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Legislative drafting tools preventing arbitrariness in discretionary powers

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ABSTRACT

Despite the differences of approach that different national legal systems may adopt regarding discretionary powers, in general terms the main issue of discussion stays the same: Given that discretion is accepted and considered an essential legal technique in the context of administrative decisions, how, and to which extent, may discretionary powers be controlled and subjected to review by courts? The purpose of the present article is to discuss discretionary powers from the perspective of legislative drafting, with the aim to identify specific tools to be used by law-makers in order to prevent discretion from turning into arbitrariness. Therefore, starting from an analysis of Portuguese legal doctrine on the concept of discretionary powers, the present article will address three main issues. First, clarification as to how legal discretion is to be understood and how to identify discretionary powers granted by legislation. Second, identification of the advantages and disadvantages of legal discretion, in order to determine normative criteria according to which we can settle under which conditions discretionary powers in legislative drafting is to be employed or not. Third, identification of which legislative drafting tools may be used by law-makers in order to grant discretionary powers. Overall, by focusing on law-making techniques, the article aims to demonstrate the extent to which legislative drafting tools, such as the ones identified in this article, are powerful tools to better identify discretionary powers in the law, but also to ensure that these powers are granted only when actually necessary. Taking into consideration that migration and asylum law usually involves reference to fundamental individual rights, the article argues that the provision of discretionary powers ought to be avoided whenever there are no solid and reasoned grounds for their use, so that discretion remains a tool for regulation and does not become arbitrariness.

KEYWORDS Arbitrariness; asylum; discretion; discretionary powers; equal treatment; non-nationals; judicial review; law-makers; legal drafting; migration; proportionality; Rule of Law; vague legal concepts

1. Introduction

When granted to administrative authorities by law, discretion involves the possibility of choosing between different legitimate solutions, which

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implicates a significant amount of power to decide over a particular case.¹ The purpose of the present article is to discuss discretionary powers as a legal technique, aiming to identify different legal forms by means of which such powers are granted, as well as legislative drafting tools that may prevent discretion from turning into arbitrariness. Here discretion is taken in its ordinary legal meaning of power within the law, whereas arbitrariness is taken to indicate an action that does not fall within the remit of the law.

Based on this understanding, the present article aims to address three main issues. First, attention is directed to clarifying how legal discretion is to be understood and how to identify discretionary powers granted by legislation. Second, the article identifies the advantages and disadvantages of legal discretion, in order to determine criteria according to which we can settle under which conditions discretionary powers in legislative drafting is to be employed or not. The third issue that the article addresses concerns the identification of which legislative drafting tools may be used by law-makers in order to grant discretionary powers, such as the use of ‘may’ or ‘must’ when referring to the powers of a deciding authority, or the provision of non-exhaustive lists of situations that may determine the application of a legal provision, among other conceivable tools. Overall, we look at the potential of legislative drafting tools to conform and adjust discretionary powers to concrete situations, with the aim to make sure discretion does not turn into arbitrariness and ensuring that the margin of liberty involved in discretion may be controlled and regulated.

2. Discretionary powers

2.1. *The concept of discretionary power*

Discretionary powers are recognised and studied in most legal systems. Their characterisation differs in accordance with the principles and specificities of each national constitutional and legal system. In this sense, although the approaches of common law and civil law are different, the main issue regarding the use of discretionary powers remains the same: Since discretion is cast as essential and generally accepted, how, and to which extent, may discretionary powers be subjected to review by courts? Even within civil law countries, however, the position concerning discretion is not exactly identical. In general, all legal systems identify discretion granted by law, but things may vary concerning other legal techniques that aim to grant a margin of appreciation to public authorities. For example, in some legal frameworks, vague legal concepts and technical discretion may also provide such a margin for public authorities to decide. In fact, in some legal frameworks, discretion itself is

¹Vittorio Ragonesi, *Manuale di diritto amministrativo* (Il Sole 24 Ore Norme e Tributi 1996) 225.

distinguished from technical discretion, where the law requires a certain degree of technical, scientific or artistic knowledge to decide.² In cases of technical discretion, it is widely accepted that public authorities are provided with a certain margin to make the best possible decision, although this is not entirely undisputed.³

In Portugal, there is extensive literature by legal scholars on the theme of discretionary powers. José Manuel Sérvulo Correia categorises discretion as the liberty granted by law to administrative authorities to choose one of several possible lines of action, where the action chosen would be the most adequate to achieve public interest as protected by the legal provision in question. On this view, discretion differs from intellectual operations aiming to fulfil vague and undetermined concepts or technical provisions the law refers to (the so-called *technical discretion*). For Sérvulo Correia, discretion that is not of this first technical kind refers to the exercise of a power; and, provided it is exercised in connection with a judgement, discretion likewise involves a will to choose between several possible options.⁴

According to Diogo Freitas do Amaral, the law regulates the decision to be enacted by public authorities in ways that vary in type and scope. In some cases, the decision to be issued on a particular subject is regulated by the law in great detail, but in other cases the law allows the authorities to choose. For Freitas do Amaral, for discretion to exist it is necessary for the law to grant administrative authorities the power to choose between different alternatives, regardless of whether the choice is between two opposing decisions (e.g. granting or not a permit) or between several decisions in a disjunctive relation (e.g. appointing one public servant for a position given a list of five names).⁵

Discretion does not mean, however, that the law grants administrative authorities the power to choose *any* possible solution, provided that the rules relating to the competence of the administrative bodies and the legal purpose of the actions are complied with. On the contrary, discretion means that the administrative authorities must search for the best solution in the perspective of the public interest and in accordance with other applicable legal principles.⁶

Marcelo Rebelo de Sousa and André Salgado de Matos discuss discretionary powers under the concept of the *margin for free administrative decision*, which consists of a space of liberty for administrative action attributed by

²Diogo Freitas do Amaral, *Curso de Direito Administrativo* (3rd edn., Almedina 1997) vol. II, 72–75; Guido Landi and Giuseppe Potenza, *Manuale di diritto amministrativo* (10th edn., Giuffrè 1997) 10.

³Francesco Caringella, Luigi Delpino and Federico del Giudice, *Diritto amministrativo* (20th edn., Simone 2003) 415–22.

⁴José Manuel Ribeiro Sérvulo Correia, *Noções de Direito Administrativo* (Editora Danubio 1982) vol. I, 175 and 178.

⁵do Amaral (n 2) 69.

⁶*ibid.* 72.

law, therefore involving, at least partially, administrative self-determination. For them, this *margin for free administrative decisions* may be related to any form of administrative action (such as regulations and administrative plans, administrative acts, administrative contracts and material acts). As such, for Marcelo Rebelo de Sousa and André Salgado de Matos, discretion is one of the forms that this *margin for free administrative decision* may take, the other one being the margin of appreciation – which may be found either when the power to fulfil undetermined concepts is granted or when the liberty to assess specific situations is recognised (for example, school exams) –, both having presently the same grounds and identical consequences.⁷

Finally, the Portuguese administrative courts usually accept that a margin of appreciation for public authorities to decide may arise from a power granted by law to the public administration to decide over the use of vague legal concepts involving a margin of appreciation or in the context of the *technical-scientific administration*, among other sources.⁸ In general, it is also recognised that discretion may be subjected to review by the courts, but only with regards to the legality of the decision and, in particular, with the rules pertaining competence and legal purpose, as well as rules pertaining to the compliance with the principles of impartiality and proportionality.⁹

Based on this general characterisation and thus leaving particularities aside, in our view discretion may be understood as the power granted by law to public authorities allowing these to choose between different lawful solutions in deciding a particular case. Based on this understanding, four main ideas about discretionary powers should be pointed out:

- (i) First, discretion shall be understood as a power or ability to decide in a certain manner or not to decide at all.
- (ii) Second, discretion shall be granted by law, which means that it is the law that provides for the existence of discretionary powers, and not the

⁷For Marcelo Rebelo de Sousa and André Salgado de Matos, discretion consists of the liberty granted by the law to administrative authorities, allowing these to choose between different alternatives which are equally legally admissible. Such liberty may concern the choice of acting or not acting, the choice between two or more legally defined possibilities or to the creation of a particular action within the applicable legal limits. Differently, the margin for free appreciation results from the liberty, granted by the law, to appreciate facts concerning the premises of the decisions to be taken and not explicitly to choose between different legitimate solutions, as is the case with discretion. See Marcelo Rebelo de Sousa and André Salgado de Matos, *Direito Administrativo Geral* (3rd edn., Dom Quixote 2008) vol. I, 187 and 190.

⁸For Paulo Otero, technical-scientific administration relates to a context of specialisation of the administrative activity, in which the satisfaction of large sectors of collective needs by the Public Administration requires, more and more, decision criteria of technical-scientific nature. This is particularly visible, as identified by the author, on the levels of educational, health, economic-financial and environmental administration. See Paulo Otero, *Manual de Direito Administrativo* (Almedina 2013) vol. I, 450–64.

⁹See decisions of the Supreme Administrative Court of March 3 2016 (Process no. 0768/15), of 2 March 2010 (Process no. 0844/09) and 20 September 2011 (Process no. 0414/10) and of South Central Administrative Court of 16 March 2006 (Process no. 01459/06), all available at <www.dgsi.pt>.

public authorities that decide themselves whether or not to employ such discretionary powers. In light of this, discretion cannot be said to call into question the Principle of Legality or the Rule of Law.

- (iii) Third, discretion must lead to lawful decisions, which means that the decisions of the public authorities using discretionary powers shall comply with the legal system as a whole, and must not breach or in any way infringe legal principles or provisions stated in law and applicable to the case at hand. Thus, the law is the limit and the condition for the use of discretionary powers, because it is the law that provides the grounds for the existence of discretion in any given situation, as well as the provisions to be complied with in its exercise.
- (iv) Fourth, discretionary powers are opposed to duty established by law.¹⁰ In some cases, law sets forth which decisions the public powers should make when certain facts are met. Thus, in such cases, public authorities do not have a choice. Therefore, there is a duty to provide a decision with specific content. In other cases, the law provides public authorities with a margin of appreciation to opt for the best solution or interpretation given certain facts. Having said this, the same legal provision often grants some discretion while also establishing duties. For example, article 32, paragraph 1 and subparagraph d) of the Portuguese Law regarding the entry, permanence, exit and removal of foreign citizens from national territory¹¹ stipulates that the entry into Portuguese territory is refused to foreign persons when they present a danger or serious menace to public order, national security or public health. On the one hand, this provision establishes a duty because public authorities are obliged to refuse entry when the aforementioned conditions occur. However, on the other hand, the vagueness of the concept ‘when they present a danger or a serious menace’ provides public authorities with a margin within which to assess whether and to which extent the aforementioned conditions do occur and hereby discretion is also granted.

2.2. Forms of discretionary powers

Having clarified our understanding of discretionary powers, as well as the main ideas that, in our view, are implied by discretion, our next step is to ascertain how to identify discretionary powers in legislation. In other words, taking into consideration the idea that the law is both the condition

¹⁰For the definition of discretionary powers opposed to duty, see André de Laubadère, Jean-Claude Venezia and Yves Gaudemet, *Droit administratif* (14^{ème} édn., LGDJ 1996) vol. 1, 643; Charles Debbasch, *Institutions et droits administratifs*, Tome 2, *L'action et le contrôle de l'administration* (4^{ème} édn. refondue, PUF 1998); Jean-Michel de Forges, *Droit administratif* (4^{ème} édn., PUF 1998) 250.

¹¹Law no. 23/2007, of 4 July, as amended by Law no. 29/2012, of 8 August, Law no. 56/2015, of 23 June, Law no. 63/2015, of 30 June, Law no. 59/2017, of 31 July, Law no. 102/2017, of 28 August and Law no. 26/2018, of 5 July.

of and the limit for, discretionary powers, as described above, we aim to determine how to recognise discretionary powers in the law. This is important because it is not easy to ascertain whether a power granted to public authorities is discretionary and when we instead deal with a duty. This is due to inaccurate legislative drafting techniques. Concerning this latter point, it is possible to identify at least three different ways in which discretionary powers are granted by law and, as such, three different forms of discretion.

2.2.1. *Possibility to adopt or not a certain action (may or may not)*

One way in which discretionary powers can be granted by law is by giving the public authority the *possibility* to adopt a certain solution as opposed to an *obligation* to decide in a specific manner, should the circumstances provided for in the law occur. In more general terms, this technique may be identified by the use of *may* instead of *shall*, when referring to the decision to be adopted by the public authority, in such a way that, whenever *may* is used in the wording of the law, in principle we stand before discretionary powers.

With reference to EU case law, Paul Craig aims to ascertain the ways in which discretion is employed within EU jurisprudence, that results in the identification of different types of situations. A first type qualified as ‘classic discretion’, corresponds entirely to what we explained above, as the author states that ‘(t)his is where the relevant Treaty, article, regulation, directive, or decision states that where certain conditions exist the Commission may take certain action’.¹²

To sum up, the use of *may* or *may not* (and equivalent wording in other languages) as well as plain language expressions to that same purpose are usually an acceptable way to grant discretionary powers.

2.2.2. *Vague legal concepts*

Secondly, discretionary powers may be granted through the use of vague legal concepts in the law, which provides the authorities with a margin of appreciation regarding the fulfilment of such concepts in a particular situation. In this sense, on our reading, discretionary powers can be said to exist only when the legal concepts involve a prognosis to be carried out by the public authority, which includes a margin of appreciation.

Paul Craig gives an example based on the jurisprudence of the European Court of Justice that, again, may be categorised as an instance of this second type of situation involving discretion. In this case, the example is based on Article 107(3)(a) of the Treaty, which provides that if aid promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, the Commission may consider it to be compatible with the common market. As Craig explains, ‘(t)he

¹²Paul Craig, *EU Administrative Law* (2nd edn., Oxford University Press 2012) 404.

dispute concerned the meaning to be given to “abnormally low”, and “serious underemployment” (...). The ECJ was willing to characterise these conditions as involving discretion, which then had an impact on the standard of review applied’.¹³

For Diogo Freitas do Amaral, an example of this kind could refer to a legal provision stipulating that whenever ‘exceptional and urgent circumstances of public interest’ so require, the public authority may adopt all acts considered necessary to maintain order. In this case, his understanding is that only the public authority is able to assess whether the specific circumstances of the case may be qualified as ‘exceptional and urgent circumstances of public interest’. This implies that the margin of appreciation that the public authority enjoys is co-extensive with the grounds of the decision.¹⁴

2.2.3. *Non-exhaustive lists of cases*

A third way in which discretionary powers can be legally granted is by adopting non-exhaustive lists of situations that may determine the application of a given provision, conferring upon the authorities the power to decide whether a specific situation that is not explicitly included in such list may or may not determine the application of the provision in question.

In this view, it is important to underline that such lists of examples or non-exhaustive lists of cases and situations not only allow to identify discretionary powers, but they are also an important tool to control such discretionary powers. We will go back to this point below but, by providing list of examples of cases or situations that may fall within the scope of a certain provision, the law gives indications as to how to interpret the provision, and it therefore limits, to the extent possible, the margin of appreciation that the public authority enjoys.

3. Advantages and disadvantages of discretion

As a power granted by law in different situations and in various manners, discretion is not good or bad in itself. In reality, discretion has advantages and disadvantages. These have to be analysed and considered depending on the specific circumstances for which discretion is used. As such, it is possible to point out, in turn, the main advantages and disadvantages of discretionary powers as follows.

Starting with the main advantages of discretion, we have chosen to signal three, which are particularly significant. First, discretion provides the possibility for similar situations to be treated equally, even if not all these situations were initially foreseen. Indeed, by using non-exhaustive lists of situations to be

¹³ibid.

¹⁴do Amaral (n 2) 97–98.

completed with the use of discretionary powers; or even by using vague legal concepts to be determined by means of a reasoning based on prognosis made by the public authorities, the law uses discretion as a tool to ensure that situations not initially foreseen may be treated equally to others already provided for. This is a very important and significant advantage of discretion, as the sophistication and diversity of social reality today increases, along with the speed and impact of events that may affect migration movements. These features of the world require flexible and adjustable legal provisions that are able to accommodate unexpected and sudden changes under the same legal principles applicable to the legal system as a whole.

Second, discretion also allows for concrete situations to be analysed and decisions taken on the basis of the best possible interpretation, depending on the specific circumstances of the case at hand. Indeed, discretion provides for the possibility of adopting or not a particular course of action, provided certain circumstances are met. Discretion is thus used as a tool for the best decision to be taken given the specific circumstances of a case when these circumstances cannot be entirely foreseen. Therefore, discretion can mitigate the risk of making wrongful decisions.

Third, the legislator cannot identify in advance all cases and situations that may fall under specific provisions in the law. Hence, discretion may be used to allow public authorities to adapt decisions to unexpected circumstances by providing a margin of appreciation within which to decide a case according to public interest. In fact, under the assumption that public authorities are supposed to seek the best possible solution, taken public interest into consideration, some room for manoeuvre must be left in certain cases because one cannot expect public authorities to always act automatically as a machine.¹⁵ In fact, overly rigid regulations may harm public interest.¹⁶ In this sense, discretion is not only a possibility or tool that may be used in the legislation but also a necessity justified by practical reasons.¹⁷

On the other side, possible disadvantages of discretion regard, in our view, the degree of unpredictability that it necessarily entails, as well as the possibility to lead to incorrect decisions.¹⁸

Regarding the first disadvantage identified, it is unavoidable that a certain degree of unpredictability comes with the attribution of discretionary powers.

¹⁵René Chapus, *Droit administratif général*, Tome 1 (11^{ème} éd., Montchrestien 1997) 949; de Forges (n 10) 250.

¹⁶William Wade and Christopher Forsyth, *Administrative Law* (7th edn., Clarendon Press 1994) 360.

¹⁷de Laubadère, Venezia, and Gaudemet (n 10) 645.

¹⁸The same disadvantages are pointed out by Marcelo Rebelo de Sousa and André Salgado de Matos, to whom the existence of a margin of appreciation in administrative decision entails the loss of some legal certainty as well as the introduction of some frictional inequalities. However, they also stress that these disadvantages are compensated by a higher justice and adjustment of the application of the law. They also argue that in some cases it provides for higher equality of administrative decisions: de Sousa and de Matos (n 7) 184.

It is the very nature of discretion to provide a margin of appreciation for the public authorities in deciding or not, or in deciding in one way rather than in another, which means that it is not possible to foresee the final decision in all situations. Certainly, there are limits to what decisions may be taken, and there are principles (such as equal treatment and proportionality) that need to be observed in all administrative procedures. If we underlined above that discretion may be necessary to provide room for more adequate decisions in unexpected cases, it is also correct to state that unnecessary discretion may lead to arbitrariness and therefore the goal of any legislator should be a balance between the use and ban of discretion, or 'the optimum degree of structuring in respect of each discretionary power'.¹⁹

With reference to the second disadvantage – the risk of having wrongful decisions – it should be stressed that this is also inherent to the liberty discretion provides. Indeed, as discretion involves the appreciation of specific cases and circumstances, chances of wrongful decisions do persist and are naturally higher where discretionary powers are attributed than in a situation where only one decision is possible given the occurrence of a certain event. In any case, the main question here is how to avoid potential wrongful decisions and, in connection with this point, determine to what extent it is possible to dispute discretionary decisions. We will address this issue below.

In light of the above-mentioned, our conclusion is that discretion is not positive or negative in itself. In reality, discretion must be adjusted to specific circumstances and used only when it is necessary and to the extent that it is so. Therefore we suggest that, whenever a decision has to be taken on whether to grant or not discretionary powers to public authorities the following conditions ought to be met: (i) when situations are determinable, and it is possible to identify in advance all cases falling within the scope of the provision, discretion should be avoided; (ii) when situations are not determinable in advance and it is not possible to identify all cases that would fall within the scope of the provision, discretion is an important tool allowing a rule to apply (or not) to circumstances that were not initially foreseen;²⁰ (iii) when fundamental individual rights are at stake, which is often the case in migration policies, special attention to these criteria is required. Indeed, considering the values involved in such policies and the impact of the decisions taken by administrative authorities, discretion, to the extent necessary, is vital so as to ensure fair and equal treatment of all cases. This requires that law-makers engage in a careful and thorough analysis of the particularities of the issues to be regulated.

¹⁹An emphasis of the need to search for a balanced use of discretion can be found at Jean Rivero and Jean Waline, *Droit administratif* (17^{ème} éd., Dalloz 1998) 89; Paul Craig, *Administrative Law* (4th edn., Sweet & Maxwell 1999) 522.

²⁰For some authors, it is practically impossible to do so and perhaps even inconvenient for the law try to foresee in detail all circumstances under which public authorities may have to act: e.g. do Amaral (n 2) 75.

4. Discretion and arbitrariness

4.1. *Limits to discretionary powers*

Granting discretionary powers to administrative authorities could, in principle, imply that the merits of the discretionary decisions may be subtracted from judicial review which is, ultimately a consequence of the principle of separation of powers. By merits of the administrative decision, we mean the assessment of the opportunity or convenience of the decision taken, i.e. the determination of whether or not the decision was the best decision given the specific circumstances.

There are, however, limits to the exercise of discretionary powers that may be subject(ed) to judicial review.²¹ First, we find limits related to the competence of the administrative authority to issue a certain decision. This means that the authority may only decide if the law grants it the power to do so. The assessment of the power of the administrative authority to decide is, in turn, subjected to judicial review. Second, we find limits related to the purpose of the powers granted by law. Indeed, when the law grants the power to decide over a specific case, it does so for a specific purpose. This purpose may not be disregarded. Third, the decision must in all cases comply with certain legal principles and values, such as the principle of equal treatment, the principle of proportionality, as well as other general principles, and the compliance with these principles may be judicially assessed.

Regardless of the aforementioned facts, it is clear that when it comes to the exercise of discretionary powers, judicial review is limited. This reinforces the importance of granting administrative powers only when necessary and to the extent necessary. Thus, it is important to distinguish discretion from arbitrariness.²² Discretion implies limits to judicial review. This is why we understand it to be important for law-makers to be aware of the legislative drafting tools that may contribute to prevent discretion from turning into arbitrariness, an aspect we will now turn to.

4.2. *Legislative drafting tools to prevent arbitrariness in discretion*

Let us now turn to the final point of our article which aims to present the legislative drafting tools that may be used by law-makers in order to avoid discretion turning into arbitrariness. This is a subject of paramount importance for legislators because arbitrariness is generally not accepted by Constitutions of democratic states where the Rule of Law is set forth as a principle and courts may judge if a law does not comply with the Constitution. Naturally,

²¹See on this subject de Laubadère, Venezia, and Gaudemet (n 10) 645–54; de Forges (n 10) 250–51; Wade and Forsyth (n 16) 379–459; Rivero and Waline (n 19) 92–94; Craig (n 19) 535–654; Chapus (n 15) 953–77; Sérvulo Correia (n 4) 187–89; do Amaral (n 2) 86–92, de Sousa and de Matos (n 7) 185 and 201–06.

²²de Forges (n 10) 251; Chapus (n 15) 951.

none of these tools is bulletproof when it comes to avoiding arbitrariness, i.e. decisions which fall beyond the scope of the law. However, these tools do provide the necessary conditions for the recommended use and application of discretionary powers.

4.2.1. Clear identification of discretionary powers

A first aspect concerns the importance of avoiding doubts concerning whether discretionary powers are even being granted. This is important for the public authorities that must decide, no matter whether discretionarily or not, as well as for the individuals who submit requests and/or claims and depend upon a decision of the authority in question. The use of clear language is not a minor issue.²³ In fact, clarity of the legislation and the use of plain language to the extent deemed possible is a requirement of the Rule of Law so that laws and regulations can be easily accessed and understood by all. In this sense, it is preferable to use as clear expressions as possible regarding discretionary powers, such as *may*, *shall*, *has the right to* or *shall only be refused if*, in order to make it clear the conditions under which the discretion is to be used. For example, in article 26, paragraph 1 of the Portuguese Law on the entry, permanence, exit and removal of non-nationals from the territory of the state²⁴ provides for the possibility of the competent authorities to issue an emergency travel document (*laissez passer*) for non-nationals that are not residents on Portuguese territory and who demonstrate the impossibility, or difficulty, of leaving the country. The legal provision is the following: ‘An emergency travel document may be granted to foreign citizens that are non-resident in Portugal, provided that they demonstrate the impossibility or difficulty of leaving Portuguese territory’.²⁵ In this case, it is clear that the possibility to make the decision of granting an emergency travel document is conceived as a possibility offered to the administrative authority which, provided certain circumstances (demonstration of the impossibility or difficulty of leaving the territory) may or may not make this decision. The decision of granting the emergency travel document is therefore possible, yet not mandatory, and in any case subject to certain conditions. Therefore, ambiguous words such as ‘required’ or ‘regulate’ in UK Administrative Law which

²³On the subject of the using of clear language in legislative drafting, see Carlos Blanco de Morais, *Manual de Legislação, Critérios científicos e técnicos para legislar melhor* (Verbo 2007) 573–77; Daniel Greenberg, *Laying Down the Law, A Discussion of the People, Processes and Problems that Shape Acts of Parliament* (Sweet & Maxwell/Thomson Reuters 2011) 217–25; David Duarte and others, *Legislação, Perspectivas sobre a concepção e redacção de actos normativos* (Almedina 2002) 127–30; Helen Xanthaki, *Drafting Legislation, Art and Technology of Rules for Regulation* (Hart 2014) 85–131; Helen Xanthaki, *Thornton’s Legislative Drafting* (5th edn., Bloomsbury 2013) 55–80.

²⁴Law no. 23/2007, of 4 July, as amended by Law no. 29/2012, of 8 August, Law no. 56/2015, of 23 June, Law no. 63/2015, of 30 June, Law no. 59/2017, of 31 July, Law no. 102/2017, of 28 August and Law no. 26/2018, of 5 July.

²⁵‘Pode ser concedido salvo-conduto aos cidadãos estrangeiros que, não residindo no País, demonstrem impossibilidade ou dificuldade de sair do território português’ (our translation).

‘take their colour from the context’ and not directly from literal meaning do not seem to provide the desired degree of clarity to identify discretion.²⁶ Other wordings are also used to identify discretion, such as ‘if the minister is satisfied that ...’ or ‘if it appears to the board that ...’. Some authors underline that these wordings, including a subjective element, may grant an exceptionally wide form of discretionary power.²⁷

4.2.2. *Avoid using discretion as a principle*

A second legislative drafting tool that may be used by law-makers in order to avoid discretion turning into arbitrariness consists of avoiding using discretion as a principle. As a general rule, discretion should only be granted when necessary, which means that discretionary powers should be granted when the situation justifies these and not as a matter of principle. In particular, when fundamental individual rights are at stake, the law should state as precisely as possible when a right is granted, reducing discretion to the bare minimum. For example, article 77, paragraph 2 of the Portuguese Law regarding the entry, permanence, exit and removal of foreign citizens from national territory²⁸ sets forth that the residence permit may be refused due to ‘public order, national security or public health reasons’. Paragraph 3 of the same article establishes that the refusal due to health reasons can only be grounded in diseases listed in the applicable instruments of the World Health Organisation or in infectious or parasitic diseases that warrant legal measures on national territory. So, the phrasing ‘health reasons’ is specified, detailed and made explicit, hereby reducing the degree of discretion of paragraph 2. However, there are no similar provisions defining the concepts of ‘public order’ and ‘national security’.

4.2.3. *Avoid vague legal concepts*

A third legislative drafting tool that may be used by law-makers in order to avoid discretion turning into arbitrariness consists of avoiding imprecise or vague legal terminology that may grant a wide margin of appreciation. Vague legal concepts should only be used when it is impossible to identify in advance which situations fall within the scope of the law.²⁹ In particular, in subject matters where fundamental individual rights should be considered, vague concepts may be an important tool to ensure that it is legal to grant a right in every conceivable, yet not previously anticipated, situation. An

²⁶Examples are provided by Wade and Forsyth (n 16) 458–59.

²⁷*ibid* 443.

²⁸Law no. 23/2007, of 4 July, as amended by Law no. 29/2012, of 8 August, Law no. 56/2015, of 23 June, Law no. 63/2015, of 30 June, Law no. 59/2017, of 31 July, Law no. 102/2017, of 28 August and Law no. 26/2018, of 5 July.

²⁹On the using of undetermined legal concepts in legislative drafting see João Tiago Silveira, *Problemas habituais de legislação* (E-Pública, vol. 5, n.º 3, 2018) 146–48, available at <http://www.e-publica.pt/volumes/v5n3/pdf/a11n3v5_0.pdf>; Xanthaki (n 23) 88–92.

example may be found in article 5 of the Portuguese asylum legislation.³⁰ Indeed, paragraph 1 stipulates that, for the purposes of the right of asylum, acts of persecution must consist in a severe violation of fundamental rights in virtue of their own nature or in virtue of their repetition, or involve a set of measures affecting the foreign or stateless person in the same manner as measures resulting in a severe violation of fundamental rights, in virtue of by the cumulative effect, the nature or the repetition of these measures. On this view, imprecise or vague legal concepts are being used (such as ‘severe violation of fundamental rights’) that requires the administrative authority to engage in a judgement based on prognosis or analysis of the consequences of the measures. In matters directly connected to fundamental individual rights, using precise legal concepts, such as ‘violation of fundamental right’, provides adequate guidance and establishes clearer criteria for the administrative decision, as well as a more objective assessment, rather than a decision which could be challenged only in few cases.

4.2.4. Use discretion when necessary

A fourth legislative drafting tool that may be used by law-makers in order to avoid discretion turning into arbitrariness consists in using discretion only when necessary. As previously mentioned, discretion should be used to allow public authorities to deal with unforeseen and unexpected cases. Particularly when fundamental individual rights are at stake, the law should not hinder public authorities from granting a request in unforeseen situations. Therefore, discretionary powers are important and should be used. In a sense, this means that the reasons for avoiding discretion are the same that may justify its use. In fact, it is best to avoid using discretion through the employment of vague legal concepts, but when necessary, these are to be employed. Necessity offers an important guideline for legislative drafting in relation to discretionary powers. So, how ought we balance these two apparently opposite guidelines of limiting the use of discretion on the one hand and employing it when necessary on the other? On the one hand, when there is no doubt that rights should be granted in provisions that should be drafted with no discretionary power or vague legal concepts. On the other hand, provisions granting discretionary powers may only be drafted where the circumstances so require.

4.2.5. When possible use non-exhaustive lists of cases

A fifth legislative drafting tool that may be used by law-makers in order to avoid discretion turning into arbitrariness consists in using, whenever possible, non-exhaustive lists of cases, thus reducing the manoeuvring room of the administration. We have mentioned above the technique to grant discretionary powers through the use of lists of examples or non-exhaustive lists of

³⁰Law 27/2008, of 30 June, as amended by Law 26/2014, of 5 May.

situations which is also a tool offering indications on how to interpret any 'open' provision and therefore to contain, as far as possible, the margin of appreciation of the public authority. Article 5 of the Portuguese asylum Law, already referred to above, provides a good example of this type of case, as paragraph 2 of this provision contains a non-exhaustive list of acts of persecution that may be considered for the purpose of recognising the right of asylum. This list includes, for example, (i) acts of physical or mental violence, including those of sexual nature, (ii) legal, administrative, police or judicial decisions, if they were discriminatory or applied in a discriminatory manner, (iii) disproportionate or discriminatory judicial files or decisions, (iv) refusal to appeal resulting in a disproportionate or discriminatory sanction. As this list is non-exhaustive, the authorities are offered the possibility to determine whether other situations that are not included explicitly in the list may be considered for the purpose of recognising the right of asylum or not. The decision to consider a specific case that is not mentioned in the list, to count as an act of persecution for the purpose of recognising the right of asylum must, in any case, meet the conditions stated in article 5, paragraph 1, previously mentioned, the fulfilment of which also involves, as we explained earlier, some discretion. There are, on this reading, two different levels of discretionary powers being used in article 5 of the Portuguese asylum Law: (i) a first level is formed by the imprecise legal terminology or vague legal concepts used to determine the conditions under which a certain situation is to be considered as an act of persecution and (ii) a second level consists in non-exhaustive lists of cases given of acts of persecution. This second level of discretionary power in the law, however, enables further situations to count as acts of persecution.

5. Conclusion

In this article, we stressed that discretion may arise from different legal instruments, and that usually different legal systems use different concepts to identify situations in which a margin of appreciation is granted to public authorities. Democratic legal systems accept discretion. If we take into consideration the fact that there are judicial review provisions that allow for challenging decisions making use of discretion in various ways, discretion cannot be said to stand in contradiction with the Rule of Law or the Principle of Legality. To avoid discretion turning into arbitrariness, as far as the decisions of the public administration are concerned, discretionary powers should be clearly identified by legislation. Legislative drafting techniques, such as the examples identified in this article, are powerful tools and should be used not only to allow identification of cases in which discretionary powers are employed but also to ensure that these powers are granted when required and not in the opposite case. Taking into consideration that migration and

asylum laws most often have to do with fundamental individual rights, it is best to limit discretion unless there are solid and reasoned grounds for allowing discretionary powers to be used by public authorities.

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