Appreciative activity of public administration: a new vision about public discretion*

Atividade apreciativa da administração pública: uma nova visão sobre a discricionariedade administrativa

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ABSTRACT:

The work entitled *Appreciative activity of Public Administration: a new vision about public discretion* seeks to demonstrate the existence of four, and not just three forms of subjectivity or public autonomy. In addition to the freedom of conformation or configuration, administrative discretion in technical legal sense and the margin of free appreciativity of indeterminate legal concepts, there is also what you want to call administrative appreciativity. The work expresses the theory of the different margins of freedom/autonomy/administrative volition does not address properly the existence of all administrative conduct, that is, fails to deal with subjectivity or public administrative autonomy enabled by non-voluntary sources of law, derived from the content of law, the shortcomings of the legal system and the role of exercise, reporting often to non deontic actions held by public agents who work in direct contact with citizens, with some immediate or urgent, and they've done routine, regular, everyday way. The proposal is therefore theorize administrative appreciativity.

KEYWORDS:

Administrative activity — subjectivity or public autonomy — administrative discretion — administrative appreciativity

RESUMO:

O trabalho intitulado *Atividade apreciativa da administração pública: uma nova visão sobre a discricionariedade administrativa* busca demonstrar a existência de quatro, e não apenas três, formas de subjetividade ou autonomia pública. Além da liberdade de conformação ou configuração, a discricionariedade administrativa em sentido técnico-jurídico e a margem de livre apreciação dos conceitos jurídicos indeterminados, existe, também, o que se pretende chamar de apreciatividade administrativa. O trabalho expressa que a teoria das distintas margens de liberdade/autonomia/volição administrativa não aborda de maneira correta a existência de todas as condutas administrativas, ou seja, deixa de tratar da subjetividade ou da autonomia pública administrativa habilitada por fontes não voluntárias do direito, derivada do conteúdo do direito, dos defeitos do sistema jurídico e do exercício da função, reportando-se normalmente a ações não deônticas, realizadas por agentes públicos que atuam em contato direto com o

cidadão, com algum caráter imediato ou urgente, e que são realizadas de maneira rotineira, regular e cotidiana. A proposta, portanto, é teorizar a apreciatividade administrativa.

PALAVRAS-CHAVE:

Atuação administrativa — subjetividade ou autonomia pública — discricionariedade administrativa — apreciatividade administrativa

Introduction

The current state of the study of the margin of administrative freedom/autonomy/volition shows that it is the legal norm that empowers the representatives of the people to define the option that the public administration will follow. The purpose of this work is to address the "*facet*" related to the margin of choice or to the so-called subjectivity/autonomy in the different types of administrative activity, particularly in relation to routine, regular everyday activities performed and applied by all frontline administrative agents or those working in direct contact with the citizens and having to take immediate or urgent measures. This is known as administrative appreciativity, a new term derived from 'appreciation' for the act or effect of appreciating, that is, recognizing and estimating the merit of something by analyzing and estimating the value of an object, work or fact.

In general, there is no doubting the existence of personal decision-making for public agents in going about their everyday duties. The question is restricted to whether one can or cannot deduce the existence of a margin of freedom/autonomy/volition; if this freedom is that which is known as discretion or some other legal figure. As may be seen in the course of this study, some claim that this margin of freedom is a form of discretionary conduct, the criterion being that a personal decision to act is made based on more or less imprecise legal formulations. Their ideas are based on the concept that vague legal guidelines, while often ambiguous, assure more flexibility, including intentionality. Others argue that it should not be called discretionary, but rather a margin of free choice or discretion derived from undetermined legal concepts, which will in principle lead to one single solution conforming to law. This study will show the existence of another conception, of an appreciative margin of freedom that, despite expanding the scope of the administration's

margin of freedom, does not in any way reduce its potential control in any context, not even the judicial one.

This study therefore addresses a legal phenomenon that exists in practice, but has rarely been covered by students of administrative law — namely public administrative subjectivity or autonomy enabled by non-voluntary sources of law, derived from the content of law, shortcomings of legal systems and the exercise of the agent's own duties, usually referring to non-deontic actions by public agents in direct contact with citizens in immediate or urgent situations or regular everyday routine situations. The proposal is to theorize what has been called appreciativity.

This study does not aim to alter the *nomen iuris* of this well-known practice — which has always been called discretionary or margin of free appreciation. The aim here is to develop a distinct concept which has not been afforded due importance in jurists' sparse coverage of a subject of extreme legal and practical relevance. This study seeks to address this point that is currently under-researched.

Discretion is one of the most controversial and widely discussed issues in the legal world. Obviously the large number of works on discretion is in itself suspect, as if there were a need to repeatedly revisit a never-ending story whose essence always seems to escape us. All sorts of theories, specific lines of analysis and different methodologies address issues that in many cases have been much altered over time. 'Discretion' therefore appears to mean everything and nothing at the same time.

Given the above objectives, this study will address requirements to follow a method appropriate to the structuring of the theme. In order to do so, it will analyze theoretical and empirical studies of so-called police discretion, medical discretion and social work discretion, which show that there are many cases in which the Administration has some degree of freedom that cannot be called 'administrative discretion' in a technical-legal sense. The most successful outcome for these studies will be to show that legal theorists' emphasis on the concept of discretion is reductionist and fails to explain all the phenomena found in the system, therefore emphasis may be placed on how the margin of freedom is exercised on the ground or in the field. Therefore the analysis addresses freedom of action, or rather freedom of appreciation, which operates as if it were a choice/decision, a truly volitional process. Jurists, therefore, simply use the word 'discretion'. There are some who consider it as a type of discretion, the so-called tactical discretion. Others avoid 'discretion' to prefer terms such as 'margin of appreciation' or *Definitionsmacht* (power to

define). In the course of developing explanations for each of the differences and characteristics between appreciativity and discretion, this study will analyze the definition of what may be called administrative appreciativity.

1. Different types of margin of freedom for administrative bodies and entities

The administration's so-called subjectivity or public autonomy entails different types of freedom for administrative bodies and entities, which therefore have elements comprising it, the most extensively studied being the legislature's and government's freedom of conformation, administrative discretion in the technical and legal sense, and margin for free appreciation of indeterminate legal concepts. More than a few argue for the existence of other forms of freedom or distinct margins in the administration's modus operandi other than the three mentioned above. The most frequently mentioned are power to reward, facultative power, evaluative power, and even a prognostic freedom.

António Francisco de Sousa[1] mentions two forms of subjectivity or public autonomy: discretion and valuation/*prógnosis*.

Bernado Diniz de Ayala[2] includes technical discretion and all aspects of bureaucratic justice in the field of free decision-making, but excludes from this context — and therefore classifies as modalities of the Administration's rules of conduct: the interpretation of classificatory concepts; areas of positive and negative certainty of indeterminate legal concepts; probationary freedom; aspects of bureaucratic justice related to probationary freedom; and the law remitting to extra-juridical norms.

Daria de Pretis[3] refers to an administration's *"potere di valutazione (non discrezionale)"* and adds that an administration has different evaluative activities, the most common of which is discretion in the strict sense, but there are other *"apprezzamento"* activities. Her interpretation[4] on this non-

1 SOUSA, António Francisco de. O controlo jurisdicional da discricionariedade e das decisões de valoração e prognose. In: PORTUGAL. Ministério da Justiça. *Reforma do contencioso administrativo.* Coimbra: Coimbra Editora, 2003. v. I: O debate universitário (trabalhos preparatórios).

2 AYALA, Bernardo Diniz de. *O (défice de) controlo judicial da margem de livre decisão administrativa.* Lisboa: Lex, 1995. pg. 130.

3 PRETIS, Daria de. *Valutazione amministrativa e discrezionalità tecnica.* Padova: Cedam, 1995. pg. 363.

4 Ibid., pg. 374.

discretionary valuation of the administration differs from typical discretion because it does not have explicit authorization of the rule, but only a generic or abstract authorization. An imprecise rule must not be mistaken for the generic rule that attributes such freedom. On this point[5] he says:

> *alia luce del principio di legalità e ferma restando (di regola) l'irrilevanza di elementi sostanziali attinenti all'oggetto delle valutazioni, l'unico sicuro critério cui rifarsi al fine di individuare le ipotesi di potere amministrativo di valutazione è dunque necessariamente la norma: il potere deriva all'amministrazione da un'apposita attibuzione normativa. Tuttavia, la norma non dovrà semplicemente "comportare" un'attívítà valutativa da parte dell'amministrazione, perché questa possa essere consíderata alia stregua di potere di valutazione, ma dovrà segnatamente, volutamente, consapevolmente affidare questo potere all'amministrazione.*

De Pretis[6] notes that a rule refers to the characterization of conditions for the administration's action, be it discretionary, non-discretionary evaluation, or merely evaluative. She concludes by clarifying[7] that:

> *Aver riconsociuto il fondamento di poteri amministrativi di valutazione (non discrezionale) per un verso nell'attitudine dell'amministrazione, per la necessaria sottensione della sua organizzazione aI principi di buon andamento e di imparzialità, ad esprimere al meglio giudizi caraterizzati da un irrisolvibile grado di opinabilità e soggettività e, per altro verso, nella necessária previsione legislativa dell'affidamento, qualificata da una consapevole volontà legislativa di attribuzione — desumibile anche in via sistemática dall'ordinamento —, già rileva, in una certa misura, anche rispetto al problema che qui segnatamente ci ocupa.*[8]

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5 Ibid., pg. 376.
6 Ibid., pg. 389.
7 Ibid., pg. 405.
8 This non-discretionary assessment assigned to the administration as power may be controlled by the judiciary, however (ibid., pg. 410): *"devrebbe essere (solamente) quell'aspectto della determinazione amministrativa — da qualificarsi in tal senso come riservata — che non può essere risolto che attraverso una scelta di carattere eminentemente ed irriducibilmente soggestivo, una scelta cioè non condizionata da criteri cui possa essere riconosciuto un grado di oggettività sufficiente ad elevarli a ragionevoli parametri delia verifica giurisdizionale della correttezza della scelta stessa"*. In this respect, non-discretionary evaluative activity may be considered power or prerogative.

Mortimer R. Kadish and Sanford H. Kadish[9] distinguish discretion as such from discretion to determine who has discretion; in this respect, they state that "*discretion is one thing; discretion to determine competence to exercise discretion is quite another*." By using this expression, they are warning *"that the rule-of-law model is not necessarily the ideal model for the functioning of legal systems."*[10] This means that the administration may act without a law authorizing it to do so. They believe that legality exists and must be respected, but there are also official roles that allow for what they call "*deviational discretion*". They see this discretion as "*power to act according to the agent's best judgment in ways that are unauthorized or even prohibited by rules of competence*."[11] The Kadishs claim this phenomenon is singular and anomalous; they even designate it as "*legitimate interposition*."

Satvinder S. Juss[12] agrees with the "*deviational discretion*" notion posed by Mortimer R. Kadish and Sanford H. Kadish and adds: "*even if mandatory rules of law exist to prescribe the exercise of official power, there is still room, in some cases, for officials to act in blatant disregard of those rules*." Juss believes that deviant conduct is only accepted in the legal context because it is consonant with the legal system's basic purpose, "*that is, they replenish the Rule of Law model by making the law conducive to greater individualized justice [...] In addition, however, the day-to-day functioning of the jury, the police, the public prosecutor and the judge is dependent, to no small degree, on the power to deviate from mandatory legal rules. All, however, find ready justification within the legal system itself*."

Hans Julius Wolff, Otto Bachof and Rolf Stober[13] admit that there is a *"discrecionalidad de dispensa"* granted by authorizing exceptions, in other words there are atypical cases that allow the administration to deviate from the legal effects set forth in the rule for reasons shown to be especially relevant.

Denis J. Galligan[14] highlights what he calls "*unauthorized or assumed discretion*," arguing that while discretion is granted by legal norms, there

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9 KADISH, Mortimer R.; KADISH, Sanford H. *Discretion to disobey:* a study of lawful departures from legal rules. Stanford, California: Stanford University Press, 1973. pg. 44.

10 Ibid., pg. 45.

11 Ibid., pg. 66.

12 JUSS, Satvinder S. *Discretion and deviation in the administration of immigration control*. London: Sweet & Maxwell, 1997. pg. 205 and 206.

13 WOLFF, Hans Julius; BACHOF, Otto; STOBER, Rolf. *Direito administrativo* (Verwaltungsrecht Band 1: ein Studienbuch). Lisbon: Fundação Calouste Gulbenkian, 2006. v. 1, pg. 448 et seq.

14 GALLIGAN, Denis J. *Discretionary powers:* a legal study of official discretion. Oxford: Clarendon Press, 1990. pg. 46 et seq; id. *Law in modern society*. Oxford: Oxford University Press, 2007. pg. 319-320.

are other circumstances in which public agents, without being expressly authorized to do so, may assume a margin of freedom to depart from a legal rule for reasons of justice, or practical necessity or convenience and opportunity.[15] The outcome of a departure from the rule may be materialized in an organized and systematic manner in an organization when superiors stipulate how prerogatives will be exercised or manifested only individually, as personal decisions of public agents in particular, providing no verification, or better still, where there is acceptance by a hierarchical superior. While this may be legitimate, Galligan argues for a very cautious attitude to the use of "*unauthorized or assumed discretion*."

Robert A. Kagan[16], who may have been the first to coin the term "*unauthorized discretion*," drew a distinction between an emphasis on following rules rather than fulfilling an organization's end-purposes. Based on these aspects, Kagan distinguishes four modes or styles of applying rules found in American regulatory agencies: "*judicial*," known to everybody; "*legalism*," which ignores the purpose of the rules applied; "*unauthorized discretion*," which ignores formal compliance with the rule; and "*retreatism*," which

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[15] Denis J. Galligan (ibid., pg. 46) argues: "*Departure here must be taken in a broad sense to include acting in direct violation of a legal standard; or acting in a more subtle and roundabout way with the practical consequence that the standard is not followed or only partly followed; or by adopting such a strained or distorted interpretation that the effect is substantially to alter the standard; or, finally, to apply the standard in a selective and piecemeal manner*."

In a more recent publication, (GALLIGAN, Denis J. *Law in modern society.* Oxford: Oxford University Press, 2007. pg. 319) notes in relation to public agents: "*their concern is with point and purpose rather than the strict letter of the law, while their understanding of what constitutes the point and purpose is linked to their social spheres and the underlying social relations. From that perspective, the law sometimes appears inadequate or unsuitable in advancing its own aims and proposes; it may also be contrary to the officials' view of how best to achieve them. At an indefinable point, the process of applying the law subtly becomes modifying, departing from, or marginalizing it. The concern to uphold the point and purpose of the law imperceptibly shifts to being a concern to advance other aims. [...]*

The tendency for officials to evaluate laws against their point and purpose is common to any legal system. Whether it is authorized or not is unclear, and again legal theory has no answer. Unauthorized discretion is a term meant to capture the ambiguity between applying rules according to their exact terms or acting for other good reasons such as pursuing the underlying purpose. Whether or not the term does so adequately, it draws attention to a common phenomenon that shows itself in many ways.

[...]

Unauthorized discretion is a useful notion through which to view the way legal rules reach down into their social context. This, in turn, connects with the issue of what it means for officials to accept the authority of law, the suggestion being that general acceptance of the rule of recognition, and rules made under it, is part of a more complex process of acceptance, with the fuller account to be found in the institutional setting of officials. How law is regarded — what it means, how far it stretches, and how it relates to factors within the various social spheres — is resolved within that setting."

[16] KAGAN, Robert A. *Regulatory justice:* implementing a wage-price freeze. New York: Russell Sage Foundation, 1978. pg. 91.

covers all bases. Operating under "*unauthorized discretion*," decisions are made without paying attention to agencies' rules and principles; nor are the general notions of due process upheld. Agents simply aim to deliver results that favor their own notion of what is best for their agency's objectives. Kagan adds that agents acting in this way make use of rules a posteriori merely to justify their decisions.

Denis J. Galligan[17] argues that the problem is knowing the reasons for an agent's deviation from a rule. From a moral point of view, he adds, there are circumstances in which an agent is not authorized to depart from the legal rule, but they would be making a moral mistake if they followed it. From a legal point of view, he claims that the entire legal system consists of norms, rules and principles, and that the latter enable agents to change and deviate from the rule in specific circumstances. He adds that:

> *the discretion to depart from a binding rule, guided by abstract principles, need not be radically different from any other broad discretion; the risks of arbitrariness and eccentricity can be guarded against by an understanding that the discretion to depart from the rules should be assumed only in very clear cases, and supported by reasons which appeal to both principles and consequences, and by the provision of adequate review procedures.*

Galligan also argues that an alternative approach to justification would be the notion of purpose. Power is conferred on agents and institutions for a specific purpose, which means that each agent has a purpose expressed by means of objectives/purposes or general values that provide the basis for departing from certain norms.

There are even those who state that there is a "*discretionary right*" to carry out certain actions or promote certain objectives. Tom Campbell[18] uses the term "*discretionary rights*" to refer to positive rights to take actions and pursue certain goals; he distinguishes three meanings of what he calls "*discretionary rights*" since the specific contents of rights depends on discretionary assessments. In other words, an agent not only has the power to exercise discretion and a duty to exercise it in the public interest, but also has a right to exercise and freely take action or to pursue certain objectives as they see fit.

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[17] Denis J. Galligan, *Discretionary powers*, op. cit., pg. 51-54.

[18] CAMPBELL, Tom. Discretionary "rights". In: TIMMS, N.; WATSON, D. (Ed.). *Philosophy in social work.* London: Routledge and Kegan Paul, 1978.

Note that the idea of a type of public administrative subjectivity or autonomy other than conformation freedom, or administrative discretion in the legal sense, or free appreciation of indeterminate legal concepts is acceptable in terms of doctrine. However there are different opinions that are treated superficially and unevenly. The fact is that there is a freedom of conduct, or rather of appreciation that operates as if it were a choice/decision, a true volitional process. This would be better named appreciativity. It is not that there is no power of deviated, dispensed or unauthorized evaluation as per the abovementioned authors. Public subjectivities or autonomies are always authorized, but sometimes by generic norms.

2. Different nomenclatures related to appreciativity

Jurists have different terms for what is called administrative appreciativity here. Some claim that any action that entails a significant element of personal judgment is a discretionary act, whether it is strictly governed by legal norms or not. Others argue that however much an action entails personal judgment when making choices/decisions, power that would be justified but not free of limitations, will not involve discretion in the strict technical-legal sense, but rather a word employed in its most common acceptance. This is why most call it discretion or discretionary, as does Denis J. Galligan,[19] who affirms that those who call it "*discrecionalidad*" do so based on two variables:) *"the scope for assessment and judgment left open to the decision-maker by the terms of his authority and the surrounding attitudes of officials as to how the issues arising are to be resolved*."[20] Others, such as Miguel Sáchez Morón[21] and Martin Bullinger[22], refer to a type of discretion rather than appreciativity as used here and favor

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[19] Denis J. Galligan, *Discretionary powers,* op. cit., pg. 23.

[20] Others using "discretion" in this sense include: RICO, José Maria. El poder discrecional de la policia y su control. In: _____ (Coord.). *Policía y sociedad democrática.* Madrid: Alianza, 1983. pg. 217; LIPSKY, Michel. *Street-level bureaucracy:* dilemmas of the individual in public services. New York: Russell Sage Foundation, 1974. pg. 7-14; KADISH, Mortimer R.; KADISH, Sanford H. *Discretion to disobey:* a study of lawful departures from legal rules. Stanford, California: Stanford University Press, 1973. pg. 44; HAWKINS, Keith. Using judicial discretion. In:_____. *The uses of discretion.* Oxford: Oxford University Press, 1992. pg. 39 and 41, among others.

[21] SÁNCHEZ MORÓN, Miguel. *Discrecionalidad administrativa y control judicial.* Madrid: Tecnos, 1994. pg. 130.

[22] BULLINGER, Martin. La discrecionalidad de la administración pública: evolución, funciones, control judicial. *La Ley:* Revista jurídica española de doctrina, jurisprudencia y bibliografía, Madrid, No. 4, pg. 896-911, Oct./Dec. 1987. pg. 902.

the term tactical discretion (*taktisches Ermessen*). This type is configured as discretion that the rules allow the administration *"para que pueda realizar flexiblemente y de la manera más efectiva posible unafinalidad estratégica, adaptándose a Ias cambiantes circunstancias reales del caso individual."* Eva Desdentado Daroca[23] calls this possibility instrumental discretion and configures it as an activity in which the executing public agent has to use his own judgment to choose and use decision making criteria.

Yet others eschew the word 'discretion' and prefer terms referring to "*márgenes*", as does Javier Barcelona Llop,[24] who uses leeway or margin of appreciation. António Francisco de Sousa[25] refers to freedom of conformation while others favor freedom of configuration *(Gestaltungsfreiheit)*, for a legislature's freedom.[26] Again there are writers who mention margin of trust[27] or cognitive margin of appreciation.[28]

A number of different terms have been used for what has been called appreciativity above. Some use "*freedom of maneuver*"[29] to designate any kind of choice freely made by an administration; *"street discretion"*[30] refers to the broad decision-making freedom enjoyed by '*street-level bureaucrats,' "apprezzamento"*[31] refers to the inevitable degrees of freedom when administrators are interpreting the rules they will be applying, or stating facts that will be axiomatic for their roles; finally *"Definitionsmacht"*[32] (power

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[23] DESDENTADO DAROCA, Eva. *Los problemas del control judicial de la discrecionalidad técnicas* (un estudio crítico de la jurisprudencia). Madrid: Civitas, 1997. pg. 61-69.

[24] BARCELONA LLOP, Javier. El régimen jurídico de la policía de seguridad (un estudio de Derecho Administrativo). Bilbao: Instituto Vasco de Administración Pública, 1988. pg. 241 and 242.

[25] António Francisco de Sousa, O controlo jurisdicional da discricionariedade e das decisões de valoração e prognose, op. cit., pg. 412.

[26] FERNÁNDEZ RODRÍGUEZ, Tomás-Ramón. *De la arbitrariedad del legislador:* una crítica de la jurisprudencia constitucional. Madrid: Civitas, 1998. pg. 94.

[27] BARNES VÁZQUEZ, Javier. La tutela judicial efectiva en la Grundgesetz (Art. 19. IV). In: BARNES VÁZQUEZ, Javier (Coord.). *La justicia administrativa en el derecho comparado*. Madrid: Civitas, 1993. pg. 178.

[28] ALONSO MAS, Maria José. *La solución justa en las resoluciones administrativas.* Valencia: Tirant lo Blanch, 1998. pg. 541.

[29] HARLOW, C; RAWLINGS, R. *Law and administration.* 2nd ed. London: Butterworths, 1997. pg. 617.

[30] BROWN, Michael K. *Working the street:* police discretion and the dilemmas of reform. New York: Russell Sage Foundation, 1988.

[31] PRETIS, Daria de. *Valutazione amministrativa e discrezionalità tecnica.* Padova: Cedam, 1995. pg. 363.

[32] FEEST, Johannes; BLANKENBURG, Erhard. *Die Definitionsmacht der Polizei.* Dusseldorf: Bertelsmann, 1972.

João Raposo (RAPOSO, João. Autoridade e discricionariedade: a conciliação impossível? In: VVAA. *Estudos jurídicos e econômicos em homenagem ao prof. Doutor António de Sousa Franco.* Lisbon: Faculdade de Direito da Universidade de Lisboa, 2006. v. 2, pg. 412), states that *"power to define"* means that a range of options are open to police officers in the course of their everyday work.

to define) refers to decisions made on the street to comply with rules under criminal law.

Although these concepts are in many ways similar to that which has been called appreciativity here, the fact is that nobody seems to distinguish between appreciativity (as I have posed here) and discretion; nor are we seeing any profound studies of these terms. Authors merely mention them or stoke controversies but do not analyze and develop their concepts and practices.

I have used 'appreciativity' for several reasons. Firstly to avoid contradicting other concepts or practices, as seen in the previous analysis. Secondly, as I shall show below, what is called appreciativity here is substantially different from any of the other nomenclatures mentioned and deserves a new term, even if this means creating a new word, as explained above in the introduction. Thirdly, because the core idea of the thesis argued here is that, apart from freedom of conformation, administrative discretion in its technical-legal sense and margin of free appreciation of indeterminate legal concepts, is another form of the public administration's subjectivity or autonomy, which has been referred to as appreciativity as mentioned above.

'Administrative appreciativity' may not be the best term to designate the practice to be conceptualized here, but it will be used for the lack of anything better. Perhaps the closest term to appreciativity in English is *leeway*, which is defined as "*a margin of freedom or variation* [...] *freedom to move within limits*."[33] Using "*room*" or "*space*" to designate space for movement is not as clear as "*leeway*". But there is no translation other than *"libertad de acción"* in languages of Latin origin. Another term that could be useful is the German *"willkür"*, meaning agency or arbitrariness, which German dictionaries describe as *"das Handeln nur nach eigenem Belieben, bei dem man keine Rücksicht auf andere Menschen od. Auf irgendwelche Regeln od. Gesetze nimmt,"* meaning taking action only when oneself deems appropriate, without referring to a law or rule. The problem of the latter term is that it denotes arbitrariness rather than discretion in its positive conception.

First of all, a distinct and appropriate name would not be at all bad to designate certain types of administrative free decision making other than discretion or margin of free appreciation. Appreciativity may (and should) be treated as a global autonomous category, thus posing administrative appreciativity.

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[33] See: <www.thefreedictionary.com>.

3. The public administration's appreciative activity

Appreciativity is the margin of freedom that an administration has to make a choice/decision, usually a quick routine call in de facto situations that require one. These are cases in which there are practically procedural guarantees either because there is a case of non-deontic action or because of the immediacy of the action. There is no prior formal motivation in these cases, although an action may subsequently be motivated or justified. [34]

As explained above, these cases cannot be accepted as free-conformation, or discretionary in a legal technical sense or as a margin of free appreciation of indeterminate legal concepts, but which also confer value in the choice/decision-making process.

The problem is in the analysis of the Executive Branch's different types of administrative roles. In the exercise of its different activities, the administration has a series of prerogatives that are all guided by *"subjectivity"* or *"autonomy"*, including extensive power of governing the citizens.[35] These subjective valuations that permeate the Administration's entire work will vary depending on different ways of acting, so they may constitute an administrative act, an administrative constraint or a technical or administrative activity.

This is so because administrative action requires a certain freedom, and this margin is inseparable and inescapable from the very essence of human action. The characteristic of human action is precisely freedom. The form of attribution will differ depending on the action undertaken. In appreciativity, the public agent is subject to a factual assumption, in his or her own judgment, in order to assess whether or not it is covered by certain legal provisions, thus enjoying a freedom of movement, particularly given the unpredictable nature of real life phenomena which may require its intervention. This margin of maneuver is not usually explicitly stated in legal rules that qualify competence

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[34] Take a situation in which a police officer has to deal with a public-safety threat; a doctor has to treat a patient in imminent danger of dying; a firefighter has to choose between saving the life of only one of two people in a fire; monetary authorities have to curb speculative trading; government agencies have to respond to unforeseen natural disasters. In all these situations, the administration must think and act promptly and firmly.

[35] Jean-Claude Venezia (VENEZIA, Jean-Claude. *Le pouvoir discrétionnaire.* Paris: LGDJ, 1959. pg. 127) notes: *"le pouvoir de commandement de l'administration se traduit, en effect, par diverses attitudes qu'elle adopte dans ses relations avec les administres; soit qu'elle prohibe, soit qu'elle provoque, soit qu'elle permette, l'administration dispose en géneral d'un large pouvoir discrétionnaire"*.

or conduct, since it is inherent and natural to some functions and is therefore implicitly attributed and usually inferred from a systematic interpretation.[36]

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[36] See the example of the police: Pietro Virga (VIRGA, Pietro. *La potestà di polizia*. Milan: A. Giuffrè, 1954, pp 41, 54, 55 and 57) notes that the police have broader discretion than other powers due to the wide range of situations they tackle; nevertheless, he notes that recognition of discretionary power that may be exercised to restrict freedom does not entail authorization to act absolutely without limits; and the power to assess circumstances (time or place) required for the exercise of discretionary power must be conferred on the competent authority, hence rules enabling police officers to decide when and how they will intervene, as well as the means to be used in each case.

Filippo Satta (SATTA, Filippo. *Principio de legalitá e pubblica amministrazione nello stato democratico.* Padua: Cedam, 1969. pg. 214 et seq.) mentions that there is no discretion in the strict sense of the word in relation to the police. Nevertheless, José Maria Rico (José Maria Rico (Coord.), *Policía y sociedad democrática,* op.cit., pg. 212) claims that police discretion applies to *"cualquier toma de decision que no está estrictamente regida por reglas legales sino que contiene más bien un element significativo de juicio personal"*. On the same lines, Carl B. Klockars (KLOCKARS, Carl B. *The idea of police.* Thousand Oaks: Sage Pubns, 1985. pg. 92-121) adds: *"un official de policía debe ejercer la discrecionalidad siempre que los límites efectivos de la norma le dejen la libertad de realizer la elección entre empreender una acción o no."*

Henri Souchon (SOUCHON, Henri. *Admonester:* du pouvoir discretionnaire des organes de police. Paris: Editions du centre national de la recherche scientifique, 1982. pg. 140 e 141): *"Sur le plan théorique, le pouvoir discrétionnaire consiste, pour un policier, à évaluer la dangerosité d'un délinquant pour la société et à décider si elle doit prévaloir sur l'intérêt du coupable à préserver sa liberté jusqu'à sa comparution devant un juge. [...]*

En d'autres termes, le pouvoir discrétionnaire de la police est fondé en principe sur deux facteurs: les caractéristiques de l'individu déviant et la situation dans laquelle il se trouve par rapport au plaignant". Michael K. Brown (Michael K. Brown, *Working the street,* op. cit., pg. 3) studies a police officer's routine "*decision to stop and 'shake' two black kids walking down the street; a decision to let a drunk driver meander on his way; a decision to forcibly break up a fight between a man and his wife; a decision to pull the trigger to stop a suspected 'felon' as he recedes into the darkness*." Brown (ibid., pg. 4), sees the inevitability of discretion in police work as arising from two factors: "*the ever present reality of scarce resources and the ambiguity of the law*."

Denis J. Galligan (Denis J. Galligan, *Discretionary powers,* op. cit. pg. 49 e 50) notes that the system must allow police officers to freely decide how to act, for example, when making an arrest. The problem, he adds, is that a decision to use "unofficial discretion" is up to the police officer in question; it would be preferable if it were up to senior officers. In the case of a police officer applying or not applying a rule, Galligan notes that studies show that the main task is to keep order, but at the same time their role is part of a complex social system that generates particular attitudes, norms and informal conventions which encourage and reward individual conceptions of effectiveness. Taken together, the latter exert considerable influence on police actions and attitudes, thus powerfully inducing "*unauthorized or assumed discretion*."

Ranelletti (1912 apud AGIRREAZKUENAGA, Iñaki. *La coacción administrativa directa.* Madrid: Civitas, 1990. p. 164) recognizes that the police have broad discretionary power because it is impossible to predict and determine all causes of disturbances, or the means and forms to use in every single supposition. The duty to act quickly and safely requires *"cierto arbitrio"*, a certain "discretion" or ability to make assessments or appreciate when a police officer has to take action and guarantees for individuals are reduced to the possibility of appealing against administrative acts or the requiring responsibility.

A. Turk (1969 apud João Raposo, Autoridade e discricionariedade: a conciliação impossível?, op. cit., pg. 412), *writes*: "in fact the police have a wide range of alternatives to the strict and effective application of the law: some legal, others illegal, yet others located in a gray area not

expressly covered by law or manuals. The police may spontaneously set out to find and arrest offenders, or operate only when evidence is offered. You can ignore an illegal activity, unless it is associated with other factors, such as when you close your eyes to the weekly poker games in privileged urban areas, but stop at a bench where cards are played in a black neighborhood. To be able to do justice on the margins of records, to arrest or just admonish. Briefly: the police have at their disposal all possibilities: from enthusiasm to apathy, from fanaticism to subtle discrimination between similar situations, from legal to illegal behavior."

António Francisco de Sousa (SOUSA, António Francisco de. Discricionariedade na atuação policial. In: VALENTE, Manuel Monteiro Guedes. *Reuniões e manifestações de atuação policial*. Coimbra: Almedina, 2009. pg. 215) also recognizes police discretion and states:

"The fundamental question posed in terms of police discretion is not knowing whether there is discretion, but what its scale entails in a concrete case." Guedes (ibid., pg. 216-219) argues that the forces of order and public safety are part of the administration and therefore subordinated to the principles of administrative action, but, because of their importance, omnipresence and meaning, he highlights the principle of legality and proportionality. In relation to these principles, there are fundamentally three theses related to police discretion:

1) the classical thesis argues that the police authority enjoys broad freedom of action to be able to act in good time and appropriately for the constantly changeable circumstances they encounter in their everyday work. Marcello Caetano (CAETANO, Marcello. *Manual de direito administrativo.* Coimbra: Almedina, 1997. v. II, pg. 1124) argues: "It has never been possible, however, to completely confine police work to legality, to reduce it to mere law enforcement activity in the precise terms regulated by the law. Although in modern law, police powers, like all forms of competence, must be legally conferred; the fact that the authorities who exercise them are constantly confronted with manifold manifestations of individual conduct and social life in so many unforeseeable cases at least as regards place, time and mode of production, leaves them with a certain degree of freedom of action," and concludes stating that "The police have thus always been a sector which is only partially controlled by law." This interpretation has been much criticized for suggesting that discretion is always the product of rules;

2) the traditional mixed thesis emphasizes that police action to prevent danger is dominated by the authority's discretion, whereas police action against crime which is dominated by the principle of legality; and

3) the reworked mixed thesis states that discretion is a characteristic (and requirement) of police actions taken to prevent danger, unlike their activity of criminal prosecution, which is dominated by the principle of legality. However, certain areas of legal repression are also dominated by discretion.

Others such as Manfred Rehbinder (1981 apud GOMEZ BENITEZ, José Manuel. *El ejercicio legítimo del cargo:* discrecionalidad administrativa y error en derecho penal. Madrid: Universidad Complutense — Facultad de Derecho, 1980. pg. 54), deny the existence of real police discretion and instead posit the existence of indeterminate legal concepts. Alfonso J. Villagómez Cebrián (VILLAGÓMEZ CEBRIÁN, Alfonso J. *Las fuerzas y cuerpos de seguridad:* del orden público a la seguridad ciudadana. Galicia: Ara Solis, 1997. pg. 192): *writes "la configuración que la doctrina y la jurisprudencia han hecho del concepto y extensión de la discrecionalidad administrativa no puede ser aceptada en la caracterización jurídica de la actividad de la policía de seguridad".* They argue against the claim that the police may choose between alternatives that are equally fair from a legal point of view. However, police appreciation is part of what the author calls the *"margen de confianza necesario"* that legislators grant the police administration, but in all cases contrasted with legal reduction and control techniques.

F. L. Knemeyer (KNEMEYER, F. L. Literatur — Polizei— und Ordnungsrecht. *Neue Zeitschrift fur Verwaltungsrecht,* yr. 2, No. 20, 2001, pg. 50. In: Javier Barcelona Llop, *El régimen jurídico de la policia de seguridade,* op. cit.) argues that the police *"se halla vinculada desde el instante en que examina los casos con los que se encuentra, por muy insignificantes que sean: los policías, en su relación con los administrados, al examinar cada suceso que afecta al ámbito policial, tanto en su fase de reflexión, como de decisión, están actuando de un modo vinculado".* He claims that rather than

In no case, therefore, is there any doubt as to the existence of personal decision-making by the public agent in their everyday conduct.[37] On the contrary, it is necessary[38] and indispensable.[39] Peter Neyroud and Alan Beckley[40] warn that discretion is not something evil which should be restricted or eliminated. Rather, it must be seen as a reality that necessarily exists and instead of trying to limit it by means of strict control and inflexible rules, agents should be taught to practice it correctly through an effort to add to elements of activity a constant attitude of reflection, weighing and accountability for

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administrative discretion, this involves the application of indeterminate legal concepts that allow for one single fair solution, based on the reality-integrated function that is predicated of any legal concept.

The existence of police power of appreciativity is recognized from a different perspective in:: FERNÁNDEZ RODRÍGUEZ, Tomás-Ramón. Las medidas de policía: su exteriorización e impugnación. *Revista de Administración Pública,* Madrid, No. 61, pg. 125-141, Jan./Apr. 1970. pg. 136 et seq.; arising from coercion in general, VILLAR PALASÍ, José Luis. La actividad industrial del Estado en el derecho administrativo. *Revista de Administración Pública,* Madrid, yr. 1, No. 3, pg. 53-129, Sep./Dec. 1950. pg. 58 and 59; and in relation to administrative police in the broad sense, GARRIDO FALLA, Fernando. Los medios de la policía y la teoría de las sanciones administrativas. *Revista de Administración Pública,* Madrid, yr. 1, No. 28, pg. 11-50, Sep./Dec. 1959. pg. 27 and 28.

37 José Maria Rico's acceptance of discretionary power does not preclude his noting two negative consequences: a) unequal treatment, since not all policemen act in the same way in similar circumstances, and recalls that investigations conducted in the United States have shown the reality of discriminatory and different treatment for blacks, the less privileged classes and groups of adolescents; and

b) excesses and errors committed when exercising discretionary power *"el hecho de ser poseedor de un poder legal casi absoluto y de un poder real extensible a voluntad, así como el caracter impreciso y anticuado de ciertas legislaciones dan a menudo como resultado que la policía sobrepasa los límites de la legalidad"* (José Maria Rico, El poder discrecional de la policía y su control, op. cit, pg. 217).

38 P. A. J. Waddington (WADDINGTON, P. A. J. *Policing citizens:* authority and rights. Londres: UCL Press, 1999, pg. 31) argues that discretion is a crucial aspect of police activity in relation to decision-making processes, since "*discretion is the pivot upon which the exercise of authority revolves*."

39 On police discretion, Lord Scarman (1981 apud Javier Barcelona Llop, *El régimen jurídico de la policia de seguridade,* op. cit.) states: *"el ejercicio de la discrecionalidad se encuentra en el fundamento mismo de la acción (at the heart of the policery function). Es innegable que hay una única ley para todos y es justo que así sea. Pero es igualmente reconocido que el éxito policial depende del ejercicio de la descrecionalidad en la forma de hacer cumplir la ley. La Buena reputación de la policía depende del conocimiento práctico y del discernimiento que los policías demuentran en las circunstancias particulares de los casos e incidents que requieran su intervención, la discrecionalidad es el arte de acomodar la acción a las circunstancias particulares. Es el trabajo diario de los policías."*

This is argued by: BLUNTSCHLI, Johann G. *Derecho público universal.* Madrid: Góngora, 1880. t. II, pg. 280; ORLANDO, V. E. *Principios de derecho administrativo.* Madrid: Instituto Nacional de Administración Pública, 1978. pg. 187 and 188. Others point to the significance of discretion in frontline practice, see: LEWIS, J.; GLENNERSTER, H. *Implementing the new community care. Buckingham:* Open University Press, 1996. pg. 18; O'SULLIVAN, T. *Decision making in social work.* Basingstoke: Macmillan, 1999. pg. 35; and others.

40 NEYROUD, Peter; BECKLEY, Alan. *Policing, ethics and human rights.* Oregan: Willan Publishing, 2001.

the decisions they make, which are indispensable characteristics for the development of public services.

Robert E. Goodin[41] questions the necessity and indispensability of appreciativity by stating that it cannot logically be eliminated. He asserts that "*some kinds of discretion are ineliminable, and some problems with discretion are apparently insurmountable", nevertheless, "eliminating such discretions may be inadvisable, but it is not logically impossible. [...] These are discretions that are inevitable, in the sense that they are logically necessary to the operation of a system of rules at all. Such discretions are truly ineliminable: they cannot be eliminated except by eliminating the system of rules itself*." He therefore corroborates the fact that appreciativity may be removed from one particular agent to another or even from one sphere of power to another.

The existence of appreciativity is seen as the result of practice produced: "*away from direct scrutiny by managers, who may themselves also be ignorant of the existence of, or detail in, policy guidance and regulations*."[42] Indeed those in charge of shaping public policies are usually professionals or former professionals from the sector or segment that is to be regulated, and they are aware that the procedures will be ignored or interpreted by professionals who, in performing their functions, will themselves be formulating their own policies.[43] This is so because every professional has a certain autonomy, which is constantly subject to their superiors' attempts to control them and at the same time are subject to maneuvers and strategies extending autonomy for the management of dilemmas that are integral parts of their tasks. Therefore the scale of the margin of freedom is influenced by the cultures around the different professional classes.[44]

Michel Lipsky[45] is one of the leading advocates of a space of freedom for frontline staff or those in direct contact with citizens, and thus notes "*unlike*

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41 GOODIN, Robert. E. Welfare, rights and discretion. *Oxford Journal of Legal Studies,* Oxford, v. 6, No. 2, pg. 232-261, Summer 1986. pg. 233 e 237.

42 PRESTON-SHOOT, M. Regulating the road of good intentions: observations on the relationship between policy, regulations and practice in social work. *Practice:* Social Work in Action, London, v. 13, No. 4, pg. 5-20, Oct./Dec. 2001. pg. 9.

43 Analyzing that public policy is what front-line agents actually do.

44 Diogo de Figueiredo Moreira Neto (MOREIRA NETO, Diogo de Figueiredo. *Quatro paradigmas do direito administrativo pós-moderno:* legitimidade, finalidade, eficiência, resultado. Belo Horizonte: Fórum, 2008. pg. 35) states that a culture is shaped when behaviors are imitated due to their presumed functionality for the satisfaction of shared interests, individual or collective, and become customs due to repetition of habits, thus producing an institution as a certain behavioral complex stabilized in a society, which becomes a regular pattern of socially predictable behavior of social actors to be posed under certain circumstances.

45 Michel Lipsky, *Street-level bureaucracy,* op. cit., pg. 14 e 15.

lower-level workers in most organizations, street-level bureaucrats have considerable discretion in determining the nature, amount, and quality of benefits and sanctions provided by their agencies." He argues that many of the problems he deals with in his book would vanish if agents did not have discretion, but he points out that "*certain characteristics of the jobs of street-level bureaucrats make it difficult, if not impossible, to severely reduce discretion. They involve complex tasks for which elaboration of rules, guidelines, or instructions cannot circumscribe the alternatives*." This is because these agents usually work in very complicated situations, which makes it difficult to reduce discretion to pre-programmed formats. He also argues that the fact that the conduct of these agents has to respond to situations of a human scale makes it difficult to eliminate them. Eliminating the discretion of these agents will oblige them to do the same for the discretion of low-level agents.

As part of their everyday activities, many public agents use their own judgments.[46] Hierarchical superiors establish criteria or policies, but when they are applied there is a margin of freedom and they are usually performed by agents who are in direct contact with citizens.[47] Hence the importance of

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[46] Jurists argue as whether this judgment has been increased or reduced. In relation to social discretion, Michelle A. Johnson et al (JOHNSON, Michelle A. et al. Implementing welfare-to-work services: a study of staff decision-making. *Families in Society:* The Journal of Contemporary Social Services, Milwaukee, v. 87, No. 3, pg. 317-328, Jul./Sep. 2006. pg. 317), emphasize increased discretion for frontline agents implementing social policy in their everyday work: "*Today frontline staff have more flexibility and discretion in their jobs than they had prior to welfare reform*." They go on to talk about agents' discretion when influencing access for participants and defining the terms of social participation. They mention that the level of discretion is reflected in the design of the social program which requires an agent to offer different kinds of assistance to a participant when they first access the system, in the form of financial assistance or services.

Contrariwise, Tony Evans e John Harris (EVANS, Tony; HARRIS, John. Street-level bureaucracy, social work and the (exaggerated) death of discretion. *British Journal of Social Work,* Oxford, v. 34, No. 6, pg. 871-895, Sep. 2004. pg. 871) examine the discretionary power of street agents. Many forms of management eradicate or reduce discretion, not only because they use information technology, but also tight control and supervision. Both perspectives tend to treat professional discretion as a phenomenon that is either present or absent and based on the assumption that discretion is obviously a "*good thing*". They argue that the proliferation of rules and regulations should not be synonymous with tight control over professional discretion, since, paradoxically, the more rules are introduced, the more discretion there will be. They also point out that discretion is neither good nor bad. In certain circumstances, it may be an important professional attribute while in others it may be a pretext for policy makers to make political decisions to hide behind, or it may be an opportunity for professionals to misuse their power.

[47] Normally, the police commissioner has the duty to enforce criminal law, no one has the power to force him to do his duty: *"the responsibility for law enforcement lie on him. He is answerable to the law and to the law alone."* [Regina v. Commissioner of Police 1968 2 W.L.R 903-4 (CA.)]. Commissioners usually have the subjective role of framing public policy.

the notion of an ideal public agent. According to J. Tompkins, M. J. Laslovich and J. D. Greene,[48] a public agent should be "*one who is politically sophisticated, technically competent, well grounded in conceptual and theoretical knowledge, and cognizant of the values that connect the means and ends of government*."[49]

It should be recalled that the administrative apparatus comprises agents at different levels, each and every one doing important tasks in the administrative machine. But when the focus is on the administration's relationships with third parties, the truth is that it is not the directors who carry them out. To think that they are the ones who have direct agreement with citizens does not correspond to administrative reality. Frontline staff who are directly in contact with citizens are the ones that matter.

Many routine or regular choices and decisions made by these public agents involve much broader margins of freedom than one might think. It may be assumed, for example, that the basis for non-enforcement of a given normative obligation is often a deliberate action, even if not existing in exceptional rules. And so it happens for having an idea of the purpose of the norm, since it is already considered obsolete or unjust; due to lack of financial means; or a social system unable to meet necessities; because the culture of the locality authorizes a certain circumstance but does not consider it so severe and even allows it among many other situations. [50] An ability to show appreciativity may lead to better results that are more beneficial for society, less injustice and, therefore more effective and efficient outcomes.[51]

The important aspect, however, is knowing that room for maneuver enjoyed by these agents is granted differently from those for governing

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[48] TOMPKINS, J.; LASLOVICH, M. J.; GREENE, J. D. Developing a competency-based MPA curriculum. *Journal of Public Administration Education,* Lawrence, v. 2, No. 2, pg. 117-130, Summer 1996. pg. 121.

[49] Vollmer (1936 apud João Raposo, Autoridade e discricionariedade: a conciliação impossível?, op. cit., pg. 417) states that the ideal police officer is one who has, at the same time, "the wisdom of Solomon, the courage of David, the patience of Job, the leadership of Moses, the sensitivity of the Good Samaritan, the strategy of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance of the Carpenter of Nazareth, the science of Galileo, and lastly a thorough knowledge of all branches of the Natural, Biological and Social Sciences."

[50] Punitive or sanctionary legal norms do not attribute power to police agents. Their duty is to enforce rules when they think they are fair or when they think enforcement is not inconvenient, or not excessively costly. This obligation is posed in the legal norm and is implicit in the basic concept of the role of the police.

[51] Denis J. Galligan (Denis J. Galligan, *Discretionary powers,* op. cit., pg. 48) points out that a distinction is needed in the case of an inefficient, unreal or unjust rule or one that is acceptable to everybody, but for which residual discretion may depart from the rule and this is a necessary element for justice or morality. He concludes that the difference is a fine line.

bodies. While discretion derives from legal rules, appreciativity is derived from other sources.

However, they cannot be seen as usurping authority or breaching the principle of legality, since the system modulates their functions for this purpose. After all, there is no substantial sanction against these choices or decisions; on the contrary, there are often penalties if the agent does not respect order. It is well known that legislators do not make rules perfectly; all situations likely to happen[52] cannot be foreseen in detail, so non-enforcement of a rule, for example, often serves to some extent to offset this inability.

Appreciativity in fact is inferred from the systematic interpretation of a set of norms. It follows, therefore, from the destination of the pretension, that is, from the composition and functioning of the bodies competent to determine its scope.

Every agent has their tasks and competence attributed by a legal norm, even if it is generic. Unlike discretion, appreciativity is usually granted by sources other than standards of conduct and competence, such as the government's political guidelines; directives issued by the administration itself; the hierarchical administrative authority; codes of conduct and ethics; guides, activity manuals; training programs; training schools; the continuing resolution of similar cases (aspects known as administrative precedent); signing, prior to the exercise of powers, of an agreement for a private subject; court statements issued by a body other than the one that should initiate, instruct or resolve the procedure, known as a report; and even intuition.[53]

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[52] Alejandro Nieto García (NIETO GARCÍA, Alejandro. Reducción jurisdiccional de la discrecionalidad en materia disciplinaria. *Revista de Administración Pública,* Madrid, yr. 14, No. 44, May/Aug. 1964. pg. 155) notes that "la *realidad administrativa es algo que no puede encerrarse en fórmulas, por muy perfectas que sean".*

[53] Peter Mirfield (MIRFIELD, Peter. *Silence, confessions and improperly obtained evidence.* Oxford: Clarendon Press, 1997. pg. 125) notes in relation to policing powers: "*The investigative powers of the police are both the creatures of, and regulated by, the law. There is, of course, a police discipline code, to which all officers are subject. The matters with which it deals, though often of great public significance, are clearly internal to the police. The general law of the land regulates police powers in three distinct ways. First, the common law continues to govern some aspects of their conduct. For example, the doctrine requiring certain information to be given to persons arrested or searched was established by Christie v. Leachinsky, though it now has statutory force. Christie would seem to be quite capable, because it is clearly based upon a general principle that citizens should be informed of what coercive powers are being used against them and of the reason why, of generating equivalent requirements in respect of newly-created police powers. Furthermore, the general law, applicable to all citizens, may prove significant in some cases. It was undoubtedly a very significant factor in the decision in Matto v. Wolverhampton Crown Court that, at the time when the police had required the accused to provide them with a sample of breath, the officers were knowingly trespassing upon the accused's land. Secondly, statutory provisions now impinge very extensively indeed upon the exercise of investigative powers.*

The attribution of appreciativity to choose or decide between acting or not acting and, once decided, choosing between many possibilities, alternatives or options to follow means that the agent, in case of collision with other goods or tasks, may prioritize the most urgent ones and delegate secondary matters than can wait to the background.[54]

Many administrative actions are outside the scope of any regulation and the enabling sources do not always describe all possible conducts. Even so, this action is an administrative activity of provision for direct attention of public interests to which its direct executor is surrounded by "*subjectivities*."

Such subjective decisions are practically immune to control, since the situation of imminence cannot be reproduced in a process. This does not mean that there is no limit to appreciativity, but they must not be applied in a very flexible manner (absolute errors of appreciation, totally disproportionate measures, etc.), otherwise the sense of legal accountability could paralyze decision-making bodies, so the aim of imposing some abstract rigid limits on their exercise would be total futile.

Obviously an executing agent acting with immediacy or urgency will often choose weakened alternatives or options of elements for actions based on the law, causing "*tragic*" actions. It is basically on these occasions that internal or external control will be able to hold back this margin of freedom within limits.

The most wide-ranging statute is the 1984 Act, but there are many other. Thirdly, there are the codes of practice mane under the Act. At present, there are five such codes, regulating the exercise of powers of stop and search (Code A), the exercise of powers to search premises and seize property found therein (Code B), the detention, treatment, and questioning of members of the public (Code C), the identification of alleged offenders (Code D), and the tape-recording of interviews (Code E)."

On these codes, Peter Mirfield states (op. cit., pg. 126): "*The form in which the codes are drafted is such that there may be as many as three different elements. There are, in all of them, numbered paragraphs, many of which are drafted in duty-imposing or power-conferring form. Some of them also have annexes, in differently numbered paragraphs, to which reference is made in the main part and which, again in many cases, impose duties of confer powers. Finally, there are what sub-headings in the codes describe as "Notes of Guidance" The clear purpose is to provide guidance to police officers with regard to the exercise of their duties and powers. However, in so doing, they often seem to qualify, limit, or even extend those duties and powers*."

These "*notes for guidance*" provide more detail about their application and interpretation for the sake of their executors and others. Codes of conduct should to be interpreted in light of their notes.

Faced with such a situation, it is also important to bear in mind that case law often acts as a guide for the executor rather than merely as a circumstance for another judge. It is not the primary function of the Courts to discipline, educate or punish the administration, but it is a fact that on resolving disputes, it does acts in this manner, and thus helps the administration to govern.

54 António Francisco de Sousa, Discricionariedade na atuação policial, op. cit., pg. 221 e 222.

Appreciativity actions of administrative executors are hard to control. But once controlled, all legal elements in the law are available. This means that the elements available for immediate or urgent action are distinct from the elements arranged at the time of control, since often the first administrative executors are assigned a value judgment influenced by psychological questions, pressure, level of information, academic level, prejudices,[55] among others, that may appear in the control phase and can only subsequently be evaluated through all norms, rules, principles and other elements of law that this executor could never be able to analyze at the facto fact administrative period.

To leave this executor under the eternal tension of being responsible for such immediate or urgent action or, on the contrary, for its omission, may be equated with failing to protect the administrative action, the public service and, consequently, the citizens. In addition, disinterested professionals may be promoted by the public service because of the fear of assuming risk and being personally liable for immediate or urgent conduct. The truth is that if every legal rule were to be strictly enforced, we would live in an unbearable society. Note that the agent's individual decision does not change the administered citizens' status[56]

Conclusions

The so-called subjectivity or public autonomy of the administrator involves different types of freedom for administrative bodies, which therefore has elements that comprise it, the most widely studied of them being the freedom of conformation enjoyed by the legislature and the government, administrative discretion in the technical— legal sense and free appreciation of indeterminate legal concepts. There are many who argue that there are other forms of freedom or margins other than these three. The most often mentioned are power to reward, facultative and evaluative power, and prognostic

[55] Not to forget that the administration acts through individuals with their particular weaknesses, passions, preferences and points of view; on certain occasions, other interests prevail rather than the objective interests of the collectivity they are supposed to (FERNANDEZ RODRÍGUEZ, Tomás-Ramón. *De la arbitrariedad de la administración.* 5th ed. Madrid: Civitas, 2008. pg. 134).

[56] Imagine a person who has broken a criminal law and a police officer who has decided not to arrest but merely warn him; his legal situation will be that of an offender and he will still be subject to legally required punishment.

freedom. There are also those who argue that there is a deviational discretion, meaning the power to act according to the best judgment of the agent, even if not authorized or even prohibited by competence rules. According to its proponents, deviation conduct is only acceptable as a legal system context because it is consonant with the basic purpose of the legal system. Others prefer the term discretionary dispensation as an exceptional authorization in atypical cases that allow the administration to deviate from undertaking legal effects established in the rule for proven reasons of particular relevance. There are yet others who prefer to mention unauthorized or assumed discretion, such as cases in which public agents assume — without express authorization — a margin of freedom to depart from the legal rule for the sake of justice, practical necessity or convenience and opportunity. Public agents are more concerned about the rules' purpose than the strict letter of the law.

It is then argued that there is a fourth form of subjective manifestation or public autonomy that is distinct from the abovementioned three. It has hardly been developed by jurists and should preferably be termed 'administrative appreciativity'. Administrative appreciativity is the margin of freedom that the administration has to make a choice/decision, usually a quick routine call in situations that require it. These are cases in which there are practically no procedural guarantees, either because there is a case of non-deontic action, or due to the immediacy of the action. There is no previous formal motivation in these assumptions, although it may subsequently motivate or justify the action. Appreciativity in reality is inferred from the systematic interpretation of a set of rules. It is therefore deducted from the allocation of the benefit, i.e. from the composition and functioning of the competent bodies able to determine its reach.

Jurists have different terms for what has been called administrative appreciativity herein. Some claim that any action that entails a significant element of personal judgment is a discretionary act, whether or not it is strictly governed by legal rules. Others argue that however much an action has an element of personal judgment, when making choices/decisions, a power that would be justified but not free of limitations, it will not involve discretion in the strict technical-legal sense, but rather a word employed in its most common acceptance. So most simply use discretion (or discretionary). Some see it as a kind of discretion and what I have termed appreciativity is called tactical discretion *(taktisches Ermessen)* or instrumental discretion. Yet others eschew 'discretion' and prefer freedom or margin of appreciation, freedom of conformation or freedom of configuration *(Gestaltungsfreiheit*, margin of trust

and cognitive margin of appreciation. There are also those who call it freedom of maneuver, "*street discretion*" or finally "*Definitionsmacht*" (power to define). The use of a new *nomen iuris* avoids contradiction with other concepts or practices, since the meaning afforded appreciativity here is substantially different from any of the nomenclatures mentioned above. In other words, they involve unacceptable assumptions such as freedom of configuration, discretion in the technical-legal sense, or as margin of free appreciation of indeterminate legal concepts, but also grant subjectivity or autonomy in the decision-making process. Thus, a new concept or practice in fact.

Just as defining administrative discretion is no easy matter, defining administrative appreciativeness is hard, too or even harder since both terms are ambiguous and the latter has not been developed by legal theorists. However, since it is a kind of public subjectivity or autonomy genre, three essential elements may be extracted as characteristic of administrative appreciation: subjective, only public administration entails this type of subjectivity, in particular frontline staff or those who work in direct contact with citizens and make use of their discernment or judgment to keep order. Therefore, I shall opt for criteria and subcriteria, ponder conflicting interests and factors, and assign relative weightings to alternatives or options. Formal, derived from the indeterminacies of the law, such as its content, the legal system's shortcomings and particularly work-related practices, usually referring to non-deontic actions, without prior administrative procedure and not necessarily having a formal administrative act at the end of their exercise. Volitional, because there is a margin of freedom that is projected on facts and interpretative criteria, its intensity varying depending on the context in which it is exercised. This freedom of conduct is often regular everyday routine carried out for some immediate or urgent purpose. In addition to these essential elements, appreciativity has an objective element, which is the duty of care for general and specific public interests. Except for the last element, which is omnipresent throughout public administration, the other elements have substantial differences in relation to elements of discretion as such and therefore must not be treated in the same way, but this would be a matter best left for future study.

One may conclude that the administrative discretion concept has not been de-characterized. Rather, there is added support for the generic idea of public subjectivity or autonomy. The notion for this new concept may be added in two ways: by inclusion, since there must necessarily be a margin of freedom/autonomy/volition; or by exclusion, since anything not identified as

conformation freedom, administrative discretion or margin for free appreciation of indeterminate legal concepts must be administrative appreciation.

References

AGIRREAZKUENAGA, Iñaki. *La coacción administrativa directa.* Madrid: Civitas, 1990.

ALONSO MAS, María José. *La solución justa en las resoluciones administrativas.* Valencia: Tirant to Blanch, 1998.

AYALA, Bernardo Diniz de. *O (défice de) controlo judicial da margem de livre decisão administrativa.* Lisboa: Lex, 1995.

BARCELONA LLOP, Javier. *El régimen jurídico de la policia de seguridad (un estudio de derecho administrativo).* Bilbao: Instituto Vasco de Administración Pública, 1988.

BARNES VÁZQUEZ, Javier. La tutela judicial efectiva en la Grundgesetz (Art. 19. IV). In: ____ (Coord.). *La justicia administrativa en el derecho comparado.* Madrid: Civitas, 1993. pg. 135-206.

BLUNTSCHLI, Johann G. *Derecho público universal.* Madrid: Góngora, 1880. t. II.

BROWN, Michael K. *Working the street:* police discretion and the dilemmas of reform. New York: Russell Sage Foundation, 1988.

BULLINGER, Martin. La discrecionalidad de la administración pública: evolución, funciones, control judicial. *La Ley:* Revista jurídica española de doctrina, jurisprudencia y bibliografía, Madrid, No. 4, pg. 896-911, Oct./Dec. 1987.

CAETANO, Marcello. *Manual de direito administrativo.* Coimbra: Almedina, 1997. v. II.

CAMPBELL, Tom. Discretionary "rights". In: TIMMS, N.; WATSON, D. (Ed.). *Philosophy in social work.* Londres: Routledge and Kegan Paul, 1978. pg. 409-440.

DESDENTADO DAROCA, Eva. *Los problemas del control judicial de la discrecionalidad técnicas (un estudio critico de la jurisprudencia).* Madrid: Civitas, 1997.

EVANS, Tony; HARRIS, John. Street-level bureaucracy, social work and the (exaggerated) death of discretion. *British Journal of Social Work,* Oxford, v. 34, No. 6, pg. 871-895, Sep. 2004.

FEEST, Johannes; BLANKENBURG, Erhard. *Die Definitionsmacht der Polizei.* Dusseldorf: Bertelsmann, 1972.

FERNÁNDEZ RODRÍGUEZ, Tomás-Ramón. *De la arbitrariedad de la administración.* 5th ed. Madrid Civitas, 2008.

____. *De la arbitrariedad del legislador:* una crítica de la jurisprudencia constitucional. Madrid Civitas, 1998.

____. Las medidas de policía: su exteriorización e impugnación. *Revista de Administración Pública,* Madrid, No. 61, pg. 125-141, Jan./Apr. 1970.

GALLIGAN, Denis J. *Discretionary powers:* a legal study of official discretion. Oxford: Clarendon Press, 1990.

____. *Law in modern society.* Oxford: Oxford University Press, 2007.

GARRIDO FALLA, Fernando. Los medios de la policía y la teoría de las sanciones administrativas. *Revista de Administración Pública,* Madrid, yr. 1, No. 28, pg. 11-50, Sep./Dec. 1959.

GOMEZ BENITEZ, José Manuel. *El ejercicio legítimo del cargo:* discrecionalidad administrativa y error en derecho penal. Madrid Universidad Complutense — Facultad de Derecho, 1980.

GOODIN, Robert E. Welfare, rights and discretion. *Oxford Journal of Legal Studies,* Oxford, v. 6, No. 2, pg. 232-261, Summer 1986.

HARLOW, C; RAWLINGS, R. *Law and administration.* 2nd ed. Londres: Butterworths, 1997.

HAWKINS, Keith. Using judicial discretion. In: ____. *The uses of discretion.* Oxford: Oxford University Press, 1992. pg. 89-111.

JOHNSON, Michelle A. et al. Implementing welfare-to-work services: a study of staff decision-making. *Families in Society:* The Journal of Contemporary Social Services, Milwaukee, v. 87, No. 3, pg. 317-328, Jul./Sep. 2006.

JUSS, Satvinder S. *Discretion and deviation in the administration of immigration control.* London: Sweet & Maxwell, 1997.

KADISH, Mortimer R.; KADISH, Sanford H. *Discretion to disobey:* a study of lawful departures from legal rules. Stanford, California: Stanford University Press, 1973.

KAGAN, Robert A. *Regulatory justice:* implementing a wage-price freeze. New York: Russell Sage Foundation, 1978.

KLOCKARS, Carl B. *The idea of police.* Thousand Oaks: Sage Pubns, 1985.

LEWIS, J.; GLENNERSTER, H. *Implementing the new community care.* Buckingham: Open University Press, 1996.

LIPSKY, Michel. *Street-level bureaucracy:* dilemmas of the individual in public services. New York: Russell Sage Foundation, 1974.

MIRFIELD, Peter. *Silence, confessions and improperly obtained evidence.* Oxford: Clarendon Press, 1997.

MOREIRA NETO, Diogo de Figueiredo. *Quatro paradigmas do direito administrativo pós-moderno:* legitimidade, finalidade, eficiência, resultado. Belo Horizonte: Fórum, 2008.

NEYROUD, Peter; BECKLEY, Alan. *Policing, ethics and human rights.* Oregan: Willan Publishing, 2001.

NIETO GARCÍA, Alejandro. Reduccíon jurisdiccional de la discrecionalidad en materia disciplinaria. *Revista de Administración Pública,* Madrid, y. 14, pg. 147-162, No. 44, May/Aug. 1964.

O'SULLIVAN, T. *Decision making in social work.* Basingstoke: Macmillan, 1999.

ORLANDO, V. E. *Principios de derecho administrativo.* Madrid: Instituto Nacional de Administración Pública, 1978.

PRESTON-SHOOT, M. Regulating the road of good intentions: observations on the relationship between policy, regulations and practice in social work. *Practice:* Social Work in Action, London, v. 13, No. 4, pg. 5-20, Oct./Dec. 2001.

PRETIS, Daria de. *Valutazione amministrativa e discrezionalità tecnica.* Padova: Cedam, 1995.

RAPOSO, João. Autoridade e discricionariedade: a conciliação impossível? In: VVAA. *Estudos jurídicos e econômicos em homenagem ao prof. doutor Antônio de Sousa Franco.* Lisboa: Faculdade de Direito da Universidade de Lisboa, 2006. v. 2.

RICO, José Maria. El poder discretional de la policia y su control. In: RICO, José Maria (Coord.). *Policía y sociedad democrática.* Madrid: Alianza, 1983. pg. 211-233.

____. (Coord.). *Policía y sociedad democrática.* Madrid: Alianza, 1983.

SÁNCHEZ MORÓN, Miguel. *Discrecionalidad administrativa y control judicial.* Madrid: Tecnos, 1994.

SATTA, Filippo. *Principio de legalitá e pubblica amministrazione nello stato democratico.* Padua: Cedam, 1969.

SOUCHON, Henri. *Admonester:* du pouvoir discretionnaire des organes de police. Paris: Editions du Centre National de la Recherche Srientifique, 1982.

SOUSA, António Francisco de. Discricionariedade na atuação policial. In: VALENTE, Manuel Monteiro Guedes. *Reuniões e manifestações de atuação policial*. Coimbra: Almedina, 2009. pg. 215-232.

____. O controlo jurisdicional da discricionariedade e das decisões de valoração e prognose. In: PORTUGAL. Ministério da Justiça. *Reforma do contencioso administrativo.* Coimbra: Coimbra Editora, 2003. v. I: O debate universitário (trabalhos preparatórios).

TOMPKINS, J.; LASLOVICH, M. J.; GREENE, J. D. Developing a competency-based MPA curriculum. *Journal of Public Administration Education,* Lawrence, v. 2, No. 2, pg. 117-130, Summer 1996.

VENEZIA, Jean-Claude. *Le pouvoir discrétionnaire.* Paris: LGDJ, 1959.

VILLAGÓMEZ CEBRIÁN, Alfonso J. *Las fuerzas y cuerpos de seguridad:* del orden público a la seguridad ciudadana. Galicia: Ara Solis, 1997.

VILLAR PALASÍ, José Luis. La actividad industrial del Estado en el derecho administrativo. *Revista de Administración Pública,* Madrid, yr. 1, No. 3, pg. 53-129, Sep./Dec. 1950.

VIRGA, Pietro. *La potestà di polizia.* Milão: A. Giuffrè, 1954.

WADDINGTON, P. A. J. *Policing citizens:* authority and rights. London: UCL Press, 1999.

WOLFF, Hans Julius; BACHOF, Otto; STOBER, Rolf. *Direito administrativo* (Verwaltungsrecht Band 1: ein Studienbuch). Lisbon: Fundação Calouste Gulbenkian, 2006. v. 1.