration chooses the measure, there may be binding – when only one solution, objectively, is optimal – or discretion – when, objectively, two or more solutions are considered optimal.

Manual de direito administrativo, op. cit., p. 453; BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional,** op. cit., p. 35 e 37.

51 Cp. MARTINS, Ricardo Marcondes. Proporcionalidade e boa administração. **Revista Internacional de Direito Público,** Belo Horizonte, ano 2, n. 2, p. 09-33, jan.-jun. 2017, p. 11 a 25. On the postulate of proportionality check: CLÉRICO, Laura**. El examen de proporcionalidad en el derecho constitucional.** Buenos Aires: Eudeba, 2009; BERNAL PULIDO, Carlos. **El principio de proporcionalidad y los derechos fundamentales**. 3. ed. Madrid: Centro de Estudios Políticos y Constitucionales, 2007; CANAS, Vitalino. **O princípio da proibição do excesso na conformação e no controlo de atos legislativos.** Coimbra: Almedina, 2017, p. 569 *et seq*.

52 Cp. MARTINS, Ricardo Marcondes. **Proporcionalidade e boa administração**, op. cit., p. 27-28.

53 *Idem*, p. 29-33.

Suppose that the Chief Executive must choose a jurist to assume the position of Secretary of Justice in a small Municipality. There are only three interested candidates: one who recently graduated, another who graduated twenty years ago, but with convictions for administrative misconduct, and another who graduated twenty years ago, but without any conviction. The appointment, in this case, is binding: objectively, the latter is the best choice and, by virtue of the principle of good administration, his appointment is imposed by Law. Often, however, there are several candidates and among them there are no objective criteria that indicate that one is better than the other. "A" is considered better than "B" only by subjective criteria. In this case, even if good administration is respected, discretion is configured: both the choice of "A" and the choice of "B" are valid, and the decision rests with the competent agent.

6.3. Real Discretion

Imposing on the Public Administration to always choose the best solution in the light of the concrete case, some scholars deny the existence of administrative discretion[54]. The possibility of choice would exist only on the abstract plane, but would always be reduced to zero on the concrete plane. There are those who believe that, when it is not objectively assessable, it is due to ignorance, on the part of the judge, of all the factual premises. In other words, there would be discretion only as a result of an impossibility of proving that the supposed choice was not the best one. With all due respect, this guidance is mistaken[55]. There are cases in which, no matter how much one knows the facts, there will be no objective criterion that determines that "A" is better than "B" or vice versa. The example of appointments to certain positions is paradigmatic. There are situations in life in which "A" can only be considered better than "B" by subjective criteria inherent in political pluralism. For example, by having a more right-wing or more left-wing inclination. It is, therefore, undeniable that there are a number of valuations in the lives of political pluralism.

7. Technical discretion

Part of the doctrine denies the so-called technical discretion: technical concepts would, always, binding it, because they are either present or they are not[56]. Example:

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54 Georges Abboud, at first, emphatically denied the possibility of volitional administrative choices (**Discricionariedade administrativa e judicial,** op. cit., p. 200 e 219-221). However, later on, he recognizes the possibility of choices between "legal indifferents" (p. 226), but only for "non-legal issues" (p. 230). With all due respect, these so-called "non-legal issues" are, indeed, juridical: they are precisely cases of administrative discretion.

55 In this sense, with absolute accuracy: BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional,** op. cit., p. 42-43.

56 In this sense: BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**, op. cit., Cap. VII-§98-A, p. 449.

either the person has a "serious illness" or is not. There is no situation in which it is as valid to say that she is a patient as it is to say that she is not a patient. However, it is possible for the Law to confer a technical analysis with judgments of convenience and opportunity. There is a "discretion mixed with technical aspects"[57]. In this case, there would not be a "technical discretion" per se, but a discretion linked to a technical assessment.

Without ruling out this possibility, technical discretion is considered possible. There are situations in the technical area in which, although a technician reaches a different conclusion from another technician, he cannot, by objective criteria, say that his colleague is wrong. Suppose the definition of the "market value"[58] of an asset for the establishment of just compensation in expropriation. Determining the value of an asset under normal purchase conditions requires engineering expertise[59]. Often, one technician concludes that the asset is worth "X" and another concludes that the asset is worth "10% above X". In certain situations, objectively, it is possible to say that one of them made a mistake. There are, however, situations in which it is not possible to say that one of them is wrong. Suppose a lawsuit is filed and a judicial expert opinion is carried out. In situations where it is not possible to say that the administrative expert is wrong, it is wrong to impose *sic et simpliciter* the solution dictated by the forensic expert. The administrative decision must be respected.

This technical discretion is reinforced when the normative system provides for the existence of technical bodies attributing to them their own competences. To a lesser extent, it is also reinforced when the Public Administration has technicians on its staff. The establishment of technical administrative bodies and positions gives rise to a special formal principle which gives greater weight to the fundamental formal principle which gives primacy to administrative considerations ("Pfa"). Therefore, only if within the respective technical field, the administrative technical error is unequivocal, can the Judiciary substitute the administrative decision for the decision of the judicial expert.

8. Politics

A significant portion of the doctrine considers that in addition to the legislative, administrative and jurisdictional functions, there is a fourth function, called the political or government function[60]. As a result of the exercise of their respective functions, there are legislative, administrative, jurisdictional and political or governmental acts.

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57 In this sense: BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**, op. cit., Cap. VII-§98-A, p. 450.

58 Market value is the value of the asset if offered for sale under normal market conditions. Cf. FURLAN, Valéria. *IPTU (property tax)*. 2. ed. São Paulo: Malheiros, 2004, p. 100.

59 Cp. MARTINS, Ricardo Marcondes. **Estudos de direito administrativo neoconstitucional.** São Paulo: Malheiros, 2015, p. 505-506.

60 For all: BANDEIRA DE MELLO, Celso Antônio**. Curso de direito administrativo,** op. cit., Cap. I-§10, p. 36-37.

However, in the Rule of Law, there are no fields of state action outside the Law. All state action is legalized. What is called a political or governmental function is nothing more than the exercise of legislative or administrative discretion, a legislative or administrative function, therefore[61]. Thus, in the Rule of Law, the sign "politics" is synonymous with "discretion". The theory of political or governmental acts was elaborated by the French to immunize certain acts from judicial review[62]. Under current Brazilian law, no state act is immune from judicial review; every act of the State, whatever it may be, may be challenged before the Judiciary[63]. Moving away from the raison d'être of the theory, it must be recognized: political or governmental acts are those in which there is a choice by the competent agent, and not just interpretation, a choice based on the agent's subjective criteria on the best way to achieve the public interest. Therefore, "politics" is just another name for "discretion".

9. Judicial function

The exercise of judicial function, as an almost absolute rule, is incompatible with the exercise of discretion[64]. Jurisdiction means "to say the Law". It is up to the magistrate, when provoked, to interpret, that is, to ascertain what the will of the Law is, to discover what the normative set establishes. Strictly speaking, the judge is the "oracle" of Law[65]: the authority responsible for saying, in this case, what is the last word on legal interpretation. On the other hand, it is not up to the judge to choose, at will, between alternatives that are equally admissible by Law.

Although in the real-world judicial activity appears to be discretionary, theoretically it is not. Suppose the magistrate examines a preliminary injunction request: whether or not to anticipate the injunction. If the competence were discretionary, the activity would be explained as follows: he interprets the Law and concludes that, for the Law,

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61 Cp. MARTINS, Ricardo Marcondes. "Políticas públicas" e Judiciário: uma abordagem neoconstitucional. **A&C Revista de direito administrativo & constitucional**, Belo Horizonte, ano 18, n. 71, p. 145-165, jan.-mar. 2018, p. 147-148.

62 For all: DUEZ, Paul. **Les actes de gouvernement.** Paris: Dalloz, 2006, p. 17. In the same vein: GARCÍA DE ENTERRÍA, Eduardo. **La lucha contra las inmunidades del poder**, op. cit., p. 57 et seq.

63 With absolute accuracy, says Oswaldo Aranha Bandeira de Mello: "Nada justifica no Estado de Direito essa figura dos atos de governo em oposição aos atos administrativos". (**Princípios gerais de direito administrativo** – v. 1. 3. ed. São Paulo: Malheiros, 2007, p. 480).

64 In Brazilian law, there is only one exception: the writ of injunction, provided for in item LXXI of article 5. of CF/88. This is an exception established by the original Constituent: there will often be two or more possibilities to regulate a constitutional right, in which case the choice is up to the Judiciary.

65 Oswaldo Aranha Bandeira de Mello pioneered the Judiciary as the "oracle of the Constitution". (**A teoria das constituições rígidas.** 2. ed. São Paulo: José Bushatsky, 1980, p. 89-93). Celso Antônio Bandeira de Mello made an important expansion: "The judge is the oracle of law in the concrete case". (BANDEIRA DE MELLO, Celso Antônio. Juízo liminar: poder-dever de exercício do poder cautelar nessa matéria. **Revista trimestral de direito público,** São Paulo, n. 3, p. 106-116, 1993, p. 114; Mandado de segurança contra denegação ou concessão de liminar. **Revista de direito administrativo e infraestrutura**, São Paulo, ano 3, n. 11, p. 441-449, out.-dez. 2019, p. 445-446).

the two possibilities are equally optimal, to grant or not to grant the injunction, and it is up to him, the magistrate, by his subjective criteria, to choose. Obviously, this is not the correct reading of the legal system. It is up to the magistrate to find out what the will of the Law is: whether, in the light of the factual and legal circumstances, it requires that the injunction be granted or requires that it be dismissed. It is a binding decision, based on interpretation (cognitive act), and not on volition (volitional act).

It could be said: it is common for magistrates to differ. The magistrate of one court grants the injunction and another, in the same case, rejects it. In the terms already examined, the understanding of what is the only solution admitted by the Law is, often, controversial and there is no discretion. The judges differ, in the example, about what the Law imposes, they differ about the only solution admitted. Consistently, magistrates are not elected, they do not exercise a political function, they do not have the power to choose by will among legal indifferent.

10. Restrictions on administrative discretion

In addition to the limitations inherent to the concept of discretion itself, including, mainly, the duty to restrict oneself to the alternatives that are objectively the best for the achievement of the public interest, administrative discretion is restricted by a number of factors. In this study, four of them will be examined: hierarchical constraint; administrative planning, restriction by precedents, the need to substantiate subjective criteria.

10.1. Hierarchical restriction

Inherent in hierarchy is the prerogative to restrict the discretion of subordinates. By means of an abstract administrative rule, introduced, depending on the authority, by decree, ordinance or instruction, the hierarch restricts the exercise of the subordinate's competence[66]. Thus, through it, the hierarchical superior carries out a weighting that would be carried out, if it were not edited, by the subordinate. It is thus an instrument restricting the exercise of administrative discretion: escolhas que would be carried out by several agents, so as to run counter to both equality and legal certainty, they are carried out by the hierarch alone; the latter removes or restricts the possibility of choice from his subordinates, he chooses for them[67]. Thus, the worldview (the subjective criteria) of the subaltern is replaced by the worldview (the subjective criteria) of the hierarchical

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[66] These are the *discretionary directives*, a kind of administrative self-binding. Cp. GONÇALVES, Pedro Costa. **Manual de direito administrativo,** op. cit., p. 227-231.

[67] About the topic: BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**, op. cit., Cap. VI-19-24, p. 364-366; MARTINS, Ricardo Marcondes. **Regulação administrativa à luz da Constituição Federal,** op. cit., p. 112-113; OTERO, Paulo. **Conceito e fundamento da hierarquia administrativa.** Coimbra: Coimbra Editora, 1992, p. 113 e 118.

superior. This prerogative is the core of the so-called *voluntarist theory of hierarchy*[68]. If, on the one hand, it is correct to affirm the possibility of the hierarch restricting the discretionary competence of the subordinate, on the other hand, it is wrong to suppose that the hierarchy is restricted to this prerogative. Moreover, the hierarch cannot always completely abolish the discretion of the subordinate and thus replace him completely. Often, in the terms explained here, only the analysis of the concrete circumstances indicates the solution required or accepted by the Law. Once the premises of neo-constitutionalism are adopted, concrete weighting can, depending on the circumstances, rule out abstract weighting: if even the law can, exceptionally, be set aside in concrete, what can be said of the decree or ordinance[69]. In this case, the special formal principle that gives primacy to the weightings of the hierarchical superior and must be taken into account in the concrete weighting by the subordinate. Second: even in the field of binding, hierarchy is present: the hierarch can impose both his interpretation and his weighting on subordinates, that is, he can impose his way of understanding what is the only solution admitted by the Law[70].

10.2. Administrative planning

The act of planning is linked to the situation of those who have the possibility of choosing between two or more alternatives. This situation is divided into two unmistakable kinds: the freedom of individuals and the discretion of the Administration. The individual can plan how he will exercise his freedom in the future, anticipating his choices. In the terms explained in this study, public agents — legislators and administrators — are also able to choose between two or more alternatives in many situations. But it is not a question of freedom, for they must seek the best way to achieve the public interest; it is a question of discretion. That said, it must be recognized: similar to what happens with the exercise of freedom, the State can anticipate future choices: plan.

This is the legal nature of state planning: it is a restriction on the future exercise of discretion through anticipation. The future exercise of discretion should pay attention to the anticipation made, to what is stated in the plan. By anticipating the discretionary

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68 One of the main supporters is: EISENMANN, Charles. **Centralisation et décentralisation :** esquisse d'une théorie générale. Paris: Librairie Générale de Droit & de Jurisprudence, 1948, p. 73.

69 In the terms explained here, opposing principles may be heavier than those concretized by the legislation and the formal principle that gives primacy to the considerations of the Legislator. In the same way, they may be heavier than those specified by the regulation or the ordinance and the special formal principle which gives precedence to the considerations of the immediate superior. This is an exception to the principle of the individual non-derogation of regulations. About it, see: ZANOBINI, Guido. Sul fondamento della inderogabilità dei regolamenti. In: ZANOBINI, Guido. **Scritti vari du diritto pubblico.** Milano: Giuffrè, 1955, p. 03-17; GARCÍA DE ENTERRÍA, Eduardo. **Legislación delegada, potestad reglamentaria y control judicial.** 3. ed. Madrid: Civitas, 1998, p. 363. Regulations apply until they are extinguished, unless the specific consideration requires their non-application.

70 For all: OTERO, Paulo. **Conceito e fundamento da hierarquia administrativa,** op. cit., p. 65.

choices of the future, they become more efficient: they are not made in the heat of the moment, but weighed calmly and impartially. This avoids or minimizes damage to legally protected assets. In addition, legal certainty is achieved: individuals know in advance what the discretionary decisions of the future will be. Having said what the state plan is, two considerations are necessary.

Firstly, as a general rule, the State is bound by the plans it establishes. State planning indicates to individuals what their future choices will be—it is indicative to individuals; but it binds the State to respect the anticipation — it is binding for the State. Supervening reasons, however, weighed against a serious consideration of the factual and legal circumstances, may, exceptionally, lead to non-compliance with the plan. In the legal system, there is a special formal principle which requires respect for the state plan. Its weight must be considered in the concrete weighing carried out for non-compliance with the plan. Therefore, the rule is that the state plan is fulfilled; disrespect for the plan must be exceptional.

Second: the Constituent may, as an express rule of the Constitution, require the Legislator to enact a plan. In this case, if there is an express constitutional rule, legislative planning is required. Likewise, the Legislator may, by means of an express legislative rule, require the Public Administrator to issue a plan. In this case, if there is an express legal provision, administrative planning is required. Suppose there is no constitutional or legislative rule that imposes administrative planning. In this case, by virtue of efficiency and legal certainty, and it is possible to anticipate discretionary choices, it is incumbent on the Public Administration to do so. Therefore, administrative planning, when feasible, is always a duty. In other words, it is difficult for the administrative agent to choose at his discretion between planning or not planning. Whenever it is possible to anticipate the discretionary choice, the anticipation is imposed on the administrative agent.

10.3. Administrative Precedent

When the public agent carries out a concrete consideration, it generates an abstract rule that restricts subsequent state action. This is the so-called law of collision, proposed by Robert Alexy: the factual premises that justify the prevalence of one principle over another configure the hypothesis of a norm that results in such prevalence[71]. Thus, if it is not demonstrated that the weighting was erroneous or that the factual circumstances are different, in the face of identical future cases, it is sufficient, by way of subsumption, to apply the abstract rule resulting from the previous concrete weighting. Such guidance respects equality and security. Even if the decision was wrong, its adoption generates *prima facie* reasons in favor of its maintenance, even in future cases.

[71] ALEXY, Robert. **Teoria dos direitos fundamentais,** op. cit., p. 94-99.

The examination of invalidity must respect the consolidated situations[72]. The administered presume the validity of administrative acts and plan their lives based on the state decisions already adopted. However, the theory of precedents, in all its particularities, is not the object of this study[73]. It is mentioned here because administrative precedents also restrict the exercise of discretionary competence.

Suppose that a public agent has exercised discretionary competence: in the light of certain factual circumstances, he has, by his subjective criteria, chosen alternative "A" as the best way to achieve the public interest. The legal reasons that justify the maintenance of the administrative precedent are that, in the future, in the face of identical factual circumstances, the agent will continue to consider "A" the best way to achieve the public interest. Of course, he can change his mind, but he must be aware that the previous precedent imposes an argumentative burden on changes in understanding. If the previous discretionary orientation has had repercussions on the legal sphere of the administrated, the change of understanding will require the establishment of a transitional regime. It will be up to the public agent to maintain the previous understanding for a reasonable period of time and to warn the administered that, after this period, the understanding will be changed[74].

10.4. Legalization of subjective criteria

The more the Rule of Law matures, the greater the restrictions on state action. To the jurist of the past, the exercise of discretion was basically confused with freedom. As much as the theory of administrative law has advanced, it must be recognized that administrative practice has not always kept up with this evolution. In the terms stated in this study, whenever an alternative is configured, by objective criteria – *rectius*, by

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72 About the topic: MARTINS, Ricardo Marcondes. **Ato administrativo**, op. cit., p 325 *et seq.*

73 About it: CARVALHO, Gustavo Marinho. **Precedentes administrativos no direito brasileiro.** São Paulo: Contracorrente, 2015; DIEZ SASTRE, Silvia. **El precedente administrativo:** fundamentos y eficácia vinculante. Madrid: Marcial Pons, 2008; LEAL, Fernando. Força autoritativa, influência persuasiva ou qualquer coisa: o que é um precedente para o Supremo Tribunal Federal? **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 1, p. 205-236, jan./abr. 2020; TRINDADE, Jonas Faviero; BITENCOURT, Caroline Müller; LOPES, Andrea Roloff. O padrão decisório vinculante administrativo e o precedente administrativo como categorias e suas contribuições à administração compartida. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 24, n. 95, p. 131-157, jan./mar. 2024.

74 The duty to establish a transitional regime is provided for in article 23 of the Law of Introduction to the Rules of Brazilian Law (Decree-Law 4,657/42), a provision introduced by Law No. 13,655/18. On this law, see: MARTINS, Ricardo Marcondes. As alterações da LINDB e a ponderação dos atos administrativos. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 20, n. 79, p. 259-284, jan./mar. 2020; SANTIAGO, Nestor Eduardo Araruna; SOUSA, Francisco Arlem de Queiroz. Consequencialismo, garantismo e a Lei de Introdução às Normas do Direito Brasileiro: uma interpretação conciliatória. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 22, n. 90, p. 107-131, out./dez. 2022; FORTINI, Cristiana; HORTA, Bernardo Tinôco de. Eberhard Schmidt-Assmann e o ordenamento jurídico brasileiro: breves apontamentos sobre a LINDB e sobre a Nova Lei de Licitações e Contratos Administrativos. **Revista de Direito Econômico e Socioambiental**, Curitiba, v. 13, n. 3, p. 653-686, maio/ago. 2022.

criteria alien to political pluralism, to the worldview of each one – as better than others, there is binding; the administrative agent has the duty to choose the alternative that is objectively the best for the public interest. As already examined, discretion will only exist when two or more alternatives are considered equally optimal from an objective point of view, when only subjective criteria define one as better than the other. In this case, the Law chooses the subjective criteria of the competent public agent.

In the past, even more so in authoritarian cultural contexts, it was assumed that these subjective criteria would be proper to the agent's intimacy. He would make the choice without having to reveal them. Nothing could be more wrong. It was emphasized that discretion is not freedom: the agent has the duty to choose the option that, for him, is the best way to achieve the public interest. Hence the pertinence of the question: why does he consider alternative "A" the best option? What criteria led you to this conviction? It is incumbent on the agent to reveal his justifications, to explain his subjective reasons.

The reasons that the agent has for making the discretionary choice are not "legal" reasons[75], but by guiding his choice they acquire "legal relevance". As the principle of good administration requires the adoption of alternatives that are objectively better, it is imperative that, in the motivation of the administrative act issued in the exercise of discretionary competence, the subjective criteria are made explicit. This explanation will allow the administered and the control offices to verify whether, in fact, the agent has chosen an objectively optimal alternative.

Strictly speaking, there will always be only one correct legal solution. In cases of binding, revealed by the interpretation of the Law in force; in cases of discretion, arising from the opinion of the competent agent as to how best to achieve the public interest. Commonly, the public agent, by subjective criteria, always considers one alternative better than another for the achievement of the public interest. This alternative becomes the "will of the Law", the correct legal decision. Theoretically, however, it is possible to assume cases in which the agent finds himself in an *agonizing situation*. This is what happens when a *relationship of indifference* occurs: for the competent agent "x" is as good as "y" and "y" is as good as "x"[76]. In this situation, the public agent is unable to

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[75] Whether they are criteria of expediency, *soft law*, or *les artis*, these criteria acquire legal relevance when they are the basis for the exercise of discretion. About the topic: RODRÍGUEZ DE SANTIAGO, José María. **Methodology of Administrative Law:** Rules of Rationality for the Adoption and Control of Administrative Decisions. Madrid: Marcial Pons, 2016, p 110-127. In his words: "In those areas in which the legal interpretation of the norm gives the administrative body the power to supplement it with technical, efficiency, political criteria (selection of preferences for purposes of general interest), etc., these criteria will be decisive. Needless to say, these criteria 'must exist' (because in the rationality of the rule of law, discretionary power can only mean the power to decide according to criteria) and they have to be made explicit." (*Op. cit.*, p. 127, our translation).

[76] For all: FIANI, Ronaldo. **Teoria dos jogos**. 3. ed. Rio de Janeiro: Elsevier, 2009, p. 24-25.

affirm in his heart that one alternative is better than the other for the achievement of the public interest; both are equally good to him.

These are unusual situations: it is not because an objective valuation (*rectius*, a valuation that can be imposed on everyone without violating political pluralism) is impossible that each individual does not have an opinion. Unusual, but not impossible: in theory, it can be assumed that there are situations in which, for the agent, taking into account the duty to carry out the public interest in the best possible way, the choice is absolutely indifferent. In such cases, is he free? Can he choose only based on your will? Even in the agonizing situation there is no state freedom. Public agents should always be *impersonal*. Therefore, in *agonizing situations*, in which there are two or more equally optimal alternatives and the agent cannot subjectively define which alternative best fulfills the public interest, it is necessary that the choice be made by an impersonal means: lottery, for example. Even in these rare cases, it is emphasized, there is no freedom. That said, it is possible to take the next step: examining vitiated discretionary competence.

11. Misuse of Power

From the considerations made so far, the expression "discretionary act" is misleading[77]. What is discretionary is the competence, not the act. Even in the exercise of discretionary power, the act will have several related aspects. Having made this clarification, it is necessary to establish the particularities of discretion in relation to the defects of the administrative act. The so-called defect of purpose is called, in the doctrine, misuse *of power*. Strictly speaking, whenever the Public Administration implements the lighter principle in the specific case or when it does not adopt the means of implementation required or provided by the Law, a defect of purpose or containerization[78] is configured, respectively, both, encompassed in the expression "misuse of power". Such defects may occur in the exercise of limited competence or in the exercise of discretionary competence.

The will of the agent — motive — is absolutely irrelevant in the exercise of the competence attached. Suppose a guard fines a driver because he has run a red traffic light and has therefore violated the law; suppose the guard fines for a spurious motive,

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[77] For all: BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional,** op. cit., p. 18.

[78] The majority doctrine does not distinguish between defects of purpose and defects of containerization. For all: BANDEIRA DE MELLO, Celso Antônio. Discricionariedade e controle judicial. **Revista de Direito Administrativo e Infraestrutura,** São Paulo, ano 08, v. 28, p. 405-422, jan.-mar. 2024; Legalidade – discricionariedade – seus limites e controle. **Revista de Direito Administrativo e Infraestrutura**, São Paulo, ano 07, v. 27, p. 443-462, jul.-set. 2023. Not implementing the heaviest principle — the purpose of the act — differs from concretizing the heavier principle by the wrong means — the specific content that the act must have. On the topic: MARTINS, Ricardo Marcondes. Administrative act. In: BACELLAR FILHO, Romeu Felipe; MARTINS, Ricardo Marcondes. **Tratado de Direito Administrativo** – Vol. 5: Administrative Act and Administrative Procedure. 3. ed. São Paulo: Revista dos Tribunais, 2022, p. 33 to 409, especially p. 263-269.

motivated by a desire to persecute or harm the driver, who is his disaffection. If the law requires that the fine be established, it matters little what the motive's agent[79]. Everything changes when it comes to discretionary competence: the spurious motive can have repercussions on the validity of the act.

One might imagine that the act will then be vitiated by a defect of will. In public law, the will of the agent is generally irrelevant; what matters is the will of the Law. Strictly speaking, the administrative act is not, even in the exercise of discretionary power, vitiated by force of "defects of will", but by a defect of purpose or containerization. It so happens that in discretionary competence, the will of the agent is fundamental to ascertain the will of the Law. Suppose that once the Law is interpreted, and the specific weighting has been carried out, it is concluded that both solution "A" and solution "B" are equally, from an objective point of view, optimal. This does not mean that the Law chooses both. The Law imputes the choice to the competent agent. It is not up to the agent to choose by free will; it must choose the alternative that, in its subjective judgment, is the best way to achieve the public interest. It should be noted: the will of the Law is the will of the agent on the best way to achieve the public interest.

Supposing that the agent chooses alternative "A" with spurious motive, either because he received a bribe or because he wanted to benefit a friend or harm a disaffected person. By virtue of the *intangibility of the agent's psyche*, it is not possible to say that if he were well-intentioned, if his motive were not tainted, he would not choose the same alternative. It is impossible to be sure that the chosen alternative is not the one that would be chosen in the case of immaculate motive. In other words, it is not possible to know whether the will of the Law has been carried out. Faced with this insoluble doubt, what to do? Bad faith on the part of the agent leads to the absolute presumption of a defect in purpose or containerization. Since the agent has chosen with spurious motive, it is presumed, without admitting evidence to the contrary, that he has chosen an alternative other than that which he considers the best way to achieve the public interest[80]. Intentional misconduct leads to the absolute presumption of misuse of power, a defect of purpose or containerization.

Suppose, however, that in the case of discretion the will of the agent is not vitiated by malice, but by error. The Law allows both the implementation of "P1" and "P2" or both the implementation by measure "M1" and measure "M2". It is not correct to suppose that the choice is free, that it does not matter one or the other. The Law requires the alternative that, according to the competent agent, according to his subjective criteria, is the best way to achieve the public interest. Suppose that the agent chose "P1" or "M1"

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79 For all: FORSTHOFF, Ernst. **Tratado de derecho administrativo.** Traducción de Legaz Lacambra, Garrido Falla y Gómez de Ortega y Junge. Madrid: Instituto de Estudios Políticos, 1958, p. 291.

80 Aimed poorly, it is assumed that did not hit the target. In these terms: BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional**, op. cit., p. 73-76.

because he made a mistake, did not realize that "P3" was also applied or there was also "M3". If he considered "P1", "P2" and "P3" he would choose "P2", but since he only foresaw "P1" and "P2", he chose "P1". In this case, it should be noted: strictly speaking, the "will" of the Law was not adopted, the alternative that, according to the agent's judgment, considering the correct premises, is the best way to achieve the public interest. The error does not lead to an absolute presumption of a defect of purpose. It is entirely possible that, even taking into account "P3" and "M3", the agent would adopt "P1" and "M1".

In the absence of bad faith, there is no absolute presumption. However, it is not irrelevant: the error gives rise to a relative presumption of misuse of powers, defect of purpose or containerization. Once it has been demonstrated that there has been an error, it is necessary to listen to the competent agent and, aware of the impact of all the principles or all the available measures, it is up to him, with reasons, to clarify whether or not the will of the Law has been achieved: whether the principle implemented or the measure chosen was, in fact, according to his judgment, the best way to carry out the Law. That said, it is concluded: once the error is removed, it is theoretically possible for the agent to invalidate the act, due to a defect of purpose or containerization[81].

The issue of misuse of power reveals a further qualitative difference between administrative and legislative discretion. In the legislative function, only the misuse of objective powers is allowed[82]. The legislation is invalid if its content is unconstitutional or if the prescribed process has been disregarded. Thus, if the Legislator did not implement the weightiest principle, violating proportionality, it will incur a misuse of power. If, however, the congressman, in voting for the bill, acted with spurious motives – malice – or with error, his defect of will won't have repercussions on the validity of the law. Even if he voted because you received a bribe or because you made a mistake on the assumption that it was another bill, if the legislative process provided for in the Constitution was observed and the content of the law does not violate the Constitution, it will be valid. The congressman, in the case of willful misconduct, may be held liable for breach of decorum, but his liability does not taint the validity of the legislative act[83].

Formal defects — which do not concern the content of the act — tend to be more serious in the case of discretionary jurisdiction than in the case of limited jurisdiction. The reason is intuitive, in binding the will of the Law is independent of what the agent wants. Thus, as a general rule, since the content of the vitiated act is required by the Law, it is quite possible that it tolerates the defect: 1) subjective assumption, referring

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81 Cp. MARTINS, Ricardo Marcondes. **Ato administrativo,** op. cit., p. 261-262.

82 For all: SERRANO, Pedro Estevam Alves Pinto. **O desvio de poder na função legislativa.** São Paulo: FTD, 1997, p. 138.

83 Cp. MARTINS, Ricardo Marcondes. Abuso de poder e abuso de autoridade no exercício das funções legislativa e jurisdicional à luz da nova Lei de Abuso de Autoridade – Lei nº 13.869/19. **A&C – Revista de Direito Administrativo & Constitucional,** Belo Horizonte, ano 21, n. 83, p. 75-95, jan./mar. 2021, p. 78-81.

to the agent who issued the act; 2) that of an objective presumption, referring to the procedural requirements, to the acts required before the act was issued; 3) a formalistic assumption, referring to the requirements of externalization of the act. In discretionary jurisdiction, the will of the Law refers to the subjective criterion of the competent agent. Therefore, if the act was not edited by the competent agent, if the agent did not observe the procedural or formalistic requirements for editing it, it is more difficult for this tolerance to exist.

Particular importance are defects in the decision-making procedure, which are types of formal defects. In discretion there is a link between the decision-making procedure and the result obtained[84], so that the decision-making procedure not only indicates the result, but produces it: there is no possibility for the agent to arrive at the correct result without properly complying with the decision-making procedure[85]. It cannot be reproduced in its entirety by others, since it is not for the court to make the choice between the two or more legally possible solutions. For all these reasons, it is correct to conclude that the defect in the decision-making procedure has much greater relevance in the field of discretion than in the field of binding.

12. Control of discretion

At the outset, a distinction must be made between two types of control: merit and legitimacy. In the former, it is possible that the normative system attributes to one authority the prerogative of controlling the judgment of convenience and opportunity of another. When this occurs, the former exercises discretion and verifies which solution corresponds to the best way to achieve the public interest, in sight of its worldview, its subjective criteria; Then, if the merits are reviewed, another authority checks whether it agrees — if its subjective criteria are identical to those of the authority that issued the decision — or if it disagrees — if they are dissonant. If there is a disagreement, it may retroactively replace the decision considered inconvenient or inopportune. A few comments must be made.

First, the control of merit presupposes the exercise of discretion; therefore, as a general rule, it is incumbent on the internal control offices (Comptroller's Offices, Legal

84 Robert Alexy rightly asserts that result and process form, in discretionary acts, from the point of view of material conformity to the law, a unity (Defects in the exercise of discretionary power. **Revista dos Tribunais,** São Paulo, year 89, p. 11-46, set. 2000, p. 42). On the administrative decision-making procedure, see: MARTINS, Ricardo Marcondes. Administrative Act, op. cit., p. 102-112.

85 Cp. MARTINS, Ricardo Marcondes. Ato administrativo, op. cit., p. 263.

Advisors) and external control bodies (Court of Auditors,[86] Judiciary)[87]. The Judiciary can only carry out merit control if it is in the exercise of an administrative function; never in the exercise of a judicial function.

Second, although conceptually very close, merit control is not to be confused with revocation. This is proper to the active administration[88], and not to the parent company, and, by definition, is non-retroactive. The control of merit, being an exercise of control, is retroactive[89].

Third, there is much discussion in the doctrine about whether there are "defects of merit"[90]. There are those who consider that they are vices that lead a decision to be considered inconvenient or inopportune by another authority, but do not make it invalid. The possibility of the vitiated act being valid, as occurs with the so-called "irregular acts" [91], is not denied. However, there are those who consider that the defect of merit does not even taint the regularity of the act[92]. We disagree: if the vice does not taint the regularity of the act, it is not a vice. "Defect of merit" will only be a defect if it indicates that the act is not, for the authority that issued it, the best alternative to achieve the public interest, whether as a result of intent or error on the part of said authority. Consequently, a defect of merit is, if it is, a defect of legitimacy.

The control of legitimacy is a control of legality: it verifies if the act has any defect, or rather, if it contradicts the Law in any way. If there was, in fact, discretion and the authority chose, without malice or error, one of the objectively optimal alternatives, the merit of the act is intangible: it is not for the judicial authority to replace the administrative authority, under penalty of violating the separation of Powers. In this case, the magistrate must respect the worldview (the subjective criteria) of the competent administrative agent. However, three situations can be distinguished. 1) the Administration often mistakenly supposes that there is discretion, it is mistaken in its understanding of the Law: objectively, only one alternative is the best, so that there is binding. Supôs poder escolher entre "A" e "B", mas o Direito impõe "A". 2) It is also possible that there is discretion, that it is possible to choose between "A" and "B", alternatives that are equally

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86 On the Brazilian Court of Auditors, see: CABRAL, Flávio Garcia. Como o Tribunal de Contas da União tem se comportado ao longo da Constituição de 1988? **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 21, n. 85, p. 161-183, jul./set. 2021; PESSOA, Robertonio Santos; OLIVEIRA, Antônio Fábio da Silva. Título. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 23, n. 94, p. 89-116, out./dez. 2023.

87 About the concepts of internal and external control: MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo.** São Paulo: Malheiros, 2008, p. 368-369.

88 Cp. ALESSI, Renato. **A revogação dos atos administrativos.** Trad. Antonio Araldo Dal Pozzo, Augusto Neves Dal Pozzo e Ricardo Marcondes Martins. São Paulo: Contracorrente, 2022, p. 224.

89 Cp. MARTINS, Ricardo Marcondes. **Ato administrativo**, op. cit., p. 313.

90 For all: AMORTH, Antonio. **Il merito dell'atto amministrativo.** Milano: Giuffrè, 1939, p. 97 et seq.

91 Cp. MARTINS, Ricardo Marcondes. Ato administrativo, op. cit., p. 150-153

92 For all: AMORTH, Antonio**. Il merito dell'atto amministrativo**, op. cit., p. 97 *et seq.*

optimal from an objective point of view, but the authority chooses "C", an alternative not allowed by the principle of good administration. 3) Finally, it is possible that the law admits a choice between "A" and "B", but the administrative agent chooses with spurious motive, so that it is presumed that he has chosen the wrong alternative. In all these cases, it is up to the Judiciary to carry out the control *of* (and not *of*) the merits, which is a control of legitimacy. The preposition changes the meaning of the expression: it is entirely possible for the Judiciary to carry out a control of the merits, to know if, in fact, there was discretion, if there was a choice of a legally admitted alternative, if there was no intent or error that leads to the presumption, respectively, absolute or relative, of misuse of power.

In the case of binding, the Judiciary, in Brazilian Law, influenced by the American understanding of the separation of powers, when provoked, replaces the Administration and issues the correct act (substitution system). In French Law, if a more restrictive understanding of the separation of powers is adopted, the judge orders the act required by Law to be issued (the injunction system)[93]. In the case of discretionary competence, when the Administration has the duty to give an answer and omits to do so, the Judiciary, under Brazilian Law, if provoked, cannot replace the Administration and exercise discretionary choice. Thus, the omission to exercise discretionary competence does not transfer competence to the Judiciary. In the control of discretionary competence, the injunction system is in force: the Judiciary condemns the Administration to issue the act[94]. If the Administration remains silent, a fine (*astreinte*) may be imposed in order to convince the competent agent to make the choice[95]. The maintenance of the omission, depending on the specific consideration, may justify the *change of subject*[96]. In other words: the Judiciary, in the face of the reiteration of the omission of the competent agent, determines that the choice be made by another administrative agent.

13. Discretionary termination

Finally, the discretionary situation is often maintained over time, so that the public agent who issued the decision or, if admitted, another agent, can verify that he or she continues to agree that the alternative previously chosen is still the best way to achieve the public interest. If it has changed its mind, it will issue an administrative act that has

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93 Cp. MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo**, op. cit., p. 587.

94 Idem, p. 588.

95 With regard to the *astreinte*, it is considered Portuguese system is better than the French one: the fine should fall on the assets of the guilty authority and not on the treasury. Cp. MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo,** op. cit., p. 579-585.

96 The theory of subject exchange was pioneered for the control of legislative omission by: ROTHENBURG, Walter Claudius. **Inconstitucionalidade por omissão e troca de sujeito.** São Paulo: Revista dos Tribunais, 2005. On its extension to the control of administrative discretionary omission, see: MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo,** op. cit., p. 590-591.

the typical effect of extinguishing the act considered inconvenient or inopportune. This extinction is called revocation[97]. It is possible that the legislation requires a change in the factual circumstances for this extinction to occur – *restrictive theory of revocation*[98] – or is content with the mere change of opinion of the competent agent – *amplifying theory of revocation*. Either way, the decision to revoke is discretionary[99]. It presupposes the admissibility of both the extinction and the maintenance of the act — both alternatives as objectively optimal — and imputes the choice to the competent agent. The repeal requires the maintenance of the discretionary situation, that is to say, the precariousness of the legal situation.

It should be noted: whenever the expression of the will of the subject is relevant to the definition of the content of the act, it will not be possible to extinguish it by revocation[100]. Bilaterality is incompatible with precariousness. It is possible, however, that due to supervening factual or legal circumstances, the Law requires, and does not allow, the extinction of the act. The act of withdrawal, in this case, the result of binding competence, is called *decay*[101] or *expiration*[102], and has nothing to do with revocation. The unilateral termination of a bidding process or an administrative contract, which is not invalid, is only valid if required by law for a supervening reason, that is, if it results from decay or expiration, and not from revocation[103].

14. Conclusions

01. The expression "discretionary power" was considered inappropriate; replacing it with "discretionary competence" or "discretionary duty-power". It was also considered inappropriate to associate it with the exercise of freedom.

02. Discretion was conceptualized as the prerogative to choose between two or more alternatives, the one considered by subjective criteria to be the best way to achieve the public interest. The foundation of discretion is political pluralism. The benefit of discretion is to define the merits of the decision, the part that must be respected by the control offices.

03. According to the legalistic theory of discretion, it is constituted by the Legislator. By the neo-constitutionalist theory, it follows from the analysis of the Law globally

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97 About the topic: MARTINS, Ricardo Marcondes. **Ato administrativo**, op. cit., p. 310 *et seq*.

98 For all: SUNDFELD, Carlos Ari. Discricionariedade e revogação do ato administrativo. **Revista de Direito Administrativo e Infraestrutura – RDAI**, ano 2, n. 6, p. 379-390, São Paulo, jul.-set. 2018, p. 385-388.

99 Cp. MARTINS, Ricardo Marcondes. **Ato administrativo,** op. cit., p. 315.

100 Idem, p. 319.

101 CINTRA DO AMARAL, Antônio Carlos. **Teoria do ato administrativo.** Belo Horizonte: Fórum, 2008, p 85-87.

102 BANDEIRA DE MELLO, Celso Antônio. **Curso de direito administrativo**, op. cit., p. 464.

103 Cp. MARTINS, Ricardo Marcondes. Encerramento da licitação: exegese do art. 71 da Lei nº 14.133/2021. **Revista Internacional de Direito Público – RIDP**, Belo Horizonte, ano 7, n. 13, p. 9-31, jul./dez. 2022, p. 17-20.

considered. It was considered the latter to be more in tune with the advances in the science of Law.

04. A distinction was made between legislative reference and discretion. When the Legislator assigns to the Administration the responsibility of fulfilling the rule, there will only be discretion when, in the specific case, it is possible to choose between two or more alternatives.

05. It was concluded that indeterminate concepts can result in discretion when the normative system qualifies the administrative agent as in charge of defining in the uncertainty zone whether or not the concept is present. In other cases, the Judiciary has the last word on whether or not the concept is present.

06. Administrative discretion arises only at the concrete level in relation to specific administrative rules, and therefore, in relation to them, the expression "reduction of discretion to zero" is misleading. It was concluded that it is possible for the norm to be incomplete in the abstract and there is a concrete binding, as well as for it to be complete in the abstract and there is discretion in concrete.

07. Fundamental formal principles ensure respect for volitional choices, both of state agents and of individuals. Due to the principle of legality, the Administration must always consider the weight of the formal principle that gives primacy to the considerations of the Legislator. It was concluded that normative completeness increases and incompleteness reduces the weight of this principle, generating, respectively, an indication of binding and an indication of discretion. In special relationships, the weight of this principle is lower, increasing the probability of administrative discretion.

08. It was concluded that the concept of discretion applies to the choices made by the Legislator. The possibility of deciding without being sure of the premises also occurs in the exercise of the administrative function. However, it is possible that there is doubt and still the competence is bound.

09. From the principle of legality follows a quantitative difference between legislative and administrative discretion. A qualitative difference arises from the principle of good administration. It was concluded that the Legislator, unlike the Public Administration, is not obliged to choose the best measure. However, the further the legislative measure departs from the best measure, at the concrete level, the less weight will be given to the formal principle that gives primacy to the considerations of the Legislator.

10. The imposition on the administrative agent to choose the best measure, dictated by good administration, will only result in discretion when the alternatives are considered equally optimal from an objective point of view. If there is objectively only one optimal alternative, there is binding. The duty to always seek the best solution does not always remove discretion, since there are hypotheses in which only subjective criteria define one option as better than another.

11. There are cases in which in the technical field one professional cannot say that the other is wrong, despite disagreeing. In these cases, it was concluded that there was genuine technical discretion. The establishment of technical administrative offices and positions gives rise to a special formal principle which gives greater weight to the fundamental formal principle which gives primacy to administrative considerations. By virtue of it, the administrative decision can only be changed if there is an unequivocal technical error.

12. It was concluded that in the Rule of Law, politics is synonymous with discretion. Alleged political or governmental acts are either legislative or administrative acts. It was concluded that discretion is incompatible with the exercise of the judicial function. It is up to the judge, when provoked, to interpret, and not to choose by will.

13. The hierarchical superior has the prerogative to take upon himself the discretionary competence of the subordinate. This prerogative is not absolute, since the specific weighting, even considering the weight of the special formal principle that gives primacy to the weightings of the hierarchical superior, can rule out abstract weighting.

14. Administrative planning consists of anticipating the exercise of discretion. In the legal system, there is a special formal principle which requires respect for the state plan. Its weight must be considered in the concrete weighing carried out for non-compliance with the plan. Whenever possible, even in the absence of an express legislative rule, the Administration should anticipate the exercise of discretion.

15. The exercise of competence creates a precedent that restricts future action. Changes in understanding must take into account the argumentative burden arising from precedent. If the previous discretionary orientation has had repercussions on the legal sphere of the administrated, the change of understanding will require the establishment of a transitional regime.

16. The subjective criteria on which the discretionary decision is based must be made explicit in the motivation. This allows administrators and control offices to verify whether, in fact, the agent chose the option that, for him, was the best to carry out the public interest. If there is an agonizing situation, in which the alternatives are indifferent to the agent, it is necessary for him to be impersonal in his choice. Even in these cases there is no freedom.

17. In discretionary jurisdiction, the tainted motive generates an absolute presumption of misuse of power, and the error generates a relative presumption. The misuse of powers revealed another qualitative difference between legislative and administrative discretion: in legislative, as opposed to administrative, only objective misuse of power is admitted. Formal defects, and among them the defects of the decision-making procedure, tend to be more serious in the discretionary jurisdiction than in the bound one.

18. In the merit control, the authority verifies whether it agrees with the judgment of convenience or opportunity of another. Unlike revocation, which is a matter of active

administration, it has retroactive effect. It was concluded that the defect of merit is only a defect if it indicates that the act was not, for the authority that issued it, the best alternative to achieve the public interest, whether as a result of intent or error on the part of said authority. Consequently, a defect of merit is, if it is a defect, a defect of legitimacy.

19. In the exercise of the judicial function, it is not possible to control the merits, but the merits, which is a control of legitimacy: it is entirely possible for the Judiciary to carry out a control of the merits in order to know if, in fact, there was discretion, if there was a choice of a legally admitted alternative, if there was no intent or error that leads to the presumption of respectively, absolute or relative, misuse of power.

20. By the system of substitution, the Judiciary replaces the Administration, when provoked, and issues the due act. By the system of the injunction, it condemns to edit the act due. In discretionary jurisdiction, if the jurisdiction is not exercised, the injunction is always in force: the Judiciary condemns the act to be issued. If the Administration remains silent, a fine (*astreinte)* may be imposed in order to convince the competent agent to make the choice. The maintenance of the omission, depending on the specific consideration, may justify the change of subject: the Judiciary determines that the choice be made by another administrative agent.

21. Revocation is the extinction of the administrative act due to inconvenience and inopportunity. It presupposes a precarious situation, in which discretionary competence is maintained. When, for a supervening reason, the law requires the extinction of the act, it is not a question of revocation, but of expiration or decay. This, unlike revocation, is not incompatible with bilaterality.

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